
Is the Game of Plea Bargaining a Game of Extortion?

Uri Weiss, Yosef Zohar

Does plea bargaining violate the right of due process of law? Are plea bargains a sort of extortion? On its face, if a defendant chooses to come to plea bargaining, he is expected to gain from this, otherwise he would not give his consent; therefore, given we can rely on the discretion of defendant, he would be better off plea bargaining than in trial; therefore, he cannot lose from his right to come to plea bargaining, and plea bargaining does not violate his right to due process or extort him. This is parallel to the main justification for a free marketplace: if the two sides come to a consented transaction, this signals that they both expect to gain from this, and therefore we should not interfere in their negotiating freely. In this article we refute this justification of plea bargaining. We propose this argument: even when it is better for a side to accept a plea bargaining proposal than reject it, we cannot come to the conclusion that it better for him to be allowed to come to plea bargaining. The right to come to plea bargaining affects the incentives of the prosecutor, sometimes such that it would be better

the application of criminal sanctions by increasing the weight of enforcement, which does not pose difficulties on the level of retribution, at the expense of the level of punishment meted to the potential offender; the use of alternative means within criminal law, which are not penal, but which may serve as deterrence, such as forfeiture or the payment of compensation; or the use of alternative means outside of criminal law such as administrative enforcement. In light of the limited efficacy of these solutions, the article examines the possibility of a separate examination of economic crime, outside the general range of offences, which could be achieved by, among other means, changing the relation between the various sentencing considerations, including strengthening the role of deterrence. Whatever the solution may be, the article maintains that there is no place for equating white-collar crimes with general crimes, and that the differences between the types of offences should be taken into account on the level of enforcement as well.