Student Scholars
To earn a JD, every University of Chicago Law School student must write at least two major papers. While this is not every student’s favorite part of their Chicago Law experience, some students take to legal scholarship like ducks to water. Their extraordinary work not only impresses the faculty and future employers, but often is published in legal journals and adds to the legal literature in important ways. Each year, the Law School awards prizes at graduation to students who have excelled in this complex endeavor. Papers are nominated by the faculty members who supervised them, and a faculty committee chooses the winners. Three students from the class of 2010 earned such prizes for their work.

Karen M. Bradshaw, ’10, earned the Casper Platt Award, given annually for the outstanding paper written by a student in the Law School. Ms. Bradshaw is a graduate of the University of California, Berkeley. She graduated from the Law School with honors and served as a comment editor on the University of Chicago Law Review. She is currently clerking for Judge E. Grady Jolly, United States Court of Appeals for the Fifth Circuit. Portions of her paper, “Backfired! Distorted Incentives in Wildfire Suppression Techniques,” were subsequently published in two different law journals: the Journal on Land, Resources, and Environmental Law (forthcoming) and the Fordham Environmental Law Review (“A Modern Overview of Wildfire Law,” 21 Fordham Envtl. Law Rev. 445 [2010]), and were unable to be printed here.

“I like to think that Karen Bradshaw found her ‘voice’ at the University of Chicago Law School and that this inner voice turned out to have a genuine, law-and-economics timbre,” says Saul Levmore, William B. Graham Distinguished Service Professor of Law, who nominated Ms. Bradshaw for the Platt Award. “This is no one-shot success; Karen also wrote a paper on the challenge of social networking websites that appears as a chapter in The Offensive Internet, a book Martha Nussbaum and I edited. In the first case, she wrote about something she knew growing up in rural California, and in the other something she knew from owning an iPhone. She should be an inspiration to us all, finding great topics in our everyday experiences.”

Eitan Hoenig, ’10, received the D. Francis Bustin Prize, given in recognition of an excellent paper which makes a valuable and important contribution to the improvement and betterment of the processes of the government. Mr. Hoenig is a graduate of Brandeis University, and he graduated the Law School with high honors. He was both a Kirkland & Ellis Scholar and a member of Order of the Coif. He served as executive articles and book review editor of the University of Chicago Law Review. He is currently clerking for Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit.

Richard McAdams, Bernard D. Meltzer Professor of Law, nominated Mr. Hoenig for the Bustin Prize: “We are used to the idea that a criminal defendant can, by pleading guilty, waive his right to a trial and that he can, by agreeing to a bench trial, waive his specific right to a jury trial. Eitan Hoenig’s paper asks a more general and fundamental question: Should a criminal defendant and prosecutor be completely free to tailor their trial procedure by agreement? Should we allow a defendant to waive distinct elements of trial rights, such as the precise structure of a jury or the duration or scope of cross-examination, and thereby offer the prosecutor a more streamlined criminal procedure in exchange for a lower sentence in the event he is convicted? This is an astonishingly creative question to ask. Hoenig does a careful job of examining the effects of such bargains.”

Eric Singer, ’10, received the John M. Olin Prize, which goes to the outstanding graduate in law and economics. Mr. Singer is a graduate of Cornell University. He graduated the Law School with high honors, and is both a Kirkland & Ellis Scholar and a member of Order of the Coif. He is currently clerking for Judge Danny Boggs, ’68, of the United States Court of Appeals for the Sixth Circuit. Mr. Singer’s paper, “Towards a Sustainable Fishery: The Price Cap Approach,” will published later this year in volume 24 of the Tulane Environmental Law Journal.

“Eric’s work on his fisheries paper represents all that is best in Chicago students,” says Richard Epstein, James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer, who nominated Mr. Singer for the Olin Prize. “He took the germ of an insight and drove it for all that it was worth. He tracked down every lead, and sought to deal with every objection. The product showed so much promise that I sent the paper off to several of my colleagues at other institutions who are leaders in the field, who responded graciously and favorably to the paper. Oh, I suspect that the paper is wrong. But his splendid effort is just another part of Chicago’s distinctive intellectual culture.”

We are grateful to Mr. Hoenig and Mr. Singer, as well as the Tulane Environmental Law Journal, for their permission to publish the introductions to their prizewinning papers here.
Crime Procedure Bargains

Eitan Hoenig

I
t’s no secret that few criminal defendants avail themselves of their constitutional right to trial. Critics of the decline in the criminal trial blame this state of affairs on the “triumph” of plea bargaining and argue for restricting defendants’ ability to plead guilty or prosecutors’ ability to offer sentence concessions in exchange for a guilty plea. Albert Alschuler and Stephen Schulhofer have gone so far as to argue for the abolition of plea bargains. But these calls for increased regulation of prosecutor-defendant bargaining miss the point.

The problem (if there is one) is not that prosecutors and defendants bargain too much—it is that they bargain over the wrong items. Defendants and prosecutors bargain intensely over guilt, but they generally treat criminal procedure as fixed and immutable. The unfortunate result is that defendants are forced to choose between a “champagne and caviar” trial and no trial at all. Defendants who wish to trade away some of their procedural rights in exchange for a partial sentence concession have no opportunity to do so. Likewise, prosecutors willing to pursue a stripped-down trial must instead accept a full trial or try to influence the defendant to plead guilty. Compare this state of affairs to civil litigation, where parties bargain over trial procedure, or streamlined adjudication systems such as alternative dispute resolution.

The lack of bargaining over criminal procedure may have made sense under determinate sentencing regimes that restricted prosecutors’ ability to offer sentence reductions. The dearth of scholarly interest in criminal procedure bargains is understandable for the same reason. Now that sentencing has moved to a discretionary regime, however, the time is ripe to examine bargains over criminal procedure with the goal of determining whether they are (1) possible and (2) desirable.

This Essay is by no means the first to discuss a criminal procedure bargain. Commentators have already examined the few procedure bargains available under determinate sentencing regimes such as waivers of the right to a jury trial, to appeal one’s conviction, or seek post-conviction review. These efforts, however, have tended to examine each bargain individually, without reference to other bargains. This Essay, on the other hand, proposes a framework for analyzing any kind of criminal procedure bargain. The analytical framework covers the bargains identified by other scholars, but it can also be extended to capture novel bargains that prosecutors and defendants might enter into. This Essay also argues that prosecutors and defendants (with the help of courts) should strike more and more varied criminal procedure bargains.

Part I of this Essay will define a criminal procedure bargain and distinguish it from a plea bargain. Criminal procedure bargains share two characteristics: 1) the defendant does not admit unconditional guilt; and 2) the prosecutor and defendant strike a formal bargain. The end result is that defendants and prosecutors still go to trial after striking their bargain. Part I also proposes extensions of this framework to novel, time-saving deals such as reverse waivers, reverse conditional pleas, and waiver of collateral issues.

Part II has two goals: to test Part I’s framework and to demonstrate that the US criminal justice system already accepts the idea of a criminal procedure bargain. Accordingly, Part I will apply the framework developed in Part I to five types of waiver in criminal procedure: 1) bench trials; 2) appeal waivers; 3) waiving the opportunity to testify; 4) conditional pleas; and 5) habeas settlements.

Part III will make the normative argument for criminal procedure bargains. Starting from the basic economic models of plea bargaining developed by William Landes and Richard Adelstein, Part III will show how criminal procedure bargains increase the number of situations where a prosecutor’s optimal choice is to go to trial and therefore the number of criminal trials. Ironically, eliminating the restrictions on criminal bargains produces the same effect that Alschulder and Schulhofer have tried, without success, to achieve by calling for their abolition.

This Essay will conclude by sketching out the limits on criminal procedure bargains and identifying areas for further research and commentary.

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Towards a Sustainable Fishery: The Price Cap Approach

Eric M. Singer

The practice of catching more of a species of fish than its population can replace through reproduction, or overfishing, is a problem that has not gone unnoticed. Fishermen feel its impact in the forms of diminished wages, costly regulations, and in extreme cases such as the moratorium on Northern Cod fishing, the disappearance of their entire livelihood. Skilled Cod fishermen once profited off of what was thought to be an infinite supply of the popular fish; they now work odd jobs, catch the noxious, slime-secreting Atlantic Hagfish, or idly collect government aid, all while waiting for the resurrection of the Cod population, an event that may never come to fruition. Consumers feel the impact of overfishing through higher prices and, in many cases, the unavailability of preferred fish. Politicians responding to the interests of both groups, in addition to those of environmentalists and endangered species advocates, continue to spend the public dollar in pursuit of an effective and politically-feasible solution.

Overfishing has attracted significant scholarly interest, and in the law and economics literature, it is the classic tragedy of the commons. An unregulated fishery is an open-access commons where any fisherman can catch as many fish as he chooses. As he realizes only his own costs, he will catch fish until the marginal benefit (the market price if he is fishing commercially) equals the marginal cost of production. As more fish are caught, the fisherman’s catch will be limited by the falling market price and the increasing marginal cost of production as the population declines. If the reproductive capabilities of fish were robust enough to keep up with the market equilibrium level of production, there would always be enough fish to meet consumer demand and overfishing would not be a concern. During the early years of commercial fishing, this was the case. The fish population was high, the human population—and thus the demand for fish—was low, and due to the limitations of fishing technology, the cost of production was high enough to limit yields to sustainable levels. As a result, fish were able to reproduce fast enough to keep up with the numbers being caught, and their supply was, given the lack of any perceived supply problems, not unreasonably thought of as infinite. In time, however, the market equilibrium yield began to increase, a consequence of an increase in the human population and, with the introduction of more advanced fishing technology, a decrease in the cost of production. Once the equilibrium yield reaches a point where the reproductive capacity of the fish stock cannot keep up, the effects of overfishing can begin to be seen. As stock size decreases, so too does the size of each individual fish caught, representing the inability of fish to live long enough to reach their full size before being caught. Bluefin tuna, for example, used to be caught at sizes exceeding 1500 pounds, yet the typical size landed today is less than 200. Lobster and Cod can both live for over 70 years and reach massive proportions, but as their population decreased, so too did their average age and size. Effects of overfishing on the fish stock can be drastic and sudden, materializing with significant increases in the marginal cost of production and decreases in fish size over shockingly short periods of time. When the age of landed fish is lower than the age at which they reproduce, as was ultimately the case with the Atlantic Cod, the population collapses to the point of commercial extinction. Explained as a typical tragedy of the commons, overfishing results from fishermen creating externalities by reducing the total supply of fish but internalizing only their own costs. As a result, fishermen catch fish beyond the optimal level.
The economic consequences of overfishing include overcapitalization by fishermen and the resulting dissipation of rents. As fish become scarcer, the cost of production increases. So too, however, does the market price. Because fishermen will catch fish until the cost of production equals the market price, they will always invest more into production until the market equilibrium is reached. As a result, no rents are available. If fishermen could agree or be made to limit production to sustainable levels, the cost of production for a given yield would be lower than in the unregulated commons. Fishermen would thus be able to extract rents from the fishery, representing the difference between the market price, which is higher due to the reduced supply, and the cost of production, which is lower due to the increased fish population. These economic losses due to dissipated rents are immense, some studies calculating them to exceed fifty billion dollars per year. Solutions to overfishing seek to limit the yield, or the total number of fish caught, to sustainable levels. Although such a solution would benefit fishermen as a whole, the incentives to violate any agreement or restriction are great. Each individual fisherman would still profit from catching fish until his cost of production equals the market price, making the implementation of any solution difficult and highly dependent on incentives to comply.

Overfishing also leads to many severe biological consequences, many of which have an economic value that, although hard to quantify in monetary terms, increases the total societal loss. As species are connected through the food chain, there are significant cascading effects from overfishing. The elimination or reduction of a particular species of fish will result in a decrease in population in the species that prey upon it and an increase in the species that it preys upon. Down the food chain, this may result in an elimination of smaller species, all the way down to the levels of individual nutrients or the plant species that help absorb carbon dioxide from the atmosphere. Many of these changes have been observed in the Atlantic and attributed to the collapse of the Cod fishery. The environmental impact of these changes in the food chain may be immense, yet due to the complexity of ocean ecosystems, they are not yet fully understood and cannot be accurately quantified. However, some species of fish at risk of extinction are primarily responsible for consuming and keeping the population of organisms that cause human diseases such as schistosomiasis under control, and an increase in disease is a more concrete, calculable harm. In many undeveloped parts of the world, such as Africa, the fish themselves are important sources of protein without an adequate substitute, and their elimination would result in a serious degradation of human health. Although difficult to quantify, these biological consequences are real societal harms and help establish the seriousness of the overfishing problem.

In theory, any of a variety of methods could be employed to resolve the overfishing problem. A solution needs only to ensure that the number of fish caught equals the number of fish that the stock has the reproductive capacity to replace, an amount referred to as the sustainable yield. Many approaches of varying complexity can theoretically achieve this result, and significant effort has been devoted over the past several decades to proposing and implementing numerous different solutions, hoping to find one that will work in practice at the lowest cost. These methods can be roughly divided into two categories: bottom-up approaches and top-down approaches. While both may share similar elements, they are sufficiently distinct to merit separate descriptions.

Bottom-up approaches are those designed and implemented by the fishermen themselves. These approaches are essentially contracts, formal or otherwise, amongst fishermen who agree to somehow limit their total catch. A classic example of such an informal approach is that employed by the lobster fishermen of Maine. By destroying the traps of outsiders, the local fishermen limit access to the lobster fishery, transforming it from an open-access commons to a limited-access shared property claim. In theory, this should result in more sustainable yields, as fewer lobstermen results in fewer lobsters caught. A finite number of fishermen also allows for the prevention of overcapitalization, as the fishermen can agree upon certain technologies and enforce against deviations. Controlling the number of fishermen and the technology employed results in an effective control on the number of fish caught. All bottom-up approaches
similarly rely on limiting access to the fishery in order to prevent outsiders who are not part of the agreement from entering and catching additional fish. In addition to informal agreements, bottom-up approaches also include formal contracts, such as union agreements. Fishermen unions were common in the early 20th century, and these formal agreements controlled access by forbidding member processing plants from processing fish caught by non-union fishermen. Yields were limited by imposing minimum weights or lengths on fish caught, thus ensuring that only mature adults were being caught, as well as by imposing total catch limits. As long as the unions are able to enforce their agreements, these formal bottom-up approaches may also be effective at achieving sustainable yields. Legal enforceability remains the most significant hurdle for formal agreements, however, as Antitrust laws have been used to shut down fishermen unions, and thus they are currently not likely a legal option.

Top-down approaches involve the imposition of regulations, generally upon fishermen, that are enforced by the fishery manager, usually the government. The simplest top-down approach is an output control, or a limit on the total number of fish that fishermen are allowed to catch in a given period of time. The limit may be per boat, per fisherman, or per the entire fishery, and it may be for any period of time. Regardless of the form of the limit, the purpose is to ensure a sustainable yield, and as long as the limit is enforceable, an output limit is the most direct solution. More common top-down approaches are input controls, or limits on the effort fishermen put into catching fish. These include limiting the length of the fishing season and limiting the technology and equipment used, such as the size of the nets or the type of vessel. Input controls work by raising the cost of production for fishermen, resulting in their reducing their total catch. The goal is to make the marginal cost of production equal the market price at a lower, sustainable yield. Another type of input control is to limit access to the fishery by issuing permits. This does not raise the cost of production for each fisherman, but rather reduces the catch by the reducing the number of active fishermen, as is the case in bottom-up arrangements.

A Pigovian tax, a tax equal to the cost of the externality that is not otherwise reflected in the price of the good, is another form of top-down approach. These are taxes added to the sale price of fish, increasing their price and thus reducing consumer demand. The tax must be set at the level that will result in demand equaling the sustainable yield for a particular species of fish. As fishermen will not supply fish that they cannot sell, they will catch only the sustainable yield. Although a Pigovian tax on fish has yet to be implemented, if the tax is calculated and enforced properly, it will result in sustainable yields.

The most recent top-down approach, and that which currently gets the most attention, is the creation of private property rights in the fishery, specifically the individual transferrable catch quota (ITQ). The most basic property rights approach would be to grant private ownership of individual parcels of ocean. While establishing and finding boundaries may now be technologically feasible with the advent of satellite navigation, the fact that fish move make the geographic property rights approach that is well-suited for land rather untenable at sea. The ITQ combines a permit to control access with an individual output control in the form of a seasonal catch limit. This permit can be bought and sold in an open market, resulting in a property right to catch a certain number of fish. If yields are sustainable and the fish population is able to grow to a normal size, the cost of production will decrease, making each fish more valuable to the fisherman and increasing the value of the permit. This gives fishermen an incentive to obey their catch limit, as they can make money in the sale of their permit if the stock grows. The ITQ system has been implemented in a number of fisheries, and studies indicate promising levels of success in many ITQ fisheries.

While each of the above approaches is based on a sound theory, implementation of any approach is accompanied by a plethora of problems. Once all relevant costs and problems are considered, it becomes abundantly clear that not only no solution is perfect, but also that no solution is the best in all situations. As there is no first best solution, efficient fisheries management relies on determining which of the many second best solutions produces the most benefit at the least cost in the unique circumstances of each fishery. With this in mind, I propose one additional arrow in the fishery manager’s quiver: the price cap. As is the case with the above approaches, capping the market price of fish sold is based upon sound theory, and when the balance of the various costs is analyzed, it could be that in certain fisheries, the price cap is the most efficient solution. Part II of this paper will summarize the various costs associated with implementing any overfishing regulation. In Part III, I will introduce price caps as a method of controlling overfishing. Part IV explains the implementation costs of price caps and factors that will influence their magnitude in a particular fishery. Part V compares price caps to existing overfishing solutions, and Part VI will conclude.