PHILOSOPHICAL IMPLICATIONS OF PLEA BARGAINING: SOME COMMENTS

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Many critics of plea bargaining assume that it is completely different from, and incompatible with, formal adjudication. Some defenders share that assumption but argue that the practice can be rendered fair and responsive to public needs if certain conditions are met. The papers by Thomas Church and Conrad Brunk do not explicitly adopt the assumption but are nevertheless consistent with it. The assumption deserves more analysis than it has received. In these comments, I propose several distinctions that may be useful in comparing plea bargaining and formal adjudication.

Jonathan Casper offered one such distinction, framed in terms of the certainty of guilt. Plea bargaining seems less offensive to notions of fairness when guilt is reasonably certain. This leads to a further distinction betweeen process and outcome. A critic of plea bargaining may object to a negotiated settlement even in clear cases, not because she feels that the process is illegitimate but because she fears that the sentence may be too lenient. Others, who emphasize parallels between plea bargaining and haggling over price, may condemn the process regardless of outcome. The criticism that plea bargaining does not adequately assess guilt may refer to outcome, or process, or both. It sometimes means that defendants who would have been acquitted at trial nevertheless plead quilty, a criticism of outcome. But it may imply that formal adjudication is a more dignified process than negotiation, more respectful of the defendant or more trustworthy.

A judgment about the propriety of plea bargaining may vary with the type of uncertainty that characterizes a case. First, guilt may be clear but sentence may be uncertain. Second, there may be uncertainty whether the defendant committed the criminal act. Did the eyewitness see clearly and remember well, for example, or is the defendant's alibi correct? Third, the nature and quality of the defendant's act may be unclear. Did she do the act with criminal intent or merely by mistake or through negligence? If she argues self-defense, did she reasonably believe she was threatened? Where the second type of uncertainty usually permits an either/or answer, the

third is often a matter of degree and judgment, not simple historical "fact." Settling a case that only involves sentencing uncertainty seems to be less troublesome, especially when the discount for a guilty plea is relatively small, than settling one that involves a lively dispute over historical fact. Settling disputes about historical fact may particularly offend critics concerned with outcome, since it may reach a result that is historically incorrect. It may be more difficult to say that the settlement of an issue involving judgment and degree was objectively wrong, but still it may violate notions of the proper process.

These distinctions highlight the fact that we understand very little about plea bargaining or, indeed, about negotiation. Pamela Utz (1978) and Melvin Eisenberg (1976) have suggested that negotiation is not simply the obverse of formal adjudication but may also display respect for norms, for facts, and for the integrity of the defendant. But more analytical and empirical work should be done to help clarify the circumstances and conditions under which plea bargaining can be an acceptable substitute for trial.

REFERENCES

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