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*Behavioral Economics and Plea Bargaining*

In recent years, behavioral economists have begun to apply the insights of the decades of cognitive research to the study of plea bargaining with important results. Combined with critical work demonstrating a variety of systemic defects that undermine the market-efficiency thesis, this research suggests that conventional law and economics descriptions of plea bargaining as the product of rational bilateral exchange of entitlements driven by punishment-maximization/minimization strategies simply does not provide an adequate account of the plea bargaining system.

Although this research provides a powerful basis on which to reject the assumption that the outcomes of plea bargaining fairly and accurately are cast in “the shadow of the law,” it also gives rise to a puzzle. Most of the cognitive biases identified by researchers, such as loss aversion, confirmation bias, overconfidence, and over-discounting, suggest that defendants should be consistently disinclined to plead guilty, and that prosecutors and defendants should consistently disagree about what constitutes a fair price for a guilty plea. Accordingly, were one to form predictions about plea bargaining based only on cognitive research, one would likely expect plea bargaining to be a rare occurrence. Of course it is not. Plea bargaining is far and away the predominant procedural mechanism for the resolution of criminal charges. Criminal trials, not plea bargains, are the oddity.

Some of the pioneering work in this area accepts plea bargaining as a given and examines the impact that cognitive bias has on the bargaining decisions made by prosecutors and defendants. That work concludes that cognitive bias sometimes impedes defendants from accepting utility-enhancing plea offers, and less frequently induces defendants to accept utility-diminishing plea bargains. This Chapter raises a different question: Why is plea bargaining so prevalent notwithstanding the existence of plea-discouraging cognitive bias? The answer I submit will strike few students of plea bargaining as novel: the criminal justice system is functionally designed to overcome cognitive bias to induce defendants to plead guilty. Although this observation is familiar, traditional examinations of plea bargaining fail to come to grips with the structural disequilibrium injected into plea bargaining by cognitive bias. Incorporation of the insights of behavioral economics into plea bargaining theory provides a more nuanced explanation of the shape of many features of our criminal justice system, and casts new light on the factors that drive plea bargaining outcomes, including the magnitude of sentencing differentials, the pervasiveness of pretrial detention, and the prosaic procedural brutality that is a universal feature of virtually every encounter with the system.