January 2007

Economics of Plea Bargaining

Richard Adelstein
Wesleyan University, radelstein@wesleyan.edu

ECONOMIC ANALYSIS OF PLEA BARGAINING

A plea bargain is a voluntary exchange of concessions in which a defendant waives his right to a full criminal trial in return for the prosecutor's guarantee of a lesser sentence than would be expected after a conviction at trial. In adversarial systems, plea bargaining is made possible by the law's allocation of valuable, tradable assets to both sides, the defendant's right to accept conviction by pleading guilty and thus abort a full trial, and the prosecutor's discretion over the precise charges lodged against the defendant, which enables her to specify, within statutory limits, the sentence imposed after a conviction, however it is obtained. It is made necessary by the uncertainty and high resource costs of adversarial trial procedures and the pressure of heavy caseloads, which together strongly incline prosecutors and judges to cooperate in maintaining the steady flow of guilty pleas that account for the vast majority of convictions in American jurisdictions. Citing the "mutuality of advantage" afforded by bargained pleas, the Supreme Court in 1970 explicitly endorsed the offer of leniency "to a defendant who in turn extends a substantial benefit to the State" (Brady 1970: 752-3).

This characterization invites an economic approach to understanding plea bargains and their place in the criminal process based on assumptions of rational behavior on both sides, with defendants trying to minimize their jeopardy and prosecutors seeking to maximize some measure of success in dealing with large caseloads in the face of budget and time constraints. Two broad lines of analysis have emerged from this common starting point. The first, built on the neoclassical foundations of optimization and efficient equilibrium, focuses on the bargaining behavior of prosecutors and defendants and aspires to mathematical precision, either in predicting the actual outcomes of bargaining or in prescribing a hypothetical, systemically

efficient allocation of resources across the entire criminal process. The second, drawing on the evolutionary tradition of institutional economics and its focus on the facilitation of individual transactions, considers existing institutions of criminal justice in historical context and proposes comparative analysis of how cases are resolved in different legal regimes as they struggle to allocate limited prosecutorial and judicial resources across crowded criminal dockets in pursuit of differing conceptions of criminal justice.

The first tradition begins with Landes (1971), who showed bargaining to be a rational response to the costs of trials for both prosecutors intent on maximizing the sum of punishments imposed on defendants as a class and for defendants hoping to minimize the expected costs of punishment to themselves, an approach that was soon extended by others to encompass the dynamics of the bargaining process itself. This narrow focus on the parties to individual bargains was extended by Grossman and Katz (1983) and others to include the efficiency effects of plea bargains in societies concerned with the costs of erroneous outcomes as well as material resources. This work, like most neoclassical law and economics, superimposes the specific principle of systemic efficiency manifested in competitive markets on legal rules and institutions, and has produced provocative results. Grossman and Katz demonstrated that under certain assumptions the optimal plea bargain acts as an efficient screening device, in that only those who are actually guilty accept the bargain while innocent defendants choose instead to go to trial; to this Reinganum (1988) added that in some circumstances, limiting the prosecutor's discretion to individualize punishments for ostensibly similar crimes in favor of more uniform sentence offers can be systemically efficient.

Neoclassical models often sit uneasily within the normative framework of American criminal justice. Here, for example, they prescribe a policy of full trials in cases where the defendant's rejection of the proffered plea bargain has already revealed his innocence. In or-

der to produce the credible threat of trial that induces guilty defendants to accept the optimal bargain, that is, prosecutors must purposefully risk, or actively pursue, erroneous convictions by taking the innocent defendants who reject it to trial. As in other cases, refinements of early models have tried to address such dissonances, but typically by resort to ever greater mathematical abstraction and remoteness from empirical observation, one consequence of which over time has been to put in bolder relief several critical points at which the logic of systemic efficiency unavoidably demands rules or behaviors that sharply diverge from traditional norms of criminal justice. Neoclassical models of plea bargaining are thus better seen as evaluative or prescriptive in character than as attempts to accurately portray either individual bargaining behavior or the historical development of procedures for resolving criminal cases.

The second strain of economic analysis, in contrast, is self-consciously positive rather than normative. It considers how caseload pressures and resource constraints are or could be accommodated by the adaptive evolution of existing institutional structures that are themselves shaped by core values of criminal justice that vary from system to system, and how these adaptations come about. It begins with Adelstein (1978), who located the phenomenon of plea bargaining within a larger framework that depicts the criminal process as a network of institutions that allow the completion of complex individual transactions between criminals and a large class of victims in environments where actual market exchange is precluded by prohibitive costs of contracting. In this light, rules or procedures intended to increase the quantity and quality of information available to defendants prior to pleading, or to enforce promises made by prosecutors during plea negotiations, are seen as adaptive institutional responses to specific obstacles impeding the legal system's successful completion of welfare-increasing criminal transactions, one at a time, constrained by the system's governing values.

This work assumes the primacy of the rule of proportionality, the legal system's attempt to "make the punishment fit the crime" by fixing punishments in each case to reflect only the economic and moral costs imposed by the offense at hand, without scaling punishments to reflect the uncertainty of conviction, as systemic efficiency would require. On this basis, it asks how new ways to resolve cases consonant with the system's governing values might or might not emerge in adversarial and inquisitorial systems in response to specific conditions of the exchange environment, or how these institutional responses, observed over time, might reveal those values themselves.

Given the contingency and path-dependence of the process through which institutions of criminal justice evolve, and the mathematical precision that is sacrificed for qualitative, historical observation, this second approach is better suited to comparative analysis across legal systems than to prediction or prescription of specific outcomes in any one of them. It has thus been applied to controversies over the existence of plea bargaining in the English criminal process, and between those who see such procedural innovations as the German penal order (*Strafbefehl*) and the diversion of minor offenses to informal court proceedings in France as functional equivalents to American plea bargaining created or adapted to address similar caseload pressures and those who reject this analogy as false and misleading.

Attempts to broaden and synthesize the two approaches have appeared in recent years. Miceli (1996) considered the links between plea bargaining and the larger question of deterrence with a neoclassical model that takes careful account of the institutional specifics of the American criminal process, in which statutory penalties are loosely specified ex ante but actual sentences negotiated only after the crime by prosecutors whose interests and intentions may diverge from those of legislators. More recent work has developed the comparative dimension of the economics of plea bargaining and confronted the problem of juxtaposing or

reconciling fact and value more explicitly. Adelstein and Miceli (2001) argued that, despite a common commitment to the internalization of the costs of crime on a case-by-case basis, the differing trial procedures in inquisitorial and adversarial systems reflect differing conceptions of criminal justice, with inquisitorial systems placing primary emphasis on fair punishment of the guilty and adversarial systems on avoiding erroneous conviction of the innocent. They apply the efficiency principle to this array of normative commitments and conclude that plea bargaining is inconsistent with the fundamental values of inquisitorial systems like those of continental Europe and thus unlikely to take root there, and that the European rule of compulsory prosecution is similarly ill-suited to the adversarial norms of Anglo-American systems. But as the recent introduction of explicit forms of bargaining into the previously inquisitorial Italian system makes clear, complex, resourceful legal institutions still have the power to respond to new conditions in surprising ways (Boari 1997).

FURTHER READING

Adelstein, Richard (1978). "The Negotiated Guilty Plea: A Framework for Analysis." New York University Law Review 53: 783-833.

Adelstein, Richard and Thomas Miceli (2001). "Toward a Comparative Economics of Plea Bargaining." European Journal of Law and Economics 11: 47-67.

Boari, Nicola (1997). "On the Efficiency of Penal Systems: Several Lessons from the Italian Experience." International Review of Law and Economics 17: 115-126.

Brady v. United States (1970). 397 U.S. 742.

Grossman, Gene and Michael Katz (1983). "Plea Bargaining and Social Welfare." American Economic Review 73: 749-757.

Landes, William (1971). "An Economic Analysis of the Courts." Journal of Law and Economics 14: 61-107.

Miceli, Thomas (1996). "Plea Bargaining and Deterrence: An Institutional Approach." European Journal of Law and Economics 3: 249-264.

Reinganum, Jennifer (1988). "Plea Bargaining and Prosecutorial Discretion." American Economic Review 78: 713-728.

Word Count (including Further Reading): 1540

Richard Adelstein

Professor of Economics

Wesleyan University

238 Church Street

Middletown, CT 06459

Phone: (860) 685-2366

Fax: (860) 685-2241

radelstein@wesleyan.edu