REFORMERS *V.* ABOLITIONISTS: SOME NOTES FOR FURTHER RESEARCH ON PLEA BARGAINING

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The conference papers, the discussion, and other recent work on plea bargaining reveal a shift in the normative perspective of many academics studying this phenomenon. Scholars are becoming more favorable to it. How might one account for such a change, what are the implications of the new arguments, and what does the continuing debate between "abolitionists" and "reformers" suggest about directions for future research?

Much of the research on plea bargaining conducted during the 1960s and early 1970s was highly critical of the practice (see, e.g., Blumberg, 1967; Alschuler, 1968; Casper, 1972). This work often had a muckraking tone, bringing to light a prevalent, semi-secret, and odious practice. Criticism focused on a variety of issues. It was said that plea bargaining might increase the likelihood that innocent defendants would be induced to plead guilty. The practice made it more difficult for courts to monitor and control the behavior of police by reducing the deterrent effect of the exclusionary principle, because legal defenses were converted into bargaining chips. Relatively unfettered discretion exercised by prosecutors and judges promoted inequalities in the treatment of defendants and permitted decisions based upon factors that should be irrelevant in adjudication and sentencing (e.g., personal prejudice, pretrial publicity, crowded detention conditions). Finally, plea bargaining encapsulated two decisions—guilt or innocence and sentence—that ought to be made independently, thus hindering rational choice about either.

In short, much of the work on plea bargaining generated during the 1965-75 period tended to argue that it was a relatively recent, sub rosa, undesirable feature of the dispositional process in criminal courts. This is not to say that the practice did not have its defenders, but most came from the bar and the public sector (see, e.g., ABA Project, 1967; President's Commission, 1967), not the academic community.

On the other hand, several of the essays in this volume (e.g., Church, Brunk), a number of other recent works (e.g., Rosett and Cressey, 1976; Heumann, 1978; Utz, 1978), and many

of the conference participants appeared to find much to commend plea bargaining, at least in some modified form. Several developments may have contributed to this changing perspective. Recent research both in the United States and in Europe has indicated that: (1) the practice may be widespread (Baldwin and McConville, 1977 and *supra*; Goldstein and Marcus, 1977; but see Langbein and Weinreb, 1978); (2) it may have characterized courts for long periods of time rather than being a response to contemporary caseload pressures (Heumann, 1975; Friedman, *supra*); and (3) it may vary greatly from one jurisdiction to another. Denunciation of plea bargaining as an undifferentiated and unmitigated evil becomes a less useful position, especially in view of increasing pessimism about the possibility of eliminating it, and gives way to a search for ways to accommodate and modify it. Other factors have probably contributed to the reevaluation of plea bargaining. The Supreme Court has rejected several constitutional challenges to the practice and endorsed it as an appropriate and legitimate means of handling criminal cases (*Brady* v. *United States*, 397 U.S. 642, 1970; *North Carolina* v. *Alford*, 400 U.S. 25, 1970; *Santobello* v. *New York*, 414 U.S. 257, 1971; *Bordenkircher* v. *Hayes*, 54 L. Ed.2d 604, 1978). These decisions, in turn, have affected the way in which plea bargaining is conducted in many jurisdictions, elevating it from hushed conversations in corridors and chambers—the "cop-out" ceremonies described by Blumberg (1967) and Casper (1972)—to the formal, quasi-contractual arrangements on the public record that are now used in many courts. Plea bargaining has come out of the closet, complete with a stamp of approval from the Supreme Court.

A final factor may have contributed to the current reaction against earlier blanket condemnations. Critics like Blumberg (1967), Casper (1972), and Alschuler (1968) found plea bargaining wanting by comparing the way it was actually practiced with the "theory" of the trial. It was largely assumed, without evidence, that the latter was better capable of separating the innocent from the guilty, deterring police misconduct through application of the exclusionary rule, and sentencing rationally by compartmentalizing adjudication and sentencing. Although there has been little empirical research refuting these propositions, Church (*supra*) has rightly emphasized that they are assumptions and not findings. This clearly weakens the case against plea bargaining, and at least requires that we postpone judgment until the empirical questions are answered.

Whatever the reason for the shift in perspective, the conference contained ample evidence that it has been occurring. Indeed, the discussion revealed something approaching nostalgia for the "good old days" of plea bargaining. Many of the old chestnuts strenuously rejected by the "abolitionists" as post hoc rationalizations were trotted out as arguments why plea bargaining was *preferable* to more adversarial proceedings. Plea bargaining was said to: mitigate excessively harsh, legislatively mandated penalties or, more generally, to tailor the sentence to the needs of the offender through manipulation of the charge or explicit sentencing bargaining; "save" the cumbersome device of the trial for "real" disputes so that adversary proceedings do not fall into disrepute; and allow defendants to avoid the glare of publicity associated with the trial. All of these arguments—and surely they are familiar ones—reemerged not as rationalizations for an administrative system that was unfortunate but inevitable, but as positive advantages of plea bargaining.

The context of these "new-but-old" arguments was discussion of reforms designed to reduce or eliminate plea bargaining (Callan, *supra*; Gross, 1978) and limit judicial discretion in sentencing. When such reforms occur, it was argued, prosecutors and judges have less flexibility in dealing with "equity cases" (apparently those in which the defendant is guilty but does not deserve the punishment prescribed by law) and working out "reasonable" sentences. In these cases—numerically small but still viewed as important—plea bargaining was said to be an essential tool for the fair administration of justice.

What are we to make of this shift in perspective? Besides noting that things always move in cycles or that excursions into short-run intellectual history reveal many twists and turns, does this shift tell us anything about future research or policy? I will offer two suggestions.

The first is that we do not know much about the criminal trial—how it works, what outcomes it produces, how it measures up in terms of the many alleged shortcomings of plea bargaining. How well do trials sort out guilty from factually or legally innocent defendants? Are adversary proceedings more effective in modifying police misconduct? To the extent that police are less interested in convictions than in other goals—developing informants, confiscating contraband, impressing superiors, harassing wrongdoers, letting the process of arrest and pretrial detention be the punishment—perhaps those of us who have championed adversary proceedings are on shaky

ground. Do trials produce more reasonable sentences than plea bargaining?

These questions have not been explored, and will be difficult to answer. One reason we know relatively little about trials is that there are so few of them. Even if we could operationalize the questions, simply gathering data will be difficult. Yet answers are necessary if we are to resolve the academic debate between "reformers" and "abolitionists," and estimate the effects of various proposed innovations. More attention to trials as they operate in practice would seem a fruitful approach.

My second observation is that proponents and opponents of plea bargaining are speaking at cross-purposes. As we learn more about variation in both criminal cases and plea bargaining we can see that adversaries in the debate are focusing on different types of cases. Most commentators seem to agree that there are two broad classes of criminal cases: "hard" and "easy" cases.

"Hard" cases—a small, but terribly important fraction of the typical court's workload—involve real controversies: whether the police have arrested the right person, or the legality of the methods by which the police have obtained evidence. The cases may be "hard" because the sentence choice really ought to be dichotomous—the defendant is either factually or legally innocent and ought to receive no punishment, or guilty and ought to receive the normal punishment, but nothing in between is appropriate. It is these hard cases that have been the focus of most of the attention of "abolitionists," and it appears pretty clear that plea bargaining is not the best mechanism for handling them. By assuming guilt, suppressing legal issues, making the offer more tempting as the state's case becomes weaker, plea bargaining may cause errors and impose inappropriate sentences in these kinds of cases.

Recent research—typically cited by "reformers"—has questioned how many hard cases there are (e.g., Mather, 1974; Heumann, 1978). Observation of plea bargaining suggests that most are "dead-bang" cases—the defendant did it, the police had little difficulty developing admissible evidence, and there are few idiosyncratic features that argue for anything other than the "normal" penalty for the defendant. In these routine cases, it is often said, there is no need for an adversary proceeding, for there is little or nothing to fight about. Many of the criticisms of plea bargaining appear to have relatively little

force in such cases—there is no danger of convicting the innocent, no need to police the police, and "ball-park" or "normal" sentences are imposed in a relatively evenhanded fashion. It is to these cases that many "reformers" point, asserting that they comprise the vast bulk of criminal cases, and are most efficiently handled by plea bargaining. Moreover, as argued at the conference, the deviations from this situation are typically not "hard" cases but rather those in which the "equities" dictate some individualization of treatment—usually a reduced penalty—readily achieved by plea bargaining.

Whether plea bargaining (in its present or some modified version) is a desirable practice would seem to depend on the distribution of cases between these two categories. Are there many "hard" cases? Are the many apparently "easy" cases *really* "easy," or do they just appear to be so because they are treated so routinely? These are difficult questions to address. Can we make estimates of whether defendants are or are not guilty? Can we assess whether a motion that was not raised might have been successful? Can we establish an appropriate sentence—in either a statistical sense (Wilkins, 1976) or an ethical sense—and determine whether bargaining or trial is more likely to produce it? Baldwin and McConville (*supra*) suggest some fruitful approaches to the ascertainment of guilt and innocence, which might be applied to looking at whether other legal issues might have been raised.

Attempting to sort out hard and easy cases strikes me as an important exercise, both analytically and practically. It will advance a more focused discussion of the relative merits and disadvantages of plea bargaining and trials as means for adjudicating and sentencing. Moreover, it will provide a more useful perspective from which to discuss reform. To be sure, any assessment of plea bargaining also depends upon more fundamental beliefs about crime control and due process. Nevertheless, attention to the factual issue of the incidence of "hard" and "easy" cases would seem a useful preliminary step.

In sum, there appears to be a distinctive shift in discussions about plea bargaining and trials that reflects less a shift in the values of those who have been thinking and writing about the issue and more the development of new data about how criminal courts in fact operate. As the debate about the nature and desirability of plea bargaining is reformulated, many new questions are raised that can usefully be the subject of empirical research.

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