Capacity as Philosophy: A Review of Richard Lippke's, The Ethics of Plea Bargaining

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Abstract

Plea bargaining is a response to capacity overload in the criminal justice system. It both preserves and belies the right to trial, making possible its glorious display but only by denying it in most cases. While plea bargaining has been documented and analysed copiously in historical, sociological and legal terms, its ethical status as an *institutional practice* are hazy. Richard Lippke offers an account of plea bargaining that draws on the normative debates over responsibility, culpability and desert, in aid of a holistic proposal for a morally defensible system of pre-trial adjudication. In proposing an ethical system of plea bargaining, and working through the normative challenges to this, two bigger questions become visible. These are: what are the implications of developing, in essence, an ethics of efficiency, and, how should the criminal justice system be held to account for the inequalities (and iniquities) that exist before and outside it? In this review essay, I show how these questions are constructed in the book and make some attempt at analysing them, thus engaging with the more urgent and general issue of the complicated relationship of the ideal to the real when it comes to penal practice.

Keywords

Plea bargain
Penal legitimacy
Expedient justice
Moral philosophy and social science

Introduction

One of the more stunning aspects of America's prison boom, if we are able to be stunned any more by the sad fact of mass imprisonment, is that this historically and globally unprecedented growth has taken place in such a well-established democracy.

Downes (2008).

The quadrupling of the United States prison population between 1980 and 2010 was not the result of large scale roundups and extra judicial detentions by rogue law enforcement agents.

Bureau of Justice Statistics Sourcebook, Table 6.1.2010 (accessed October 2012); Blumstein and Beck (1999).

Rather, each and every one of the more than two million people now in jail or prison received a hearing before an adjudicator to assess the necessity and legality of their imprisonment. Few accounts of mass imprisonment have explained, let alone marvelled at, how the machinery of justice has been able to process so efficiently the huge workload that comprises these millions of prisoners (and even more millions of additional convicted people serving community-based, e.g. probation, sentences).

For example, the volume edited by David Garland (2001) includes accounts of the causes and consequences of mass imprisonment but makes no comment on this phenomenon in terms of workload volume.

Growth in the number and capacities of correctional facilities over the past several decades has not been matched by growth in the numbers of judges, prosecutors and defence counsel, and yet the system marches on.

In fact, numbers of judges and prosecutors have been on a downward trend in the past several years, for example the New York City criminal court lost 12 judges between 2004 and 2011 (while increasing the numbers of arraignments and trials), while the District

Attorney's Office of Alameda County (Oakland), California, reduced its staff numbers from 410 to 316 over a similar period (NYC Criminal Court, 2004, **2011**; Alameda County Office of the District Attorney **2010**).

The avoidance of system overload and collapse is made possible by a number of pressure management mechanisms. Chief among these is plea bargaining. The figures of 90 and 95 % are regularly put about as the proportion of criminal cases disposed through a plea agreement; whatever figure is invoked, there is universal agreement that the vast majority of criminal convictions in the United States are achieved without a trial.

Lippke cites the figure of 95 % in the ~~U.S.~~US (p. 1). The rate might be even higher in some places—the District Attorney's Office in Alameda County (Oakland, California) reported a felony trial rate of 1 %, and a misdemeanour trial rate of 0.5 % in 2010. Op. cit., n. 5.

While for the most part we have come to treat plea bargaining as taken for granted as part of the criminal process, an ongoing and committed line of scholarship remains fascinated and concerned by this mundane, massively widespread practice. Lippke's interest, as in his last book on the ethics of imprisonment, is in making us aware and addressing the lack of a normative foundation of this phenomenon as an institutional practice.

R. Lippke, *Rethinking Imprisonment* (2007).

That is, while moral theory has attended to some key normative dimensions of plea bargaining—such as, voluntariness and coercion in the bargaining, due process, the innocence problem, the adequacy of a truncated adjudication to determine culpability, and so on—few have attempted to gather together these criticisms into a project of institutional reform in as comprehensive a manner as is done here.

Though there have been calls for such work to become a priority (e.g., Dubber **1996**).

As such, this work marks a contribution to the literature, one which fundamentally is about the philosophy of the practical: the criminal justice system handles too many cases to afford each the full treatment of the trial, how can we deal justly with this capacity challenge? Lippke's response is simple: he calls for a principled system of

'non-trial charge adjudication', one that better achieves accepted aims of punishment and the purposes of the criminal process than the unregulated, widely variable and arguably cynical and self serving practice that prevails in many parts of the US.

As a criminologist who spends much time observing how criminal justice systems are, rather than how they should be, the engagement by a philosopher with institutional context is refreshing. This is because the normative consideration of justice, to those of us who deal in its empirics, too often lapses into overly fine grained analyses of conceptual problems or makes highly doubtful assumptions on which to build sweeping claims. For example, in a recent project a colleague and I conducted research with those serving short prison sentences, and they described their experience of punishment in ways that mapped hardly at all onto the notion of proportionality that finds its way into most contemporary sentencing theory. A proportionality premised on the centrality of prison (which is more or less implicit in all accounts) proceeds along a linear and perfectly incremental dosage system of punishment ratcheting it up and down in response to the seriousness of a person's wrong. The people we talked to experienced short prison sentences as more punitive than long ones, community-based sentences as more demanding (though less punitive) than prison sentences, and detailed how the punitive effect of the sentence extended beyond the time in prison or on probation.

Armstrong and Weaver (forthcoming 2013). On proportionality I am talking about leading accounts as in von Hirsch (1993) and Ashworth and von Hirsch (2005).

It became clear to us that the proportionality guiding decisions—longer stretches for longer criminal histories or more serious offences—failed in almost every case to be experienced as proportional by those being punished. Normative theorists need to engage with the practical and institutional dimensions of sentencing and punishment, as Lippke attempts to do in this work, to enhance the relevance and reliability of philosophy for policy. That said, the present book recapitulates many of the philosopher's tics that I find frustrating in this genre as a whole, and in the discussion here I identify two issues that are particularly crucial for future work in this vein. First is the issue of expediency in justice, framed in the book as the balance that necessarily must be struck

between pursuing an efficiency that allows criminal justice actors to manage high volumes of cases, and an efficiency that allows us to get closer to our ideal of justice. Second is the connection drawn between social justice and criminal justice, which is not unique to this book but is representative of normative debate in this area. Hence, the topic of plea bargaining offers a springboard to some larger questions.

Before I can elaborate these, however, it will be useful to provide an overview of the content of the book and its proposal for reform.

Overview of the Book

The aim of the book is simply stated and eminently reasonable: 'to shear plea bargaining of its excesses and constrain the abilities of state officials to engage in it, thereby forcing them to do so in more public and accountable ways' (3). What makes this a project for an ethicist rather than a policy maker is the injustice that is being produced in the high pressure atmosphere of the plea bargain setting (at least in the US) where defendants may be coerced to accept far more punishment than they deserve, or prosecutors may be forced to concede far too much ground on a deserved sentence in order to secure an agreement.

This creates a profoundly unjust situation in which defendants who have committed similar crimes can be assigned vastly different levels of punishment, and, in addition, the punishment any individual defendant receives can be grossly out of proportion to what he deserves. While this includes the situation where a minor offender receives an excessive punishment, Lippke seems equally perturbed by the possibility that some defendants are getting off too lightly (4).

One of the central tenets of his plea bargaining proposal, therefore, is to limit the advantage a defendant receives in the form of a sentence discount for waiving his right to trial and accepting a plea deal (the 'waiver reward'). It is the spirit of restraint that drives Lippke's insistence that sentence enhancements for those who go to trial ('trial penalties') should be banned altogether. Although one suspects a practical motivation behind this in that it would be extremely difficult to differentiate when prosecutors are strategically overcharging and seeking excessive punishment from when they are acting purely on the merits of

the case, a whole chapter is devoted to constructing a moral objection to trial penalties. Distilling the claim to its essence, trial penalties have no place in criminal justice as they are 'inexplicable except as they function to punish defendants for exercising their right to trial' (22) constituting 'an additional increment of punishment...unrelated to the seriousness of their crimes' (16). '[B]y contrast, [waiver rewards] are downward departures from the punishment defendants merit for their crimes' (16). Hence, waiver rewards occupy a more normatively secure ground than trial penalties because they are at least connected to the crime that brought a person before the criminal court in the first place. The empiricist in me wonders how the moral distinction between sticks and carrots is experienced by the person over whom they are dangled. The withdrawal of a waiver reward from one who insists on the right to trial would have the same effect, after all, as a trial penalty. What actually seems more crucial to Lippke's account is the magnitude of rewards and punishments, rather than their conceptual distinctiveness. The allowance of '*substantial* waiver rewards is a morally suspect practice. It is a practice unlikely to enhance the deserved punishment profile of the criminal justice system as a whole or optimize crime reduction' (61, emphasis added). In contrast 'by keeping waiver rewards fixed and modest' defendants 'would not have to face overwhelming pressure, borne of outsized waiver rewards, to confess or plead guilty' (60).

Lippke does not specify a precise figure that would represent a fixed and modest reward but in various places suggests a range of sentence discounts between 10 and 20 %, though in the hypothetical case of ~~Henderson the~~a robber, discussed next, the discount works out to 25 %.

Lippke uses the discussion of rewards and penalties to formulate the basic good allocated in plea bargains: the expeditious and deserved punishment of the guilty. This sets up the discussion of his proposal for a system of non-trial adjudication called 'settlement hearings', the details of which are attended to mainly in the book's opening and closing parts. The settlement hearing is a formal process overseen by a judge who is provided comprehensive information about the case to lay odds on a likelihood of conviction at trial and to set a presumptive sentence accordingly. The level of information and amount of review in

the settlement hearing are impressive and substantial: 'a full dossier of the state's case, including police reports, pertinent evidence analyses, and likely witness testimony would be delivered to the judge prior to the hearing … to enable the settlement-hearing judge to determine whether the evidence dossier provided a full and accurate picture of the case' (18). Victims would participate, through subpoena, in their capacity as witnesses~~, commenting on the evidence~~. The settlement-hearing judge decides which charges hold water by applying a preponderance of the evidence standard of proof as a general rule, with a higher standard applied in cases involving more serious offences (and thus more severe punishments). 'Perhaps when the sentences defendants face if convicted exceed 5 years' imprisonment, we should insist that judges at settlement hearings find the evidence to be "highly likely" to lead to a judgment of guilt' (19–20). By accepting the judge's determination of the case, the defendant would receive a reward for waiving his right to trial in the form of a sentence reduction from the presumptive sentence. We are given the hypothetical case of Henderson, who in pleading guilty to armed robbery at a settlement hearing receives a 'waiver reward' of 1 year off a presumptive sentence of 4 years' imprisonment.

Though not referred to explicitly, the Minnesota sentencing guidelines governing felony crimes, a model for jurisdictions within and beyond the US, sets four years as the presumptive punishment for aggravated robbery where the offender has no prior criminal convictions (Minnesota Sentencing Guidelines and Commentary, **2012**). However, the Minnesota Guidelines frown on sentence departures solely to induce plea agreements and, in any case, would allow a maximum downward departure of seven months in the case of armed robbery (Id.: 40).

This hypothetical scenario sets up the issues Lippke considers in the book's remaining chapters. Does rewarding an offender such as this with a reduced sentence undermine the desert aims of punishment (Chapter 3)? Would it be desirable to punish the person who refuses a good plea offer with a harsh sentence upon conviction at trial (Chapter 2)? Should the defendant who pleads prior to trial because he is truly remorseful be treated differently than the one who pleads early strategically, in order to get the reward of a reduced sentence (Chapter 4)? Does offering a sentence reduction undermine the crime reduction function of the penal system (Chapter 5)? Is it just to reward those who finger a

co-conspirator (Chapter 6)? Would it make more sense to conceptualise plea bargains as a form of contract (Chapter 7)? Are larger rewards justified when prosecutors have such weak cases that conviction at trial is unlikely (Chapter 8)? Are settlement hearings an adequate substitute to trials as truth finding forums (Chapter 9)? It is possible to read each of the chapters independently as they offer discrete coverage of the main topics in the literature on plea bargaining. The book thus offers a useful resource in its up-to-date exploration of the scholarship on each of these questions.

Rather than move through the arguments in these individual chapters, my interest and the book's contribution to the literature, is in the project as a whole. However, it is worth drawing out some of the practical implications of the proposal that arise in the book's parts which in turn foregrounds the conceptual criticisms that follow.

The settlement hearing system in many ways resembles a bench trial in its emphasis on active judicial involvement to vet evidence and restrain the self-servingly strategic tendencies of prosecution and defence, which is probably the most significant pathology of the adversarial criminal process.

Increasing the involvement of the judge is a common feature in other proposals for reform. See Alschuler (**1976**) and Turner (**2006**).

The judge is also newly invested with the power to set a presumptive sentence, providing the basis for calculating a modest reward for waiving one's right to trial. Settlement hearings, on paper, clearly provide a more thorough, rigorous and judicially supervised review of a case's strengths than the form of plea bargaining to be found in most parts of the US. It would make prosecutors less able, as they are institutionally incentivized to do currently, to strategically overcharge, and defendants less likely to put up time wasting resistance when confronted by a comprehensive case.

However, two problems suggest themselves immediately in reading about the proposed arrangements. First, it is clear that the settlement hearing will require significantly more time and effort than the status quo. This requires us to consider that rather than having the effect of upgrading plea bargains, the implementation of this reform would also or instead

have the impact of downgrading trials. Lippke opens the door for this possibility himself in hesitantly suggesting that settlement hearings might be offered in all cases (26). This is also implicit in his reference to settlement hearings more often as 'non-trial' or 'charge' than as 'pre-trial' adjudication. Second, the settlement hearing imagines the sort of judge who features regularly in the world of ideals but is not a typical inhabitant of reality. Consider this: in Lippke's vision, the judge who has vetted extensive evidence, interrogated the defendant on his crimes and set a presumptive sentence at a settlement hearing on the basis that a trial would produce a similar result, would be able to preside at the subsequent trial, *tabula rasa*, if the defendant refused the settlement deal. Although Lippke notes it might, in larger courts, be possible to ensure different judges at a hearing and trial, 'we ought to be cautious about concluding that participation in a settlement hearing makes impartiality by judges at subsequent trials impossible or unlikely … Judges are supposed to remain impartial in spite of what they have seen and few question whether they are capable of doing so' (27–28).

This is an odd exercise of caution—a caution against caution, essentially—that trusts a great deal to the unimpeachable behaviour of institutional actors. It is a lot to ask of judges particularly when the settlement hearing envisages that the defendant would 'be expected to address questions put to them by the presiding judge…[i]n other words [they] would be understood to have waived their right against self-incrimination. There seems little point in insisting upon such a right if one is prepared to admit one's guilt' (18). Some empirical evidence is cited showing that when judges are required to take a more active role, they do not side with prosecutors as often as the cynics would believe. Still, is it plausible that a waiver and re-invocation of the Fifth Amendment would be handled seamlessly as a rule?

This proposal begins to feel as if it is a gradual slide from a proposal concerned with improving the ethical profile of the plea bargain to one that actually offers a truncated form of the trial, one which goes rather too quickly for comfort around certain corners of due process. Moreover, in doing so, it implicitly treats the high caseloads of criminal courts as inevitable and outside the control of courts themselves. These

are problematic assumptions for empirical, but also philosophical, reasons.

~~Expediency~~ Efficiency and Justice

It is difficult to disagree that plea bargaining presents a justice problem of 'too much or too little punishment' and that this merits attention and reform (5). Aside from the injustice produced through mismatches between individual wrongdoers and their punishment, the justice system as a whole is tarnished in the process of plea bargaining, deepening our 'unease with the whole idea of punishment being something about which negotiation is possible' (3). What is striking to Lippke, and should be to all of us, is that this predominant means of disposing cases is almost unquestioningly accepted as necessary, despite being barely regulated and entirely lacking an explicit normative basis. This contrasts strikingly with concern about the trial, in percentage terms a mere blip in the workload of the justice system, the principles and rules of which are endlessly discussed and interrogated.

Consider, for example, that in their three volume series on the trial, Duff et al. (**2004**, 2006, 2007) offer but one chapter and one sub-section on the topic of plea bargains.

While much other work on plea bargaining also observes this imbalance in attention, Lippke may be the first to tackle the problem in such a comprehensive, programmatic manner.

Lippke identifies a number of other reform proposals, in particular Turner (**2006**) and Alschuler (**1976**) both cited in note 13, p. 17.

We might wonder, though, that if plea bargaining is so problematic why bother with it at all, when the trial is set up precisely for the purpose of ensuring that justice is public and accountable? The answer to this question may be obvious—there are too many cases to provide a trial for each one—but itself requires some accounting for. If our unease with the taint of plea bargaining is recognised as cause for concern, why not also our ease at taking for granted the necessity of it? Going over this ground exposes a problem: that of setting up an ethics of efficiency, without explicitly addressing the value and entailments of efficiency or the thing being produced more efficiently. This is a problem not just for plea bargaining, but for any reform to criminal justice introduced to manage

high workloads and their consequences.

The intention, of course, is that it will be justice which is produced more efficiently. Efficient allocation of a scarce resource—in this case, institutionally produced justice—requires sacrifices to be made. The sacrifice required by a plea deal is the giving up of a little bit of justice, in the form of a reduced sentence. That is, in a successful plea bargain, the defendant gets less punishment than he deserves in exchange for giving up his right to contest the charges at trial. To strict desert theorists, the tribe to which Lippke appears most sympathetic, such a bargain is unacceptable.

~~Moore, von Hirsch, Feinberg, Duff.~~

The compensation, though, is that such cases are adjudicated at all. Without an expeditious mechanism of case disposal, working alongside the trial system, the assumption is that a majority of cases might be dropped. It may strike the reader as strange that Lippke mounts a consequentialist argument (referring to it himself as an 'aggregative consequentialism' reflecting that 'in the real world of limited resources, we might have to accept some compromises', 74) to convince the non-consequentialists. However, expediency is a principle immanent in the concept of justice, apparent in the cliché that justice delayed is justice denied—the situation which it is implied would reign in the absence of plea bargaining. Pursuing less justice in many cases also frees up time to seek full justice through the trial in the small number of cases involving the most serious kinds of crime.

In a bid to convince the hardcore retributivists that such a justice trade-off is acceptable, Lippke sets up a numerical argument for this position. 'Suppose…that all criminal sanctions take the form of prison terms measured in months [and that] all months in prison are the same. Imprisonment does not become easier as time goes by, or harder as an offender's release date nears. We can refer to 1 month of deserved punishment as a "deserved punishment unit" (or DPU, for short)' (74–75). The performance of a variety of scenarios measured in DPUs is then calculated. Robust sentence discount systems (RDs, as in the status quo where large discounts are possible) perform less well than capped or fixed discount schemes (CDs, FDs) because while more offenders would

accept a deal in an RD scenario, they would be doing so at a higher discount on their sentence. In a hypothetical set of 100 cases, the RD scheme, by offering 50 % sentence discounts on a presumptive 6 month sentence, 'would yield 270 DPUs (90 offenders punished by 3 months each)' (79). Meanwhile the CD and FD schemes would net, respectively, only 60 and 70 plea deals due to the smaller sentence discounts they offered (Id.) A 20 % cap on sentence reduction in the CD scheme and a fixed 10 % discount under the FD scheme mean the DPUs, would be 336 and 324. The case for moderate sentence discounts thus is established, and so is the case against ND (a no discount system where it is assumed zero people would take a plea where there is no offer of a waiver reward).

Though even Lippke disclaims this exercise as a bit 'contrived' (74), it reveals a logic that moves the argument through the book. This is the logic of rational actors and choices, and systems of perfect information and specifiability, where it is possible to posit even at a conceptual level the plausibility of a 'deserved punishment unit'. Prison, in this paradigm, is not just an illustrative form of punishment but (like the fine) becomes essential to the particular version of proportionality worked up in prevailing desert theory which requires punishment to be precisely rankable and hierarchical.

I do not want to engage particularly with the anchoring problem, except to say that while von Hirsch (**1993**) and Ashowrth and von Hirsch (**2005**) do not explicitly link their accounts of proportionality to imprisonment, it is difficult to see how such a version could work in the absence of a punishment which is infinitely segmentable into equal parts. See Simmel (**1990** [1907]) who focuses on this quality of money (and, e.g., the fine) linking it to the emergence of the particular form of individuality characterising modernity.

What if, rather than prison, the main penal currency were flogging? We could still perform the neat arithmetic (with a single lash as the DPU, say), but the assumptions about desert and choice become more problematic and thus less easy to bracket out of the discussion. For example, we cannot assume that decision making about the choice between being lashed a little now or accepting a risk of being whipped a lot later will be predictable and patterned as is suggested in the foregoing model. Flogging, more viscerally than prison, reveals punishment's affective core; sure, we can structure behaviour to some

extent through incentives that encourage particular choices but under such circumstances not only might we not behave rationally, but the notion of rationality in which costs and benefits can be specified and weighed against each other is fundamentally called into question.

Another slant comes from Feeley's (1978) observational study of lower court processing. Plea deals in this setting are both rational and irrational. A defendant who pleads early makes a rational choice to end the immediate, and punitive, process of his court case but at the same time, by increasing the likely severity of his treatment in future court cases, is making an irrational (in the long-term) choice. Feeley also notes that in this process, individually irrational choices add up to a rational process of maintaining the ability to manage heavy court workloads.

The corridors and offices in which plea deals are worked up, therefore, appear less as markets susceptible to prudent regulation, and more like Vegas casino floors where the pressure of the environment encourages impulsive behaviour and unrealistic assessments of advantage. A recent statistical analysis of Chicago criminal courts found that though most defendants take plea deals, the 'risk neutral' defendant would be better served by going to trial.

D.S. Abrams (**2011**).

So it turns out that the same lack of information and faulty judgment exercised in the purchase of a lottery ticket is at work in the acceptance of a plea agreement.

Lippke's proffered solution is to design a process which would encourage more comprehensive information prior to placing one's bet, but the focus is on ensuring the bet is placed, rather than providing a mechanism for exposing how the decks are stacked.

This becomes worrying in that the uncontroversial notion of efficient justice risks blurring into a claim of efficiency *as* justice, and efficiency as a logic that overrides other notions of fairness. It is argued that an acceptable plea bargain system is one which both induces a willingness to plead among a high proportion of defendants and assigns to them a level of punishment not significantly different than what they really deserve. The reformed system is designed to produce the same result as the trial, but faster and at the price of a reduced punishment. In fact, it is

hard to see why such a system, if it were possible to implement, should not replace the trial system altogether.

However, at the same time, something very troubling is happening in this reasonable sounding proposal in that it indirectly and implicitly re-constructs a guilt determining process into a guilt delivery system. That is, the workload problem facing the courts is understood as not how best to separate the innocent from the guilty, but how to get the guilty to their final penal destination as quickly as possible. On this account, the current enjoyment by prosecutors of wide powers over plea bargaining produces inefficient results because while plea deals may be worked out expeditiously, we cannot be certain the punishment in these cases is fair or consistent. However, trials also come out rather badly in that they are less efficient than a system of regulated presumptive sentences in achieving volume justice.

The advantage of Lippke's reformed plea bargaining is that it retains a sense of fairness within cases—in requiring defendants to be provided thorough information of the case against them and an opportunity to contest the number and severity of charges—and across them through improved consistency, but it feels like an application of fairness that reduces the criminal process in nearly all cases to a sentencing system. This impression deepens in reading a book where defendants are regularly described as 'guilty and they know it' (e.g. at 43, 68, 125, 183). This reminds us that the price of entry to a plea deal for the defendant is, if not an outright confession of guilt, then at a minimum a concession of culpability and waiver of some key rights related to this. Making more robust the regulations governing the negotiation of a plea once the defendant has already crossed this threshold feels as if we are losing sight of the original question of fairness raised about this phenomenon.

Alschuler (**1968**).

It is fully acknowledged that the reform proposal, and the arguments upon which it is based, work best 'against a set of idealized background assumptions' (90), specifically that the 'criminal prohibitions being enforced are defensible … that individuals who violate them…deserve punishment …[and]… sentencing regimes have been devised so that

they are proportionate' (90). Raising hope for the project's engagement with empirical context, Lippke asks: 'But what if the operations of existing, less-than-ideal criminal justice systems confound ... these assumptions?' (91). At this point, the discussion scuds across what arises for me as the core capacity problem, recognising that 'enabling state officials to process more cases might produce underserved punishment' (91) in places where there is too much criminalization, prosecution and punishment. In such a situation, 'it might seem that having a charge-adjudication scheme with reduced capacity to process cases is preferable under non-ideal conditions' (95). In other words, in a situation of excessive criminalization and punishment (I postpone to the next section the additional concern raised by Lippke that these are taking place against a background of racism and unfair targeting of the poor), the ethical path of reform might be to *reduce* capacity rather than to allow for system adaptation to high capacity. Raising such questions, admirably, invites the philosopher to come out of the castle. However, these issues are treated as largely beyond the reach of the present exercise except as troubling concerns, important to note but because they are too difficult to calculate the precise impact of, not brought into direct consideration: if 'larger systems are badly flawed it will be much harder to determine how [limiting sentence discounts] will affect punishment outcomes' (96).

The risk of settlement hearings displacing trials remains unexamined, however, which perhaps reflects that plea bargaining is analysed in a vacuum rather than in the company of the many other workload management mechanisms which work in tandem in criminal justice systems across North America and the UK. These mechanisms operate as pressure release valves and exist at every stage of criminal justice: from powers given to police and prosecutors to divert cases, to pretrial release programs that free up jail space, to early release programs operated by jails and prisons. Such schemes are justified in political discourse as substantive reforms that expand the ability of criminal justice actors to achieve justice through better targeting of resources. Even parole has been claimed to originate from the need to manage the size of custodial populations.

Haworth Editorial Submission (**1977**).

The fact that these safety valves, whenever and wherever they are created, are branded and rationalized in terms of their ability to better achieve justice illustrates the problem for Lippke, whose stated desire to inject principle and morality into practice, is difficult to distinguish from, and may be co-opted by, amoral justifications to speed a large volume of offender widgets along the conveyor belt of the justice system. If Lippke's proposal for beefed up pre-trial adjudication is implemented as intended, that is by being used in cases which currently would be processed hastily through a plea deal rather than a trial, then there would be an increase in pressure on the courts. This suggests there would have to be give somewhere else in the process leading to expanded use of other workload mechanisms or introduction of new ones.

In many US jurisdictions, plea deals are worked out as early as first appearance. For example, NYC data shows over half of plea agreements are reached by the arraignment, which is mandated to take place within 24 h of arrest (NY Criminal Court **2011**). The expanded evidential demands of the settlement hearing would necessarily require more than 24 h to prepare.

Hence, increasing the integrity of one part of the process puts the squeeze, normatively and practically, on other parts.

For an example of such mechanisms and they way pressure management motives are explained in terms of principles, see Armstrong et al. The year of this reference has been corrected and now can be hyperlinked to the list of references. (2010).

Ironically, under contemporary conditions of ever increasing population and scarcity of resources, now might be just the time when a philosophy of capacity is most needed. After all, capacity problems in need of ethical regulation abound. Two examples are university admissions and organ transplants. In both cases, the number of people seeking to access a system to obtain a good—an education, a life saving body part—far outnumber the goods available. These systems are constantly auditing their rationing systems to accord with evolving ethical standards. One factor distinguishing these cases from plea bargaining is the unconditionally positive quality of the good being sought. In the case of plea bargaining, the quality of the thing produced—deserved

punishment—is neither fixed nor unconditional but depends on the justness of the society in which criminal justice operates. In a society where writing a bad cheque can lead to a life sentence, the question of desert has been distorted to spectacularly nonsensical levels.

Lippke gives this example from the case of *Bordenkircher v. Hayes* where the US Supreme Court upheld a sentence of life imprisonment where the defendant had written a fraudulent cheque for $88.30 and refused a plea deal (p. 11).

It is in light of this context that we have to query whether it makes any sense to talk about improving the ethical defensibility of a practice without also considering the content and value of the good distributed. That is, efficiency is an important and necessary condition for the fair allocation of 'penal goods' but loses its meaning if the good we are producing is itself unjust. Moreover, one wonders whether the problem of capacity should be addressed at a bigger level, moving from the capacity of criminal courts to the ethics of having no capacity limit on the caseloads of courts when the trade-off here is with other social goods such as education and health which are required for the basic justness of societies.

~~Example~~ This issue is considered in Hawkins (**2010**).

This brings us to the second issue, which is assessing a proposal of criminal justice reform operating in the context of wider social injustice.

Social Justice and Criminal Justice

Throughout the book, as is called for in a work aiming to tackle the ethical dimensions of an everyday institution, Lippke assesses his arguments at two levels: do they stand up against an ideal (of justice or other abstract concept) and are they workable in the 'non-ideal' situation otherwise known as reality? As he puts it, 'how we evaluate plea bargaining will be shown to crucially depend on the assumption we make about the context in which it operates' (5). Yet how are we to deal with a situation in which the gap between the ideal and the real is massive due to 'the context of criminal justice systems that have gone off the rail in significant respects' (148)? That is, how does it make sense to talk about ethical reform of one component of a justice system such as America's with not only a world beating imprisonment rate, but

one with such extensively disproportionate representation of particular groups, along race, ethnicity and class lines, at every stage of the criminal process?

To his citation mainly of Elliot Currie's work he might have added, among many others, Wacquant (**2001**) and Alexander (**2010**).

Lippke adopts two distinct lines in addressing the real world context. In the first one, he finds in favour of his proposed reform because it would not make things worse. This argument depends on a limitation of sentence discounts to a moderate level of reward. Modest rewards limit the damage of bad plea deals and might even work to correct some penal excessiveness by bringing the level of punishment down to one which is closer to that actually deserved by the wrongdoer. To this line of reasoning, I refer back to the previous section where such an argument is taken to task for claiming to improve the ethical efficiency of a good which itself is of uncertain desirability. That is, whether the claim that a proposal does not worsen a troubling situation depends on the analysis of the good in question and the situation in which it is distributed.

The second line Lippke takes to assess the workability and defensibility of his proposal is to explore the possible linkage points between the problems of contemporary criminal justice and the wider society in which it operates. The reaches of the US criminal justice system are well known to be disproportionately applied to poor brown people, reflecting for some a problem of inequality in society, and amplifying and compounding its effect. Even if a reform to criminal justice does not worsen but merely maintains the disproportionate criminal justice burden of this group, it still clearly troubles Lippke, as it does many others, including myself, that the criminal justice process perpetuates and worsens the wider inequalities of society. There is much to sympathize with in Lippke's account about the difficulty of developing ethical models of criminal justice in this context, and, in practical terms, recognizing how little can be accomplished by tinkering within the system: 'modifications in plea bargaining, all by themselves, will do little to help matters. We would likely achieve better outcomes by reducing over-criminalization in all its forms and improving the social and economic lot of the disadvantaged' (143). Amen.

Short of abandoning the project of criminal justice reform altogether, though, there is still a need to specify the relationship and duties between criminal justice and social justice in order to understand what might be asked of reform and to what values the criminal justice system should be held accountable. To get at these issues, Lippke occasionally deploys language that jars this criminologist's sensibility. Here are only two examples: 'It is probably no coincidence that the economically downtrodden are drawn to lucrative crimes such as trafficking drugs and sex' (p. 151), and, '[s]evere social deprivation may undermine the capacities constitutive of responsible citizenship' (140). In both passages from which these quotations come, poverty is set up as a cause of criminality. And if criminality, like poverty, is not the responsibility, or not totally the responsibility of the individual, then perhaps the role of the criminal process should be to ~~occasionally~~ limit the individual's accountability. This leads to tentative suggestions that the settlement hearing he proposes might incorporate considerations of social deprivation to guide choices about presumptive sentences. ~~However,~~ ŧThis conceptualization of criminality and the subsequent consideration of appropriate justice responses is representative of a wider tendency in philosophical considerations of poverty and crime.

The volume he particularly refers to and the contributions of which largely exemplify this tendency, is Heffernan and Kleinig (**2000**). Lippke also develops the argument in a recent article (**2011**).

It is a tendency which deserves much scrutiny.

The first and most obvious point to make here is that these statements commit a logical fallacy, one against which we constantly warn our students. That is the reasoning process by which it is assumed that if those involved in criminal justice are disproportionately poor, then poor people are more likely to be criminals. Even setting aside (the well documented and argued) claims of radical and Marxist criminologists that the economically powerful are able to obtain the status of legality for their anti-social behaviour, it is an illogical and unsupported argument: most people who fall within the definition of poverty are not criminal, and yet Lippke looks for the underlying essence of poverty that means they are less able to withstand criminal urges. Second, we should make explicit the theoretical model by which poverty is being connected

to criminality. In the ~~passages~~quotations above, representative of the position taken in the book, a simplistic rational choice model is employed that at best bears the patina but not the substance of criminological theories of strain and control.

Merton (**1938**), Gottfredson and Hirschi (**1990**).

The former posits that unrealistic material aspirations imposed on people who are structurally prevented from realising them encourages illicit methods of wealth acquisition. The latter sets lack of self-control as the driver of criminal behaviour. In any case, in the present stage of criminology, it is fair to say that such general theories of crime appear exceedingly dated, having been supplanted long ago by more pluralistic and critical traditions in which non-rational and other factors all have a role to play in understanding criminality and criminalization.

E.g. Katz (**1990**) for a controversial though influential non-rational account of criminality.

This is not the place, however, to bicker over criminological theory, and to be fair, it is not Lippke's intention to engage directly with this debate. It is important, however, for the reader of normative work to be alert for embedded causation arguments and of their implications. It is all well to recognise that the criminal justice system bears some responsibility in connection to social justice, but what this responsibility is depends upon how the relationship between class and crime is conceived.

Tadros (**2009**) offers this up most clearly among work on this topic and, while there is still some unsupported slippage between the state of being poor and the act of criminality, offers a less patronising account than most.

While I object to the casual way in which poverty is connected to crime, I also want to point out that in making this move, another premise is being established which also requires scrutiny. This is the implied claim that it is crime which creates demand for criminal justice services. Whether or not we agree that all of the behaviour defined as crime is worthy of this status, there is no doubt in Lippke's book that it is the individual behaviour (fairly or not labelled) of criminals that determines the workload volumes of criminal justice actors. However, as self-evidently logical as this connection may seem, it is also a self-serving rationalization of criminal justice systems to model the

problem of crime as an external phenomenon like hurricanes or cancer rates, rather than one in which they are directly complicit.

Criminologists have long challenged this premise and increasingly are showing how criminal justice agencies not only define the boundaries of, but also manufacture, their own clientele.

McAra and McVie (**2007**).

Through arrest and prosecution decisions, sentence recommendations, enforcement of violations of probation, and designations of 'at risk' youth, criminal justice actors make choices, facilitated by definitions of crime and rules governing punishment, about what is or is not criminally actionable behaviour. These choices are what generates caseload pressures which require relief through the kinds of safety valves listed above. Empirical knowledge of the world which Lippke eyes for reform thus belies the conceptualisation of crime as an external phenomenon which we can prepare for but are (largely) uninvolved in causing. The ethical challenge is not merely at the level of the rules, but at the level of their implementation. Lippke's proposal of reform understands this in that it proposes an alternative system which would regulate the behaviour of criminal justice actors involved in charge adjudication, but then presumes that the world outside the front door of justice is largely beyond the control and jurisdiction of these actors. I argue this is a function of how crime causation is conceived and the consequent connection made between it and social inequality.

Rather than social deprivation as a cause of *crime*, there is more evidence for the claim that social deprivation is a cause of criminal justice intervention. The activities of the poor are more likely to be policed by the state than the activities of those who are better off.

Wacquant (**2001**); McAra and McVie (**2007**).

Under aged drinking on the street, for example, can be avoided by middle class teens who are able to consume alcohol in the private space of suburban homes and college dorms. ₱Moreover, poverty itself is criminalized through criminalization, for example, of welfare rule violations, which recipients of benefits may be forced into committing in order to supplement the inadequacy of benefits.

Gustafsson (2009).

Note that this is distinct from the person whose destitution leads him to steal a loaf of bread, an example thoroughly analysed in moral philosophy.

E.g. ~~Waldron (2000)~~.

In the case of the welfare recipient abusing benefit rules, the fraud is necessitated by the inadequate provision of the benefits themselves, so that it is impossible to live a minimally decent life without occasionally violating benefit rules; it is impossible, in other words, to be both poor and not criminal.

Gustafsson's (**2011**) empirical research on welfare provision in the US documents numerous ways this happens.

In this situation it is the social injustice *of* the state, and not merely the circumstance of social injustice which ~~are~~ is inadequately addressed by the state, that defines and induces the subsequent criminal behaviour. This demonstrates one connection between criminal justice and social justice that would be a productive focus of normative work. If the criminal justice system participates in class- and race-based segregation and stigmatization, then its operations invite ethical scrutiny, and moreover, normative consideration ought to include a focus on how people end up at the front door of justice, and not simply on ensuring that once they have entered the system, they will be treated fairly or leniently within it.

Without attention to this aspect of the state's criminalization of people, normative consideration of poverty, social justice and crime invariably lead to paternalistic discussions about minimising the accountability of poor people. This leads us back to a final concern about how the problem of social justice and criminal justice are related in this book, which is conveyed in the connection made between social deprivation and its consequences for reduced moral capacity. In raising this point I want to acknowledge that taken out of the context of a substantial work in which the author's commitment to a socially just world is not under review, the offensive quality in passages like the above may appear to be over emphasized. Nonetheless I do not think we can pass over without

comment the framing of extreme indigence as akin to mental retardation or the state of being a child: 'the severely socially deprived seem most vulnerable...as they are less likely (for complicated reasons) to be guided and supervised in ways that enable them to avoid stunted or warped moral personalities' (141). This raises for me not a question about Lippke's motives but one about the ability to conduct debates about social justice through the categories and vernacular of legal and normative theory. That is, aside from just getting the facts wrong about poverty and crime, there is an ontological obstacle as well. This concern is inspired by Barbara Hudson's attempt to intervene in the analytical philosophical debate about social justice, in which she suggests the issue may be in the nature of legal categories themselves, in which defences grounded in claims about reduced capacity are unable to encompass other, non-paternalistic, ways of conceptualising responsibility.

Hudson (**2000**), and see Cov

She claims a basic difference between the world views of social science and law (that are largely justified through the concepts of moral philosophy), in which sociological understandings of poverty cannot be accommodated within law's definitions of duress, excuse, justification and so on.

Hudson (**2000**), p. 189.

Another way of putting it is that the law can only 'see' social injustice through a set of categories organised around the behaviour of the individual actor. Deprivation and inequality thus become reduced to, and are only actionable as, personal characteristics of the offender rather than as properties of a society or consequences of state action.

The question is whether the individual focus of the criminal law can be reconciled with the social dynamics of inequality and deprivation to produce a criminal justice system which survives ethical scrutiny not just of its component processes but of its outcomes as well.

For sociological accounts that suggest it cannot, see Feeley (1978) and McBarnet (**1981**).

Hudson's attempt to solve this clash requires first of all explicit recognition that the criminal justice system is primarily concerned with

regulating the 'transgressions of the poor' (noting that not only sociologists have pointed this out, quoting Richard Posner: 'the criminal law is designed primarily for the non-affluent; the affluent are kept in line, for the most part, by tort law').

Hudson, op. cit., p. 199.

Once we have done this, community-based sentences, rather than imprisonment, should be designated as the normal or default punishment. This would move sentencing away from a notion of proportionality that is prison-centric in its artificial and simplistic designation of penal severity quantitatively as temporal increments and nothing more. Community sentences, in contrast, involve more qualitative decisions about appropriate conditions and level of supervision; they also lend themselves better to restorative aims for justice systems.

I am not sure I agree with Hudson's proposal, but raise it to offer an example of an approach which directly takes up the ontological challenge of administering criminal justice so as to advance social justice. The risk of trying to do this, which Hudson herself is wary of, is that it does not necessarily challenge the way social welfare services have been replaced by or increasingly come to be delivered through criminal justice systems.

Downes and Hansen (**2006**) have persuasively shown that countries which have decreased investment in social programs are also those which have increased investment in penal systems.

The rollback of the welfare state has left criminal justice as the awkward safety net, and we should be hesitant of reforms which cement this role. This is because, whatever its limitations in achieving criminal justice, the criminal justice system certainly is an egregiously expensive and ineffective method of administering social welfare.

Conclusion

Realising that we have travelled some distance from the specifics of a modest proposal for plea bargaining, let us close by coming back to the book at hand. Indeed, perhaps the distance travelled itself says something about the limits of reform. Though the aspiration of engaging

normative theory with social reality is praiseworthy, I am unconvinced of this proposal for reform. Despite Lippke's exhaustive analysis, the need for an ethics of plea bargaining remain ~~elusive~~ problematic and under sketched. Moreover, having now worked through the implications of the proposal, if we commit to such an ethics, we are ceding ground to some troubling constructions of crime and society and to the role of efficiency as a value in justice. My intention is not to fall into an easy dismissiveness that rejects the entirety of the book, but there remains doubt about the initial premise of accepting the inevitability of plea bargains.

Aside from my argument that the processes of justice plays a part in generating high caseloads, others have ~~cited~~ called the premise of inevitable plea bargaining 'a myth, or at least a gross exaggeration' (Dubber, op. cit., p. 556).

More than this, though, even if plea bargaining is inevitable, and if it is necessary in order to allow courts to process as many cases as they do, an ethical account of this practice needs to be set more firmly, in both empirical and normative terms, into a broader account of criminal justice as a set of rules supported by legal theory, as a centralised system of administration, and as a political institution and cultural practice which reflect and enact wider conditions prevailing in society. ~~The mode of m~~Moral philosophy on its own is insufficient to provide this account ~~on its own~~, suggesting that '[c]riminal law, criminal procedure, and penology must be freed of their isolating idiosyncrasies and reconceived as closely related subjects that focus on three aspects of a single practice, criminal punishment'.

Dubber, op. cit., p. 553.

Indeed, my own field of penology similarly would benefit from greater incorporation of normative theory so that the tendency towards functionalist research on effective sanctions does not lose sight of fundamental concerns about fairness and justice as valid criteria of effective penal intervention.

Bringing together these different disciplinary perspectives might force us to examine critically what otherwise is too easily bracketed when we are working in our own particular corners. Perhaps it is not a universal ethics of particular institutional practices that we should be aiming for,

but a more general notion of principled policy making that uses place-based approaches and measures its effectiveness empirically based on outcomes of fairness.

An analogy might be found in the empirical, policy impact focused work of advocates of limiting retributivism, particularly in Michael Tonry's work on sentencing (as explained in Thorburn and Manson **2005**).

The dominant role played by plea bargaining is a specifically late modern development, flowing in the wake of a large, powerful state with extensive bureaucracies for administering, among other things, justice. This institutional history is rarely accounted for in normative theory where the main anchoring points continue to be concepts worked up during the Enlightenment, a period in which the formalisation of the criminal court process and the importance and power of the state remained fixed on a distant horizon. Among the few to set their calls for criminal justice reform in this history was William Stuntz. As one of the most acute observers of these changes and their implications for justice, ~~and~~ it is fitting to close with his prognosis:

'From the perspective of those who pay for the never-ending battle against crime in the coin of safety and freedom, criminal justice is no longer an exercise in self-government – not something residents of high-crime neighborhoods do for themselves, but something people who live elsewhere do to them. If we are ever to see a greater measure of equality in America's unsystematic criminal justice system, that must change. More law – more carefully defined crimes, more elaborately protective procedures – is not the answer. Rather, the need is for more politics: not the kind in which images of furloughed prisoners swing national elections, but the kind that happens locally, where crime and punishment alike cut deepest.'

Stuntz (**2008**), p. 2040.

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