FROM PLEA NEGOTIATION TO COERCIVE JUSTICE: NOTES ON THE RESPECIFICATION OF A CONCEPT

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Because the literature on plea bargaining disagrees about a definition of the concept, many differences in findings and opinions are more semantic than substantive. The concept of plea bargaining should not be restricted to either pleas or bargains. The fundamental phenomenon is the state's use of coercion to obtain the legal grounds for imposing a penalty.

I. PURPOSE

The purpose of this paper is to provide an adequate conceptualization of the phenomena indiscriminately referred to as "plea bargaining" or "plea negotiation." I shall move inductively from the problems associated with existing definitions in order to devise one that meets as many objections as possible. My purpose is to explore the full scope of the phenomenon at issue and ensure that the artificialities of language have not unwittingly imposed a premature cloture upon the scope of the subject.[1]

II. TOWARD A DEFINITION

A. Explicit and Implicit Bargains

Some prosecutors will tell you that in their jurisdictions no "plea bargaining" goes on, but readily admit that many cases are "settled" before trial. Some judges known locally for their adamant disapproval of plea bargaining flatly deny that any "plea negotiations" go on in their courts. They are right: there is nothing *negotiable* about pleading guilty in those courts. Instead, defendants are simply informed that they have a choice: they can either "plead guilty and get mercy or go to trial and

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[1] Merton and Lazarsfeld have called this process of reexamination of the basic conceptualization of a problem "respecification of a concept." Goode and Hatt (1952:49) quote this advice and urge that the process be one of the first steps of a research effort (*ibid.*: chap. 5).

get justice." Some prosecutors, defense counsel, and law professors share the view that such an arrangement is not plea bargaining. In a similar vein, criminal justice officials in other countries assert, with a certain national pride, that they do not "plea bargain" as we do in America. They are correct, but only to the extent that they are referring exclusively to those forms of American plea bargaining that involve explicit negotiation. If, on the other hand, plea bargaining is conceived more broadly, other countries can take little consolation in the comparison. They may not conclude their deals in the bazaar atmosphere prevalent in some American jurisdictions but they engage in its functional equivalent. As Goldstein and Marcus (1977) have documented, defendants in such systems may not be able to negotiate pleas but they learn about a regular pattern of expectations. Defendants who do not challenge the prosecution's case can expect greater leniency than those who deny their guilt.

Newman's (1966) distinction between explicit and implicit plea negotiation helps to clarify the situation somewhat, though not completely. In explicit negotiations the defendant agrees to plead guilty in exchange for some specified concession by the state. In implicit negotiation there is no bargaining but defendants learn they will be punished more severely for going to trial. Nevertheless, some implicit bargains contain explicit elements: the defendant may be told the sentence differential for going to trial. On the other hand, some explicit negotiations leave the quid pro quo unstated. It is better to think of these types as poles of a continum that varies in terms of the specificity of agreements. In the middle are agreements that establish a sentencing range or place a ceiling on the sentence.

Negotiations vary along three other important dimensions: whether the agreement is treated as a legal contract; the amount of haggling permitted; and who negotiates. Explicit bargains have some of the earmarks of a legal contract, and this provides the defendant with some procedural protection when they are broken. Nevertheless, just because negotiation is explicit does not mean that pleas will be treated as legal contracts. In some explicit systems the defendant must plead in the dark, trusting blindly in the good faith of the criminal justice officials. In others, a great deal of energy is spent disguising the contractual nature of the agreement: the defendant is asked to act as if he had a contract but will have no remedy if the state welshes. In still others certain kinds of agreements are treated as contracts and enforced by remedies for breach.

This latter is increasingly the trend (e.g., *Santobello* v. *New York*, 404 U.S. 257, 1971). If taken to its logical extreme all negotiations could lead to binding contracts that could not then be nullified by the state. This is one possible goal for those reformers who accept some form of plea bargaining.

The survey of plea bargaining by the Georgetown Institute of Criminal Law and Procedure (Miller *et al.*, 1978) found that most negotiations were fairly explicit, usually involved defense counsel and prosecutors (and often judges as well), and generally treated the agreement as contractually binding. Many agreements are recorded in writing or read into the court record at the time of entering the plea, a change from the hypocrisy (less than a decade ago) of making the defendant state for the record that no promises had been made. Today the defendant is asked, instead, if any promises were made other than those contained in the plea agreement.[2]

In summary, Newman's distinction between implicit and explicit negotiation should be replaced by a four-dimensional cross-classification that reveals the variety of plea bargaining

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[2] The new procedure has not eliminated inducements for the guilty plea but does provide some assurance that the judge will know what those inducements are. Lawyers who practiced under the old system regard the new procedure as a great improvement because it reduces the cynicism engendered by hypocrisy and relieves them of having to suborn or allow perjury.

The Georgetown survey found that, where judges used to warn defendants that they had better plead guilty if they wanted mercy, today, because indigent defendants have a right to counsel and the prosecutor has emerged as the key actor in the administration of criminal justice, plea bargaining has become more explicit. Defense counsel do not like implicit bargaining because it gives them no role to play. A private attorney in Greenville, South Carolina, where we found the only court that still operates entirely implicitly, explained that he hates to take cases in that court. It is bad for his reputation among potential clients because he can do nothing for them and it is bad for his self-image as a lawyer. He frequently tells his clients to get another attorney if all they want him to do is "stand up there and plead them guilty." Similar objections were raised by defense attorneys in El Paso, Texas, and Blackhawk County, Iowa, to the "no plea bargaining" policies in those jurisdictions. It seems plausible that furnishing indigent criminal defendants with attorneys generated pressure to make plea bargaining more explicit.

The pressure for explicitness also comes from prosecutors. Implicit bargaining may operate satisfactorily in small one or two-judge courts but it is not well suited to larger jurisdictions using assembly line methods. The prosecutor controls the administration of justice in a multi-judge court because the individual judge can only deal with his portion of the caseload. As jurisdictions have grown, prosecutors have assumed a larger role in system management and, concomitantly, have encroached on judicial prerogatives like sentencing. In Greenville, South Carolina, a new county solicitor recently began sentence bargaining. In one of the two court systems the judges acquiesced in the innovation. The other court, however, resisted this "encroachment" and continued its traditional practice of implicit bargaining. In Kalamazoo, Michigan, the former chief prosecutor said that he is waiting for the day when the judges will let his office make sentence recommendations. The power to make sentence bargains increases the bargaining power of the prosecutor and helps run the system more efficiently.

systems and thus reminds us that the choice is not just between tolerating and abolishing plea bargaining but also among its various forms.

B. Reasonable Expectations

Although this classificational scheme clarifies some of the policy options it does not encompass, or define, the full scope of the phenomenon. The Georgetown survey of Criminal Law and Procedure defined a negotiated plea or plea bargain as "a defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state" (Miller *et al.*, 1978:2). This definition has two important advantages: it is not cast in legal contractual terms and hence does not exclude implicit bargains; and the notion of a "reasonable expectation" frees it from limitations as to who makes an offer and how. Even if no offer is made by the state but a defendant reasonably believes there is differential sentencing, his guilty plea would constitute a bargain. By this definition plea bargaining is not necessarily eliminated if the prosecutor ceases to offer concessions in exchange for pleas. Other officials may begin to bargain. Even if they do not, there is still plea bargaining as long as defendants continue to believe reasonably that they will be treated more harshly for going to trial and therefore plead guilty. A criminal justice system that has relied on plea bargaining in the past, or continues to rely on plea bargaining in some cases, or is part of a network of jurisdictions that plea bargain, cannot suddenly stop offering considerations for pleas and claim that it has demonstrated that "plea bargaining" can be eliminated. The system will continue to benefit from the belief among some defendants that they will get something by pleading guilty. Until this belief has been reduced to insignificance, it cannot be said that "plea bargaining" has been eliminated.

C. Plea Bargains without Pleas: Disposition Bargains

The major drawback of the Georgetown definition of plea bargaining is its limitation to guilty pleas. Although this was done deliberately in order to render the study manageable, it is an arbitrary limitation. For instance, the German, French, and Italian functional equivalents of plea bargaining do not involve a plea of guilty but rather an agreement to stage an uncontested trial (Goldstein and Marcus, 1977). Similarly, in some American jurisdictions, "plea" negotiations do not result in a

plea being entered but rather in an agreement to have an abbreviated trial in which the formal rules of evidence are suspended and the finding of guilt is a foregone conclusion—what Mather (1974) calls "slow-pleas" of guilt.

Still other variants of plea bargaining exist. In searching for the full scope of this phenomenon we would do well to take a cue from defense attorneys, who use the phrase to refer indiscriminately to such diverse activities as having a case rejected at initial screening, diverted before trial, or completely dismissed. Defendants handled by a pretrial diversion are frequently required to admit guilt informally and also to pay restitution before the charges are dropped. As a prosecutor with long experience pointed out, this is no different from a plea bargain in which the defendant agrees to satisfy the same conditions in exchange for having his conviction expunged. In this prosecutor's jurisdiction, the latter process is being replaced by the former.[3] The appropriate generic label for all of these variants is not "plea negotiation" but "disposition negotiation" or "negotiated justice."

D. Bargains for State's Evidence and Special Services

Negotiation to obtain the state's evidence or special services has also been recognized by some as a form of plea bargaining (see, e.g., Tappan, 1960: 384). In these deals one party helps convict another (instead of himself), or engages in behavior that will not result in anyone's conviction but will do some good, for instance, paying restitution or telling where nitroglycerine is hidden. Nowhere is the thesis of this paper better illustrated than by this kind of negotiation. Alschuler (1979:4) argues that plea bargaining was unknown during most of the history of the common law, but acknowledges that negotiations to convict others are an exception. The force of much of his argument thus turns on excluding this type of negotiation from

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[3] The functional equivalence between diversion and plea bargaining was revealed in the effort to eliminate "plea bargaining" in Alaska. In implementing that policy, the Attorney General directed his prosecutors as follows:

> I am not interested in seeing the office file Assault with a Deadly Weapon charges and then reduce them to Simple Assault with suspended impositions of sentence with no fine or jail time purely because we never had a case in the first place. . . .
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> In this vein, consider diversionary programs carefully.
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> . . . [D]iversionary programs may help us handle some of the case load we are bound to face [with our no plea bargaining policy]. [Avrum Gross, Attorney General, Alaska, Memorandum of July 24, 1975]

However, the Attorney General reported at French Lick that diversion did not become a substitute for plea bargaining.

his definition, which he justifies on the ground that "although the fifth amendment prohibits compelling a person to incriminate himself, the Constitution does not prohibit compelling a person to incriminate another. . ." (*ibid.*). Bargains for information, restitution, and other services do "not subject a defendant to the same burden on the exercise of a constitutional right as bargaining for his plea of guilty" (*ibid.*). Furthermore, he argues, "when one defendant agrees to testify against another. . . his statements will be subject to refutation and critical evaluation in the courtroom" (*ibid.*).

These distinctions may be useful for some purposes, but they do not justify altogether excluding the second type of bargain from our consideration. Klein's (1976) analysis suggests that defendants offered concessions in return for state's evidence or other services or rewards feel just as much compulsion as those who plead guilty. As for the contention that the deal is scrutinized in court, that only applies to the small subset of cases that go to trial. Many of the defendants whose conviction is sought by means of such bargains are likely to plea bargain themselves. And of those who go to trial, not all will be able to test the credibility of the information because the government may only use the fruits of such information and protect the source.

In my view the fundamental evil of plea bargaining is the state's improper use of its coercive power. The distinction between the compulsion to plead guilty and the compulsion to turn state's evidence or render other services does not alter the essential evil involved. Convictions obtained through coercion are necessarily suspect.[4]

III. SUMMARY AND CONCLUSION

In light of the above discussion, a less parochial statement of the plea bargaining problem might be: "Does the defendant agree to accept some minimum penalty in the reasonable expectation that he would be punished more severely if he insisted upon invoking the full gamut of procedural safeguards provided by law?" This expanded definition includes the slow plea, the uncontested trial, and pretrial diversion. But it does not reach those instances of negotiation for state's evidence

[4] In his criticism of plea bargaining Tappan (1960:384) pointed out the danger of bargains for state's testimony. More recently, Amnesty International has used as one criterion of being a "political prisoner" whether the defendant was convicted through testimony given under threat or promise of leniency to "turncoats or paid informers helping send former friends to jail" (Sinclair and Jacobs, 1978).

and special services where the state has been able to impose some penalty on one party (either after conviction, at trial or by guilty plea, or even without conviction through procedures inducing "voluntary" acceptance of some penalty, for example, pretrial diversion or civil process) by the help of another, secured through threatening to punish the latter.

We could simply add this second statement to the first and use them in tandem to define our subject matter. But by distilling the elements common to both we arrive at the following reformulation of the issue: "Does the state use its power to penalize in order to obtain the grounds for imposing a penalty or obtaining a special service?" The concept of "penalty" is not restricted to legal sanctions, narrowly construed, but includes any deprivation no matter how minimal. We are ultimately addressing the question of state use of coercive power, not "plea bargaining" or "negotiated justice." The question is whether a criminal justice system can function without using coercion to secure convictions (as contrasted with punishment after conviction). Policy choices should be cast in terms not of plea bargaining or no plea bargaining but of differences in the kind and degree of coercion used in the adjudicative process. Under what circumstances is the use of state penal power to obtain convictions and services an acceptable policy? The use of the subpoena power to force witnesses to testify against others seems universally to be regarded as acceptable. The question is, under what conditions, if any, should they be forced to testify against themselves? What are the significant differences between the third degree at the police station and the offer of a year in prison under threat of life imprisonment? These questions are addressed elsewhere in this volume (see Brunk, *infra*). My purpose has been to show the centrality of the question of coercion: the state's use of its powers to obtain the grounds for punishing some individual or achieving some good. Systems for the administration of that power can be structured in various ways. Policy makers must choose among them.

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