THE PROBLEM OF VOLUNTARINESS AND COERCION IN THE NEGOTIATED PLEA

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This paper focuses on the narrow question whether prosecutorial or judicial negotiation of a reduced charge or sentence for a criminal defendant in exchange for a guilty plea renders the plea "involuntary." I begin by clarifying the conditions under which choices in general are considered voluntary or coerced. In Part II, I measure the practice of plea bargaining against this general theory of voluntary choice. I argue that a negotiated guilty plea is not intrinsically involuntary but that many of the conditions commonly a part of plea bargaining may render it so. The negotiated plea can be defended from the charge of coercion only if these conditions can be, and are, eliminated. I also show that overt "threats" of prosecutorial or judicial reprisal are not the only way of coercing a guilty plea. Under certain conditions, apparent "offers" of leniency can be coercive as well.

The past few years have witnessed an intensified debate over the propriety of the practice of plea bargaining. This debate has ranged over a broad spectrum of questions, such as whether the practice is consistent with due process and equal protection of law and with the theoretical assumptions of the adversarial process, whether it undermines the accuracy of trials, whether it reduces respect for the judicial process, and whether it places a burden on the right to trial or impinges upon the right against self-incrimination. In addition to these considerations of procedural fairness, some critics have argued that the practice is unfair to society because it produces sentences so lenient that they defeat the aims of the criminal justice system (Kipnis, 1976).

Although most of these are important and profound questions, which must be answered before the practice of plea bargaining can be given a clean bill of health, I will concern myself in this paper with only one of them: whether plea bargaining places a "burden" on the exercise of the right to a trial and the attendant procedural protections. To put the question more clearly, does plea bargaining, either empirically or essentially, place the defendant in such a position that his choice to plead guilty is coerced or induced and hence is not voluntary?

An early draft of this paper was read in the Colloquium Series of the University of Waterloo Department of Philosophy; the comments and criticism of those who participated have been helpful. Richard Abel has been instrumental in helping me clarify several crucial points in the paper. I am especially indebted to my former colleague at Oakland University, Thomas Church, Jr., whose research and philosophical reflections, shared with me in many hours of dialogue, have been invaluable in shaping and clarifying my own thinking on this issue.

In several recent challenges to the constitutionality of plea bargaining, the United States Supreme Court has focused on the importance of voluntariness as an essential condition of a legitimate negotiated plea of guilty (see *Machibroda* v. *U.S.*, 368 U.S. 487, 1962; *Boykin* v. *Alabama*, 395 U.S. 238, 1969; *North Carolina* v. *Alford*, 400 U.S. 25, 1970; *Brady* v. *U.S.*, 397 U.S. 742, 1970). In the last two cases the defendants had agreed to plead guilty rather than face the risk of possible death sentences, and both accepted long prison terms instead. The Supreme Court held that the guilty pleas entered in these cases were voluntary.

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor or his own counsel, must stand unless induced by threats (or promises to discontinue proper harassment), misrepresentation (including unfilled or unfillable promises), or perhaps by promises that are by their very nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). [*Brady* v. *U.S.*, 397 U.S. 742, 755, 1970]

In addition, the Federal Rules of Criminal Procedure were amended several years ago to eliminate the official prohibition of plea bargaining. Rule 11 stipulates that the court must assure that pleas of guilty are entered voluntarily by "addressing the defendant in open court, determining that the plea is voluntary and not the result of force or promises apart from a plea agreement."

The typical judicial attitude is that guilty pleas ought not to be induced by threats of severity, but that it is perfectly legitimate to reward such pleas by granting leniency. A 1956 study conducted by the editors of the *Yale Law Journal* found that among the 240 judges questioned, 66 percent considered the guilty plea a "relevant factor in sentencing procedure," and a majority rewarded the defendant pleading guilty with a less severe sentence (*Yale Law Journal*, 1956:204). Thus the developing doctrine assumes that the question of voluntariness depends upon whether the plea resulted from a "threat" or an "offer."

Critics of plea bargaining, however, have continued to voice earlier judicial and legislative sentiments condemning the practice on the ground that the standard of voluntariness cannot be met because the practice is intrinsically coercive. The criticisms advanced have taken two distinct but related courses. The first asserts that any difference in the sentences following guilty and not-guilty pleas constitutes an implied threat that operates to coerce the defendant to plead guilty. For example, Abraham Blumberg (1967:31) argued that since the jury trial is

an undesirable alternative, the threat of it places the defendant on the horns of a dilemma and is thus one of the most powerful prosecutorial tools to "reduce a defendant's resistance."

More recently, Kenneth Kipnis argued that the bargain situation facing the defendant differs little from that facing the victim of a gunman demanding his money:

> [T]he same considerations that will drive reasonable people to give in to the gunman compel one to accept the prosecutor's offer. . . . [O]ne can see that, like the gunman's acts, the acts of the prosecutor can "operate coercively upon the will of the plaintiff, judged subjectively," and both the gunman's victim and the defendant may "have no adequate remedy to avoid the coercion except to give in." In both cases reasonable persons might well conclude (after considering the gunman's lethal weapon or the gas chamber) "I can't take the chance." A spineless person would not need to deliberate. [1976:99]

Apparently Kipnis believes that this element of threat is intrinsic to plea bargaining insofar as the prosecutor, like the gunman, "require(s) persons to make hard choices between a very certain smaller imposition and an uncertain greater imposition." "As a defendant," he says, "I am *forced* to choose between a certain smaller punishment and a substantially greater punishment with a difficult-to-assess probability" (emphasis added) (1976:98-99). Indeed, given a choice between being an innocent defendant offered a bargain in exchange for a plea and facing a "fairminded gunman," Kipnis would prefer the latter! (1976:99).

Underlying this line of reasoning is the notion that, because the defendant faces the threat of criminal prosecution, any offer that allows him to avoid this threat coerces or "induces" his choice. This approach is shared by the authors of the American Law Institute's *Restatement of Contracts*: "A threat of criminal prosecution . . . may be of such compelling force that acts done under their influence are coerced, and the better foundation there is for the prosecution, the greater is the coercion" (1933:652).

Justice Brennan voiced a similar view in his dissenting opinion in the *Alford* case. Alford had been indicted for first-degree murder and was offered a reduction to second-degree in exchange for a guilty plea. Although there were witnesses prepared to give testimony strongly indicating his guilt, Alford nevertheless maintained:

> I pleaded guilty on second-degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault of the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all. . . . I'm not guilty, but I plead guilty. [*North Carolina* v. *Alford*, 400 U.S. 25, 28 n.2, 1970]

After his plea of guilty was accepted, the court sentenced Alford to 30 years imprisonment, the maximum penalty for second-degree murder. Justice Brennan wrote in dissent that "the facts set out in the majority opinion demonstrate that Alford was 'so gripped by fear of the death penalty' that his decision to plead guilty was not voluntary but was the product of duress as much so as choice reflecting physical constraint" (*North Carolina* v. *Alford*, 400 U.S. 25, 40, 1970).

The second criticism of the voluntariness of plea bargaining is broader. It claims that, whether or not threats or other forms of duress enter into the decision to "cop a plea," the very offer of consideration in exchange for a plea constitutes an "inducement" that places a burden on the right to trial by undermining the will of the defendant to exercise it.[1] This line of argument focuses on the "offer" side of the bargain rather than on any allegation of an implicit threat, but claims that these offers, if not coercive, at least render suspect the defendant's choice. Thus Ferguson and Roberts argue that whether a guilty plea is the result of threats, false promises, or misrepresentations, or merely of a proffered reduction in sentence or charge,

> it is likely that in either case the accused will still feel the same pressure to plead guilty. . . . In offering benefits or concessions to accused persons in order to secure guilty pleas, plea bargaining encourages both the guilty and the innocent to plead guilty. . . . [A]s the concession or inducement increases, so also does the risk of *causing* an innocent person to plead guilty. [1974:549-50]

The assumption is that the more attractive the offer, the more likely it is that the defendant's acceptance is involuntary.

It is important to note that both sides in the debate agree that threats of increased severity or other sanctions for pleading not guilty seriously undermine the voluntariness of the plea. What they disagree about is whether offers of leniency do so as well, and what constitutes a threat or an offer. The character of these disagreements is sometimes obscured by couching the debate in terms of whether or not the guilty plea is "induced." As we shall see, "inducement" is a highly ambiguous concept, especially as it is used in this debate.

It is evident that before the debate over the voluntariness of plea bargaining can be resolved crucial questions must be

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[1] For example, the *Harvard Law Review* argued a few years ago that "A plea induced by a bargain, though perhaps voluntary in that no blatant coercion has been employed and in that the defendant has full knowledge and understanding of his action, still subverts the defendant's ability and will to defend himself, for the state has structured his alternatives and encouraged him to plead guilty as the lesser of two evils" (1970:1396).

answered and concepts clarified. The concept of "free" or "voluntary" choice is a notoriously complicated philosophical question that has generated a vast literature, and requires careful analysis. In what follows I shall draw upon this literature to clarify the question whether plea bargaining constrains in some illicit way the choice to exercise the right to trial.

I. CLARIFICATION OF THE CONCEPTS OF VOLUNTARY AND COERCED CHOICE

A. The Various Senses of "Freedom"

The question "is this or that choice a free one?" is not, by itself, unambiguous. When we inquire about the freedom of a person's choice or action we must have in mind what he is free *from*, what he is free *to do*, and what *aspect* of the agent is free. That is to say, the concept of "freedom" is always a relationship of three variables: x (agent variable) is free from y (constraint variable) to do z (goal variable). The many different kinds of "freedom" that have been considered of value in various ages and traditions are really different combinations of the variables. For example, the kinds of constraints a Marxist theory of freedom identifies as important (e.g., poverty, joblessness, alienation, etc.) and the *goals* it emphasizes (e.g., self-fulfillment, social participation) differ significantly from the constraints and goals of "bourgeois" theory (e.g., freedom from state interference or physical harm from others, freedom to do what one wants).[2]

Thus the terms "free" and "voluntary" can be used in many different senses depending on the constraints and goals that are selected. When we ask whether a mentally deranged person is able to make "free choices" we are asking, presumably, whether he is free from certain physiological or psychological disabilities, to act or choose in rationally prescribed ways. This is wholly distinct from the question whether a bank teller looking down the barrel of a shotgun is able to make a "free choice" about handing over the money she has in her hands. She may well be free of any physical or mental disability. Yet her choice is still "unfree," if in a very different sense of "unfreedom" from that involved in the case of the mentally deranged person. Indeed, the gunman makes the threat "your money or your life" just because he is confident that the bank teller is capable of making rational choices. What the bank teller is not "free"

[2] This analysis of the structure of the concept of freedom is taken from an excellent article by Gerald McCallum, Jr. (1967).

from is a manipulation of her choice situation that makes the option of continuing to conduct her routine business far less desirable than it normally would be.

The constraints referred to in the first sense of "free" are psychological, whereas those relevant in the second sense are social. Christian Bay identifies these as two fundamental concepts of freedom (1958:83-94). 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 of freedom at issue in the question whether a negotiated plea of guilty is "voluntarily" given. Does plea bargaining structure or manipulate the choice faced by the defendant so that he is deterred from exercising his right to go to trial? A person's choice may be coerced in this sense, even though it is voluntary in the psychological sense. And a person's choice may be involuntary even though it is free in the social sense ("not coerced"), as would be the case if a person under the influence of a hallucinogenic drug decided to "fly" out a third-story window. Further, as we shall see later, some instances of coercion are successfully coercive just because they also involve psychological unfreedom, or "duress."[3]

B. The Idea of "Inducement"

Many critics of plea bargaining argue that the voluntariness of the plea is undermined by "inducements" or "offers" designed to encourage the defendant to enter a guilty plea

[3] Kenneth Kipnis argues in his rejoinder (*infra*:561-62) that I mistakenly focus upon the question of "coercion" in plea bargaining rather than "duress" or "compulsion." The term "coercion," he says, "does not appear to have played an important part in the debate of plea bargaining." Oddly, however, "coercion" is the term Kipnis himself employs in the criticism of plea bargaining from which I quoted (*supra*:529).

Kipnis's subsequent preference for the terms "duress" and "compulsion" seems to stem from the fact that they imply a wider class of unfree action than does "coercion." Hence he speaks of being "compelled" by a toothache to visit the dentist (*infra*:561). Thus it is clear that Kipnis is concerned with unfree choice in a sense that is broader than what I have called "social unfreedom." But surely Kipnis does not believe that the concept of "duress" in contract law is meant to cover cases other than social unfreedom. Should the "duress" of the patient compelled to see his dentist by his toothache void the implied agreement to pay the bill? This law would void such a contract only if the dentist had taken unfair advantage of the patient's duress. The concept of "duress" in contract law is concerned only with socially unfree acts—e.g., with instances where psychological unfreedom (duress) has coercively been turned to another's advantage (see *infra*:539 ff. and Dobbs, 1973:658 ff.).

(Ferguson and Roberts, 1974:543-50).[4] But it is not clear what they are asserting. Do all inducements presented to a person to influence his choice call into question the voluntariness of that choice? The person who offers to buy my house at an unreasonably high price is certainly influencing my choice, and in this sense is "inducing" me to sell the house. But certainly this "inducement" does not necessarily impinge upon my (social) freedom of choice. All else being equal,[5] my freedom to act is increased by the offer, not dimished; hence, I am not being coerced to sell the house.

This question points out an ambiguity in the term "inducement" which tends to confuse discussions about the voluntariness of plea bargaining. Certainly the defendant is being given an inducement to plead guilty when he is given a promise of leniency but the question is, what kind of an inducement? Is it more like the inducement given me to sell the house, or the inducement the gunman is giving the bank teller? Since the word is used to cover both cases, it does not seem very helpful in parsing out the issue of voluntariness.

This discussion suggests that there are different kinds, or perhaps different *levels*, of inducements, each of which involves different degrees of freedom. One can usefully distinguish among at least the following four levels:

1. *Pure-and-simple offers.* The subject is "free" to reject the offer ("take it or leave it").
2. *"Soft" coercion.* The subject is manipulated so that he is influenced to do what he would prefer not to do ("goading").
3. *"Hard" coercion.* This is like "soft" coercion, except that it involves inducements that are somehow irresistible or that cannot reasonably be rejected.
4. *Force.* The exertion of physical strength to overpower the will of another.

Certainly there are such things as pure-and-simple offers that expand the range of options open to a person rather than constrain his choice. The idea of "free exchange" relies upon

[4] In the *Restatement of Contracts* (American Law Institute, 1933:652) for example, plea bargaining is said to be a "wrongful means of inducing the accused to enter into a transaction. To overcome the will of another for the prosecutor's advantage is an abuse of the criminal law which was made for another purpose."

[5] As I explain later, we cannot know for certain whether an offer is coercive until we know the social context in which it is made (e.g., is the price offered a "fair" one by prevailing market standards, or by other standards of fairness?) and the financial and psychological condition of the offeree (e.g., is he in a position to refuse?).

the idea of the nonconstraining offer as the paradigm of free choice. The person who makes me a pure-and-simple offer for my house may or may not be influencing me to sell it to him. If he makes me a poor offer my choice situation is no worse than it was before. If he makes me an extremely attractive offer, I may be "induced" to sell the house. But the offeror has not necessarily placed any limitations on my freedom of choice because the offer does not restrict, but facilitates, the accomplishing of my principal desires and goals.

The second and third levels, unlike the first, involve impositions or constraints that constrict the range of options and deter a person from doing what, in some sense, he would prefer to do. They differ from the fourth level in that a person coerced still *chooses* his course of action, whereas a person who is the victim of force does not exercise any choice at all. Hence, though the use of force is the most direct and extreme form of social unfreedom, it is not, strictly speaking, a form of "inducement," since it does not *influence* choice but bypasses choice altogether.[6] Of course, one of the most common ways of influencing the choice of another is to *threaten* the use of force against him, but the *threat* of force is not the same kind of imposition as the actual *use* of it.

Since a pure-and-simple offer does not infringe upon the voluntariness of choice, and there is no suggestion that defendants are being "forced" to plead guilty, what is at issue is whether "soft" or "hard" coercion is being applied to the defendant so that his choice to plead guilty can be said to be "against his own will." I have distinguished between levels (2) and (3) because some writers have held that a person whose action is spurred by inducements that would sway only a very weak-willed person has not been "coerced" since he should have resisted the inducement (e.g., Frankfurt, 1973:77 ff.). Nevertheless, the spineless coward is induced to choose against his will in just the same way as a courageous person for whom a much stronger inducement is needed, although we may hold the former responsible for his choices. Indeed, it is just the weak-willed defendant who stands in greatest need of protection from pressures to plead guilty and forfeit his right to trial.[7]

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[6] In ordinary parlance the term "force" is not used this narrowly but also includes cases of what I am calling "hard coercion." My definition follows the distinction in modern international relations theory between "coercive diplomacy" and "force." See, e.g., Schelling (1966).

[7] Dobbs notes that "the earlier requirement that the coercion [to constitute duress in the law of contracts] must have been the kind that would coerce a reasonable man, or even a brave one, is now generally dispensed with, and it is enough if it in fact coerced a spineless plaintiff" (1973:658).

Hence, with respect to the plea bargaining issue, the requirement that the guilty plea be entered "voluntarily" implies the exclusion of conditions that are coercive in the "soft" as well as the "hard" sense of the term. The test of voluntariness is solely whether the pressures brought to bear upon the defendant are sufficient to lead him to plead guilty "against his will."

C. Choosing "Against One's Will"

I have suggested that a coercive inducement is one that leads a person to choose a course of action he does not "really" want to carry out but chooses because of constraints imposed by others. It is not fully his *own* choice. This is, however, a problematical rendering of the concept of coercion. It raises questions that have been the subject of philosophical debate for centuries, not the least crucial of which is how a person can *choose* to do something he does not wish to do. For it seems that if a person chooses to follow a certain course of action he must in some sense desire to engage in it.

In a helpful discussion of this issue, Gerald Dworkin has pointed out that a person can choose to act in a way he does not wish to act in the sense that he acts "for reasons which he minds acting from" (Dworkin, 1970:367).[8] That is to say, even if it is true that the explanation for every action is ultimately some desire or wish, it does not follow that the actor desires to be in *this* particular circumstance or to perform *this* particular action for the reasons dictated by the circumstances. Just because an end is desired by the actor, it does not follow that the means to achieve this end are also desired. Just because a person desires cavity-free teeth and the only way to achieve this is to have a dentist drill and fill them, it does not follow that she wants to have her teeth drilled by the dentist. By the same token, her desire for healthy teeth does not imply that she wants to give her purse and watch to the thug who is threatening to knock her teeth out if she doesn't do so!

Both of these are cases of desiring an end (healthy teeth) without necessarily desiring the means essential to accomplishing it. But the two examples are different in just the respects that are interesting from the point of view of the concept of coercion. Even though the drilling of one's teeth is something one does not desire in itself, nevertheless most people are willing to have it done for the sake of preventing even worse consequences. Given the present state of dental technology, the

[8] I am indebted to this insightful article for the direction of my own argument, though I depart from Dworkin at several crucial points.

drilling and filling procedures, with all their attendant discomforts, are the normal and expected means of dealing with tooth decay. So though a person would view these procedures as highly unpleasant and undesirable in themselves, she would not view them as intrusions by her dentist upon her freedom to enjoy dental health. Indeed, most people view the existence of disagreeable medical and dental therapies as enlargements of their personal freedom. There is a clear motivation for subjecting oneself to the rigors of dental therapy—maintenance of dental health—which is perceived as an appropriate reason for choosing the dentist's chair. Following Dworkin's construction, one does not "mind" letting a dentist drill one's teeth for this reason.

The case of the thug who jumps from an alley to present his victim with the option of handing over her purse and jewelry or losing her teeth is also one where an undesirable means (giving up the purse) is necessary to a desired end (dental integrity). The important difference is that in the case of the dentist there is an appropriate relation or congruence between the action (undergoing painful therapy) and the reason for it (dental integrity), whereas in the case of the thug there is a severe incongruence between end and means. In the normal scheme of things one does not expect to have to hand over one's purse and jewelry in order to preserve one's dental integrity. Our hapless victim "minds" performing this action for this particular reason. That is why she perceives the thug's "offer" to respect her teeth for a price as an imposition.[9]

The sense of inappropriateness or incongruence between an action and the reason for performing it arises from the fact that the action is less preferable than the means which in the "normal and expected" course of events would be required to produce the same end. This can be illustrated by a different example. If a mother tells her son that he cannot play baseball with his friends until he has cleaned up his room (which he would not do on his own initiative), his decision to clean it now is unquestionably carried out under constraint from his mother. Because cleaning one's room is not normally an essential condition for playing baseball with one's friends, and because it is less desirable to Sonny than the normal means to

[9] This is not just because the thug gives her "no other choice" whereas the dentist does. The differences would remain even if there were only one dentist available who could preserve her teeth, assuming that his fee does not exceed a reasonable range.

this end (e.g., cleaning the dirt from his spikes), it is an imposition on his freedom of choice, brought about by the manipulation of that choice by his mother.

Suppose she does not threaten to keep him home if he does not clean up the room but merely hides his baseball (the only one on the block) under the debris, making it necessary to clean the room in order to find the ball. Again, if Sonny discovers his mother's surreptitious intervention in his affairs, he will legitimately feel that he had been coerced into cleaning his room.

What if his mother had not forbidden him to play ball until he cleaned his room but rather had offered him ten dollars if he cleaned the room instead of playing ball? In this case, too, his mother would have intervened in the normal course of events to alter her son's choice situation. But the fact that the offer does not make his choice situation *less* preferable than the one he would face in the normal course of events or the choice he would have had without his mother's intervention indicates that no imposition upon his choice is involved here. If he prefers earning the ten dollars to playing baseball, then the new choice situation he faces as a result of his mother's intervention is preferable to the one he would otherwise have faced or the one he can expect in the normal scheme of things.[10] He remains just as "free" to play ball as before, or as he would be in the normal course of things. But whatever decision he makes, he would obviously prefer having the choice to not having it.

It should now be evident how it is that a person can choose to do something that he "really" does not want to do, thus choosing to act "against his own will," and the sense in which this can be the result of an imposition upon the person's choice by another. If a person is required by his circumstances to perform an action as a means to the achievement of a desired end, and this means is less desirable than some other that will normally achieve the same end, then he will probably perceive the contingencies of his situation that require the less desirable means as an imposition on his freedom of choice.[11] If these

[10] Again, this is assuming that the son's choice situation is "normal" in other respects. If his choice situation has been worsened previous to this particular intervention by his mother then, by the account of coercion I am developing, her "offer" could be a coercive one. See *infra*:541-42.

[11] The intuitive basis for this claim is spelled out by Robert Nozick (1969:440). He puts forward the following tentative principle of a sufficient condition of unfree choice:

> If the alternatives among which Q must choose are intentionally changed by P, and P made this change in order to get Q to do A, and before the change Q would not have chosen (and would have been unwilling to choose) to have the change made (and after it's made, Q

contingencies are the result of identifiable interventions by other persons, then these are impositions upon his choice by those others and, hence, upon his "social freedom."

Crucial to this account of "social unfreedom" is the reference to some normal choice situation the agent would have faced but for the intervention of the other person, or to which he has some claim in the normal system of expectations or from the point of view of some critical moral judgment. The actions or proposed actions of other persons infringe upon one's freedom of choice to the extent that they render one's choice situation less desirable than would be normal or expected. What this means, of course, is that the concept of coercion is relative to a set of norms or common practices; what is seen as coercive in one social or cultural context, or from one critical moral viewpoint, may be perceived in another as no imposition upon choice at all, and perhaps even as expanding social freedom. To identify an intervention as coercive is to judge that it breaks with some common practice and/or violates a norm of morality, custom, or law.[12]

It is commonly held that only threats can be coercive—that offers and other interventions or manipulations of the consequences of another's action cannot coerce his choice. In an otherwise very helpful article, Robert Nozick defines coercion in terms of threats alone. Only threats, he argues, can make the consequences of another's actions worse, or less desirable, for him than the "normal or expected course of events" (Nozick, 1969:440ff.). This assumption is shared by many defenders of plea bargaining, for whom the issue seems simply to be whether the court or prosecutor is offering a more lenient charge or sentence, or threatening a more severe one. As long as only offers are made, it follows from this view that the voluntariness of the plea is not jeopardized.

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would prefer that it hadn't been made), and before the change was made Q wouldn't have chosen to do A, and after the change is made Q does A, then Q's choice to do A is not fully his own.

[12] As Nozick has argued, the "normal or expected course of events" against which a choice situation is measured includes the "morally" normal or expected course of events (1969:450). Hence an objection that this account of coercion is relative to the existing system of expectations in a society and, thus, assumes an ethic of the status quo, is misplaced. For one's moral judgment that a choice situation is worse than it *should be* can be a judgment that runs counter to prevailing moral standards. This is why persons with different moral viewpoints will differ about the coercive nature of a particular choice. For example, if one accepts the socialist critique that a market economy places the poor in morally unacceptable conditions, then one will characterize as coercive the "offers" made to them by certain sectors of the economy (e.g., the health care system). The free market protagonist, on the other hand, may not be able to see these "offers" as coercive, in part because he sees no *moral* problem in the condition of the poor to begin with.

The account I have given on the way in which choices can be made as a result of impositions by others illustrates that the problem of coercion and social freedom is more complex than is suggested by a simple distinction between threats and offers. There are many ways in which one person can manipulate the conditions of another's choice so that his social freedom is infringed upon, without threatening to worsen his condition if he fails to comply with certain demands. Before an adequate assessment of the voluntariness of plea bargaining can be made, the full complexity of the coercive choice situations that might be involved in the practice must be understood.

Our example of the mother who hides her son's baseball under the clutter of his room is a good example of a coercive imposition (of the "soft" variety, to be sure) that involves no threat but merely a manipulation of the son's choice situation, requiring him to do what he does not want. His mother's intervention into the normal course of events does not *force* him to clean his room (he can choose not to play ball and hence not have to clean his room) but it certainly places a restriction on his freedom to play ball.

In the same way offers made under certain conditions can operate coercively on the choice of the offeree. An offer to a person so circumstanced that he cannot refuse it (whether or not the circumstances are imposed by the offeror) can create a choice situation less desirable than the one he can claim in the normal or expected course of events. For example, suppose the only pharmacist in an isolated town offers to sell the only available insulin to a wealthy diabetic who lurches into the store with only hours to live if he does not receive the drug, on condition that the latter agree to will his entire estate to the pharmacist. Is the diabetic being coerced by the pharmacist to pay this price? In a similar example involving a drug addict and a pusher, Robert Nozick argues that if the pusher is not the addict's usual supplier, then his demand that the latter pay for his drugs by beating up a third person is not coercive. He is merely making the addict an offer he cannot refuse (1969:447-48).

But this view violates both our ordinary intuitions and the account of coercion I am advancing. For clearly both the pharmacist and the drug pusher are taking *unfair advantage* of the circumstances of their customers to get them to choose against their wills and perform actions the sellers desire. The choice of each customer is subjected to impositions by another just as it

would if the seller threatened to shoot him unless he performed the desired action. In each case the offer made by the seller creates a choice situation for his customer that though preferable to the choice situation the latter faced prior to the seller's intervention, is *less* preferable than the choice situation the offeree has every reason, even *right*, to expect. This is due not only to the fact that the seller in each case is "charging" more for his wares than the normal price structure stipulates, but also to the fact that he has no right (moral or legal) to require this kind of action of the offeree as a condition for purchasing any good or service.

If, on the other hand, the seller were to offer the drug to the buyer for a fair price, even though strictly speaking the latter would still have "no choice" but to accept, he would not then be imposed upon coercively by the seller. Payment of the "expected" price would not be a choice "against his own will" in the sense we have given to this notion, because the choice situations would not then be less desirable than the normal or expected one.[13]

Nor would the unorthodox offer be coercive if other options were available to the prospective customer. If each had access to a pharmacist (or pusher) next door who was selling the needed drug at the normal price, then the offer made by these particular dealers would not necessarily be one the offeree was

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[13] This account of coercive offers clearly handles the "hard case" that Kipnis claims cannot be handled by my view of coercion (Kipnis, *infra*:562). The case is that of the drowning victim who is rescued with little effort by a bystander only after the victim agrees to unconscionable conditions—doing whatever the bystander subsequently asks. Kipnis suggests that because the bystander has no legal duty to rescue the victim, my account of coercion does not give the latter any basis for challenging the agreement.

But because a bystander can be assumed to have a *moral* duty to rescue a victim, as Kipnis correctly argues, it follows that by placing an onerous condition upon the rescue, the bystander's offer has worsened the victim's choice situation relative to what is *morally* normal or expected, and hence has coerced his choice. I agree with Kipnis. But if Kipnis is to succeed in his analogy from this example to the case of plea bargaining he needs to show that the prosecutor or judge has a duty (moral or legal) to reduce the charge or sentence, in the sense that the bystander clearly has a duty to rescue the victim. But Kipnis argues elsewhere in his paper (*infra*:558) not only that prosecutor and judge do not have a duty to reduce charge or sentence, but that they have a duty not to do so!

The second line of argument taken by Kipnis is that the defendant has an "inalienable right" not to plead guilty, just as the victim has an "inalienable right" not to become the slave of the bystander (*infra*:563). By "inalienable" Kipnis means that the right-holder is not entitled to give up the right. If the right to trial were "inalienable" in our legal system, then Kipnis would have a good case for saying that the plea bargain is coercive. For, like the drug dealer in my example, the prosecutor or judge would be asking the defendant to pay a price they have no right to demand. But in our legal system, at least, it is clear that guilty pleas are permitted and the right to trial is not "inalienable." In the absence of any moral argument for the abolition of the guilty plea there is no reason to consider the plea bargain coercive on this ground alone.

not free to reject. The "offer" does not significantly worsen his choice situation. He would be receiving a pure-and-simple offer, albeit an extremely poor one.

These considerations suggest the following account of the conditions under which a choice is subject to coercive imposition by another.

The choice of a person Q to perform an action A is subject to coercive imposition by another person (or persons) P, and hence is "not fully his own choice" if, and only if:

1. P has introduced or proposed to introduce (by either threats or offers) considerations into Q's situation that alter the desirability to Q of doing A (or not doing A).
2. The choice situation that Q faces as a result of P's intervention is less desirable to Q than the choice situation Q would face in the normal or expected course of events.
3. The choice situation Q faces is either
   (a) less desirable to Q than the choice situation 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.

Coercive intervention, then, could characteristically take any one of the following forms (the reader may be able to think of other forms that would fit the above conditions as well):

I. If Q does not do A, P proposes to bring about some consequence X that renders not doing A less eligible as a course of conduct. ("P threatens to bring about X if Q does not do A.")

II. P brings about consequences of Q's not doing A that render not doing A less eligible to Q and P proposes to remove those consequences if Q does A. ("P punishes Q for not doing A" or "P offers to cease harassment of Q if Q does A.")

III. P actually brings about conditions that render the not doing of A less eligible to Q. ("P makes the prospects of not doing A more costly for Q.")

IV. P proposes to bring about consequences of Q's doing A that render doing A more eligible as a course of conduct for Q, where (1) Q cannot refrain from choosing

A, and (2) doing A is a higher than normal cost for enjoying this consequence. ("P takes unfair advantage of Q.")

An example of Case I would be the paradigm coercive threat situation—"Your money or your life." Examples of Case II would include the maltreatment or torturing of prisoners of war to extort information or other concessions. These are not *merely* threats (to continue torture); they are just as plausibly described as offers (to cease the torture).[14] Case III differs from II in that it involves no proposal to act that could be construed as either a threat or an offer but simply a manipulation of the choice environment so as to make certain options less desirable. An example would be a group of demonstrators lying down in the entrance to a building so that military recruiters would have to walk on their bodies to enter the building. The demonstrators are not threatening the recruiters with some worsening of their situation, nor even offering to better it. They have already worsened it in a way that imposes a burden on the recruiters' choice. The illustrations of the pusher and the pharmacist taking advantage of the circumstances of the drug addict and the diabetic are clear examples of Case IV.

II. IS THE BARGAINED GUILTY PLEA COERCED?

The previous discussion of the concept of coercion gives us a basis for parsing out the factors in the plea bargain situation that are relevant to the question of its voluntariness or coerciveness. We need to examine the practice to determine whether it involves a manipulation of the defendant's choice situation by the court, the prosecutor, or the defense counsel in such a manner that the defendant is constrained to plead guilty "against his own will," as we have explained this concept. We shall need, then, to answer the following questions:

1. What is the "normal or expected" course of events that serves as the background against which the defendant views the choice situation created by an offer of considerations in exchange for a plea?
2. Is the choice situation faced by the defendant less preferable than the "normal or expected" one?

[14] This is another reason why the attempt to limit coercion to cases of threats while excluding offers is unreliable. In many cases an action can fit under *both* descriptions. There is a sense in which every offer contains an implied threat (not to perform if the offer is rejected) and every threat an implied offer (not to carry out the threat if there is compliance).

3. Does the plea bargaining practice create a choice situation
   (a) that is less desirable to the defendant than the choice situation he would face without the practice or
   (b) in which the prosecutor takes unfair advantage of the defendant's "inability" to choose a trial?

In the remainder of this paper I shall take up each of these questions in turn.

A. The "Normal or Expected Choice Situation"

We have seen that the concept of coerced choice always contains an implicit reference to some situation of normal or expected choice. This aspect of the concept is one of the most difficult to assess in actual situations. The "normal or expected" course of events can be what usually happens in the course of nature, standard procedure in a particular institutional or social practice, prevailing legal, moral, and customary norms, or critical ethical judgments of how things "ought to be" (see n.12, *supra*). What might be coercive from one point of view might not be from another. This means that it is sometimes necessary to determine which context is relevant to the choice at issue.

This problem tends to confuse the debate about plea bargaining because there are several possible versions of the "normal or expected" choice situation. For example, compared to the choice situation faced by the defendant before he is charged and the prosecutorial process initiated, his choice whether or not to plead guilty in exchange for leniency is clearly between a less desirable set of options. But compared to the choice situation he would face if no offer of concessions were made and the prosecution were ready to "throw the book" at him, a set of options that includes a negotiated plea is preferable. Which, if either, is the appropriate benchmark?

Many of the most vigorous critics pick the pre-prosecution choice situation as the "normal course of events" with which to compare the plea bargain. For example, Kenneth Kipnis asserts that the defendant is "forced to choose" between the certain lenient sentence and the uncertain severe sentence (1976:98-99). In one sense this is certainly true. Viewed from the point of view of the pre-prosecution situation, the defendant is being coerced, even forced, to make a choice. He is even being coerced to choose the guilty plea and the lenient sentence over the trial because the former alleviates the duress

of the harsher sentence to which the law is threatening to subject him, clearly against his will. His choice is, indeed, less desirable than it would be were no one threatening to prosecute him.

But this is hardly the proper norm against which to assess the defendant's choice. The question is not whether the defendant is being coerced, or forced, to make a choice between trial or no-trial; certainly he is. Nor is it whether the defendant is being coerced by the prosecutorial process to plead guilty; this too is true. *Any* action taken by a defendant to alleviate the exigencies of his situation, including a choice to plead *not guilty* and go to trial if that seems the best way out, is coerced by the prosecutorial process. Rather, the question is whether one alternative (the guilty plea) is made preferable to the other (trial) by coercive incentives that are not themselves a part of the normal prosecutorial process. Or alternately, it is whether the right to trial is being "burdened" with conditions not "normally" present, which prod the defendant's choice in the direction of waiving the right.

Hence it is erroneous to argue, as some critics do, that since the prosecutorial process is intrinsically coercive, every choice among options within that process is also necessarily coerced. If we want to know whether or not coercive incentives that deter a defendant's choice of a trial are being introduced into a choice situation, we cannot use as evidence the rigors and risks of the normal trial, which are the very things to which the defendant has a right! *It cannot be argued consistently that the "threat of trial" makes the choice to waive the right to trial coerced, unless the trial being threatened is itself something less desirable than that to which the defendant has a right.*

This confirms that the "normal choice situation" against which to evaluate plea bargaining is not the pre-prosecution choice situation but the normal or expected choice situation faced by a defendant in the normal (intrinsically coercive) prosecutorial process. But what is the "normal prosecutorial process" with which the defendant's bargain situation is to be compared? It is the set of options the defendant would face in a no-bargain 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. A legitimate fear of those who question the voluntariness of the plea bargaining process is that it tends to increase the exigencies of the trial option, thus making the offer of leniency no more desirable to the defendant than the

outcome he could expect in a reasonably just no-bargain system.

Hence it is essential to examine the elements of the no-bargain prosecutorial process that might be jeopardized by the bargaining process. For the purposes of this discussion I will assume that the "normal" no-bargain system is what we would have were bargaining eliminated from our present practice, and that it would be defensible from the point of view of basic considerations of justice. The elements that are germane to this discussion include the following:

1. Assurance of due process at trial, including an impartial judge and/or jury, the fair application of rules of evidence, adequate procedures for pretrial discovery, and other constitutional protections against self-incrimination.
2. No appreciable lengthening of pretrial detention as a result of pleading not guilty and going to trial.
3. Uniformity in the crime charged where the evidence is similar.
4. A sentence, upon conviction, that falls within the normal sentencing range, is based upon the merits of the case, and is consistent with the penal philosophy of the legal system or basic standards of justice.
5. A guarantee of the defendant's ability to go to trial if he wants, including the right to have counsel provided by the state if the defendant is indigent.

The fourth element of the "normal" system is one of the most difficult to assess. The problems involved in determining the penal philosophy underlying a legal system, or even a particular criminal statute within that system, are as notorious as the problems of determining "legislative intent." Hence it is difficult to assess whether any given sentence meted out to a defendant is objectively "deserved." Presumably, then, the best measure of a normal or expected sentence risk, against which to compare the risk faced by the defendant who refuses a bargain, is the actual sentencing practice in the no-bargain system.[15]

[15] This expectation or risk can be expressed as a set of probabilities: 1/x of receiving the statutory maximum M, 1/y of receiving M-1, 1/z of receiving M-2, etc. It is tempting to choose the statutory maximum as the "normal" sentence risk faced by the defendant in the no-bargain system, with the result that anything better would be a "pure-and-simple offer." But this would be misleading because it is not an accurate account of the actual risks faced by defendants in the normal no-bargain situation. In addition, the statutory maximum is not always a fair sentence, even as defined by the prevailing penal philosophy.

B. Is the Bargain System Less Preferable?

The question to be answered now is whether in the practice of plea bargaining the defendant faces a choice situation that is less desirable than the one he has in the no-bargain system just defined. The answer, of course, depends upon what happens to the elements of the latter when bargaining takes place. *If any is altered in such a way that the prospect of a trial becomes significantly more burdensome to the defendant, then it is likely that the defendant's choice situation is worse than the choice situation present in the no-bargain system.* This is true even though in the bargain situation the defendant is being offered promises of leniency that make a guilty plea preferable to the trial option. For there is no guarantee that the treatment "offered" under these conditions is more lenient than the treatment one would receive after trial in the no-bargain system. If it is not, the defendant has been induced to plead guilty by a concession that is only apparent. Thus, if the choice situation of the defendant who is bargaining for leniency presents a trial option more onerous than the normal trial process, the conditions of voluntary choice we have identified would be abrogated and the choice, therefore, coerced.

Noncoercive plea negotiation would require then, that *at least* the following conditions be met. First, *there must be an assurance of full due process at trial if the defendant refuses a bargain and opts for trial.* The aspect of plea bargaining that seems most likely to detract from this requirement is the involvement of the judge in the negotiations, either directly or indirectly. A judge who has been party to bargaining that failed to obtain a guilty plea could seek to punish the defendant, either in the way he conducts the trial or, if the jury convicted, in his sentence. To help guard against this burdening of the trial, and against the equally important *fear* of it by the defendant, it would be advisable either to eliminate judicial sentencing discretion or to create separate benches, one of which would conduct the bargaining process and the other the trial.[16]

Second, *there can be no extended pretrial detention following the decision to go to trial.* The length of detention in some jurisdictions, especially in the larger cities, makes a guilty plea a reasonable option even if *no* concessions are granted through a negotiated plea. In such circumstances the defendant is

[16] This recommendation is made by Church (*supra*:520). The account of coercion and its implications for plea bargaining that I have put forward here would support most of the reforms of the plea bargain system recommended by Church.

clearly bargaining under the pressure of a strong implicit threat.[17]

Third, *the prosecutor or the police in a plea bargain system must not engage in "overcharging."* This can be "vertical" (charging at higher levels than normal or than the evidence merits) or "horizontal" (multiplying the counts against the defendant beyond the normal practice in the no-bargain situation) (Alschuler, 1968). If a defendant is "overcharged" in either of these ways, the offer to reduce the level or number of charges in exchange for a guilty plea is again only apparently a concession, and the defendant is being coerced.

The difficulty here is to determine the "normal" practice of charging. Even a theoretical standard of proper charging cannot be derived from the penal philosophy underlying the system the way a "normal" sentence can be. Since the prosecutor in a plea bargain system tends to start with as many or as high charges as he reasonably can in order to optimize his bargaining power, this may skew expectations throughout the legal order about what constitutes "normal" charging. If this does happen, with the result that more counts are pressed at trial, the choice situation of the defendant has again been worsened by the bargaining, not improved.

Fourth, *there must be no appreciable increase in the sentence-risk faced by the defendant in the plea bargain system.* This, of course, rules out any practice of "over-recommending" in prosecutorial sentence recommendations to the courts, as well as threats to "throw the book" at defendants who are being encouraged to cop a plea. Here, again, there is the difficulty of determining whether or not sentences following trial convictions are in fact being inflated beyond the "normal." If, as I suggested earlier, the best measure of what is consistent with the "prevailing penal philosophy" is the actual sentencing practice in the no-bargain system, how shall we know whether sentence inflation is occurring once we are in a bargain system? As plea bargaining becomes more pervasive, there is likely to be pressure to increase the severity of sentences following trial convictions: prosecutors can strengthen their bargaining positions by increasing sentence risk at trial, and legislatures may respond to public fear of leniency or "criminal-coddling" generated by widespread plea bargaining by increasing the statutory

[17] If plea bargaining actually shortens court docket backlogs it tends to make the choice of a trial *less* onerous for the defendant in such a system. A guilty plea would then be less coerced in a bargain than a no-bargain system.

maxima. These slow adjustments of the system occur imperceptibly. Nevertheless, they tend to make the "offers" of the plea bargaining system more apparent than real when viewed against the backdrop of the normal no-bargain system. I am not sure there is any simple way of insuring against this evolutionary process, especially in the absence of a shared theory of just punishment that could serve as a constraining criterion.

The most persuasive examples of coercive plea bargaining adduced by those who question the voluntariness of negotiated pleas usually involve the threat or imposition of sentences that violate the sense of fairness shared by the critic and his readers, although they technically lie within the legal range of sentence options. For example, Alschuler (*supra*: 242) points to the recent decision of the United States Supreme Court in *Bordenkircher* v. *Hayes*, (98 S. Ct. 663, 1978) as a clear example in which the defendant was threatened with punishment for pleading not guilty, and subsequently punished when he so pleaded.[18] For Alschuler, unlike the majority of the Court, the case is a flagrant, if unsuccessful, attempt by a prosecutor to coerce a defendant to plead guilty.

I agree with Alschuler that Hayes was placed under coercive pressure and then penalized for not succumbing. But the reasons he and the dissenters offer miss what I see as the basic coercive element. The question is not whether the prosecutor's *motive* was punitive, as indicated by his timing in seeking to upgrade the indictment after the not-guilty plea; motive alone is not sufficient to establish coercion. Rather, the question is whether the charge and sentence threatened and imposed on Hayes were "normal."

On the basis of the facts reported in the Court opinion, the invocation of the Habitual Criminal Act against Hayes was unwarranted by Hayes's prior record or the nature of his offense. Even if such harsh implementation of the Act is normal practice in Kentucky, it is not "normal" from the point of view of Alschuler's sense of justice and fairness (and mine). Hayes was being punished for not allowing himself to be coerced into a guilty plea, and this is true regardless of the motives of the prosecutor. Alschuler himself seems to recognize this when he

[18] Hayes was originally charged with uttering a forged check in the amount of $88.30. After the not-guilty plea the prosecutor successfully sought grand jury indictment under the Kentucky Habitual Criminal Act, which carries a mandatory sentence of life imprisonment. Hayes had served a term in the state reformatory when he was 17, after pleading guilty to "detaining a female," and was given probation following a robbery conviction when he was 26. Hayes was convicted after pleading not guilty and received the mandatory life sentence. The Supreme Court upheld the conviction in a 5-4 decision.

states that "neither Mr. Stewart [author of the majority opinion] nor any other member of the Supreme Court was willing to say that, whether a habitual offender charge had been dismissed as a reward for a guilty plea or added as a penalty for standing trial, the difference between five years and life was too much" (Alschuler, 1978).

A fifth condition protecting the voluntariness of the plea bargain concerns *the nature of information available to the defendant in choosing whether or not to plead guilty in exchange for leniency*. It is not enough that the trial option is not *in fact* burdened by the practice of plea bargaining; it is equally necessary that the defendant *knows* this to be so. Consequently, it is essential not only that the defendant have access to the resources he needs to conduct a trial if he should choose it—especially competent counsel—but that the information he receives through counsel provides him with an accurate assessment of the consequences of his choice to plead guilty or not guilty. The usual plea bargaining practice gives judge, prosecutor, and defense counsel incentives to distort the actual risks involved in exercising the trial option. Judge and prosecutor share an interest in moving the docket. The prosecutor is also seeking the best "deal" he can get, as well as the best possible conviction rate. If he can lead the defense to believe that the probabilities of conviction or the sentence risks are higher than they really are, he has a better chance of securing a guilty plea. The defense attorney may also have incentives to dispose of his cases by offering quick guilty pleas—both economic self-interest and maintaining a reputation with the prosecutor as a "good man to deal with." Alschuler (1968:72 ff.) presents an excellent illustration of how prosecution and defense can collaborate to bluff a defendant into pleading guilty.[19]

There is no way to guaranteee that prosecutors do not bluff in order to coerce guilty pleas. Several commentators have recommended strengthening pretrial discovery so that the defense can make a more accurate assessment of the probabilities of conviction on each charge (e.g., Church, *supra*). But this would not ensure that such information was communicated by the defense attorney to his client. Minimizing the benefits that

[19] Heirens, the defendant, pled guilty to three counts of murder after his defense attorney told him he was likely to be executed if he did not do so. The defense attorney was aware that the evidence held by the prosecutor had been illegally obtained and the likelihood of conviction was low. The State's Attorney acknowledged to the court that "the small likelihood of a successful murder prosecution of William Heirens early prompted the State Attorney's office to seek out and obtain the cooperative help of defense counsel . . ." (Alschuler, 1968:74).

defense counsel anticipates from an expeditious guilty plea would remove some of his incentives to put coercive pressure on his client. Increasing public defender staffs and raising the fees paid appointed counsel to a level commensurate with those charged paying clients would also move in this direction.

We have thus far ignored one aspect of the concept of the "normal or expected" choice situation. A standard of "fair offers" is intrinsic to the negotiation process. Not every offer of concessions to a defendant is a *good* offer. Suppose a prosecutor gives me a choice between a ten percent chance of conviction at trial followed by a sentence to the statutory maximum of twenty-five years in prison, and pleading guilty to a lesser charge that carries a sentence of twenty years. If I am even minimally reasonable I will reject this offer without hesitation. As in any institutionalized negotiation, plea bargaining is guided by a rough standard of reasonable trade-offs that weighs a severe sentence discounted by the probabilities of conviction at trial against the 100 percent probability of the more lenient sentence given for a guilty plea. Although relative preferability is not always easy to determine, in part because individual preferences differ (which is preferable, a ten percent chance of the gallows or the certainty of life imprisonment?), there is such a thing as a ridiculous or terribly poor offer, as my first example shows. Thus, we should add a sixth condition of the "normal and expected choice situation" against which the plea bargain is assessed: *the prosecution must make a "reasonable offer" of leniency in exchange for a guilty plea—one that is preferable to the prospects of trial.*

C. The Question of Unfair Advantage

A person who receives a terribly bad offer is not necessarily under any constraint to accept it. But, as our previous examples of the drug dependent person illustrated, he can be, and when he is, his choice is coerced. We now need to consider whether this can be true of the defendant in the plea bargaining process.

A defendant who is offered leniency may be in a better choice situation than he was before but, as in our drug examples, his choice situation may still not be what it should be. And if, for some reason, he "cannot" refuse the offer, his choice is coerced. The sixth condition of the "normal or expected choice situation" shows that not every offer of leniency to a defendant is as desirable as it *should* be, even though it may be more desirable than no choice at all. If the defendant is under

such duress that he is incapable of refusing even an unfair offer, then his "choice" to plead guilty is coerced.

Can a defendant be in such a condition? Certainly. *A person who does not have the physical means to go to trial cannot refuse an alternative to trial no matter how bad the alternative is.* If he is given the choice between a highly unlikely 25-year sentence following trial and the certainty of a 20-year sentence following a guilty plea, he has no choice but to plead guilty. A person without access to counsel, or one for whom the costs of trial would impose severe financial or other hardship, is under such duress that he cannot refuse a poor offer. A noncoercive plea bargaining system would require relaxation of the sharp distinction between indigent and nonindigent defendants in the criteria of eligibility for state-subsidized counsel. If steps are taken to minimize the pressures on criminal defendants to accept poor offers, it is not so crucial to ensure that poor offers are not made.

Duress can be psychological as well as physical. Like the drug addict who cannot refuse an overpriced "fix," a defendant can be under such psychological compulsion that he is driven by forces beyond his control to accept a ridiculous or unfair offer of leniency. It is not totally implausible to suggest that the risk of certain types of sanctions (e.g., death) or conviction of a highly opprobrious charge (e.g., child molestation) could drive some defendants to accept a poor offer in order to avoid them. Justice Brennan, dissenting in *North Carolina* v. *Alford*, wrote that Alford was "so gripped by fear of the death penalty that his decision to plead guilty . . . was the product of duress as much so as choice reflecting physical constraint" (400 U.S. 25, 40, 1970). I am inclined to agree with Brennan on this point, but to reject his conclusion from this fact alone that Alford's guilty plea was coerced. For the probability that Alford would be convicted of first-degree murder and sentenced to death was so high that the offer of 30 years imprisonment for a guilty plea to second-degree murder was not unreasonable. It is not enough that choice be made under psychological or physical duress; to be coerced it must also involve an unfair offer that takes advantage of the duress.

The notion of psychological duress is readily abused and must be handled with care. It is easy, for example, to fall into the trap of thinking that anyone whose preferences differ from our own must be acting compulsively or under duress if he chooses an option we would not choose. Yet this paternalistic distortion of the idea of compulsive choice does not mean that

some choices are not compulsive. I am inclined to believe, for example, that the risk of death by execution is so frightening and paralyzing for most people that special safeguards would be required in any noncoercive bargaining system to protect defendants in capital cases from accepting highly unfair offers of leniency.[20] A judicial inquiry into the basis of the plea when it is entered, including an assessment of the evidence and the probabilities of conviction or acquittal, would help screen cases of unfair advantage. Such a judicial screening of unfair bargains might be appropriate whenever guilty pleas are entered, to determine whether there are special conditions of duress that led to the acceptance of an unfair offer.

In conclusion, the concept of coerced choice developed here and the analysis of voluntariness in plea bargaining suggest that the practice is not intrinsically coercive. However, I have identified the conditions that would have to be met before we could be reasonably confident that the choice of a defendant to plead guilty for considerations offered by the prosecutor or court is free from coercive restraint. But this does not exonerate the practice of plea bargaining from either the charge of coercion or the various other criticisms that can be leveled against it. First, I am not convinced that the conditions of voluntary, noncoerced choice are being met in present plea negotiation practice, nor even that they can be achieved by initiating reforms. This is an empirical question which I leave to the social scientists.

Second, serious questions remain about a truly noncoercive plea bargaining system. For example, even if plea negotiations involved only "pure-and-simple offers" of leniency it might be inappropriate for such leniency to be conditioned upon the quasi-"pricing system" implied in a system of regular plea bargaining. Albert Alschuler's question whether this does not place unconstitutional conditions upon the granting of government benefits (Alschuler, 1975:59-65) is pertinent, quite apart from the issue of voluntariness and coercion. Notwithstanding *Brady* v. *U.S.* and Rule 11 of the Federal Rules of Criminal Procedure, voluntariness is not the only consideration in determining the propriety of the negotiated guilty plea.

[20] In Canada, prior to the elimination of capital punishment by parliament in 1976, no guilty pleas were accepted in capital cases, precisely for reasons of this sort. Of course, this is yet one more argument in addition to many other strong ones, for the elimination of capital punishment.

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