PLEA BARGAINING: A CRITIC'S REJOINDER

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The paper is a reply to two defenders of a reformed system of plea bargaining: Thomas Church and Conrad Brunk. At the broadest level, it is argued that plea bargaining is in a twofold conflict with the constitutive purposes of the liberal-democratic idea of a criminal justice system: the practice is not conducive to the punishment of the guilty in accordance with their deserts and it violates basic liberties, among them the right against self-incrimination and the right to the lowest reasonable sentence. It is argued that the value of the jury trial is insufficiently appreciated in Church's analysis. Brunk is criticized for failing to distinguish between two critical responses to plea bargaining: that the agreement made by the defendant should not be honored by the courts and that public officials act wrongfully in coercing such pleas.

Thomas Church (*supra*) and Conrad Brunk (*supra*) have written rebuttals of what they take to be some of the leading arguments against the institution of plea bargaining. Church's paper is more ambitious, an attempt to establish as "groundless" the "case for the inherent impropriety of plea bargaining," (*supra:* 512). Brunk, though building upon Church's work, has a somewhat narrower focus. He is concerned to undercut the critic's argument that, because of inevitable coercion, bargained-for guilty pleas do not represent the voluntary choices of defendants.

The papers have some notable similarities. Both authors seem convinced that plea bargaining, as presently practiced, is improper. Each, however, lists conditions that, if satisfied, would eliminate significant objections to plea bargaining. Although both are concerned about practicality, each gives priority to the question whether plea bargaining, taken as a whole and in its ideal form, is justifiable. Church writes:

> [A] defense grounded upon economics or administrative convenience is somewhat beside the point against the kind of fundamental charges leveled against plea bargaining by its strongest critics. [*Supra:* 511]

I believe that this is both correct and important. For surely none would object if justice could be achieved with the expenditure of less money, time, and energy.[1] But if savings in the

[1] It is generally assumed that the system of plea bargaining is cheaper than a no-bargain system. This may not be so. Under a no-bargain system it appears that fewer defendants would be brought to trial. If, for example, there is only a 25 percent chance for the prosecutor to get a conviction and send a suspect to prison for 10 years, under plea bargaining the prosecutor might offer to accept a plea of guilty to a charge carrying a one-year prison sentence. Under a no-plea system, the prosecutor might well choose to drop the case entirely. If enough of these weak cases are dropped—or, more likely, never brought to the attention of the prosecutor—fewer people may spend time in

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criminal justice system can only be obtained by sacrificing the value of justice itself—the value that gives the system its very point—then, as citizens concerned about the quality of our legal institutions, we must object vociferously.

Church observes that the critics of plea bargaining can be divided into two camps: reformers and abolitionists. The former maintain that changes in the practice would eliminate its defects, whereas the latter hold that the defects are inherent in any system of plea bargaining. Church and Brunk are reformers. Their general thrust is to rebut what they take to be the main arguments of the abolitionists in order to lay to rest the most important doubts about plea bargaining and begin the task of instituting the needed reforms. As one who has advanced the abolitionist position (Kipnis, 1976), I am naturally interested in the cogency of their arguments. Although I am prepared to grant that they have expanded the debate into new areas, it does not appear that the abolitionists have been vanquished. In the remainder of the piece I shall indicate where one can reasonably take issue with Church and Brunk. The time has not yet arrived to limit our concern to the fine tuning of the present system.

As a first step I will argue with the view of jury trials taken by Church:

> Trials are costly and psychologically unpleasant. Our adversary process was hardly designed to be otherwise. [*Supra:*514]

Now whether something is a cost or a benefit depends upon which values are choiceworthy. We should at least remind ourselves of the value of the jury trial before we endorse a system that largely dispenses with it. Basically, jury trials remove the disposition of criminal cases from the control of bureaucrats and professionals. This appropriation of responsibility by citizens has important consequences. (1) Stability: it immunizes the state against much of the responsibility it would otherwise bear for the miscarriages of justice that inevitably occur in any system. (2) Security: it incorporates staunch protection against official abuse of the criminal justice system. The most cursory look at history shows that tyranny typically expresses itself through subversion of the criminal law. The jury trial helps to

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prison. Also, following the institution of a no-bargain system the average length of sentences after a jury trial might well decline since surcharges would not be imposed in order to discourage going to trial. These two factors could result in substantial public savings. Although the larger number of trials would result in additional costs, the savings that might result from a smaller and more highly selected prison population might offset them. Now that no-bargain systems are operating in El Paso and Alaska, it may be possible for social scientists to make dispositive findings in this area.

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prevent this. (3) Openness: by opening up the criminal process through citizen involvement, the jury trial reduces the cynicism and contempt bred by less visible proceedings. (4) Democracy: by informing judges and prosecutors of the degree to which the legislative mandate can and should be carried out, the jury trial builds in a kind of check against dated law and overzealous officials. (5) Participation: finally, the jury trial offers an opportunity for persons to assume an important responsibility as citizens in a democracy. These occasions serve to remind us of the laws our representatives have passed, of the measures taken to identify and apprehend those who are believed to have broken them, of the rights that properly pertain to the accused, and of the gravity of the judgment of guilty. It may be that no more efficient procedure than the jury trial has ever been developed for alerting citizens to the full dimensions of their civic duty. Ordinary citizens, as jurors, speak for all of us in much the same way that statespersons sometimes do. Were we all well attuned to the political dimensions of our lives, these experiences as jurors might well be superfluous. But since the opposite obviously seems to be the case, we might well ask how we could have more jury trials rather than fewer. (One answer might be by abolishing plea bargaining.) The suggestion that jury trials are costly affairs most of which could be eliminated without loss should be viewed with grave skepticism.

These observations about the value of the jury trial could be developed at length; they are part of a liberal-democratic political theory, the philosophical basis of the Anglo-American system of criminal justice. Nevertheless, I want to pursue a separate but related point: whether plea bargaining does or does not subvert the constitutive purposes of that system. It is Church's contention (*supra:* 513) that it does not. To the abolitionist charge of illegitimacy Church replies

> we must ask whether it is necessarily irrational or otherwise detrimental to the deterrent function of the criminal law to allow procedures in which (1) proportionally more criminal defendants are convicted than would be if all cases went to trial, but (2) the sentences imposed are less severe. Given the recent discussion of the importance of sure (although not necessarily harsh) punishment for effective deterrence of criminal behavior, a choice for more convictions is, at the very least, not inherently irrational. [*Supra:* 519; citations deleted]

This argument is not satisfactory, for one cannot show that a practice is legitimate simply by showing that it furthers some desirable end. At a minimum, one must also show that the practice does not conflict with the central aims of the institution in which it occurs. The abolitonist argument, as I have advanced it, is intended to show that plea bargaining is in serious

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conflict with the fundamental purpose of the Anglo-American, liberal-democratic, criminal justice system.

That purpose is not deterrence. To begin, deterrence is more properly the concern of specialists in what might be called "security" rather than criminal justice. Specialists in security seek to reduce the unwanted effects of certain types of behavior. Except insofar as their own activities might be illegal, they are not particularly interested in the rights of those persons whose intentions they wish to thwart. The discipline of criminal justice has quite a different orientation. These two endeavors, security and criminal justice, are often confused. More importantly, the appeal to deterrence does not provide a satisfactory account of the goals of the criminal justice system. That system is not merely another "public" security agency. For example, it may be that we could deter crimes more effectively by visiting suffering not upon wrongdoers but upon those about whom the wrongdoers care: spouses, children, friends, innocent hostages, and so on. In terms of the deterrence theory of criminal justice, it is merely a happy accident that we punish the wrongdoer in order to maximize the deterrent effect. But under our legal system, it is essential—not accidental—that we punish only the guilty.

In my earlier article (1976:102 ff.) I argued that our system can best be understood as an institutionalization of two principles. The first is that those (and only those) individuals who are clearly guilty of serious specified wrongdoing deserve an officially administered punishment proportional to their wrongdoing. Justice in punishment is realized when the guilty person receives neither more nor less punishment than is deserved. Under the reforms advocated by Church and Brunk, those accused tried by juries would be guaranteed "theoretically correct" sentences, the sentences deserved by persons who have done that with which they are charged.[2] Those taking advantage of plea bargains would have these sentences discounted in some way. Obviously, either those pleading guilty have committed their crimes or they have not. If they have, they receive less than the punishment they deserve—an injustice. If they have not, they receive more than the punishment

[2] I am willing to assume here that the "theoretically correct" sentence is always the same as a just sentence. The argument of the paragraph rests upon that assumption. If, however, the assumption is false—and I am strongly inclined to believe that it is—then my argument in the paragraph fails. We must then ask whether it is reasonable to give respect to a legal system that has forgotten about justice in punishment and, instead, talks about something it calls "theoretical correctness" in sentencing.

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they deserve—another injustice. Under plea bargaining, it will *never* be reasonable to believe that those convicted receive the punishment they deserve. This systematic misapplication of punishment, this structural injustice, is what discredits the legitimacy of plea bargaining.

Consider another familiar context in which allocations are supposed to be made in accordance with desert: grading in an academic context. A student has turned in a term paper. The instructor, glancing at it, says that it probably deserves a C but if the student were to waive his right to a careful reading and a conscientious critique, the instructor would agree to give the student a B. The grade-point average being more important to the student than either education or "justice in grading," the student accepts the B and the instructor gets a reduced workload.

The same considerations that establish the illegitimacy of the "grade bargain" in the educational system confirm the impropriety of the plea bargain in the criminal justice system. Bargains are out of place in contexts where persons are to receive what they deserve. Our courtrooms, like our classrooms, should be such contexts. It is this objection to plea bargaining that must be central: not that it cannot be justified by any of the rationales of punishment (although I believe it cannot), but that it flies in the face of the very raison d'être of the criminal justice system itself. That objection is not met in Church's discussion.[3]

Conrad Brunk's more sophisticated analysis focuses narrowly on the question of coercion. The issue as he sees it is whether a bargained guilty plea is coerced, that is, not the product of a voluntary choice. Critics have tried to show that, under plea bargaining, the constraints upon the defendant are such as to make involuntary the decision to plead guilty. Brunk's reply is that under a properly reformed system of plea bargaining the decision to plead guilty need not be coerced.

But how, one might want to know, does the solution of this problem help to settle the question whether plea bargaining should be eliminated? Two answers are possible. The first focuses on the plea itself: a guilty plea one is *forced* to enter should be a legal nullity. Plea bargaining should be abolished because defendants cannot be presumed to be the authors of what they say. The critic is hearing Alford say "I'm not guilty but I plead guilty" (*North Carolina* v. *Alford*, 400 U.S. 25, 28 n.2,

[3] The argument here—and at several other points in this piece—is substantially as I developed it in Kipnis (1976).

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1970). The critic is wondering whether Alford should be let off the hook; whether we should be relying on what he is saying, given his situation; whether, in deciding to send him to prison, we should be proceeding largely on the basis of this "plea" of guilty. Has something important been lost? Is enough left to form a coherent theory of criminal justice when a plea of guilty no longer involves a declaration of belief in one's guilt?

There is a second answer that proceeds from a very different perspective: if prosecutors, judges, and others are coercing defendants into pleading guilty, such behavior is reprehensible and should be stopped. Plea bargaining should be abolished, because we do not want people acting like gunmen and blackmailers—even indeed, especially—when they are public officials. The critic is focusing on the "wrongful" conduct of the public official rather than the plea itself. The criminal justice system allows defense attorneys, prosecutors, judges, and others a great deal of discretion in the way they perform their roles. In maintaining the system of plea bargaining, these officials have improperly extended their authority, have abused their discretion.

Though I will not develop either of these arguments here, it is important to notice that Brunk does not indicate which he is rebutting. If the first is his target—if he is attempting to show that we should honor and rely upon the guilty plea that the defendant enters in order to avoid the risk of a greater punishment—then it is not enough for Brunk to reply that no one has coerced the defendant. For even if nobody is guilty of coercing the defendant, the constraints under which the plea is entered might properly make us hesitant to act upon it in depriving the defendant of liberty. On the other hand, if Brunk's target is the second argument—if he is attempting to show that no official (including the defense attorney who is an "officer of the court") has acted improperly in securing the guilty plea—then he must provide an account of the responsibilities of each official. He must be prepared to show that plea bargaining can be carried on without compromising or otherwise disregarding official obligations. Although Brunk is aware that the charge of coercion contains an implicit reference to the responsibilities and privileges of the person so charged, he nowhere gives such an account. In conflating two distinct objections to plea bargaining, Brunk has failed to meet either.

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At a somewhat broader level, it is difficult to understand why Brunk emphasizes "coercion" in his discussion. Although the term has received some attention in philosophical literature, it does not appear to have played an important part in the debate on plea bargaining. Two other terms seem more relevant. If one looks at plea bargaining as a type of contract in which offers are made and accepted and entitlements given up, then the proper concept would be "duress." Unlike "coercion," "duress" is what the lawyers like to call a "term of art." It is an accepted defense against a contract. If, as seems reasonable, we were to consider plea bargaining as falling under the law of contracts, we might well decide that no legal consequence should flow from a bargained-for plea of guilty because it is the product of duress. This was an argument I developed in my earlier paper (1976:96 ff.).

Another relevant term is "compelled," used in the Fifth Amendment: "No person shall be compelled in any criminal case to be a witness against himself." Being compelled is very different from being coerced. Having a toothache I am compelled—not coerced—to pay a visit to the dentist.

Earlier I referred to our criminal justice system as an institutionalization of two principles. The second of these is that certain basic liberties shall not be violated in bringing the guilty to justice. In liberal-democratic societies certain restraints are observed in the effort to bring the guilty to justice. The second principle underlies the constellation of constitutional checks on the activities of virtually every person who plays a part in the system. It might well be that Star Chamber proceedings, torture, hostages, bills of attainder, dragnet arrests, unchecked searches, ex post facto laws, unlimited invasions of privacy, and an arsenal of other measures would bring more of the guilty to justice. But these steps bring us to a dystopia where our most terrifying nightmares can come true. Much of the United States Constitution, especially the Bill of Rights, is directed at checking the state itself in the interest of basic liberty. Although this is not the place to set them out, there are very powerful arguments in favor of securing the constitutional right to be free from compelled self-incrimination as such a basic liberty. Now clearly a guilty plea is self-incrimination. When it is bargained for is it "compelled"?

Arguably it is. After all, we assume that reasonable persons seek to minimize punishment. That a particular course of

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action would subject one to a risk of punishment is *supposed* to be a *compelling* reason for not embarking upon it. Under plea bargaining and its system of discounted sentences, the accused runs the risk of increased punishment if he refuses to incriminate himself by pleading guilty. If plea bargaining does confront defendants with compelling reasons to incriminate themselves (and if I am right in assuming that persons who are given compelling reasons to act are thereby compelled to act) then plea bargaining violates a constitutional right secured by the plain language of the Fifth Amendment.

I shall conclude with what I believe to be a hard case for Brunk's account of coercion, a case that may throw light upon the propriety of plea bargaining and the voluntariness of guilty pleas under it. A victim is drowning and a bystander is in a position where he alone can save the victim's life. Let us say he can do this practically costlessly, simply by moving his arm. The bystander offers to save the victim's life if the victim will agree to do whatever the bystander subsequently asks of him. The victim agrees and is saved but challenges the agreement in court. Should the terms of the agreement be honored by the legal system? Note that under current law, the bystander has no legal duty to intervene on behalf of the victim. Note also that both parties are better off as a result of the agreement: the victim is still alive and the bystander has an unlimited right to the victim's services and property. Nonetheless, at least two separate arguments can be marshalled in support of the contention that the agreement should not be legally enforceable. Moreover, each directs us to similar concerns about the legitimacy of plea bargaining.

The first argument begins with the dire predicament of the victim. Persons who are precariously situated or otherwise hard-pressed by circumstance have a strong claim to special consideration by social institutions. We typically continue to pay people their salaries although they are too ill to work. We apply special traffic regulations to persons who are driving to funerals. We allow people to declare bankruptcy when they have made a mess of their financial affairs. We are beginning to consider that vital medical care may not be just another consumer good in the marketplace, that the desperately ill have a claim to social resources. In short, it may be reasonable to decide that those who find themselves in the fire deserve more than the offer of a frying pan. Although we may still insist that

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our social institutions are based on a theory of rugged individualism, we have always endeavored to provide reasonable accommodation for the specially vulnerable and dependent.

When one is arrested and taken into custody the presumption of liberty that prevails in our legal system is abruptly reversed. Ordinarily one is permitted to do anything provided that there is no sound reason for prohibiting it. Once under arrest, however, one is prohibited from doing anything unless there is a sound reason for permitting it. We say that the accused has lost his freedom. The threat of prolonged imprisonment is supposed to be something that reasonable people will fear. Like the drowning victim, the defendant facing a criminal charge is in jeopardy: vulnerable and dependent. Even if the desperate defendant believes that it is reasonable to trade away the procedural rights guaranteed by the Constitution in exchange for a shorter sentence, we might well decide that the defendant deserves more and that the agreement should not stand.

The second argument, instead of concentrating on the predicament of the victim, focuses rather on the terms of the agreement. What is it, exactly, that the bystander is demanding of the victim? Is it something the victim is entitled to give up? Or is it something to which he has an *inalienable* right? The law does not honor agreements in which one party consents to become the slave of another, even when it is clear that the former consented and both prefer the agreement. We may reasonably choose a legal system in which a person cannot alienate his freedom.[4]

But are inalienable rights given up under plea bargaining? I believe so. A strong case can be made for a principle of parsimony in sentencing decisions (Morris, 1974:60 ff.). The state endangers its authority when it regularly punishes convicted criminals more severely than they deserve. Excessive punishment is cruelty and a state that is cruel in administering punishment is less worthy of respect. Aside from those unnecessary costs, the state may well be committing an injustice against the criminal. I can think of no reason why convicted criminals should be permitted to opt for punishment that is in excess of the lowest reasonable sentence. There is

[4] One could argue on this basis that defendants should not be permitted to plead guilty under any circumstances. Needless to say, this would eliminate plea bargaining. The West German criminal justice system apparently operates successfully without the guilty plea (Langbein, 1974).

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therefore some ground for supposing that the right to the lowest reasonable sentence should be inalienable, one that cannot be waived.

If I am correct in this, then even the reformed plea bargaining system advocated by Church and Brunk violates an inalienable right. Let us concede that bargained-for sentences are reasonable sentences. In order for the bargain to be attractive, the bargained-for sentence must be lower than the sentence that could be expected after conviction at trial. Accordingly, in deciding to go to trial, the defendant must thereby waive his right to the lowest reasonable sentence if convicted. Defendants under plea bargaining are thus being permitted, indeed encouraged, to give up a right that they should not be permitted to alienate. In any plea bargaining system I can imagine defendants *must* waive either their right to trial or their right to the lowest reasonable sentence if convicted. I would ask the defenders of plea bargaining to show why an accused should not be entitled to both: a fair trial *and* the lowest reasonable sentence upon conviction.[5]

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[5] In the clearest cases of coercion—for example, a threat by a gunman—I am required to choose which of two things I will give up. What makes the gunman's act wrong is that I am entitled to both—my money *and* my life. If to be treated in this way is to be coerced, and if the paragraph above is correct, then, contra Brunk, plea bargaining does involve coercion.

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