

Most defendants could avoid both plea bargaining and trial if they could coordinate.

The Prisoners' (Plea Bargain) Dilemma

BY OREN BAR-GILL

New York University School of Law

AND OMRI BEN-SHAHAR

University of Chicago Law School

The policy debate over plea bargaining has focused in large part on one question: Do plea bargains help defendants or hurt them? Proponents of plea bargaining argue that it is good for defendants. The defendant, so the argument goes, can always choose not to plea and instead go to trial. If a defendant chooses to accept a plea bargain, then the deal must be better for the defendant than going to trial. Plea bargains add an option, and more options are better than fewer. Against this view, a prominent opposition highlights the coercive features of the plea bargaining process. Defendants' choice is not free, but rather a response to powerful constraints and threats from prosecutors. In the same way that a contract reached under duress is not beneficial to the coerced party, plea bargains cannot be generally viewed as an improvement.

Both views are based on an important assumption we challenge, that in the absence of a plea bargain the defendant would have to go to trial. This assumption is crucial for the more-options argument: the availability of a plea bargain is viewed as providing one additional choice (often a better choice) beyond that which already exists, going to trial. The assumption is also crucial for the coercion argument: it is the prosecutor's threat to take the defendant to trial that gives rise to duress.

Oren Bar-Gill is professor of law and co-director of the Center for Law, Economics, and Organization at the New York University School of Law.

Omri Ben-Shahar is the Frank and Bernice J. Greenberg Professor of Law at the University of Chicago Law School.

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The assumption that in the absence of plea the defendant would face trial is only true if prosecutors have credible threats to take to trial those defendants that choose not to plea. But can prosecutors credibly make such a threat?

To be sure, prosecutors have enough control over the criminal process to be able to make such trial threats. This aspect might lead us to conclude that the trial threat is credible; indeed, thinking of each individual case in isolation, this conclusion is sensible, almost obvious. In any individual case against a single specific defendant, the prosecutor may have enough discretion and resources to make a trial threat in a credible manner, and to carry it out if the defendant does not budge.

However, the prosecutor has to bargain against more than one defendant at any given time — more than she can possibly afford to take to trial. Therefore, thinking about each individual case in isolation misses some important element of the strategic interactions between prosecutors and defendants. Specifically, it overlooks the fact that the prosecutor cannot possibly take all defendants to trial.

The prosecutorial resource constraint is commonly recognized. Harvard law professor William Stuntz has noted that "due to docket pressure, prosecutors lack the time to pursue even some winnable cases," and that "prosecutors in most jurisdictions have more cases than they have time to handle them." This resource constraint is commonly invoked as the most persuasive justification for the plea bargain institution. But recognizing the resource constraint does more than justify the plea bargain system as a cost-saving device. It also raises a fundamental paradox: If the prosecutor has enough resources to take only very few defendants to trial, how can her

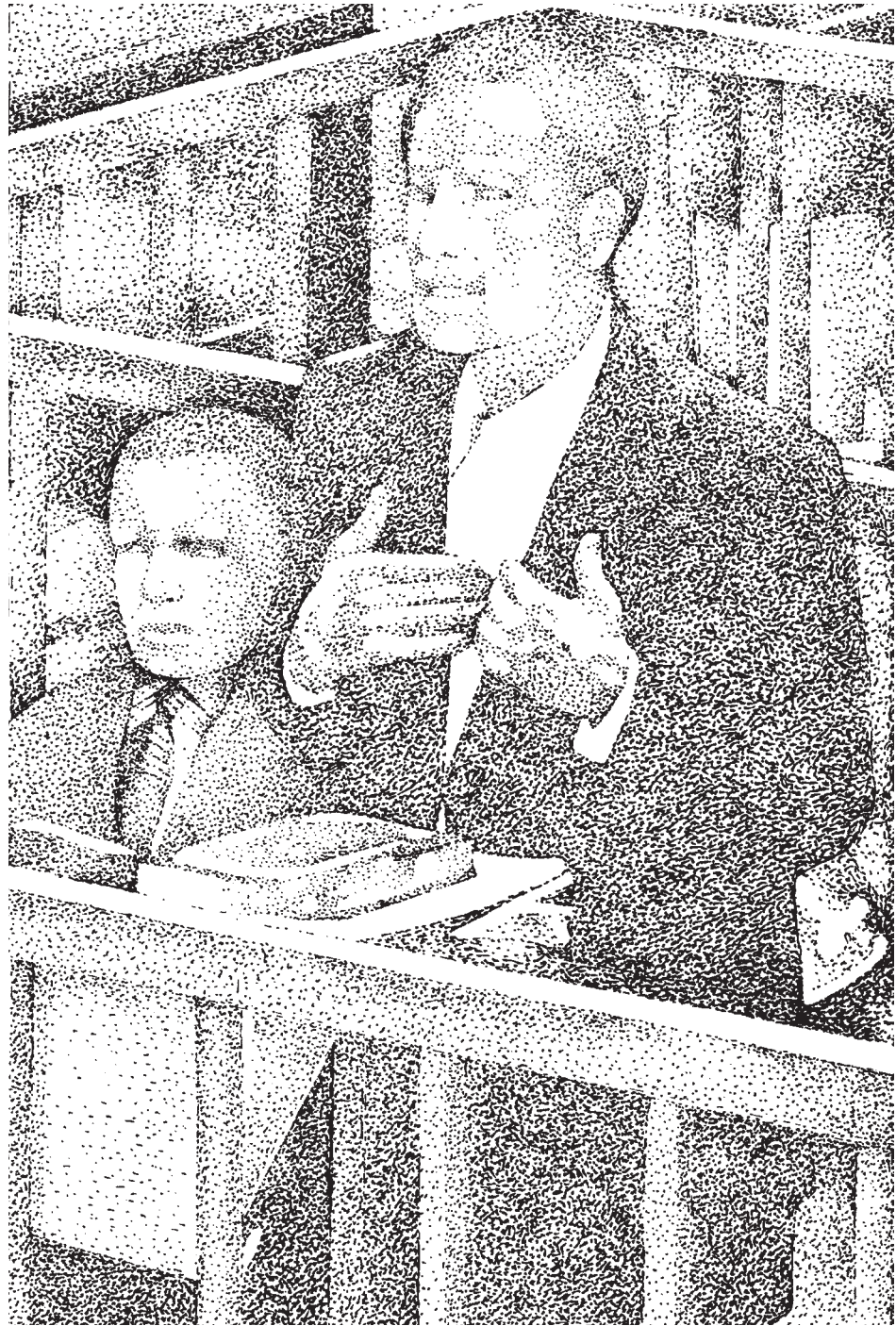
threats to take all defendants to trial induce them to plea? Why does it matter that prosecutors can select the sentence if, because of “extreme docket pressure,” they cannot make good on their threat to pursue the case all the way to the verdict and sentence? The resource constraint can potentially undermine the credibility of the prosecutor’s threat. Stated metaphorically, if you are facing off against a multitude of opponents and have only enough ammunition to strike one or very few of them, how can you succeed in having them all surrender? Why, in other words, do prosecutors succeed in extracting favorable plea bargains from a large majority of defendants when their threats against defendants are undermined by severe budget constraints?

This paradox is fundamental because it has implications for both sides of the plea bargain debate. For supporters who believe that “more choice is better,” the credibility paradox suggests that, for most defendants, plea bargains are not an additional option. Instead, because the trial option realistically applies to only a small fraction of defendants, the plea bargain replaces a no-prosecution option. Because of prosecutors’ resource constraint, these defendants would not have been prosecuted at all. A plea bargain, it turns out, is not an improvement for them.

For the opposition who believe that plea bargains are coercive, the credibility paradox raises a puzzle: Why do so many defendants accept stiff plea bargains when the alternative is no prosecution? If the resource-constrained prosecutor does not have a credible threat to take them to trial, why do defendants plead guilty? Why, in other words, is it commonly perceived that prosecutors have credible threats to go to trial?

DEFENDANTS’ COLLECTIVE ACTION PROBLEM

The problem of credibility is not solved by reputation. In some settings, a repeat player like the prosecutor, who has to deal with one-time players like many defendants, has strategic reputation concerns. A repeat party wants to acquire a tough reputation and would be willing to carry out threats that would otherwise seem non-credible. While the prosecutor surely has reputation concerns, this would not make her



threats to prosecute more credible because the resource constraint hurts the credibility of her threats. She simply cannot create a “tough” reputation if it is widely known that she has insufficient resources to back it up.

The key to understanding why prosecutors have credible trial threats is the defendants’ collective action problem. If defendants could bargain collectively — that is, if they were to coordinate a strategy and stonewall as a group by refusing to accept harsh plea bargains — they would all be better off. In response, the prosecutor would have to choose how to spend the limited prosecutorial resources. She could spend them on trials, but she would only be able to try a small subset of the defendants. Or she could offer plea bargains, but the pleas offered would have to be much more lenient to induce defen-

dants to accept them because they will have to reflect the small trial risk that each defendant effectively faces.

The problem is that defendants do not bargain collectively. Each defendant bargains individually with the prosecutor, and the prosecutor can take advantage of this lack of coordination. With the power to decide who of the many defendants will stand trial, the prosecutor can make each defendant feel as if he is the one facing trial and induce each defendant to surrender to the prosecutor's plea offer.

To better understand defendants' collective action problem, consider again the limited ammunition metaphor. Defendants are like a battalion of unarmed soldiers facing a single opponent with a single bullet in his gun demanding that they all surrender. If these soldiers collectively decide to charge their opponent in unison, they would be able to overcome the threat. They might, it is true, suffer a single casualty because the one bullet will be fired at them. But *ex ante* they would

and extracting harsh plea bargains that reflect the credibility of the trial threats.

The prosecutorial priority list must be public knowledge for it to succeed in inducing all defendants to accept harsh plea bargains. Often, the prosecutor's priorities are based on the severity of the charge as manifested in the magnitude of the sanction. Prosecutors' highest priorities are to charge defendants accused of the more serious crimes, and the degree of seriousness is often known and recognized by defendants. A defendant charged with murder knows he is at the top of the list; a defendant indicted for manslaughter knows that his case is located above any theft case on the priority list; and a defendant charged with multiple crimes knows that he is at a higher prosecutorial priority than those charged with a single crime. Now, it could be that the priority list is sometimes murky, which means that some defendants would not know if they are likely to be targeted and might continue to

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all be better off bearing this small risk than accepting the fate of those who surrender. Their problem, though, is that it is in the interest of any single soldier to duck — to defect from the front line and let others mount the charge. A smart opponent would cultivate this temptation of his enemies to defect one by one, by threatening to strike the first one who charges. A single bullet might be enough for the opponent to prevent the uniform charge and to force the entire battalion of soldiers to surrender.

Unlike other collective action problems and tragedy of the commons scenarios, there is no clear way for defendants to overcome their collective action problem *vis-à-vis* the prosecutor. You might wonder: Can't defendants simply reject the plea offers made by the prosecutor and force the prosecutor's hand? With or without coordination, why don't defendants utilize this stonewalling strategy?

The problem for the defendants is that the prosecutor can unravel their resistance by facing off with one defendant at a time. All the prosecutor needs is a "priority list" — a plan establishing which defendants are more important to prosecute and convict. If the prosecutor's priorities are known, defendants at the top of the list would know that the threat to prosecute them is credible and would thus surrender to the plea bargain. Now that the top-priority defendants have settled, the prosecutor can instead aim its limited resources against the next layer of defendants in the priority list, and they too would view the prosecutor's threat as credible and surrender. And so on. The prosecutor can march down her priority list, effectively making credible threats all the way down

stonewall. But if the prosecutor has the capacity to conduct enough trials, this murkiness effect is offset. The more resources the prosecutor has, the less publicly known the priority list needs to be. Put differently, the clarity of the priority list is a substitute for prosecutorial resources. For a severely resource-constrained prosecutor, the solution is to make her priorities crystal clear.

WHY DEFENDANTS CANNOT COORDINATE

There are several reasons why defendants cannot coordinate and join forces against the prosecutor.

First, such multilateral coordination requires that all relevant parties be identified in advance. But most defendants do not know each other. Moreover, the prosecutor can begin bargaining with suspects even before they are charged, further preempting coordination.

Second, even if a sufficiently large number of defendants know each other — from previous criminal activities or from time served in the same prison — coordination is very difficult. These parties must be able to communicate — to get together and agree on the commitment strategy. Substantive communication across many individuals is difficult.

Third, the coordinated commitment to stonewall must be self-enforcing, since defendants cannot make it binding by entering a formal, enforceable, legal contract that penalizes a defendant for accepting a prosecutor's plea offer. Indeed, it is occasionally observed that small criminal teams manage to maintain a coordinated strategy *vis-à-vis* the prosecutor. But breakdowns occur even within small teams when prosecutors

manage to alienate individual defendants from the collective, usually by offering them favorable plea bargains (or threatening to offer the favorable bargains to their counterparts). The fear of retaliation by gang members cannot fully deter a defector because, unlike a decision to become a state witness, the decision to plea could be made invisible. If honor or violence cannot cement coordination even within small and cohesive criminal communities, it surely cannot be the basis for a binding commitment amongst the entire class of defendants.

Can coordination be attained with the help of a third party, the defense attorney? If, for example, the public defender's office would go on a "plea bargain strike," it would be able to secure better plea bargains for all its clients. But defense attorneys, even if they were to collude, cannot make defendants' commitment to the stonewalling strategy binding. It would still be in the interest of each individual defendant — when his turn arrives under the priority list — to accept the prosecutor's enticing offer. The only way for defense attorneys to solve the collective action problem that plagues their clients is by forgoing their duty of loyalty to their individual clients.

There are examples where public defenders have done just this. Occasionally, faced with what they perceive to be intolerable behavior by the prosecution, public defenders have gone on "strike" and taken all cases, or all cases of a certain type, to trial, or at least threatened, explicitly or implicitly, to do so. And, there is anecdotal evidence that such strikes influence the prosecution to offer better deals to defendants. Northwestern University law professor Albert Alschuler interviewed a New York public defender who described the following incident: "Some prosecutors in this city once concluded that forgery was a worse crime than robbery.... They discovered that forgery defendants would not plead guilty to felony charges, and they quickly came back to their senses."

To wield such influence on the prosecution, public defenders must be willing to put the good of defendants as a group above the good of their individual clients. Sacrificing individual defendants for the greater good is, however, a problematic strategy — one that cannot be sustained indefinitely, and perhaps not at all. A Manhattan prosecutor, interviewed by Alschuler, argued that "[i]n a Legal Aid strike, a few defendants might go to trial and hold things up, but the stiff sentences that they received would quickly persuade the Legal Aid Office to reconsider its position." Moreover, this strategy runs contrary to the rules of ethics that require loyalty to the individual client, not to defendants as a group, and mandate that the defense counsel communicate and explain to its client all significant plea proposals made by the prosecutor.

Perhaps the way to overcome this ethics problem is to offer defendants the option to make a no-plea commitment. The defense counsel would ask each defendant if he is willing to sign a no-plea form. Those who sign would confront the prosecutor with the binary choice of either pursuing the case to trial or dropping the charges. If many defendants sign such a form, the prosecutor would have to drop the charges in the great majority of cases. But even if these commitments were somehow binding and non-retractable, the collusion they are attempting to achieve is likely to unravel. True, most

defendants in the no-plea group would be better off, as charges against them would be dropped. But the problem is that those defendants at the top of the prosecutor's priority list would be worse off because they would be taken to trial. Accordingly, these defendants would refuse to sign the no-plea form. But once the top-priority defendants opt out, joining the no-plea group becomes a losing prospect for the second-priority defendants, and they too would opt-out. And so on.

Finally, even if public defenders somehow managed to unite defendants and organize them to overcome their collective action problem, it is not likely that this success would be long-lived. The public defender's office is set up and funded by the state. If it is too successful — if it forces the hand of prosecutors or organizes effective plea bargain strikes — the state can replace this system with a different one. For example, the state can contract out the representation of defendants to individual outside attorneys. By scattering representation across dispersed providers, coordination would become impossible.

CONCLUSION

We argue that plea bargains do not always represent improved choice for defendants, but rather a coordination trap. Without plea bargains, many defendants would not face the risk of trial; they might not be charged at all. Defendants are charged, and are threatened with trials, only because the prosecutor expects them to plea; they would not have been charged otherwise. Our analysis therefore qualifies one prominent argument in favor of plea bargains, which rests on the logic that it makes everyone better off.

Our analysis does not provide an affirmative argument against plea bargains. That is, we cannot say that the plea bargaining institution is clearly bad for defendants. The main reason for this is that the prosecutor's resource constraint is endogenous. The prosecutor's budget depends on the existence of the plea bargaining institution. In a world without plea bargains, it is quite unlikely that suspects would be allowed to escape charges altogether. It is more likely that prosecutorial resources would be increased or that trials would become less costly. Accordingly, it may well be that defendants as a group would not benefit from the abolition of plea bargains.

Our analysis has additional implications for the debate over plea bargaining. For example, some have argued that plea bargaining is responsible for the increase in statutory sentences. Higher statutory sentences are viewed by legislatures as a way to compensate for the prosecutor's limited budget — a measure necessary to increase prosecutors' bargaining power. We showed that the limited budget does not undermine the credibility of the prosecutors' trial threats and does not reduce their ability to bargain for stiff plea agreements. Thus, this argument in favor of higher statutory sanctions is ill-founded. **R**

Readings

- "Plea Bargaining and Criminal Law's Disappearing Shadow," by William J. Stuntz. *Harvard Law Review*, Vol. 117 (2004).
- "The Defense Attorney's Role in Plea Bargaining," by Albert W. Alschuler. *Yale Law Journal*, Vol. 84 (1975).