ABOVE THE LAW

Plea Bargaining: A Necessary Evil?

David Lat

November 20th, 2018

Plea bargaining is responsible for 97 percent of federal felony convictions — but it definitely doesn't generate 97 percent of the discussion about federal criminal law. News articles, appellate court decisions, and academic scholarship focus on trials and neglect plea bargaining, despite the centrality of the latter to the criminal justice system.

So I was pleased to attend a panel at last week's Federalist Society National Lawyers Convention entitled "The Pros and Cons of Plea Bargaining." It featured leading thinkers on the subject engaged in a wide-ranging discussion of this critically important practice, with strong voices on both sides.

(People often think of Fed Soc as focusing on politically charged issues and advocating the conservative or libertarian viewpoint, but panels like this one are an important reminder that so much of the Society's programming consists of learned and lively debates about interesting issues with little or no partisan valence — or issues that divide conservatives and libertarians, like plea bargaining.)

Greg Brower, a shareholder at Brownstein Hyatt and a former U.S. Attorney for Nevada, wound up as the defender of plea bargaining (despite his acknowledgment at the start of his remarks that he falls somewhere in the middle of the spectrum of critics and supporters). He acknowledged that trial has its virtues — it's "the most fun you can have as a litigator," even if "for each case you try, you lose a year of your life on the back end" — but the criminal justice system simply couldn't function without plea bargaining.

The strongest critic of plea bargaining on the panel was Clark Neily of the Cato Institute, who made the constitutional case against plea bargaining. He quoted the language of Article III, Section 2 — "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" — and pointed out that the Bill of Rights has more words about jury trial than any other topic.

Brower's response: it's the right to a jury trial that's so important and constitutionally protected — and this right belongs to the defendant, which she can waive by pleading guilty. Some plea bargains are unfair, but a fair plea agreement is constitutionally sound (and a variety of safeguards exist within the system to promote fairness).

Unfortunately, according to Clark Neily, many plea bargains are deeply unfair — which is why innocent people routinely plead guilty to crimes they did not commit. He cited three factors that make the plea-bargaining process so coercive: (1) pretrial detention, which is often hellish (think of Rikers Island), and which defendants will do practically anything to escape; (2) woefully inadequate and/or under-resourced defense counsel (and/or conflicted defense counsel, to the extent that they have to maintain good relations with prosecutors for future cases); and (3) the "trial penalty," which is the (often vast) difference between your sentence if you plead and your sentence if you dare to go to trial.

Professor Carissa Hessick echoed many of Neily's concerns. On the issue of pretrial detention, she quoted one public defender who told her that he has never been able to convince a client to reject a plea deal if the deal allowed for immediate release. Speaking more broadly, the idea of plea bargaining rests upon concepts of negotiation and contract that assume rational actors — but some (perhaps many) defendants act irrationally, calling into question the legitimacy of the model.

Notwithstanding her criticisms of plea bargaining, Professor Hessick parted ways with Clark Neily on what is to be done. "Plea bargaining is bad," she noted, "but other things are also very bad." The practice simply can't be abolished.

Given its importance to the criminal justice system, plea bargaining isn't going away anytime soon. But it can and should be reformed, according to Judge Stephanos Bibas (3d Cir.).

A professor at Penn Law before joining the Third Circuit, Steve Bibas has written extensively about how to improve plea bargaining. Under the current system, he said, prosecutors wield far too much power; we checks and balances to provide greater balance. Possible solutions could involve judges getting more involved in the plea-bargain process (as Judge Jed Rakoff has argued) or "plea juries" deciding on the acceptability of plea and sentence (as Laura Appleman has proposed).

The panelists disagreed with each other on a number of issues, but by the end of the discussion, one thing was clear: the status quo is unacceptable. The fact that it's rational for some innocent people to plead guilty is, as Judge Bibas put it, "the canary in the coal mine" — a sign that something is seriously wrong with current practice, and a sign that something must be done.

Disclosure: Because I spoke on a panel at this year's Convention, I received free access to Convention events. I also speak regularly at other Federalist Society events, for which I receive travel-expense reimbursement and the Society's standard honorarium (lower than my normal speaking fee).