Justice in the Justice System?

Essays on Crime and Punishment in Canada

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September, 2016

VANCOUVER ISLAND UNIVERSITY

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Killing Criminals: More Harm than Good

Angela Linthorne

Capital punishment is one of the most passionately debated issues in the criminal justice system. Often, people feel very strongly about their stance on this particular issue, citing various concerns such as the right to life and the appropriate response to the most heinous of criminals. While there are legitimate reasons for capital punishment, they are strongly outweighed by the negative consequences.

Undeniably, putting criminals to death incapacitates them. When fully carried out, capital punishment ensures that the offender will never commit further crime. However, this level of incapacitation may not be necessary. Murderers are statistically the least likely type of criminal to break the law again, and they rarely commit another murder (Evjen). Consequently, the death penalty is often an excessive punishment, more punitive than necessary to ensure public safety. In response, one might note that, while few convicted murderers actually receive the death penalty, judges or juries should have the option of imposing this sentence in the most dangerous of cases. Although this may sound reasonable in principle, in practice it can be difficult to determine, at the time of sentencing, that an offender cannot be rehabilitated. And less extreme punishment, such as life imprisonment, can accomplish the same goal of incapacitation.

Perhaps the most obvious concern over capital punishment is the irreversibility of the sentence and the implications for persons wrongfully convicted. While it is true that no sentence can be undone and the years spent imprisoned cannot be recovered, the problem is heightened in capital cases. Wrongfully convicted inmates, if later found innocent, can be released and compensated financially. Admittedly, this does not make up for the grave injustice they suffered, but they can still have something of a future. However, society can make no amends once someone has been put to death. The dead cannot come back to life, and family and friends are also permanently impacted. Wrongful executions also result in a state guilty of its most serious crime: prolonged, premeditated murder. While wrongful conviction is not an issue specific to capital

punishment, the effect of the injustice is much more acute when the sentence is death. This unfortunate reality provides strong reason against capital punishment.

In the United States, the use of juries in capital trials further complicates the issue. Capital cases constitute a rare exception where juries have a role in sentencing, often deciding on whether to impose the death penalty. Potential jurors in capital cases undergo a process known as death qualification, in which only those who are willing to consider the death penalty may be selected (Haney). This process seems reasonable at first glance, but it can be detrimental to the accused. Jury members may be more likely to impose the death penalty, as, theoretically, none of them oppose the practice in general. They may also feel *expected* to impose a capital sentence, given how they were selected. The questioning process during death qualification may further compromise the objectivity of jurors as they hypothetically consider imposing the death penalty with an assumption of the accused's guilt. Death qualification is further likely to affect the demographic composition of juries (in terms of gender, age, race, ethnicity, etc.), because certain groups of people are more likely to oppose capital punishment than others (Lanier and Acker). Thus, the qualifying process may preclude juries from being representative of the larger community, arguably defeating the purpose of being tried by a group of one's peers. This could contribute to the unequal application of the death penalty, more often imposed on racial minorities and/or those of low socioeconomic status. Thus, as practiced, capital punishment creates its own injustices and must be prevented at all costs.

Although the criminal justice system is not victim-centred, a utilitarian analysis will have us consider all players affected. Victims, which may include family and friends, are certainly impacted by the practice of capital punishment. While some may support it and feel a sense of relief once an offender has been put to death, this may not be the case for many. Capital punishment can foreseeably have a negative impact on victims in multiple ways. The prolonged court process that accompanies capital cases, including several levels of appeal, can take many years and might make it difficult for victims to move on with their lives as they are repeatedly reminded of the details of what happened to their loved one. Some victims may later regret advocating (or even wishing) for the offender's death, and may subsequently feel guilty about these actions

or thoughts. Finally, the death penalty increases the number of victims impacted by each capital crime: members of the offender's family are also victimized when they suffer the loss of their loved one. Unfortunately, there is no adequate justification for the emotional harm inflicted upon the families of executed offenders.

For all these reasons, the death penalty is *not* an appropriate sentence for any crime. The overwhelming negative outcomes of such a practice cannot be justified by appeals to incapacitation, when a lesser method—life imprisonment—will achieve the same goal. Life imprisonment eliminates the aforementioned effects on victims and problems arising from death qualifications of jurors. It also lessens the harm in cases of wrongful conviction, while affording the practical benefit of cost savings that would result from fewer appeals and retrials. Thus, the use of capital punishment simply cannot be justified.

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Is Rehabilitation Wrong?

Jordan Lonsdale

Introduction

One of the main goals of the Canadian criminal justice system is to rehabilitate offenders. Through many avenues—such as wide sentencing options, prison programs, and halfway houses—offenders have many opportunities to change their ways. The main motive behind rehabilitating criminals is to make the public safer (Fortune, Ward and Willis 647). However, Immanuel Kant, the 18th century German philosopher, believed it was immoral to rehabilitate criminals since it offends human dignity, by molding people's personalities and violating their autonomy. I think he was incorrect, despite his commendable concern over human dignity. In this paper, I will argue that, while humans should be treated with a high level of dignity, Kant was wrong in thinking rehabilitation ran contrary to that objective.

Rehabilitating Offenders

Most offenders have a history of victimization, violence, substance abuse, and other criminogenic factors that contribute to their anti-social behavior (Farrington 390). There is a far-reaching explanation for most crimes; these deep-rooted causes are what rehabilitation programs target. Once offenders are caught up in the criminal justice system, the goal is to identify and target their risk factors—whether they be mental health problems, substance abuse issues, or uncontrollable sexual desires—to help them live a productive life after their sentence ends. This goal is primarily intended to benefit *society* by preventing further crimes. However, it is also intended to benefit *offenders*, by giving them the necessary skills to earn a pay cheque and to avoid a dangerous lifestyle in order to survive. Rehabilitation programs can help offenders become clean, saving them from a potentially life threatening drug addiction. Further, rehabilitation efforts are often more humane than prison. Thus, with rehabilitation, we are not merely using criminals for our own ends, but rather also promoting their welfare.

Despite Kant's concerns, rehabilitation efforts won't change offenders' values or manipulate their personalities. Offenders can be required to participate in treatment programs as part of a community-based sentence or probation order, but it is up to them to learn something from the programs. We can require offenders to attend every possible program, but they must be willing to make a change in order for the programs to work. Rehabilitation programs cannot force offenders to change their attitudes or beliefs, but they can give offenders a set of tools and skills to facilitate change in their lives if they so choose. Given that offenders still have the ultimate choice as to whether to adopt the attitudes taught in rehabilitation programs, they are not, in my opinion, being treated as "mere means" for the end goal of public safety. Offender autonomy is respected by allowing criminals to reintegrate back into the community and make choices for themselves. Rehabilitation provides offenders with the knowledge and education to make well-considered decisions.

Rehabilitation and Kant's Respect for Persons

Kant's main concern over rehabilitation was that it violated the autonomy of rational agents. He didn't want society to shape and mold offenders, but rather to respect their rational decisions as to what they wanted to be like. However, it's hard to say if his theory would apply to a person whose rationality is compromised because of mental illness, drugs, or alcohol. If offenders have an illness that is preventing them from making rational choices, perhaps it would be ethical to treat them and help them get to a point where they can become rational and truly autonomous beings. The same goes for offenders with a drug or alcohol addiction.

Some aspects of the criminal justice system infringe on the dignity of human beings and should be questioned under Kant's demands for basic respect. However, many offenders are not fully rational people and thus need help and guidance to be able to make free choices.

Conclusion

The debate on what to do with offenders has existed for centuries; to this day, there is still no straightforward answer. I believe that rehabilitation, when possible, is the safest

and most cost effective way of dealing with offenders. I also believe that rehabilitating offenders is morally acceptable. While I agree with Kant on how humans should treat other humans, I do not agree that rehabilitating offenders is immoral. Humans need to respect each other's rationality and autonomy; however, not all offenders are rational beings. Many suffer from mental illnesses or substance abuse that can be at least partially treated, restoring the offenders' rationality and true identity. Far from violating autonomy, rehabilitation programs are often geared towards providing the tools and resources to make reflective choices. This is different from manipulating personalities—which was Kant's main objection to rehabilitation programs. Any attempt to "mold" offenders would be destined to fail anyway, because values cannot be changed so easily without buy-in from offenders themselves.

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When Laws Clash with Justice: In Defence of Jury Nullification

Christian Brzoza

Throughout legal history, there have been many cases where an individual clearly broke the law, but the jury felt the law or the mandated punishment would be unjust, or at least given the circumstances. However, jurors often believed (as many people did) that they were required to vote guilty based solely on the evidence and the law at hand, despite their consciences telling them that the defendant did not deserve the punishment (s)he would receive. In such cases, jurors had been unaware of one of their fundamental powers: jury nullification. This power allows jurors, effectively, to nullify a law by reaching whatever verdict they wish, independent of the verdict that is prescribed by that law, thereby protecting the accused from arbitrary or unjust exercise of authority. Juries have used this power in the past, for example, when they refused to convict escaped slaves under the United States' former Fugitive Slave Act. As it stands today in Canada, however, a defense lawyer (or anyone in the courtroom for that matter) is not allowed to inform jurors about jury nullification. This came out of the Supreme Court of Canada's decision in R. v. Morgentaler (76-79). I will argue, however, that defence lawyers should be able to inform juries about jury nullification—a practice that is not only within the law, but is also good and necessary for justice.

To start with, jury nullification is within the boundaries of the law. One of the crucial aspects of a jury is its independence from external influence during its deliberations, and this is secured by the secrecy and privacy of the jury. Because jurors do not have to provide reasons for why they vote as they do, they can reach a verdict that is different from what the law would prescribe based on the evidence. Quite simply, "it is not illegal to come to a verdict that is contrary to the law" (Bauslaugh 24), and so defence lawyers should be allowed to tell juries about nullification. While jury nullification is not explicitly stated in written law (it is not a legally protected right *per se*), the legal community recognizes that juries have this ability. Former Chief Justice

Dickson, for example, recognized jury nullification as a “de facto power” (R. v. Morgantaler 78), indicating it comes not through explicitly stated rights like those in the Canadian Charter of Rights and Freedoms, but rather through something inherent in how a jury operates. By law, jurors cannot reveal their reasons for a verdict. This ensures the privacy and security of the jury, protecting it from external influences of power and potential harm from strong opponents of its decisions. However, this also gives juries a lot of latitude in reaching a verdict, giving them the power to vote with their conscience in the face of an unjust law. It is clear, then, that jury nullification is within the limits of the law, and so defence lawyers should be able to inform juries about this practice if they so choose.

Furthermore, defence lawyers sometimes need to bring up jury nullification because it is a good and sometimes necessary practice for justice. As mentioned previously, a jury functions properly when it is free from external influences, since it serves the role of protecting citizens from arbitrary exertion of authority and power. In order for juries to serve this purpose, “they must themselves, in rendering verdicts, be free of all external authority—political, judicial, and legal” (Bauslaugh 137). Laws act as a legal authority, and while they are designed to bring about justice, laws or their application can be unjust under certain circumstances. A jury, only when it is aware of its ability to nullify, can act as protection for citizens against persecution under such unjust applications of laws, and thus bring about justice. Additionally, the act of jury nullification can have an even greater effect on justice, signalling a message to Parliament that a law should be changed. This is especially important because it could prevent such unjust applications of laws from occurring again, once it is shown that the public (as represented by the jury) does not agree with the law. The Morgentaler trials constituted a case in point; juries effectively nullified the law against abortion by finding Dr. Henry Morgentaler “not guilty” each time he was charged, although he had clearly performed illegal abortions. This brought about justice in an instance where strict adherence to the law would not have, and, through a series of appeals, lead the Supreme Court of Canada to deem the abortion laws unconstitutional. Of note, Morgentaler’s lawyer, Morris Manning, had explicitly informed the jurors of their ability to nullify the law.

Some, however, are against lawyers using jury nullification as part of a defense; they fear this would lead juries to acquit guilty people due to arbitrary reasons and biases, such as a racial prejudice against the victim. While this is a genuine concern, the opposite possibility of an innocent (as deemed by the consciences of the jurors) being found guilty is perhaps even more disconcerting. This notion is supported by William Blackstone, an influential legal writer, who said “it is better that ten guilty people go free than one innocent go punished” (qtd. in Bauslaugh 135), emphasizing that it would be a much greater failing in our justice system for an innocent person to be punished than for a guilty person to be acquitted.

Of final note, defence lawyers should be able to inform juries of jury nullification, because keeping it a secret is detrimental to justice. For example, unlike Henry Morgentaler’s jury, Robert Latimer’s jury was not told about its power to nullify the law. Latimer’s jurors, then, felt compelled to deliver a guilty verdict for a mercy killing, despite their consciences telling them that Latimer did not deserve a life sentence—the mandatory minimum for murder. Latimer might well have been acquitted of his crime, thus ending his long legal ordeal much sooner, if the defence council could have only told the jury about its power to nullify. But that had been disallowed since the Supreme Court decision in Morgentaler. This is a serious detriment to justice because juries cannot be effective “safety valves” against unjust applications of laws unless they are informed of their abilities to combat them. Most juries won’t know they can refuse to follow the letter of the law, especially when judges direct them only to judge the facts of the case. While juries do indeed have this power to nullify laws, as Gary Bauslaugh notes, “keeping [this] knowledge a secret is almost the same thing as banning it” (133). This ignorance can lead to unjust convictions, as in the case of Latimer.

Those against using jury nullification as a defence argue it would lead to gross inequities in verdicts due to the differing views, biases, and possible prejudices held by different juries. However, it seems that these opponents are neglecting inequities that arise from juries *not* being informed of nullification in court. This is because, as Bauslaugh points out, “information about nullification is publically and very readily available. Members of some juries would have knowledge about the power to nullify … while others like Latimer’s did not know. It is unfair to the defendant, and discriminatory,

that some juries have these crucial bits of information and others do not" (144). It is not just or right that what would otherwise be an effective jury (one which reaches a verdict that accurately reflects a moral and reasonable society) is limited by its ignorance of its power to nullify the law, yet defense lawyers cannot remedy this. It is also not just that, in preventing defendants from giving an argument in favor of nullification, they should be deprived of what may be their best defence. When this is the case, it seems that defendants are "once again, as they were before juries were established, subject to arbitrary punishment by authorities" (Bauslaugh 145). This was the case for Latimer, where a plea for nullification would have been his best defence, and most certainly an effective one, but he was unable to use it.

Jury nullification, as it stands today, remains a marginally known ability of juries. It is, however, one of the most crucial powers that juries, as protectors of citizens against the arbitrary exercise of authority, possess within the legal system. Defence lawyers should be allowed to inform jurors of this ability, because it is entirely within the confines of the law, it is a good and often *necessary* practice for proper justice (as shown by the Morgentaler case), and its secrecy is detrimental to justice (as shown by the Latimer case). We should promote this power of juries, as it is wrong for people to be deemed guilty simply because of an unjust law or an unjust application of a law in their exceptional circumstances.

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The Mayhem of Mandatory Minimums

Natalia Lassak

One of the main arguments for mandatory minimum sentencing is that it allows for more consistency in punishment. This is especially true for the least grievous cases of a type of offence, where judges would simply prescribe the minimum sentence, or for murder cases, where the minimum sentence is also the maximum: life imprisonment. Although consistency in punishment is important, especially for crimes with similar intents and circumstances, mandatory minimums are not effective and overlook important sentencing objectives. Mandatory minimums were meant to solve sentencing disparity and prevent undue leniency, yet have either exacerbated these justice problems or created new ones. In light of this, I argue that mandatory minimum sentencing is not justifiable.

In some cases, mandatory minimum sentencing can exacerbate the very problem it purports to solve, namely sentencing disparity. Prosecutors, judges, and juries have gone so far as to avoid punishing offenders in cases where the minimum punishment seems disproportionate to the crime (Gabor 400). Prosecutors fail to prosecute such individuals; judges or juries acquit them despite being convinced of their guilt. This has been particularly true for cases of battered women who have killed their partners, or for cases of medical personnel who have carried out mercy-killings. Most of these offenders still deserve some punishment, but perhaps not as severe as the minimum laid out by legislation. However, since a lesser-sentencing option is unavailable, decision-makers let the offenders off scot-free. In some murder cases, the provocation defence, a partial defence, is applied inappropriately just to avoid the mandatory life sentence for murder and lessen the punishment. This law-bending is problematic, because it sets a precedent for further misuse of the defence.

The law-bending that takes place is not without good reason. It is a way around mandatory minimum sentencing which does not take into account mitigating circumstances, and can thus result in disproportionate sentences. A common example

is the case of Robert Latimer, who killed his young daughter to prevent her further suffering (Gabor 385). Tracy Latimer was congenitally very sick, and could not walk, talk, or feed herself. She experienced severe pain daily. Robert Latimer, who by all accounts was a good father to her, ended her life because he could no longer stand to watch her suffer. He confessed to the *premeditated* act and was charged with first-degree murder, but was convicted of second-degree murder, which is technically defined as *non*-premeditated (R. v. Latimer). The law was bent to allow Robert Latimer eligibility for parole after ten years instead of twenty-five, since the latter seemed excessive for his crime. This is yet another example where the law is manipulated to avoid what seems to be a disproportionate sentence.

Disproportionate sentences come into direct conflict with the fundamental principle of sentencing as stated in the Criminal Code of Canada: “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” (718.1). Thus, different sections of the Criminal Code contradict each other, forcing advocates of the law to violate one section or another.

Mandatory minimum sentencing may even violate the Canadian Charter of Rights and Freedoms (“Charter”), because it generates cruel and unusual punishment in exceptional cases (s. 12). Such was the case of Leroy Smickle, a young man with a job, a fiancée, a child, and no past criminal record. He was found taking pictures of himself with a loaded gun in his cousin’s home. The gun belonged to Smickle`s cousin and was unregistered. Smickle found himself in a precarious situation as police barged into his cousin’s home and found him posing with the weapon. He was convicted of possession of an illegal loaded firearm which carries a three year mandatory minimum sentence. According to the Ontario Superior Court, sentencing Smickle to three years in prison for little more than folly was cruel and unusual, violating the Charter (R. v. Smickle). The Ontario Court of Appeal also deemed the three year minimum as unconstitutional.

Thus far, I have shown that mandatory minimum sentencing can result in acts of ‘law-bending,’ can violate sentencing objectives, and can constitute cruel and unusual punishment. I believe that these side effects of mandatory minimum sentencing constitute sufficient reason to look for other methods of ensuring consistency in

punishment among similar crimes, but I shall present two more reasons for the sake of argument.

Supporters of mandatory minimum sentencing often argue that it carries a greater deterrent effect than the laws would otherwise have. As is usually the case with deterrence, it is difficult to determine its true effect, due to a lack of clear empirical data; however, the goal of *specific deterrence* is certainly questionable. Putting lesser criminals in jail for longer periods of time tends to promote, and not prevent, criminal behaviour. To see how, imagine a case like that of Leroy Smickle, described above. And now, imagine that the mandatory minimum sentence had been upheld and he had been sentenced to three years in prison. This would have turned this normally upstanding citizen's life upside down. It is possible that his fiancée might then leave him, and it is almost certain that he would lose his job. Perhaps Smickle would make friends in prison, and be encouraged to continue a life of crime upon his release. The prison environment is much more conducive to helping offenders become better criminals than to helping them become rehabilitated (NeSmith 259-260). This is why prison is sometimes referred to as "con-college." Thus, putting a first-time offender in prison when (s)he is unlikely to reoffend might, in turn, *make* the offender more likely to reoffend, and this certainly counteracts deterrence.

A final consideration against mandatory minimum sentencing is cost. I am not suggesting that economics should determine legislation or legal practice, but it is nonetheless a reality in our society. Prisons are already overcrowded, and mandatory minimum sentencing will only exacerbate this problem. Because the costs of keeping an offender in prison are so high, prison space should be reserved for the most violent and dangerous offenders, who pose a real threat to others. These persons would still get lengthy sentences without mandatory minimums. Judges are well-trained professionals and know as well as any common person that serial killers, rapists, and child molesters need to be taken off the streets.

Mandatory minimum sentencing removes judicial discretion, which is important for cases with mitigating circumstances or cases involving first-time offenders. If there are sentencing discrepancies between different judges, they could be due to personal biases or different emphases on sentencing objectives. For example, one judge may

place more value on rehabilitation, but another, on retribution. Either way, mandatory minimum sentencing is not the way to deal with such discrepancies because it creates more problems, and thus there is need for a different solution. Just to illustrate the point, I might lightly suggest a panel of three judges for complex cases or perhaps some standardized, but flexible, sentencing guidelines which a judge can override if (s)he provides good reasons. These are just a couple ideas that could be investigated, reviewed, and perhaps applied effectively.

Mandatory minimum sentencing has been implemented as a way to “get tough on crime,” and has been represented as a way to ensure consistency in punishment; however, it is largely ineffective and problematic. It is problematic because in certain cases, it contravenes the sentencing objectives of the Criminal Code or even, rights secured by the Charter. It is ineffective because advocates of the law will find a way to bend legislation if the mandatory minimum is too harsh. The issue of consistency in punishment is a complex one and requires a complex solution rather than a “quick fix.” It is time for us to investigate other solutions, because mandatory minimum sentencing is simply not justifiable.

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Plea Bargaining: A Necessary Evil

Sean Bowie

Plea bargaining is a major feature of the Canadian criminal justice system. At its simplest, plea bargaining involves pleading guilty in exchange for some sort of benefit, most commonly a lighter sentence. Plea bargaining saves the system a great deal of time and money, and serves to considerably reduce backlog. This reduction in backlog is pivotal, as the Canadian Charter of Rights and Freedoms states that "any person charged with an offence has the right to be tried within a reasonable time" (s. 11(b)). Without the use of plea bargaining, the resulting backlog of cases would very likely mean that many accused could apply for a stay of proceedings and potentially be let off entirely. Although our legal system now relies on plea bargains to manage case volume, there are many inherent problems with the way they are used. As such, I will argue that plea bargaining is not acceptable—with the caveat that, without a major overhaul of the Canadian criminal justice system, there is currently no viable alternative.

The very nature of plea bargains conflicts with justice and retribution. There are three main types of plea bargaining, and all essentially result in lesser punishment for the accused than if (s)he were found guilty at trial. In charge bargaining, the prosecution agrees to drop secondary charges or to reduce a charge to a lesser included offence. In sentence bargaining, usually the prosecution agrees to recommend a lesser sentence than (s)he would if the accused were found guilty at trial. In the case of a hybrid offence, (s)he might agree to proceed by summary rather than by indictment. In one very troubling form of sentence bargaining, the prosecution agrees *not* to seek a dangerous offender or long-term offender designation upon sentencing. Both designations exist to protect society from offenders thought to pose a very high risk of reoffending. If persons truly warrant dangerous offender or long-term offender designation, it seems highly unethical to bargain away that designation; they pose too much of a public safety risk. In the third type of plea bargaining—fact bargaining—the prosecution agrees not to

mention aggravating factors pertaining to the crime, assuming the judge will issue a lesser sentence as a result.

All three types of plea bargaining effectively undermine justice by softening the punishment that an offender would have received if found guilty at trial. However, a guilty verdict is supposed to result in a sentence that reflects the nature of the crime, in terms of both the gravity of the offense and the responsibility of the offender. Plea bargaining effectively results in a situation where either the seriousness of the crime or the responsibility of the accused is given compromised consideration. This is not in keeping with traditional notions of justice.

Furthermore, plea bargains could prompt innocent people to plead guilty to avoid, potentially, a more serious penalty if they were to be found guilty at trial. The possibility of this becomes very real, if there is enough disparity between what they would get if found guilty at trial versus what they would get as a result of a plea bargain. Trials are inherently unpredictable, and as such, even innocent people can have no real way of knowing what might happen. This is particularly true if misleading evidence seems to incriminate them, or if exonerating evidence is limited or weak. In such cases, it is perfectly understandable why innocent people might opt instead to plead guilty in exchange for a sentence that is shorter or less severe. In this way, plea bargaining can be seen as having a potentially coercive effect, as prosecutors may be able to scare the accused into pleading guilty for fear of what might happen in a trial. This also has the effect of more or less punishing people for exercising their right to a trial, because opting to go to trial is likely to result in a more severe penalty for the same crime.

Perhaps most troubling, plea bargaining largely removes the judge from the judicial process. The sentence is effectively agreed upon by the prosecution and the defence, and the judge usually honours it. Thus, any discretionary role on the part of the judge is all but eliminated. Judges do have the power to reject plea bargains, but in practice, this does not happen very often. Prosecutors already wield a great deal of power, for it is they who determine which cases go to court, as well as what charges are laid. With plea bargaining, the prosecution can partially determine sentencing, and of greater concern, works on the assumption that the accused is guilty. Without a trial to determine guilt or innocence and without the discretion of the judge, plea bargaining can

be seen as a very unfair process in terms of the rights of the accused. Furthermore, the whole plea bargaining process is unregulated, with no formal procedures to ensure that plea bargains are made fairly and with informed consent, or to ensure that they are communicated effectively to the judge.

Plea bargaining is also not without its costs to the victims of crimes. The aforementioned removal of the judge from the sentencing process renders victim impact statements all but useless. If a sentence has, effectively, been determined prior to sentencing, victim impact statements can have no genuine effect on the sentence whatsoever. The absence of a trial can also make victims feel as though their case was never adequately heard. Furthermore, the lighter sentences often generated through plea bargains can lead victims and members of the public to feel as though the system is too lenient. This has the effect of undermining public faith in the criminal justice system.

There are, arguably, some positive aspects of plea bargaining, but they do not justify the downsides. In addition to saving time and money, and to reducing backlog, plea bargains can indeed result in guilty verdicts in situations where the accused is truly guilty but might be found “not guilty” in a trial. Plea bargains can also spare the victim from re-victimization as a result of testifying at a trial. Despite these potential benefits, plea bargaining still seems unacceptable due to a fundamental justice issue. The seriousness of a crime shouldn’t be downplayed by a lesser sentence that doesn’t reflect the crime. Innocent people shouldn’t feel coerced to plead guilty, thinking it is their best option. Judges shouldn’t be removed from the judicial process, and victim impact statements shouldn’t be rendered pointless. All of these problems notwithstanding, as it presently exists, our criminal justice system is not equipped to handle the number of cases that would go to trial without the practice of plea bargaining, and there is presently no practical alternative. Therefore, expediency necessitates the use of plea bargaining, but it does not make it right.

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Plea Bargaining: An Acceptable Practice

Julie Kidson

Introduction

Plea bargaining has become an accepted practice in the Canadian criminal justice system. In essence, plea bargaining operates on the basis that the accused pleads guilty in exchange for some benefit—usually a lesser charge or sentence. This exchange ensures a conviction on the basis of a guilty plea, expedites the process, alleviates the cost of a lengthy trial, and provides (in some cases) closure to victims. On the other hand, plea bargaining allows guilty persons to get away with a lesser punishment for the sake of expediency and cost, which, if abused, could bring the criminal justice system into disrepute. This paper will examine arguments for and against plea bargaining, and ultimately demonstrate that plea bargaining in practice is not only acceptable, but also necessary.

The Purpose of Plea Bargaining

There is much to gain from plea bargaining for the accused, the prosecutor, the victim, and the public. The accused can take responsibility for his or her actions in exchange for a lesser charge and or sentence. This could mean fewer years in prison and lesser stigmatization. Prosecutors also gain a great deal from plea bargaining, which *guarantees* them a conviction, unlike going to court. In some cases, bargaining allows prosecutors to save face in front of the victims, when their case against the accused is weak. The Crown and the accused both benefit from a guilty plea in terms of cost; simply stated, trials are expensive. By plea bargaining, accused persons are saved from having to pay the high costs of a lawyer to represent them, or worse, from having to represent themselves against experienced prosecutors. Furthermore, for every minute that a trial is in session, many people must be paid, such as the judge, prosecutor, stenographer, and bailiff. These salaries—combined with court fees, research efforts, and court time—increase the bill exponentially.

Expediency is another reason why plea bargaining is not only an acceptable practice, but also a necessary one in our current system. The Canadian Charter of Rights and Freedoms ("Charter") not only guarantees our right to a trial that is fair, but also "within a reasonable time" (s. 11(b)). If every accused person went to trial, court cases would be significantly delayed. Many cases may result in acquittals due to demand over and above the availability of courts, prosecutors, judges, et cetera. This, in turn, means guilty persons would not be accountable for their actions, which undermines the integrity of our justice system.

Victims and members of the public seek retribution when an injustice has occurred. Even though plea bargaining may result in a lesser sentence/charge than what a judge would have doled out, it can offer the victims and the public closure and relief knowing the accused will receive some punishment versus the uncertainty of a trial. This is particularly true when evidence against an accused may not be strong enough to prove guilt beyond reasonable doubt.

The Down Side to Plea Bargaining

Although there are many benefits to plea bargaining, it can be abused by lawyers to serve their own interests, to the detriment of the accused as well as the public. As previously mentioned, plea bargaining helps prosecutors and judges in breaking through the myriads of cases they handle, ensuring a swift process. A problem with the reliance on plea bargaining is that it effectively can rob the accused of his or her right to a trial. Prosecutors may exaggerate or inflate a charge and then offer a plea bargain that seems fair to the accused, when, in reality, it mirrors what a judge would have ruled if the case had gone to trial. In other cases, the accused is offered a plea bargain and led to believe they'll have the proverbial book thrown at them if they don't accept it. This is particularly problematic for those who truly are innocent and are facing what appears to be compelling evidence against them. These persons may accept a bargain and plead guilty out of fear of harsher punishment if their case goes to trial.

Defence lawyers are just as culpable of abusing the practice of plea bargaining as prosecutors are. Much like prosecutors, defence lawyers may be burdened by heavy caseloads, which can lead them to find ways to expedite a case and move on to the

next— such as encouraging clients to plea bargain to avoid a trial. This is particularly true if the defence lawyer's client is deemed repugnant and the lawyer wishes to avoid being stigmatized by standing up for such a heinous individual.

Another noticeable downside to plea bargaining is its effect on victims and members of the general public. They may feel that the criminal justice system is being too lenient on the accused. The perceived leniency may result in a lack of faith in the system, resulting in a backlash on lawyers and the justice system.

A Necessary Evil

The bottom line is that people are overworked and often underpaid. With any job, this demand has its negative consequences. However, without plea bargaining, cases would take considerably longer to go to trial, which would be to the detriment of the accused—especially if detained in custody until trial. Once at trial, the costs are borne by both the Crown and the accused. While, arguably, plea bargaining may compromise some individuals' right to trial, it still promotes justice by facilitating the right to a speedy trial. This ensures that trials are held within "a reasonable time" as guaranteed by the Charter; if they weren't, charges could be dropped and cases dismissed.

While the victims and the public often look down on plea bargaining, they do not always understand the law. Their judgement is often compromised by emotion and ignorance, and thus they cannot always discern that a plea bargain may have been the best course of action in ensuring justice. Victims often criticize plea bargaining for letting criminals off easy. However, nothing is guaranteed at a trial either, where the accused may be acquitted. Often prosecutors develop a good sense of which way a judge will sway, and they get a feel for when plea bargaining will be the best way to ensure a conviction. Furthermore, while it is difficult for victims to understand, plea bargaining and trials are not about them; they are about the accused. Therefore, plea bargains and trials are not meant to serve the victims' needs, but rather the interests of justice and retribution.

Conclusion

The practice of plea bargaining is not only acceptable, but is also necessary in the interest of justice. Plea bargaining expedites the process by swiftly dealing with straightforward cases and allowing mostly necessary and complex cases to go to trial. This ensures an accused will be guaranteed his/her Charter right to a fair and speedy trial. Additionally, plea bargaining alleviates the cost of many trials for the accused and the Crown, and saves victims from being revictimized by a lengthy trial. Despite the potential abuse in the practice of plea bargaining, and the potential for guilty persons to get away with a lesser sentence, it still promotes the goals of justice and retribution.

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When Good Evidence Was Obtained in a Bad Way: What Should the Courts Do?

Rebecca Watmough

The Canadian Charter of Rights and Freedoms ("Charter") is the highest order of law, given it is part of the Constitution of Canada—a document that promises the citizens of Canada how the state and its agents will treat them (Paciocco). The Charter is meant to protect citizens from the state through a legally enforceable body of rights; protections afforded by each Charter right thus need to be upheld in some fashion. Otherwise, the purpose of protecting citizens is undermined, rendering the Charter a meaningless document enacted for political appearance rather than a true protection of Canadians' rights. Unfortunately, sometimes police violate Charter rights to obtain evidence, e.g., conducting an improper search without a warrant. I argue that the courts should adopt a default position of throwing out any wrongfully obtained evidence, hereafter called "wrongful evidence," unless the accused poses a severe risk to public safety. This default position shows Canadian citizens that the criminal justice system takes their Charter rights seriously—by remedying Charter violations while simultaneously deterring police misconduct. These goals are known, respectively, as the *remedial* and *deterrence* rationales for excluding evidence.

The Remedial Rationale

According to the remedial rationale, excluding wrongful evidence acts as a remedy for the violation (Paciocco). As law professor David Paciocco states, "[A] right without a remedy is a useless thing" (230). I agree, because without a mechanism to remedy Charter rights violations, the Charter simply becomes an empty promise to protect citizens' rights. In theory, there are other ways to remedy breaches of Charter rights, such as criminal or civil proceedings against offending police. However, as I will explain, they are not viable remedies, making excluding evidence the only practical way of protecting Charter rights.

Some may argue against the remedial rationale, claiming that it only helps those where, as a result of the rights violation, incriminating evidence was found, but not those where, as a result of the violation, incriminating evidence was not found (Paciocco). For example, excluding evidence would help a man who was charged because police arbitrarily searched his house and found narcotics; the evidence would subsequently not be used against him in court. However, excluding evidence does not help a man who was innocent, but police still arbitrarily searched his house, invading his privacy without finding anything.

This is a misguided criticism. For either man in the above example, excluding evidence does not remedy the psychological distress of having his home arbitrarily searched. In the first case, the exclusion remedied the injustice of presenting wrongful evidence in court where the man could be convicted. However, it did not remedy the indecency of having his home and privacy invaded, without warrant, in the first place. In the second case, no evidence turned up to use against the man. But, just like the first case, there were no amends for the improper search and invasion of privacy. This shows that exclusion does not unfairly benefit those subject to incriminating evidence. Rather, it was never meant to remedy the psychological harm of a Charter violation itself, but instead —and perhaps more aptly—the greater threat of prosecution that lies in its wake.

The remedial rationale has been criticized on other grounds. Some argue that excluding wrongful evidence prevents us from pursuing more effective solutions such as tort action or prosecution of police officers who violate Charter rights (Paciocco). I argue that this is not the case. Whether or not evidence is excluded, individuals whose Charter rights are violated still have the opportunity to pursue a civil case against the offending officer. However, most people cannot afford the legal costs of a civil action, because high crime rates are significantly associated with poverty (Stretesky, Hogan and Schuck). The main alternative does not fare much better: making Charter violations a criminal offence. If every police officer who violates a Charter right is prosecuted through the court system, there would be a substantial increase in the backlog in the courts, delaying current cases for a longer period. This would violate Section 11 of the Charter which guarantees the right to be tried within a reasonable time. The threat of

prosecution could have a negative effect on how police officers conduct their jobs when dealing with borderline situations where Charter boundaries are not clear-cut. Fear of prosecution may prompt a far more conservative approach wherein police prioritize Charter compliance, under any interpretation, over public safety.

The Deterrence Rationale

According to the deterrence rationale, excluding wrongful evidence will deter police from violating Charter rights in the future (Paciocco). There are many objections to this rationale; however, arguably, none are particularly strong. Some critics question how well excluding evidence would deter police officers when they are not being punished directly (e.g., through departmental suspension or legal prosecution). Rather, the consequences of excluding evidence would seem far removed. However, it is important not to underestimate the discouragement of wasted time and effort. A police officer may be more inclined to respect Charter rights in the future if, (s)he has seen hard work on a case amount to nothing, due to the exclusion of wrongful evidence. Furthermore, an officer with a conscience may feel regret, embarrassment or shame at the judge's public reprimand. This may be enough of a negative experience to deter the officer from future Charter violations.

Some question the deterrence rationale on a different ground: the constitutional violation is likely to go undetected, making deterrence weak (Paciocco). However, nowadays, this is unlikely to be the case. Police interrogations are recorded, so that we would likely catch a Charter violation, such as beginning an interrogation without advising the accused of his rights to a lawyer or denigrating the role of counsel as exemplified in the Terry Burlingham case (Paciocco). The initiatives throughout Canada to have police officers wear body cameras substantially decrease the risk of undetected police misconduct. The enhanced accountability of police increases the likelihood that a Charter breach will be detected, which subsequently enhances the deterrent effect of excluding evidence in court.

Conclusion

I have argued that the courts should continue to throw out wrongful evidence, by focusing on the remedial and deterrence rationales for excluding evidence. By throwing out such evidence, the courts show Canadian citizens that the criminal justice system will disregard evidence that flagrantly violates Charter rights, thus remedying Charter breaches and deterring Charter-violating police misconduct. If the protections afforded by each Charter right are not upheld in some fashion, then we undermine the Charter's purpose of protecting citizens, while simultaneously rendering the Charter a hollow document upheld primarily for political appearance. At the very least, this creates cynicism throughout Canadian society.

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