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17.908 Research Paper

The Historical and Racial Implications of Plea Bargaining

In the legal system, plea bargaining is utilized as the standard methodology for processing defendants quickly. Due to its efficiency and flexibility, it has been the standard tool for securing convictions for the last 100 years. Due in part to its predominant role in the conviction of lower-class and minority defendants[1], however, it has also become the target of a great deal of scrutiny in the legal community.

Legal dilemmas often arrive wherein laws or policies are enacted with racially neutral justifications, but with a clearly racial orientation[2]. Discussion about these issues most often focuses on the racial motivation of the law's original form, and whether the current justification or form of these laws makes them acceptable, despite their original racial "taint"[3].

In this paper, I will analyze plea bargaining from a racial perspective. In Section I, I will discuss the historical foundations of the use of plea bargaining as common practice, and whether a significant racial motivation existed in its origins. In Section II I will discuss the current state of the racially disparate impact of plea bargaining and its non-racial justifications, including whether any initial 'taint' of racial motivation in the practice's origin have been dealt with by it's current implementation. Finally, I will discuss processing procedures that help relieve the racially disparate impact of plea bargains.

I. The History of the Plea Bargain in American Law

1. Guilty Pleas in Western Law

Proponents of plea bargaining often claim that the procedure has an extensive history in western law. Opponents of plea bargaining instead claim that it is a recent innovation without legal

1 William J. Stuntz, "The Political Constitution of Criminal Justice", Pg 5
2 Jeff Manza, Christopher Uggen, Locked Out. Oxford University Press, 2006, pgs. 3-94, 221-223. See also footnote 3
3 Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005)

precedent or justification. In actuality, the history of plea bargaining in American Law is not easy to track. While prosecutors have for centuries extended lenient sentencing for defendants who cooperated with them[4], the judiciary procedurally offering lesser sentences to defendants for pleading guilty is a far more recent occurrence.

Due to a lack of substantial long term records keeping about unofficial bargains that are made in the justice system, it is difficult to identify to what degree unofficial bargaining occurred in the past. What is clearly identified in the court records of the early 1900's is the far lower number of clients willingly entering guilty pleas compared to the modern legal era, attributed to the early court's discouragement and distrust of them[5] due to concerns over the legitimacy of self-incrimination. This distrust of guilty pleas can be traced back as far as medieval courts, where judges commonly advised self-incriminating defendants to change their pleas and receive a trial.

This is not to say that guilty pleas are in any way unheard of in early American law. There exist scattered records of time periods during which courts accepted large numbers of guilty pleas for various reasons[6]. These instances came under appellate scrutiny a number of times, with the 1892 case of Hallinger v. Davis setting a precedent in the Supreme Court allowing for the constitutionality of guilty verdicts. Hallinger plead guilty to first degree murder, and was sentenced and incarcerated without a hearing by a jury. He claimed that the New Jersey statue allowing for the processing of defendants based on guilty pleas was a violation of the Fourteenth Amendment guarantee of due process, of which he claimed the jury was an integral part. The court found that there was a number of precedents for due process not necessarily indicating a jury trial, and that guilty pleas that were followed by sentencing were an admissible form of due process.

The primary rise in plea bargaining in American law came to pass sometime before the 1920's. [7] Criminal Justice surveys performed in many states in the 20s showed a heavy reliance in many

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4 Albert W. Alschuler, Plea Bargaining and Its History. Columbia Law Review, Vol. 79, No. 1. (Jan., 1979), pp. 1-43.
5 Ibid
6 Lawrence M. Friedman, Plea Bargaining in Historical Perspective (in Historical Perspectives). Law & Society Review, Vol. 13, No. 2, Special Issue on Plea Bargaining. (Winter, 1979), pp. 247-259.
7 Albert W. Alschuler, Plea Bargaining and Its History. Columbia Law Review, Vol. 79, No. 1. (Jan., 1979), pp. 1-43.

states on the entering of guilty pleas, with an average of near 75% of all convictions being in the form of such pleas. Judging by the steep rate of increase of these guilty verdicts within short decades of time, it is reasonable to estimate that the procedural switch to plea bargaining occurred sometime around the turn of the century.

2. Racial Motivations in Plea Bargaining

The rise of plea bargaining in the American legal system appears to have no direct racial motivation in its inception. The reasoning for this argument relies on the observation that racially motivated laws tend to arise to replace discriminatory laws or practices that have been rendered unusable due to changes in the political or legal climate, and that these racially motivated laws and policies tend to be enacted during periods of legal reorganization[8].

Laws designed to target specific racial groups often appear in the fall of another law, to service the same discriminatory purpose. In the case of plea bargaining, the shift in legal processing style followed a subtle path with no clear policy choices being made. Until the Hallinger decision, no official legal precedent regarding plea bargaining had been set into place. Additionally, there seems to be no clear racial driving motivation for utilizing plea bargains.

Due to the non-uniformity of its usage in different states, it is difficult to ascertain a defunct law that plea bargaining would have served as a replacement for, but no clear racially discriminatory purpose is apparent. Instead, plea bargaining appears to have arisen more naturally as a consequence of its usefulness in prosecution. It is possible that a number of different cultural contexts played a part in this rise, including prosecutorial techniques used against prohibition and organized crime at the turn of the century[9].

II. Modern Plea Bargaining

1. The Modern Plea Bargaining Process

The modern implementation of plea bargaining is a streamlined process with a large degree of

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8 Loic Wacquant, "Deadly Symbiosis"

9 John F. Padgett, “Plea Bargaining and Prohibition in the Federal Courts, 1908-1934”, *Law & Society Review*, Vol. 24, No. 2

discretion assigned to the prosecuting district attorney, and remarkably little assigned to local judges. Something near 90%[10] percent of defendants in the United States enter a guilty plea as a part of a bargain agreement, making it the primary tool for the administration of justice in the nation's legal system. This pervasive process is the subject of a great deal of concern and debate among modern legal scholars.

The prime justification for the plea bargaining process is that it offers an efficiency that is unparalleled by trial proceedings. Especially in clear cut cases, such as minor violations of drug laws, plea bargains can allow prosecutors to process large numbers of defendants quickly. It also allows for discretion at the hands of the local DA, whose experience with standard violations sets them in an excellent position to offer a balanced and quick process for defendants, who can then opt in or out of the bargain. This contractual freedom is similar to that at the heart of the American justice system.

2. Racial Disparities in Modern Plea Bargains

The goal of efficiency in modern plea bargaining comes with a heavy price. Due to the regular exercise of complete discretion in negotiating guilty pleas, and the secret and unbounded nature of the offers extended to defendants,The plea bargain arguably excises the trial process from the legal system. At a time when nine-tenths of the nation's convictions are carried out in such a manner, the cause for concern about justice and equality become clear. The concept of opting out of a plea bargain contract seems to be a false benefit when opting out is a rare exception, or is done in a manner that is unequal across race or class. In the case of race, there are a number of clear racial disparities in modern sentencing that exhibit a clear failing of plea bargaining to adequately enforce laws in a consistent and fair manner.

2a. Plea Bargaining in the American War on Drugs

Although race's role was small, if even detectable, in the birth of the modern plea bargaining process, it has played a large role in the disparate conviction of black defendants due to violations of drug laws. This effect is compounded by the enormous influx of defendants into the justice system

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10 Albert W. Alschuler, Plea Bargaining and Its History. Columbia Law Review, Vol. 79, No. 1. (Jan., 1979), pp. 1-43.

created by the aggressive prosecutiorial nature of American drug policy.

Defendants convicted of violations of drug laws are overwhelmingly African American[11]. While this disparity is not the main subject of our attention, it does further the impact of the streamlined plea bargaining involved in drug convictions. African Americans are arrested and convicted for drug violations more regularly due to the more public nature of drugs dealt in urban, predominantly black, neighborhoods. The regularity of processing makes the plea bargaining system a standard element of the judicial system for these defendants.

Celesta Albonetti's research regarding the characteristics of defendants of drug offenses also reveals that not only are African Americans more likely to be convicted of drug convictions, once in the legal system, they are statistically more likely to enter a guilty plea than white defendants[12]. They are also receive a statistically lower reduction in their sentence once a guilty plea is entered than do white defendants[13].

This overwhelmingly implies that in the modern legal system, Black defendants are subject to a three-fold disadvantage regarding plea bargains. They are more likely to be arrested and convicted of drug offenses, more likely to receive and accept a plea bargain, and more likely to receive less benefit from doing so than white defendants. Despite a legal origin seemingly void of racial intent, plea bargaining has become a tool in the war on drugs that aggressively discriminates against African Americans.

2b. The Selective Justice of Plea Bargains

Plea bargaining has a clear regressive tendency regarding its application across economic and social classes. Plea bargaining is an alternative to trial for all defendants in the legal system. However, it is only an appealing option for those defendants for whom trial appears an unattractive option. Access to non publicly appointed legal counsel, degree of education regarding one's rights, and

11 William J. Stuntz, Race, Class and Drugs, Columbia Law Review, November 1998
12 Celesta A. Albonetti, Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992. Law & Society Review, Vol. 31, No. 4. (1997), pp. 812
13 Ibid, page 815

general biases in the legal system all have strong effects on a defendant's decision to take a plea bargain.

The fundamental goal of plea bargaining is, from an economic perspective, to clear space in the legal system for cases “worth” a trial. Although defendants who chose to insist on a trial are often successful in defending themselves[14], those whose person or crime fit a general profile of a 'standard' offender are set up in the legal system to perceive a plea as the most attractive option.

Public defenders most often press their clients to take plea bargains, and negotiate these rather than push them to go for a trial. A defendant's low level of understanding about his rights prevents him from striving for a jury trial. Finally, and perhaps most importantly, defendants who are pushed into the plea bargain process by threats of being charged with worse crimes if they do not take the deals presented are programmed to think of these deals as the fundamental mechanism of the criminal justice system.

The statistical profile of this 'standard' offender is perceived as a young male of low economic status. As such, the legal process of plea bargains focus around the idea of this 'standard' offender, who is to be processed by a plea bargain, and 'nonstandard' offenders whose case is 'worthy' of the system's trial resources. This distinction is at odds with the fundamental concept of due process that the constitution requires for all defendants.

By setting up a distinction between worthy and unworthy prosecutions, the process of plea bargaining insists upon the unrealistic assumption that prosecutors have a clear understanding of what kind of 'slot' each defendant and their crime fit into, which easily extends to an unacceptable level of racial profiling regarding what kind of defendants fit this standard profile.

III. Alternatives to Plea Bargaining

A number of alternatives to plea bargaining have been proposed by legal scholars to relieve the large degree of discretion present in modern sentencing and convictions. Many of these

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14 John A. Humphrey; Timothy J. Fogarty. Race and Plea Bargained Outcomes: A Research Note, Social Forces, Vol. 66, No. 1. (Sep., 1987), pp. 176-182

alternatives provide methods of processing defendants without allowing for decisions regarding sentencing to be made in a way that allows for undue discretion or lack of due process, relieving some of the bias in the system regarding minority defendants.

The first, and in someways most straightforward, alternative to plea bargaining is to simply cease and disallow the aggressive procurement of guilty pleas. Because plea bargains are not subject to legislation and only subject to limited federal judicial oversight, there is no real way to control the arbitrary execution of the law than to prevent prosecutors from deciding which sentences apply.

The primary concern with this solution is of course the increase in cost associated with the full trials that would be held for those defendants who before would have simply pleaded guilty. It is often argued that the legal system could deal with this increased burden[15], especially if the trial process was in some way made ore efficient. We'll assume for argument's sake that it cannot deal with it adequately, and that the lack of resources will result in discretion simply being redistributed to other positions.

One often proposed alternative is that of criminal screening. The goal of a screening process is to identify general categories of prosecution in the DA's office[16]. Screening classifies general crimes and categories of crime along standards as to how they are to be prosecuted. These classifications are a matter of solid policy, and not merely discretionary standards. The main goals are consistency, and the removal of negotiating guilty pleas outside of earshot of the court. Through the use of screening, efficiency is improved by setting a prosecutorial standard to streamline common offenses. In addition, forcing prosecutors to follow the same standard eliminates the racial bias of 'standard' defendants, and the usage of threatening overly-severe charges to force compliance with an arbitrary sentence.

IV. Conclusion

My analysis fails to show a racial motivation behind the advent of plea bargaining as the standard mode of criminal prosecution. However, a clear bias can be seen in the impact of modern

15 Albert W. Alschuler, Plea Bargaining and Its History. Columbia Law Review, Vol. 79, No. 1. (Jan., 1979), pp. 1-43.
16 Wright, Ronald. Miller, Marc. “The Screening/Bargaining Tradeoff, Stanford Law Review, October, 2002. 83 pages.

plea bargaining on the distribution of state resources towards African American defendants. The profiling nature of the plea bargaining system helps to perpetuate a profile of Black criminals who are 'standard offenders' to be dealt with in a formulaic manner, devoid of the due process of trial. Incentives are presented to make a deal with the DA's office more appealing than a jury trial. This impact is especially clear in drug prosecutions, where African American defendants are more likely to be negatively impacted by plea bargaining in three separate manners, in a manner set forth as a standard prosecution style. This racial impact gives strong credence to the abolition of plea bargaining in lieu of a process that allows for equal resources to be utilized for African American defendants.