DEBATING ON BARGAINING: COMMENTS FROM A SYNTHESIZER

SAMUEL KRISLOV

I want to compliment the participants on a rich and varied conference, one that was very thought provoking. I feel I have been initiated into a secret society: the ancient and honorable circle of plea bargaining experts. To a newcomer, some of the arguments were not as clear as they might have been; there were private signals and understandings I did not always catch. In short, my position is very much like that of George Kaufman who was called up by Moss Hart about 11 o'clock one night and asked, "What are you doing for dinner?" Kaufman replied, "I'm digesting it."

My first effort is to clear off some underbrush. It seems to me that there were several determined attempts to win arguments by definition. For example, there was a concerted effort to turn the discussion from plea bargaining to a much broader issue and then to insist that a remedy for plea bargaining would not cure what had suddenly been defined as the ill. McDonald is a prime example of trying to make an important and, in my view, probably correct point in a totally unacceptable way. He suggests "respecification of the problem" in order to define plea bargaining in a highly unusual fashion and then chides others for not seeing plea bargaining where he sees it. It is rather like the old *New Yorker* cartoon in which the mother says to her child, "but it is *broccoli*, dear," and the kid replies, "I say it is spinach, and I say to hell with it." There is something to be said after all, for Pamela Utz's point about a definition: even though we know it is arbitrary, it should not violate ordinary usage so totally that we can no longer perceive any connection with the earlier meaning. McDonald's definition expands plea bargaining to something that involves neither pleas nor bargaining; and though he may use his definition consistently it does create difficulties beyond those of communication. I suggest that the term "implicit" bargaining, particularly when used loosely, is one of those hedge words like "quasi" or "semi" that obliterate true distinctions—the academic equivalent of saving a village by totally destroying it. To equate giving something up with plea bargaining is to be overly inclusive. The bargaining ought to be manifest. The fact of life that

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paying a traffic ticket is cheaper than going downtown becomes improper plea bargaining in McDonald's unique formulation.

But I agree that his point, if not its form, is well taken. McDonald is arguing that what is bothersome about plea bargaining is the coercive element and that the two are inseparable. As I heard the discussion, however, coercion was not the only objection to plea bargaining and at least some of the participants remain convinced that they have driven a stake through the evil part of plea bargaining. At the Williamsburg Conference of the National Center for State Courts in May, 1978, the Attorney General, Griffin Bell, displayed what to me was a surprising sense of humor by telling of the Vermont farmer who was asked, "Do you believe in infant baptism?" "Believe in it," said the farmer, "why I have seen it with my very own eyes." Thus we are told by the social engineers themselves that Alaska and El Paso, Texas, have eliminated those aspects of plea bargaining that offend them, if they have not extirpated all that offends McDonald. On the other hand, as I have noted, there is another group of critics who argue that coercion is just one of the objectionable elements, and would remain dissatisfied if all coercion were eliminated. Such critics might accept diversion even if, as has been argued here, it is a "functional equivalent" of plea bargaining, because it lacks some element deemed objectionable in plea bargaining.

Heumann has shown that explicit charge bargaining can be abolished, although this may lead to an increase in sentence bargaining and other functional equivalents—an outcome he predicted in his earlier book (1978:158-62). Similarly Alschuler, at least at this conference, argued for improving things now, pressing down the bulge that occurs elsewhere, and simultaneously trying to come up with something that will eliminate the next bulge. Whether it is worth all that bulge pushing is not to be found in any absolute concept, but by weighing the empirical advantages and disadvantages of particular reforms. The solutions to these problems do not turn on either concepts or evidence alone but on a highly complex mixture of both, which includes careful definition of values and careful measurement.

On the other hand, I am not quite sure why the Germanophiles insist on their own purity and the sanctity of terms. It is difficult to understand what is objectionable in Felstiner's assigned title "European Analogues to Plea Bargaining." (I accept his disclaimer that he never used the term himself.) Those who protested violently against the notion that the penal

order is an "analogue" to plea bargaining do not seem to understand that an analogue is not an isomorphism. To say, "what the *Strafbefehl* and plea bargaining have in common is precisely nothing" is clearly incorrect. At a minimum they are both legal devices, and indeed legal devices for accepting pleas in criminal cases, and in fact there is more. I suspect that legal comparatists are subject to the same adoptive ethnocentrism that befalls anthropologists discussing their different tribes and being carried away with a "we fry ours in butter" argument. There is a need not only to extol the system with which one is familiar but to claim that it is totally unique. This is not to deny that German criminal procedure is significantly different from American—that it lacks the haggling over price which, we will see later, is one of the chief objections to plea bargaining.

Let me complete this preliminary discussion by noting that arguments from definitions seem to me nonscientific in that they overlook trade-offs. Perhaps because we are mostly social scientists we are constantly thinking in terms of trade-offs. The decriptions of the Alaska experiment by Gross (1978), and Rubinstein and White, constituted a particularly valuable and informative part of the conference because both were aware of costs and willing to state them.

Having cleared the underbrush, let me state what I perceived as the six families of objections to plea bargaining and comment about each.

At the simplest level the objection is to the notion of cow buying or haggling over the price. To some it is objectionable because it is unseemly in itself. Others feel that it is unjust because it produces differential results. And finally, there are those who argue that the accused should not participate in defining the punishment.

A second family of objections argues that because plea bargaining takes place *in camera* it undermines the appearance of justice. The privacy of the proceedings not only permits collusion but, even more, suggests to outsiders the possibility of collusion. This latter is an objection over and above the unseemliness of what actually occurs.

A third family of objections is to confounding the question of guilt and innocence with that of the level of punishment, resolving them together instead of through some two-stage process.

A fourth objection is to the coercive element in plea bargaining, that induces the accused either to plead guilty in return for a lighter sentence (as in the previous objection), or to

give up other rights in return for some advantage. This was a focus of discussion in the conference, with several arguing that this aspect can be structurally minimized if it is the objection.

A fifth family of objections relates to the question of who sets the punishment. It asserts that the principal problem is the appropriate authority. Should it be (1) the judge (this is the thrust of the Texas experiment); (2) the police, who investigate; (3) a neutral prosecutor; or (4) the lawyers and parties in what is, after all, a laissez-faire society. There was agreement that the present process evolved from one in which individuals pursued their own complaints (much as they now do in tort and other civil actions) and that the law deliberately tried to prohibit the settlement of criminal matters by payment, establishing the common law crime of compounding as one means of control. Far from being modern, plea bargaining can be viewed as a return to an old-fashioned system. Whether it is less objectionable for this reason, or more, depends on one's point of view.

The final argument against plea bargaining is that punishment is ad hoc rather than regular and predictable. Thus some believe that the practice can be saved by making it explicit and routine.

Some of these objections cut across one another but some are contradictory. For instance, there are those who would find a regular and predictable discount for pleading guilty to be coercive and highly objectionable, and courts have ruled that some aspects of specificity violate due process. Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York has told me that he not only reads a card to those he is about to sentence, listing all of his own rules and discounts (including the fact that he does take into account the guilty plea), but also encourages them to appeal so that he can find out whether it is legal for him to do so. I mention this to illustrate our confused state of affairs. In seeking to satisfy some of the critics we run the risk of offending others. Thus, the plea bargaining experiment in Miami, which encourages the accused, the victim, and the arresting officer to participate in the discussion, might seem objectionable to those who believe that the matter should be exclusively in the hands of the judge. Certainly the inclusion of other participants diminishes predictability, although the judge is in a position to indicate the range within which he will allow bargaining. On the other hand, this greater inclusiveness is precisely what others find attractive.

Some of these matters are more intractable and fundamental than others. Haggling is the easiest to eliminate, as several papers make clear. Judges can formally be given full authority, although students of organization know that police and prosecutors cannot be totally excluded from influence. Indeed, critics of the German system argue that judicial authority there masks, and simply rubber stamps, actions by nonjudicial structures. Divergent motives have inspired similar reforms in different places, which confounds the results. And other reforms may be implemented simultaneously—determinate sentencing, for instance—which will further complicate the evaluation of reforms in plea bargaining.

Other problems of definition inhered in these criticisms. Are we worried about the *outcome* of the process or the formal *process* itself? I do not see that this argument was advanced very much during the conference. Some urged that we clarify the values in the system. But I think it is clear from the discussions that the system does not serve a single value but some complicated balancing of different values.

Some interesting convergences seemed to have occurred during the conference. I tend to agree with Lawrence Friedman's observation that it is not very important whether plea bargaining is so new that it was clearly established only in the second half of the nineteenth century or so old that it was thoroughly entrenched by the second half of the nineteenth century. In an America that treats twelve-year-old buildings as historical landmarks, a hundred-year-old custom has a respectable pedigree. Nevertheless, speculation about the origins of plea bargaining seems to me to be very fruitful. Friedman believes that the growth of professionalism is accompanied by an effort to concentrate control over punishment in the hands of experts.

Langbein suggests that the development of lawyer-prosecutors, the rise of the law of criminal evidence, the development of the extended voir dire and other changes in juror selection and qualifications, the rise of adversary procedure, and the development of the strong form of the privilege against self-incrimination all contributed to the increased complexity of the criminal trial. This, in turn, gave the defense real bargaininq power and ushered in an era of plea negotiations. Indeed, Langbein maintains that there was nothing to bargain about when trials were short and simple. Nevertheless, I personally am convinced that pleas are negotiated in every system and that the guilty plea is rewarded not just because it saves time

but also because it lightens the judge's psychic burden and has both a legitimating function for the system and a cathartic effect upon the actors themselves. Let me combine all of the images of this conference by suggesting that what is "under the judicial robe" is an itch to have the criminal "roll over and expose his jugular." All of this suggests the need for further study of the historical emergence of our judicial system so that we can understand where problems arise and solutions can be found. The discussion of German and English analogues confirms that such historical research can be very illuminating.

The German example makes clear that we pay an enormous price for police localism. For though the German structure gives the police rather more power than adherents admit, it is nevertheless true that the courts have no difficulty in establishing their primacy where it counts. There could have been nothing in Germany like the Warren Court struggle with the police, which has resulted in conflict without reform.

Perhaps even more significant are the costs inflicted by the American failure to construct separate processes for routine and serious cases, which Friedman attributes to the rarity of the latter. Other explanations may be our preoccupation with procedure, our lack of trust in authority, and the degree of discretion accorded the prosecutor. The prosecutor on the frontier, for example, tended to be a flamboyant figure, a scourge of crime, seeking publicity en route to the governorship. He eschewed routine and invoked popular support for discretionary behavior that may have had little basis in law.

The lack of separation between routine and unusual criminal cases creates special problems. Advocates of due process have argued for ever greater judicialization of routine cases. In doing so they have upped the price for those cases and thereby fostered plea bargaining, although many are critics of the practice. If, as Malcolm Feeley's title propounds, "The Process is the Punishment" (1979), well-meaning reformers may have intensified both.

Substantial issues remain, most nonempirical but some susceptible to empirical study. First we still do not know who benefits or loses from plea bargaining and to what degree. It may be that plea bargaining is such a congeries of diverse systems that a given type of defendant is sometimes benefited and sometimes harmed. Because the system encourages the prosecutor to multiply charges so that he can drop some of them, he is bartering threats he never intended to carry out; this obscures the "real" charge and complicates empirical study.

Second, is there in fact a discount for pleading guilty? Conversely, is there a penalty for mounting a vigorous defense? Is either supportable? James Eisenstein asserted that when there was substantial question in a case, a judge was unlikely to penalize a defendant for going to trial. It was only in the "frivolous case" where the defendant's effrontery in asserting his innocence indicated something about his attitude, that he would be punished. Is this a self-delusion among judges or a correct description, and if the latter, is it universal or does it vary from judge to judge?

Kenneth Kipnis maintained that any variation in disposition between defendants who plead guilty and those who are found guilty after trial signifies that one category is not receiving the correct amount of punishment—either the former are underpunished or the latter are overpunished. But Jonathan Hyman responded that nobody believes punishment is that precise; the discount might be acceptable if it remained within the limits of punishments customarily applied to the particular type of crime. But the seriousness of the crime ought to outweigh the nature of the plea, and it is not clear from the evidence whether this is the case.

A third issue appeared only briefly in our discussion. To a large extent we continue to treat plea bargaining as a single system when we fully recognize it is many. Serious and nonserious cases is one important dichtomy, plea bargaining and sentence bargaining is another. Jack Katz implied that the prosecutor of white-collar crimes is so engrossed in preparing the case, which requires him to prejudge complex evidence before it is all in, that he is probably not the proper person to make settlements. Nevertheless, white-collar prosecutions are settled even more frequently than others.

It was asserted, though not shown, that prosecutors find it easier to adhere to the German standard—that a case must be tried if it has any substance—than to the American criterion that a case should be prosecuted only if there is sufficient probability of winning. It would be desirable to test this plausible hypothesis further.

A number of important issues were not discussed. One was the notion that plea bargaining is caused by court caseload. The participants in this conference—on the basis of evidence that several of them have developed—appear to accept the conclusion that caseload by itself does not lead to plea bargaining. It may be the threat of caseload that is critical, or

caseload may simply be a post hoc rationalization for the practice. We also failed to analyze adequately the fact that guilty pleas remain the prevalent way of dealing with cases even when plea bargaining is curtailed.

The Alaskan experience confirms this: elimination of plea bargaining reduced guilty pleas only marginally—from 94 percent to 92 percent of all cases. As Thomas Church pointed out, even today many a trial is a "slow plea" in which the defense spars for a bargain.

At the beginning of the conference Malcolm Feeley discussed what he called the Crock Theory—that plea bargaining is actually an effort to do substantial justice. Although the theory was never explicitly discussed, it surfaced again in two forms. Feeley himself revived the notion by suggesting that what really occurs in the process is "bargaining over the worth of the individual," which seems to me to be very close, if not identical, to the Crock Theory. Jonathan Casper challenged Feeley's notion, denying that he had ever seen bargaining that was sufficiently complex or sensitive, but other respondents have suggested that such discussions can be brief and brisk because they use elliptical codes that everybody understands: "he's back with his wife," "she's a first offender," "he's off the drugs." Michael Rubinstein suggested that the Alaskan experiment, by abolishing plea bargaining, had lost just that ability to mitigate the penalty for the relatively clean first offender. What we have here is an age old paradox: the problem of criminal law is to treat equals as equals, but exceptional categories are always emerging that were not provided for in the law. It is difficult to structure the requisite discretion without creating other exceptions we do not find equally worthy.

This leads to the last point, one adverted to by Kenneth Kipnis but explicit in the account of Judge Sam Callan. It is certainly interesting to learn that in Texas a sentence of 40 years actually means 10, a ratio of four to one that applies to all imprisonment. Kipnis regards it as improper for the experts to subvert official values by this sort of corrective mechanism. But what else is the rule that good time equals three times the sentence actually served? If Americans demand the imposition of extreme sentences so that they can read about them in newspapers, but then do not insist that they be executed in practice—on the contrary, compel mitigation by withholding the funds that would make it possible to carry out the sentence—then the experts not only can but must do something to subvert the system. If we mandate jail for everyone but have

no places for them, the experts must develop a queue or an alternative disposition or somehow shorten the prison term. That raises basic issues because decisionmakers are not getting adequate guidance from these contradictory public signals. A federal judge, looking at the study of sentencing in the Second Circuit (Federal Judicial Center, 1978), said he did not understand why it talked about discrepancies in sentencing when a two-year sentence and an eight-year sentence (which represented almost the full range in the study) amounted to the same thing in the federal system because in both instances the individual would be paroled after about one year. Thus the question was whether the judge wanted to grandstand for the public by imposing a long sentence so as to look severe or was perfectly willing to be honest about it and only sentence the accused to the two-year minimum that would, in practice, produce the normal one-year sentence, given good time and the possibilities of parole. The determining factor is the need of the system to make room for new offenders.

Thus, we do not have an ideal of public control subverted by expert discretion but an unworkable system mandated by the legislature, which the expert must somehow make to work because in fact the legislature has no other concrete expectations. We have many analogous situations—for instance, the tension between freedom of information acts and privacy requirements, both imposed by the legislature upon administrators who must then reconcile them. If our criminal system is in fact made workable only by the exercise of expert discretion where should experts get guidance? And to what extent should they be explicit about what they are doing? In a sense the argument about plea bargaining is an argument about that—a product of the basic fact that public opinion exercises little real control in the criminal justice area. Thus other countries may have more coherent and rational systems not because their experts are in control but because they have evolved a more consistent attitude toward punishment as well as a more realistic and explicit distribution of authority between the public, the judiciary, and the other actors in the criminal justice system.

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