THE QUESTION OF VOLUNTARINESS IN THE PLEA BARGAINING CONTROVERSY: A PHILOSOPHICAL CLARIFICATION

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The practice of plea bargaining has been a subject of controversy in much recent literature. At least one legal philosopher, Kenneth Kipnis, has argued that this practice ought to be abolished on the ground that negotiated pleas are entered involuntarily. Wertheimer and Brunk have challenged Kipnis' claim that negotiated pleas are involuntary. I argue that each party to this controversy has failed to distinguish between two important questions: (1) are negotiated pleas involuntary in a sense that renders them legally invalid; and (2) are negotiated pleas involuntary in a sense that warrants the abolition of that practice as a matter of social policy? I believe that their failure to distinguish between these questions is partly responsible for the fact that their analyses of voluntariness are inappropriate to either of them. In showing how the analyses of these thinkers go wrong, I provide at least a partial account of the meaning of "involuntary" appropriate to the questions they conflate. Finally, I argue that the uses of "involuntary" in these questions, though established by practice, are nonetheless misleading, and I suggest alternative formulations of these questions that clarify the issues they present.

I. INTRODUCTION

In "Criminal Justice and the Negotiated Plea," Kenneth Kipnis argues that negotiated pleas are entered involuntarily and ought therefore to be recognized as having no legal standing (1976: 93-106). He concludes that the institution of plea bargaining ought to be abolished. Alan Wertheimer has recently published two papers defending plea bargaining against these charges (1979a: 269-279; 1979b: 203-234), and Conrad Brunk has recently published another (1979: 527-553). Kipnis, moreover, has published a response to Brunk (1979: 555-564).

Although they do not distinguish clearly between them, the participants in this controversy in fact address two questions: (1) are negotiated pleas involuntary in a sense that renders them legally invalid; and (2) are negotiated pleas involuntary in a sense that justifies abolishing the practice of plea

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bargaining as a matter of social policy? The first is a question of what the law is, and should be decided by reference to legal rules and principles. The second is a question of social and political philosophy, and should be decided by reference to the principles of social and political theory. Kipnis, Brunk, and Wertheimer each offer only one account of voluntariness; and—partly because they are insensitive to the differences between the questions—none offers an account appropriate to answering either of them. Accordingly, each fails to characterize important issues raised by the questions. My critique of their positions is intended to clarify these issues—i.e., to explicate questions (1) and (2) in a manner that will help us to address them adequately.

Kipnis' Argument

I shall begin with the account offered by Kipnis. According to Kipnis, the paradigmatic case of involuntary action is that of the victim of a highway robber who hands over his wallet in response to the demand, "Your money or your life!" A choice situation is imposed on the victim such that he must choose between a lesser more certain penalty (the loss of money) and a greater less certain penalty (the loss of life). Kipnis argues that this is the same type of choice situation imposed by a prosecutor on a defendant in a plea bargaining situation. Since these cases are identical in this relevant respect, Kipnis concludes that defendants act involuntarily when they accept negotiated pleas. He concludes that negotiated pleas ought to be recognized by the courts to have no legal standing, and that the practice of plea bargaining ought to be abolished. Brunk and Wertheimer agree with Kipnis that the victim of the armed robber acts involuntarily, but hold that the prosecutor, gunman, and their respective "victims" are not fully analogous to each other.

The gunman paradigm is of course familiar to philosophers and may be appropriate as a paradigm of voluntary action in *some* contexts. It is not, however, appropriate in every context—not even in every important context in moral, legal, and political philosophy.[1] Moreover, it is a mistake to employ the paradigm to answer the questions Kipnis needs to address.

[1] For example, the gunman paradigm is not appropriate in determining whether actions are involuntary in a sense that excuses the agent of responsibility (i.e., in a sense that renders praise and blame inappropriate). Suppose that the money that the gunman demands of me has been entrusted to me to buy medicine to save the people of my town from the ravages of plague. Suppose, moreover, that I volunteer for this job and that I am selected over other volunteers because of my known determination, physical strength, and cunning. Finally, suppose that my estimation of the gunman is such that I

To say that an agreement is made involuntarily in the legal sense is to say that it has no legal standing. If I agree to hand over my money to Kipnis' gunman, my action is involuntary in this way—that is, I continue to have a legal right to the money I hand over. Kipnis claims that since the conditions of choice imposed by the prosecutor in negotiated pleas are like the conditions imposed by the gunman in an armed robbery, the defendant who "hands over" his right to a trial under these conditions also acts involuntarily in this way—and that just as the victim of the armed robber has a right to recover his money in court, so does the victim of the prosecutor have a right to recover his right to a trial. As this suggests, the real question here is: under what imposed conditions of choice are transfers or surrender of rights not legally enforceable? Once this is clear, it should also be clear that there is an important difference between the choice conditions imposed by the gunman and the choice conditions imposed by the prosecutor. For what the gunman does is clearly illegal, while what the prosecutor does at least seems to be within the law (see also Wertheimer, 1979a). Our reason for saying that the victim of the gunman has a legal right to recover his money, then, may have nothing at all to do with the fact that the gunman takes his money from him illegally. For were there no laws against the sort of thing the gunman does it is doubtful that the victim could be said to have a legal right to recover.

Kipnis, of course, maintains that it is not the illegality of the gunman's threat that renders the victim's action legally involuntary. It is rather that the gunman imposes a situation of choice on the victim such that the victim must choose between a lesser more certain penalty and a greater less certain penalty. But it is clear that the law does not invalidate agreements simply on the ground that they are made under these conditions. Suppose, for example, that A's business is on the verge of collapse and that B offers to buy it from A at 50

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believe I have one chance in four to disarm him. It seems to me that I am obligated to give it a go. Or, if this seems too strong, it is clear that I have a *choice* in the matter and that I should be praised for making the noble one. On the other hand, suppose that I am reasonably well off and that the money I am carrying is relatively unimportant. Suppose, moreover, that I am a surgeon with a number of important operations scheduled and with a large family to support. And suppose that my estimation of the gunman is that I have three chances in four to disarm him. In this case I would not only be foolish to give it a go, I would be derelict in my obligations to my family and my patients for so doing. In each case the gunman imposes the choice situation that Kipnis describes. But in each case the victim *has a choice* and can be evaluated morally for the choice he makes.

percent of what its value would be if it were to survive its present crisis. Suppose also that this would represent a considerable loss to A (though only half the loss A might incur were his business to collapse entirely). In this case B has imposed a choice situation in which A must choose between a lesser more certain penalty (a certain 50 percent loss) or a greater less certain penalty (a less certain 100 percent loss). Were Kipnis correct, such agreements would be involuntary in a sense that would deprive them of legal standing. But it is obvious that a wide range of legally acceptable agreements are like this—e.g., labor agreements signed in response to threats of strike. Kipnis' version of the gunman paradigm is out of place in the legal context.

One might claim that the gunman paradigm is appropriate to the question of whether negotiated pleas are involuntary in a sense that warrants the abolition of that institution on either of two grounds. First, one might maintain that the state ought not to enforce agreements made in response to the choice conditions imposed by the gunman (as Kipnis understands them). Or second, one might maintain that the state has no business imposing such conditions on citizens. As the examples of the previous paragraph suggest, it would take some powerful argumentation to show that it is unjust or unwise for a society to enforce agreements in which one party has been forced by the other to choose between a more probable lesser penalty and a less probable greater penalty. Too many agreements that are *prima facie* unobjectionable would be ruled out by such a principle. Kipnis does not see this problem and does not attempt to respond to it. Moreover, it seems equally implausible to hold that the state itself has no right to impose such conditions of choice on its citizens. Were this the case, the state could not legitimately attach penalties to tax laws, and it could not compel citizens to testify in court. Again, Kipnis does not see the problem. I suspect that this is because he does not recognize that "involuntary" has different uses in different contexts. Since the gunman paradigm seems so appropriate to some contexts, he appears to assume that it is appropriate to every important context.

Brunk's Argument

Brunk acknowledges that there are many senses in which actions may be said to be voluntary, and that an important part of his task is to determine which of these senses are relevant to the question(s) of the voluntariness of plea bargaining. Brunk

concludes that the social sense of freedom, as opposed to the psychological or physical sense, is the sense that is relevant here:

> The question of social freedom is the question of the conditions under which the choice of an action by an individual (or group) is free from constraints imposed by other persons or social institutions . . . . This is the sense at issue in the question of whether a negotiated plea is "voluntarily" given (1979: 532).

The suggestion here is that if an action is not free from such constraints, it is involuntary in a sense that invalidates the legal consequences it might otherwise have; Brunk also appears to hold that if a law, practice, or institution imposes such constraints on us we have good reason for abolishing that law, practice, or institution.

Brunk identifies constraint with the imposition of a choice situation that requires an agent "to perform an action as a means to the achievement of a desired end [that is] less desirable than some other that will normally achieve the same end" (1979: 537). Borrowing heavily from Nozick's account of coercion, he offers the following five conditions as a more formal characterization of the sort of involuntariness that arises out of constraint. Thus, Q acts involuntarily if and only if:

(1) P has introduced or proposed to introduce (by either threat or offer) considerations into Q's situation that alter the desirability to Q of doing A (or not doing A);
(2) The choice Q faces as a result of P's intervention is less desirable to Q than the choice situation Q would face in normal circumstances;
(3) The choice situation Q faces is either
  (a) less desirable to Q than the choice Q would have faced if P had not intervened, or
  (b) such that Q cannot (physically or psychologically) refuse to do A;
(4) Q chooses to do A;
(5) Except for P's intervention Q would not have chosen to do A (1979: 541).

It is clear from Brunk's account that P may be a person, group, law, or institution.

The first thing to notice about this account is that it is meant to be applied to actions performed against a background of normalcy (condition 2). Since plea bargaining *is* normal practice in most jurisdictions, it would appear that we could not judge the voluntariness of negotiated pleas by these standards. Brunk recognizes this and attempts to solve the problem by taking "normal conditions" to be "the set of options the defendant would face in a no-bargaining prosecutorial system that meets constitutional and critical moral standards and possesses similar statutes, procedures, and protections at trial

and similar risks of conviction and punishment" (1979: 544). The question of the voluntariness of plea bargaining now becomes the question of whether the defendant's choice situation is better under the no-bargain system or under the bargain system. If it is better under the no-bargain system, then negotiated pleas are involuntary by Brunk's account. If it is better under the bargaining system, then they are voluntary. Brunk concludes his paper by arguing that given certain safeguards, the defendant's choice is better under the bargaining situation, and that his choice under such a system is thus a voluntary one.

Construed as an attempt to answer the question of whether bargained pleas are voluntary in a sense that makes them *legal* (constitutional), Brunk's proposal is a curious one. This question is about the concept of voluntariness upon which the legal standing of agreements is determined *in our legal system*. We cannot answer a question of this sort by speculating on how things might be in a legal system *other than our own*, but this is just what Brunk asks us to do. We are to determine whether an agreement is involuntary in a sense that deprives it of legal standing in *our* system by speculating about whether one party to the agreement would have had a better choice situation under *another* system—i.e., a system in which the sort of agreement in question were illegal. But this is clearly the wrong way to answer the question. If we are interested in the meaning of "voluntary" in our legal system, we must attend to our legal system.

Questions of method aside, Brunk's analysis of "voluntary" in the legal context is seriously flawed. With respect to many kinds of agreements, one representative party will always be better off in the relevant sense under a different sort of arrangement. Thus, in doctor-patient choice situations the patient is favored under various forms of socialized medicine, and the doctor is favored under the current U.S. system. Whichever system we choose, one representative party to the doctor-patient agreement will be said to enter that agreement involuntarily, by Brunk's account. Brunk apparently overlooks the fact that since many sorts of agreements are made between representative parties with conflicting interests, the choice situation of one representative party can always be improved by appropriate changes in the rules.[2]

[2] It could be argued that such a conflict of interests exists between prosecutors and defendants that they believe to be guilty, at least if we consider prosecutors in their role as representatives of the people. For as representatives of the people, their job is at very least to do their best to

Neither is Brunk's account of voluntariness appropriate to the question of whether negotiated pleas are involuntary in a sense that warrants the abolition of that institution. If it were, then either: (a) the law ought not to enforce agreements that satisfy the conditions Brunk describes; or (b) the state acts illegitimately in imposing such conditions on citizens. However, as the argument in the previous paragraph shows, (a) implies that the state ought not to enforce any agreements between representative parties with conflicting interests—a position no political philosopher (to my knowledge) would want to endorse. Moreover, (b)—the view that the state may legitimately pass no law and establish no institution limiting social freedom (as Brunk understands it)—would have many highly undesirable consequences. For example, it would eliminate laws against rape (let "O" be a rapist; let "Not doing A" be "refraining from rape"). Indeed, it would eliminate any laws which attach penalties to actions. Some anarchists might accept this consequence, but this position surely requires some strong argumentation.

In general, anyone who would argue that negotiated pleas are involuntary in a sense that warrants the abolition of the institution must do more than present an account of voluntariness in which negotiated pleas are involuntary; he/she must also *defend* the claim that *this* sense of involuntariness warrants abolition of the institution. Neither Brunk nor Kipnis sees this.

Brunk also confuses matters somewhat by proposing a *general* theory of voluntariness in this connection—a theory of the conditions under which laws, practices, institutions, groups, and individuals constrain and act under constraint. The question of whether negotiated pleas are entered involuntarily in a sense that justifies legislation against plea bargaining is really a question about the sorts of *agreements* that ought to have legal status in a society. Or, more precisely, it is a

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convict defendants they believe to be guilty of the crimes they believe them to have committed (evidence permitting) and to see to it that these law breakers receive sentences that are legally appropriate to their crimes. The institution of plea bargaining, however, gives rise to a set of circumstances in which it would be difficult if not impossible for a prosecutor to do this, even if he wanted to do it. For where negotiated pleas are the practice, the legal system is not set up to accommodate trials in every case in which a prosecutor believes he has a good case against a defendant he believes to be guilty. And any prosecutor who attempted to bring every such case to trial would not long hold his job. By Brunk's account, then, the institution of plea bargaining places constraints on the prosecutor (the people). Accordingly, the prosecutor's acceptance of a negotiated plea is involuntary on this account and we have reason to abolish the practice of plea bargaining for *this* reason.

question about the conditions of agreement under which agreements ought to be given legal status. This is more specific than the question Brunk's account permits him to address, and appropriately so. For we cannot assume in advance that there is one sense of voluntariness or constraint on the basis of which we can make abolitionist arguments with respect to laws, institutions, practices, acts of individuals, and types of agreements. Indeed, most political philosophers hold that institutions (e.g., police) are permitted to constrain in some ways that private individuals are not; and that private individuals are allowed to constrain in certain ways and under certain conditions that are not permitted to officers of public (or private) institutions. For example, marriage partners of different religious convictions may make moves to induce one another to raise their children in a certain religious or non-religious tradition that would not be tolerated, in liberal theory, in a public official acting in a public capacity.

Wertheimer's Argument

Unlike Kipnis and Brunk, Wertheimer is sensitive to the fact that the sense of "voluntary" relevant to deciding the legality of plea bargaining is a special legal sense. Thus, in his reply to Kipnis, Wertheimer rightly observes that negotiated pleas are like contracts, and maintains that the criteria for voluntariness governing contracts ought to apply here as well (1979a: 271). In his more general and ambitious attempt to deal with this question, Wertheimer attempts to show that the Court's account of "voluntariness" in plea bargaining cases can be made consistent with the Court's apparently conflicting use of "voluntary" in certain Fifth Amendment cases were we to recognize that "voluntary" has a special legal meaning in the case of "right waivers" (1979b: 214). Accordingly Wertheimer distinguishes between the meaning of "voluntary" in right waiving contexts (perhaps in the context of contracts in general) and the meaning of "voluntary" in other legal contexts. On the basis of this single distinction he declares that he has provided an adequate account of "voluntary" for all significant contexts—not just the legal context, but every significant moral and political context as well.[3] Indeed, he

[3] Thus he claims that he has "unpacked the Court's theory of freedom" (1979b: 205); that he has provided an alternative to philosophical theories according to which "voluntary is an objective interaction relationship" (1979b: 211); that he has offered accounts of "free" and "voluntary" that capture the use of those notions in ordinary discourse (1979b: 214); that he has "provid[ed] a philosophical defense" of these accounts "which can indicate just why such a

believes that he has solved or made an important contribution to the problem of the will. Unfortunately, this admirable quest for generality leads him to make important errors with respect to each of the contexts he discusses (Philips, 1981). My present concern, however, is with his account of the legal context.

As suggested, Wertheimer takes his cue from contract law. Noting that a contract is involuntary when it is made under duress, Wertheimer takes the question of the legal voluntariness of negotiated pleas to come down to the question of whether such pleas are made in response to duress. Quoting from *Restatement of Contracts*, Wertheimer offers the following definition of "duress":

> (a) any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or
> (b) any wrongful threat of one person by words or conduct that induces another to enter into a transaction and under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement (1979b: 215).

Wertheimer simplifies these conditions as follows:

> . . . Y gets X to do Z under duress if and only if: (1) X is (in some way) actually compelled to do Z; (2) it is wrong for Y to compel X to do Z (1979b: 215).

According to Wertheimer, agreements (right waivers) are voluntary if and only if they are not made under duress. Conditions (1) and (2), therefore, are each necessary conditions of involuntary agreements, and jointly, they are sufficient conditions. Wertheimer calls this "the two-pronged test"[4] (1979b: 215) and maintains that this is the test used by the Court in determining the voluntariness of negotiated pleas in *Brady* v. *United States* and *North Carolina* v. *Alford* (1970).

On this account it is clear that the imposition of the choice situation that Kipnis describes does not by itself render negotiated pleas involuntary. Even if a case can be made for the claim that the prosecutor compels the defendant to accept a bargained plea in every such case, this by itself does not constitute duress. To establish duress Kipnis must go on to establish that the prosecutor acts wrongfully in so compelling

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view is necessary" (1979b: 215); and that he has connected his own account with the concept of will in a manner that elucidates what philosophers mistakenly have taken to be "the 'real' issue of voluntariness," i.e., the problem of the will (1979b: 218).

[4] Wertheimer claims that this test applies only in the case of right waivers. In other cases, the fact that P's action is compelled by a threat is sufficient to render it involuntary. Wertheimer believes that once he has distinguished the sense of voluntariness in the right waiver context from the sense of voluntariness that applies in all other contexts, he has provided an account of voluntariness (and freedom) relevant to *every* context of philosophical concern.

the defendant. But while Wertheimer takes himself to have established that Kipnis has not made *his* case, Wertheimer concludes that the voluntariness of negotiated pleas is an open question. For we cannot decide whether prosecutors act wrongfully in compelling defendants to accept negotiated pleas until we have at our disposal "a more complete theory of the morality of proposals" (1979b: 234). And he does not believe that we have such a theory at this time.

Threats may be morally wrongful for a variety of reasons. For example, A may threaten B simply to enjoy dominating B. Or A may impose a choice situation on B that is in some way morally objectionable. In this latter case the immorality of A's threat is not merely a matter of A's goals or intentions but is also a matter of the situation A's threat creates for B. It is this latter sort of immorality, I presume, that concerns Wertheimer.[5] But it is clear that not every agreement made in response to a threat of this kind is legally invalid. Suppose, for example, that gallery owner B owns something of great sentimental value to artist A, e.g., journals and photographs of A's dead grandparents. And suppose that B threatens to destroy or deface these objects unless A agrees to exhibit his paintings exclusively in B's art gallery for five years—a gallery that A considers commercial and tasteless. This threat is—by most standards—immoral. Suppose further that after one year A can stand it no longer and decides to exhibit at a competing gallery. B, scoundrel that he is, takes A to court. Now in Wertheimer's view any judge who shares the judgment that B's threat to A is immoral must hold that A acted involuntarily in agreeing to exhibit at B's gallery, and that the agreement is therefore unenforceable. But is it so clear that a judge who so ruled would be making the proper legal choice?

Wertheimer's corresponding claim that—other things being equal—agreements made in response to morally appropriate threats are voluntary and therefore enforceable is also highly dubious. Consider the following case. C.T. Hatfield one day discovers that he holds deed to a small piece of land smack in the middle of the McCoy family graveyard. Not one to forgive and forget, Hatfield demands that the McCoys remove the headstones and bones of their ancestors from his property. The McCoy patriarch answers with an ultimatum that Hatfield

[5] Wertheimer does not in fact qualify his position in this way. But it is clear that he needs to do so in order to avoid certain obvious counter-examples, viz., cases in which the threatened party is in fact incapable of making a rational decision—for example, cases in which he is hysterical or completely disoriented.

sign over the property to him immediately or face war. Hatfield refuses and war there is. After eight or ten deaths in the family, members of the Hatfield clan tire of the feud and plead with the elder Hatfield to sign the deed over to McCoy. On the ground that there is nothing like a good feud to spice up mountain life, Hatfield refuses. Dissatisfied with this response, the malcontents draw weapons and demand that Hatfield sign or die. Hatfield signs. Since his signature here is made in response to an illegal threat, it is made under duress and is therefore involuntary (in the legally relevant sense). But it is not at all clear that the threat in response to which Hatfield acted was immoral. It is the legal wrongfulness of the threat, not the moral wrongfulness, that constitutes legal duress here. Note that the malcontents might also have accomplished their purpose merely by threatening to withdraw their protection from Hatfield, leaving him open to attack from the McCoys that would spell certain death. In some views, at least, there is not a *great* deal of difference between the morality of this action and the morality of killing Hatfield outright. Had Hatfield signed in response to the second threat, however, there would be no question of legal duress, because this threat would have been perfectly legal. This is not to say that moral considerations are never relevant in determining whether a particular kind of threat invalidates an agreement. If Dworkin is right, moral consideration may enter judicial deliberations as principles (1977: 47-48).[6] In this case courts may be required to take moral considerations into account in determining the validity of contracts. Still, not every consideration appropriate to determining the morality of an action will be appropriate to determining its legality. At most, Dworkin's approach may be used to support the claim that threats may render agreements invalid if they are immoral in certain specific ways—i.e., if they violate those moral precepts for which the law "makes room." Immorality *per se* is not enough.

It is unclear what position Wertheimer adopts on the question, "Are negotiated pleas involuntary in a sense that warrants the abolition of plea bargaining?" Since he does not distinguish this question from the question of voluntariness

[6] Dworkin distinguishes legal principles from legal rules. In this view if a case falls under a legal rule the Court must either decide that case according to the rule or it must overturn the rule. Principles are not like this. Rather, they are considerations that ought to be taken into account by the court in reaching its decision. The court may acknowledge that a principle applies to a case and nonetheless refuse to let that principle determine its decision without overturning that principle.

that pertains to the legal standing of negotiated pleas, and since he focuses primarily on the legal context, it may be unfair to attribute any position to him here. On the other hand, he very clearly and explicitly claims that he has provided an account of voluntariness that is adequate to every moral, legal, and political context. In any case—whatever he takes himself to have done—it is instructive to construe his account as an attempt to answer the extra-legal question, for it leads us once again to see the connection between this question and other deeper issues in political philosophy.

Construed as an answer to the extra-legal question, then, Wertheimer's position amounts to the claim that no agreements made in response to immoral threats ought to have legal standing. This is not the place to discuss the merits of this view. What is important to point out, however, is that it is not *obviously* correct, and that its truth or falsity depends on the answers to deeper questions of political philosophy. Some political philosophers would hold that law and morality ought not be so intimately and thoroughly connected—i.e., that so long as A acts within the framework of certain minimal moral constraints, he ought to be permitted to induce B to enter into an agreement by any means he chooses; and that, other things equal, these agreements ought to be legally enforceable. The morality of inducements may concern us as moral agents who make moral judgments (i.e., we may have a right to condemn the character of persons who force others to enter into agreements by immoral threats), but this is and ought to be a private matter (i.e., the state has no business imposing these moral judgments on citizens in general). On the other hand, it is the business of the state to *enforce contracts* (so long as they meet certain minimal conditions). Now, *if* this general line of reasoning is correct, Wertheimer's account is fundamentally flawed.[7] The adequacy of Wertheimer's account, therefore, is contingent on the truth of a certain theory of the role and purpose of the state. And insofar as this is true, it is contingent on the truth of related views about the nature and scope of

[7] It is likely that were the issue put to him directly, Wertheimer himself would endorse this line of reasoning. He holds that the purpose of the voluntariness clause in contract law is (and presumably should be) to protect the rights of contracting parties, and, for reasons too complex to explain here, I think he probably takes the most important of these rights to be the right to enter into contracts freely (1979b: 216). I take this to mean that he would be opposed to impositions by the state that would infringe on this right, e.g., in the name of morality. Accordingly I do not think that he recognizes the implications of his position with respect to the question of abolition.

legitimate authority and the rights of citizens. Wertheimer does not seem to recognize that the issue is so deep.

On the other hand, Wertheimer's position might be amended in a manner that makes it more plausible. Instead of making a claim about agreements in general, he could limit his claim to agreements made by citizens in response to agents of the state. Thus he might hold that any agreements made by citizens in response to immoral threats on the part of such agents ought to be considered involuntary in a sense that deprives them of legal standing, and that any practices which by design involve agents of the state in making such threats ought to be abolished. This position, or something like it, may well be defensible. Precisely what it rules out, of course, will depend on how we evaluate the morality of threats.

II. AN ALTERNATE VIEW

To discover whether negotiated pleas are involuntary in a sense that renders them unconstitutional, we must consider the sorts of issues that the Court considers in making its determinations. The first and most obvious consideration that confronts us when we do this is that the Court, in a recent series of cases, has ruled that negotiated pleas are not involuntary. We may take issue with the Court's reasoning in this matter and argue on the basis of case law that negotiated pleas are involuntary in the requisite sense, despite what the Court has recently ruled. Or we may argue that the Court's own account of voluntariness does not adequately serve the purpose that the voluntariness requirement is supposed to serve in relation to agreements, e.g., that it does not adequately protect the legally guaranteed rights of contracting parties. This sort of account raises deeper issues, but it is still rooted in the present legal system. In either case we may say that the Court's own account is mistaken. If we take the Court's activity to be that of *interpreting* the law, we will conclude from this that the Court is wrong about what *is* voluntary in the legal context, i.e., that it has interpreted wrongly. If we take the Court's activity to be that of *making* the law, we will conclude from this that the Court has wrongly decided what ought to be considered voluntary from the standpoint of the Constitution. In either case we will be arguing from the standpoint of the legal system as it is currently constituted. We cannot decide the legal voluntariness of negotiated pleas simply by proposing *a priori* philosophical analyses of the

voluntary. Neither Kipnis nor Brunk appear to appreciate this adequately.

Such analyses also do not settle the question of whether negotiated pleas are involuntary in a sense that justifies the abolition of plea bargaining. To answer this question it is not enough to present an account of involuntariness. One must also defend the claim that if negotiated pleas are involuntary in the sense one describes, we have sufficient grounds for eliminating plea bargaining. One may do this by arguing: (a) that it is unwise or unjust for the state to enforce agreements that are involuntary in this sense; or (b) that it is unjust or unwise for the state to compel citizens to enter into agreements that are involuntary in this sense. In either case one must base one's stand on the principles of social or political philosophy.

I have distinguished between two important questions that arise in relation to plea bargaining: (1) are negotiated pleas involuntary in a sense that renders them legally invalid?; and (2) are negotiated pleas involuntary in a sense that warrants the abolition of the institution of plea bargaining? Though I have stressed the differences between them, I now want to discuss a way in which they are importantly similar, viz, that the use of "voluntary" in both is confusing, and confusing in the same way. In fact, that use is so confusing that it may be better to express the concerns voiced by these questions in some other way. I want to conclude by explaining why I take this to be so.

Although the term "voluntary" has different uses in different contexts, these uses are not unrelated. Roughly, in at least most contexts, the distinction between what is voluntary and what is involuntary is grounded in the choice situation of the agent. Here we may distinguish between two kinds of involuntariness. In the first, involuntariness$_1$, we speak of movements or processes as involuntary on the ground that they are *beyond* choice, i.e., on the ground that the agent literally could not choose to prevent them. The paradigms here are seizures, twitches, spasms, the digestive process, and so forth. Strictly speaking, these are not actions at all—i.e., they are not things that we do but things that happen to us. When we speak of acts as involuntary on the ground that they are performed under irresistible psychological compulsion, brainwashing, or "mind control," we are assimilating them to this model. In effect, we are saying that they are altogether outside the realm of choice. It is stretching only a little to extend this use to

actions performed by those incapable of understanding the meaning or implications of the alternatives that confront them. For these acts fall outside the realm of *rational* choice. In the second sense of "involuntariness," involuntariness$_2$, the agent has a choice—i.e., he understands his alternatives and it is within his power to choose one or another. Still, there is an important sense in which he is *forced* to choose the alternative he chooses—i.e., in which he chooses that alternative against his will. When the gunman confronts us with the alternatives "Your money or your life!" it is typically within our power to choose to risk our lives (and in some cases we may properly be criticized for not doing so.)[8] Still, at least in typical cases of armed robbery, when we hand over our money there is a sense in which we hand it over involuntarily. Roughly speaking, this is because the gunman imposes a situation of choice on us such that we must choose one unattractive alternative to avoid another still more unattractive alternative. It is by forcing us to choose an unattractive alternative that the gunman makes us act involuntarily$_2$ (i.e., against our will). Where one of the alternatives is decidedly more unattractive than the other we may even say we "had no choice" (though we do not mean by this that it was not within our power to choose). Although this is not a complete account of the ordinary use of "voluntary," it should suffice for my purposes.[9]

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[8] This principle is established by the example in note 2.

[9] There is a temptation to attempt to reduce involuntariness$_1$ to involuntariness$_2$. Indeed, the Supreme Court seems sometimes to surrender to this temptation. Thus in *Garrity* v. *New Jersey* (1967), the Court held that:

> The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice . . . is "likely to exert such pressure upon an individual as to disable him from making a free and rational choice" (*Garrity* v. *New Jersey* (1967: 497 [quoting *Miranda* v. *Arizona* (1966)]).

This is highly dubious psychology. A normal individual who is told that he must choose between the certain loss of his job or a possible stint in jail may bitterly resent having to make this choice, but is clearly capable of intelligently weighing the costs and benefits of either alternative—at least he is if given a bit of time to think it over. Surely we do not want to say that human beings are typically incapable of rational choice when faced with highly undesirable alternatives. As we have seen, this would rule out far too much. This is not to say that the Court was mistaken in overturning Garrity's conviction. There was a good reason to do so and the court offered it as well, viz.: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of price" (*Garrity* v. *New Jersey* [1967: 500]). That a threat attaches a penalty to the exercise of a constitutional right may be a sufficient reason for invalidating certain legal consequences of acts performed in compliance with that threat. In such cases we may say that such threats are legally invalidating forms of compulsion. I argue presently that to say an act is involuntary in the legal context is sometimes to say that it is performed in response to compulsion of this kind. I also maintain that the use of "involuntary" creates unnecessary confusion.

Now the cash value of saying that an agreement is entered into involuntarily in the legal context is that that agreement has no legal standing. And it is clear that we do (and should) deprive agreements of legal standing where it can be shown that they are involuntary$_1$. However, not all cases of legal involuntariness are of this sort. In at least many cases in which our courts are asked to invalidate agreements on the ground that they are entered involuntarily, it is clear that the agents have a choice. Moreover, it is clear that the typical defendant has a choice (in the relevant sense) when offered a chance to plead guilty to a lesser offense. The sense of "involuntary" appropriate to considering the legality of negotiated pleas, then, is not involuntariness$_1$, but neither is it involuntariness$_2$. Clearly, more is required to invalidate an agreement than the finding that it is involuntary in *this* sense. If the younger Hatfields tell the older Hatfield to sign over the disputed property to the McCoys or they will cease to protect him, the older Hatfield may claim that he is forced to sign or that he has signed against his will, but he cannot plausibly argue on these grounds that the document he has signed has no legal standing. An employer also cannot successfully argue that a labor contract has no legal standing on the ground that it was signed in response to a threat of strike. Legal involuntariness is not merely a matter of having imposed on one a choice situation in which one must choose one unattractive alternative in order to avoid another more unattractive alternative. The imposition of this choice situation must be of a certain sort—i.e., of the sort that legally invalidates agreements. Precisely what kinds of impositions these are is a complex legal question and one I have neither the space nor the expertise adequately to discuss here. One example may be threats that strongly discourage the exercise of constitutionally guaranteed rights. Another may be threats that impose grossly unfair conditions of choice (grossly unfair by legally acceptable standards).

In any case, it should be clear from this that the use of "voluntary" in this case may extend well beyond the question of whether an agent has a choice and/or whether he chooses against his will. Also at issue may be the legal propriety of the threat made to the agent to induce him to accept a certain alternative. Thus, assuming that an agreement is voluntary$_1$, voluntariness$_2$ is at best a necessary condition of legal voluntariness. Whether an action is involuntary in the legal sense will also depend on whether the agent was threatened in a legally improper manner—an issue wholly unconnected with

the question of whether the agent is forced to act against his will.

The corresponding point may be made in relation to the question of whether negotiated pleas are involuntary in a sense that warrants the abolition of that practice, because it is highly implausible to claim that agreements *ought* to have no legal standing merely on the ground that they are involuntary$_2$ (recall labor contracts signed in response to threats of strike). Yet it is possible to recognize this while at the same time acknowledging that a real and important issue is raised by question (2). Here too, I think, we must distinguish between legitimate and illegitimate compulsion. Illegitimate compulsion may include (though is not necessarily limited to) those exercises of compulsion that attach penalties to rights that citizens ought to have (according to the principles of some political philosophy). In this case, to say that negotiated pleas are entered involuntarily in a sense that warrants abolition of that practice is to say that the prosecutor's threat to a defendant constitutes an illegitimate exercise of compulsion, e.g., that it makes it impossible for a defendant to exercise some right that he ought to have. Once again, then, what one takes to be voluntary and involuntary may depend in part on what rights one believes citizens ought to have (from the standpoint of political philosophy). Once more, assuming that an agreement is voluntary$_1$, voluntariness$_2$ will be at best a necessary condition of voluntariness in this context. The question of voluntariness goes well beyond the question of whether an agent is forced to act as he does, i.e., whether he acts against his will.

If I am right about all of this, the uses of "voluntary" and "involuntary" in questions (1) and (2) invite confusion. The questions in which we are really interested are these. (1) Are negotiated pleas entered in response to legally invalidating exercises of compulsion? (2) Are negotiated pleas entered in response to exercises of compulsion that legally ought to invalidate contracts? If we understand "duress" to be a technical legal term meaning "legally invalidating compulsion" we might ask simply (1) are negotiated pleas made under duress; and (2) ought the law to be such that the conditions under which negotiated pleas are entered count as duress? An additional advantage of replacing "involuntariness" with "duress" here is that it will allow us to reserve the legal use of "involuntary" for involuntariness$_1$, and thereby avoid the confusion attendant upon our having two legal uses of that

term. A problem with this reformulation is that "X did A under duress" is sometimes understood to mean "X did A involuntarily" and where this is so, no advantage is gained by the alternative term. In any case, the uses of "voluntary" and "involuntary" create unnecessary confusion when we are attempting to evaluate the legality and the wisdom of the practice of plea bargaining, and they ought to be replaced by expressions that more clearly and precisely express the relevant issues.

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