

Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements

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Abstract : Most criminal cases end with a plea agreement, an issue whose many aspects have been discussed extensively in legal literature. One important feature, however, has gained little notice, and that is crime victims' place in plea agreements following the federal Crime Victims Rights Act of 2004. This law has provided victims some meaningful and potentially revolutionary rights, including the right to be heard in the proceeding and a right to appeal against a decision made while ignoring the victim's rights. While victims' rights literature has always emphasized the importance of such right, references to this provision in the general literature about plea agreements are sparse, if existing at all. Furthermore, there are a few cases only mentioning this right. This article purports to bridge between these two bodies of legal thinking - the vast literature concerning plea agreements and victims' rights research- by using behavioral economics. The article will, firstly, trace the possible structural reasons for the failure of this right to be materialized. Relevant incentives of all actors involved will be identified as well as their inherent consequential processes that lead to the victims' rights malfunction. Secondly, the article will use nudge theory in order to suggest solutions that will enhance incentives for the repeat players in the system (prosecution, judges, defense attorneys) and lead to the strengthening of weaker group's interests - the crime victims. Behavioral psychology literature recognizes that the framework in which an individual confronts a decision can significantly influence his decision. Richard Thaler and Cass Sunstein developed the idea of 'choice architecture' - 'the context in which people make decisions' - which can be manipulated to make particular decisions more likely. Choice architectures can be changed by adjusting 'nudges,' influential factors that help shape human behavior, without negating their free choice. The nudges require decision makers to make choices instead of providing a familiar default option. In accordance with this theory, we suggest a rule, whereby a judge should inquire the victim's view prior to accepting the plea. This suggestion leaves the judge's discretion intact; while at the same time nudges her not to go directly to the default decision, i.e. automatically accepting the plea. Creating nudges that force actors to make choices is particularly significant when an actor intends to deviate from routine behaviors but experiences significant time constraints, as in the case of judges and plea bargains. The article finally recognizes some far reaching possible results of the suggestion. These include meaningful changes to the earlier stages of criminal process even before reaching court, in line with the current criticism of the plea agreements machinery.

Keywords : plea agreements, victims' rights, nudge theory, criminal justice

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