The Prisoner's Lawyer's Dilemma

BY CHARLIE GERSTEIN

The criminal system churns through millions of people each year. Almost all convictions result from guilty pleas, for reasons that readers of this magazine know well: the threat of lengthy pretrial detention, the possibility of a long sentence, and the costs—financial, emotional, and human—of contesting a criminal charge.

In 2012, Michelle Alexander floated an idea that many who work in the criminal system had also considered: what if everybody went to trial? (*See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 11, 2012, at SR3.) "The system of mass incarceration," Alexander wrote, "depends almost entirely on the cooperation of those it seeks to control. If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation." (*Id.*) The system would crash.

Scholars and lawyers immediately raised a host of objections to this strategy. (It's worth noting that Alexander didn't actually advocate advising clients to refuse guilty pleas en masse.) I'd like to respond to one of those objections: that it would be unethical for a public defender to advise his or her client to refuse an otherwise beneficial plea deal for the purpose of forcing the system to face a deluge of litigation and, therefore, crash. (*See, e.g.*, Carrie Leonetti, *Painting the Roses Red: Confessions of a Recovering Public Defender*, 12 OHIO ST. J. CRIM. L. 371, 387 (2015).)

A criminal defense lawyer's ethical obligations are easily summarized: advocate for your client's best interests as zealously and as diligently as you can without breaking the rules. The defense lawyer's morality—like all lawyers' morality—is role-specific. A defense lawyer's duty is to his or her client, not to any other competing need. In the service of that duty, the defense lawyer gives his or her client advice on whether or not to plead guilty. (The ultimate decision to plead guilty or go to trial is always the client's.) And in giving that advice, the defense lawyer must give his or her client all the relevant information concerning the decision.

Attempting to crash the system by advising clients to refuse plea bargains, the argument goes, is unethical because it forwards a larger goal—ending mass incarceration—at the expense of the client's short-term best interests. If you advise all of your clients to refuse pleas, "[s]ome defendants would end up way worse off, serving thirty years after trial because they turned down a five-year offer as part of your 'break the system' strategy. Your advice to those clients was malpractice." (*Id.*)

I don't think so. Or, at least, I don't think so in all cases. I think that, given certain assumptions about a jurisdiction's criminal system, *all* clients in that jurisdiction are better off if they *all* refuse to plea bargain. This is possible because lawyers can help their clients cooperate.

Consider first the classical prisoner's dilemma. (*See, e.g.*, JOHN VON NEUMANN & OSKAR MORGENSTERN, THE THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).) Two codefendants, A and B, are arrested and imprisoned in separate cells. The prosecutors lack sufficient evidence to convict the pair on the principal charge against them unless they rat each other out, but the prosecution can convict both on an easily provable, lesser charge regardless. So the prosecutors offer each prisoner a bargain: If A and B each rat on the other, each of them serves two years in prison; If A rats on B but B remains silent, A will be set free and B will serve three years in prison (and vice versa); If A and B both remain silent, both of them will serve only one year in prison (on the lesser charge).

According to John Nash's theory of stable equilibria, if both A and B are acting only in their own individual self-interest, they will both rat each other out and end up in jail for two years. A Nash equilibrium is one in which neither player can benefit from changing his or her strategy if the other's remains the same. A knows that regardless of what she does, B will be better off ratting A out; B knows that regardless of what he does, A will be better off ratting B out; so they both

UNIQUE NASH EQUILIBRIUM IN THE PRISONER'S DILEMMA

	A: RAT	A: DON'T RAT
B: RAT	A, 3; B, 3	A, 0; B, 3
B: DON'T RAT	A, 3; B, 0	A, 1; B, 1

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always rat each other out, even though they'd *both* be better off if they worked together. But they can't work together.

At first glance, the problem of the public defender seeking to crash the system might look like the prisoners' dilemma. If everybody else is pleading not guilty, anyone who pleads guilty will get a particularly sweet plea deal from the swamped prosecutor, and anyone who doesn't misses the boat. The defendants would be better off taking it, right?

But consider the prisoner's lawyer's dilemma. Imagine that A and B, both represented by the same lawyer, are being prosecuted for the same crime in a small town with one prosecutor and a strict speedy-trial rule. The speedy-trial clock is about to run, so both the prosecutor and the defense lawyer know that there isn't enough time to take both A and B to trial. The prosecutor offers them both the same deal: plead guilty and get a two-year sentence. If either goes to trial, he will get a 10-year sentence. And assume the prosecutor can't simply flip a coin and prosecute one but not the other.

There are two Nash equilibria here—both plead guilty, and both go to trial. But if A and B do not know what the other will do, they will both plead guilty. Each assumes that the other will assume that the first will plead guilty. Fearing that possibility, they

dilemma. For this to be true, first, the public defender's office must represent a large enough portion of the criminal defendants in its jurisdiction to ensure that it can flood the prosecution with enough trials to effectively shut the system down, and the defenders must be able to act together to achieve this goal. Second, the defense lawyers must be reasonably sure that the prosecution won't respond to—or, better still, won't be able to respond to—the defense lawyers' efforts by selecting a small portion of defendants and prosecuting them extremely harshly relative to the crimes with which they are charged. Finally, the defense lawyers must be confident that if their clients have all the information about the pros and cons of pleading guilty under these circumstances—denying them information in order to get them to plead guilty would be unethical—a very high proportion of their clients will take their advice and refuse to plead guilty.

Where these things are true, defense lawyers should be able to slow the criminal justice system to a halt. Without guilty pleas, as Alexander and others have explained, the system simply won't have the resources to adjudicate the glut of claims that modern mass incarceration requires. But, of course, other objections to the strategy remain. What if prosecutors do end up decimating defendants, randomly selecting a few people for especially harsh treatment? Perhaps

TWO NASH EQUILIBRIA IN THE PRISONER'S LAWYER'S DILEMMA

	A: PLEAD GUILTY	A: GO TO TRIAL
B: PLEAD GUILTY	A, 2; B, 2	A, 10; B, 2
B: GO TO TRIAL	A, 2; B, 10	A, 0; B, 0

both plead guilty. But if they *can* cooperate, they will both go to trial because if each can make a creditable commitment to go to trial, the other will be better off making one too. (*E.g.*, Roger B. Myerson, Learning from Schelling's "Strategy of Conflict" (Apr. 2009), http://tinyurl.com/jnr4cr7.)

The lawyer can help them cooperate. She can truthfully tell both A and B that the other is willing to go to trial. Knowing that, both A and B would be better off going to trial. Because each client's best interest is served by cooperating, the lawyer is not only ethically permitted to facilitate cooperation, she may be ethically required to. Crashing the system is a Nash equilibrium. And it can happen if lawyers help.

I think that the would-be system-crashing public defender sometimes faces a world that looks more like the prisoner's lawyer's dilemma than the prisoner's

prosecutors will triage, starting by prosecuting only the top decile of charges ranked by severity. If prosecutors do that, will defense attorneys be obliged to predict who will be in that decile and advise those clients to accept a guilty plea? And if that happens, can the prosecutors simply continue down the scale of severity until they've potentially prosecuted everyone, ending up back where they started? What if the system responds to the defenders' efforts by simply locking everyone up pending long-delayed trials? Although this would be illegal, that's surely no reason categorically to assume that it won't happen. And if the system eventually resuscitates itself, how will it look?

I don't have answers to these questions. But whatever else is true of crashing the system, it's not necessarily unethical. ■