Commentary and Debate

LEGAL AND EXTRA-LEGAL VOLUNTARINESS: A RESPONSE TO PHILIPS

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Michael Philips (1982: 207-208) argues that several recent articles on the voluntariness of plea bargaining (Kipnis, 1976; Brunk, 1979; and Wertheimer, 1979a; 1979b) fail to distinguish between two questions: (1) a *legal* question—are negotiated pleas involuntary in a sense that renders them legally invalid? (2) an *extra-legal* question—are negotiated pleas involuntary in a sense that justifies abolishing plea bargaining as a matter of social policy? Philips maintains that sensitivity to this distinction is necessary to a proper understanding of the problem.

I do not presume to respond on behalf of Kipnis and Brunk. With respect to my argument, although Philips makes one helpful refinement, there is much less there than meets the eye. In this response, I will maintain: (1) the distinction between the legal and extra-legal questions is not as sharp as Philips supposes; (2) in any case, the structure of the concept of voluntariness is identical in both contexts; (3) Philips actually accepts and incorporates the major point of my argument.

I respond, however, not merely to make the previous points. The stakes are much larger than that. Although important in its own right, "voluntariness of plea bargaining" should, I believe, be used as a prism through which to examine a concept of considerable and general importance. Issues of duress and voluntariness arise in a wide range of moral, political, and legal contexts—promises, marriages, business contracts, wage offers, consent to medical procedures or experimentation, confessions, etc. Indeed, the viability of an entire social theory may turn on the adequacy of its account of voluntariness. Capitalist theory, for example, assumes that virtually all economic transactions are voluntary, even if they

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occur in a context of great inequality. Perhaps they are. Understanding the structure of voluntariness is the first step towards a resolution of such issues.

Let me put the immediate problem in context. The structure of plea bargaining makes it at least plausible to argue that a prosecutorial proposal—plead guilty and accept a lenient punishment or stand trial and risk a severe punishment—"forces," "compels," or "coerces" a defendant into pleading guilty, that given his alternatives, a defendant may have "no choice," and that his guilty plea is made involuntarily or under duress.[1] At the same time, we are also committed to the voluntariness principle (VP), which maintains that a valid agreement, contract, or waiver of a right must be voluntary. VP is a fundamental principle of law, and of moral discourse generally. VP is accepted by the Supreme Court and has been invoked, for example, to invalidate confessions elicited by certain techniques and in several Fifth Amendment cases.[2] These decisions notwithstanding, the Court has also continually held that plea bargaining is not incompatible with VP and that most negotiated pleas are voluntary.[3]

It can be argued that the Court's position in the plea bargaining cases is inconsistent with its use of VP in related cases and that its decisions have arisen from (or been rationalized by) an erroneous (or disingenuous) theory of voluntariness. For example, Kipnis argues that a defendant's decision to accept a prosecutor's offer is analogous to accepting a gunman's offer to spare one's life in exchange for one's money (1976). If the analogy holds and if the agreement to turn over one's money is involuntary and unenforceable (one is entitled to recover—the gunman cannot say "he gave it to me"), the agreement to plead guilty is also involuntary.

Although I have suggested that Kipnis' argument is unsound (1979a), the major burden of my papers is to defend a theory of voluntariness in the context of agreements, contracts,

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[1] For present purposes, I am not distinguishing among these various constructions of involuntariness. Nothing in this paper turns on any distinction among them.

[2] In *Bram* v. *United States* the Court ruled that an involuntary confession was not valid. In *Garrity* v. *New Jersey* the Court ruled that a police officer (Garrity), who was asked to testify in connection with an investigation into police corruption, could not be threatened with the loss of his job if he refused to testify. See also *Spevack* v. *Klein*. VP is also incorporated into statute. For example, the *Federal Rules of Criminal Procedure* (Rule 11, 1975) states that a court should not accept a guilty plea "without . . . determining that the plea is voluntary."

[3] See *Brady* v. *United States*; *North Carolina* v. *Alford*; *Bordenkircher* v. *Hayes*.

or rights-waivers, i.e., those moral and legal contexts in which VP applies.[4] There are essentially two types of theories of voluntariness, although each admits of important variations. An *empirical* (or "objective") theory of voluntariness holds that the voluntariness of A's agreement turns on certain facts, e.g., facts about A's psychological state or the relative unattractiveness of the alternatives available to A.[5] I argue that no empirical theory of voluntariness is adequate, that no such theory can explain why we do or should regard certain "hard choices" as voluntary but others as involuntary. I defend a theory, based on the notion of duress invoked in contract law, which holds that voluntariness is a *moral description*. This theory holds that B gets A to agree to do X involuntarily (or under duress) if and only if (1) A is (in some way) *empirically* compelled to agree to do X and (2) it is *wrong* for B to compel A to agree to do X.[6] This *two-pronged* test entails, then, an *empirical test* which concerns the extent of the pressures brought against A and a *moral test* which concerns the legitimacy of the pressures brought against A. Both tests must be satisfied if A's agreement is involuntary; each is necessary, together they are sufficient. Moreover, it is important to note that the two tests are independent: B's proposal cannot be wrongful simply because it empirically compels A to agree to do X or it would be circular or pleonastic to speak of wrongful compulsion.

The theory holds that A *in*voluntarily turns over his money to the gunman not merely because A is under extreme pressure but also because the gunman's proposal is wrong. Suppose, however, that C sues D for $1,000,000, alleging medical malpractice. D offers C $200,000 to settle out of court and threatens a long trial if C refuses. C, concerned that he may not win at trial, concludes that he has "no choice" but to accept D's offer. C's agreement is voluntary. Even if C is under extreme pressure to accept D's offer, D's proposal is not wrongful. The empirical test may be satisfied, but the moral

[4] The account of voluntariness I develop here does *not* apply to all contexts in which the voluntariness of an action is important. I have argued that a different account applies when agreements are not at stake, when the question is whether A does X voluntarily, not whether B gets A to agree to do X voluntarily. And it is certainly not always wrong to get or coerce someone to do something involuntarily (1979b: 216-19).

[5] For example, Felix Oppenheim maintains that all ascriptions of freedom or voluntariness are empirical; they have "no valuational connotation" (1961: 70).

[6] For present purposes, I will not specify the way in which the empirical test should be operationalized. I have, however, argued that a purely psychological account is not adequate (1979b: 209-13).

test is not.[7]

I argue that this theory of voluntariness is implicit in the Court's plea bargaining decisions and that it allows the Court to reconcile those decisions with its putatively inconsistent decisions in the Fifth Amendment cases. The Court can argue that even if a defendant's choice situation meets the empirical test of involuntariness, it does not meet the moral test, but that both tests were met in, for example, *Garrity* v. *New Jersey*. Indeed, the Court does argue that a prosecutor does nothing wrong in the standard plea bargaining situation and reaches the logical conclusion that plea bargains are voluntary.

Professor Philips states that I defend plea bargaining against the charge that negotiated pleas are involuntary (1982: 207). Philips is wrong. I argue that the Court's position is coherent, not that it is correct. In fact, I explicitly argue that although the Court employs the correct theory of voluntariness, it may have misapplied that theory in the plea bargaining cases (1979b: 206). And although I have argued that a prosecutor's proposal is not analogous to the gunman's proposal, I also maintain that a prosecutor's proposal may be wrongful in a different way and therefore may meet the moral test of involuntariness (1979a).[8]

What is the problem? Although Philips often seems less concerned with what my argument claims than with what I allegedly claim for my argument, the principal question concerns the correctness of my account of voluntariness.[9] The major problem here, as I noted at the outset, is my failure to distinguish between the legal and extra-legal questions. According to Philips (1982: 208):

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[7] The *Restatement of Contracts* (American Law Institute, § 492 comment g [1932] [amended 1979]) says: "Acts or threats cannot constitute duress unless they are wrongful, even though they exert such pressure as to preclude the exercise of free judgment."

[8] Actually, despite Philips' remark at the outset of his paper, he makes other statements suggesting that he understands that I have not endorsed plea bargaining. For example, he says, ". . . Wertheimer concludes that the voluntariness of negotiated pleas is an open question" (1982: 216), and "It is unclear what position Wertheimer adopts on the question, 'Are negotiated pleas involuntary in a sense that warrants the abolition of plea bargaining?' " (1982: 217).

[9] Philips goes to some length to reject what he takes to be my claims to have: (1) provided an account of voluntariness which is adequate for all significant contexts and (2) "solved or made an important contribution to the problem of the will" (1982: 214-15). In a long footnote, Philips attempts to document these claims, but the two general assertions are not cited. If, by problem "of the will," Philips refers to the traditional free-will problem, I do not say nor claim to say anything about it. It seems to me that all this is, however, beside the point.

> 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.

It is true that I do not distinguish these issues and that I focus on legal voluntariness. Nevertheless, for several reasons, this does not affect the adequacy of my argument.

To begin, Philips' distinction begs a crucial question. He assumes that there is a sharp distinction between what the law "is" (what can be settled by reference to legal standards) and what the law "should be" (what must be settled by reference to social and political theory). Although Philips (1982: 217) pays appropriate homage to Dworkin (1977), the problem before us does not turn on the correctness of Dworkin's critique of positivism.[10] The fact is that the concept of legal voluntariness invoked in contract law explicitly includes a moral test. B's threat must be wrongful if A's contract is to be held involuntary. Moreover, "wrongful" does not refer to any explicit black-letter, readily accessible, and determinate standards to which any competent judge could turn. Judges work out the appropriate standards in the adjudication of cases. They will, of course, consult the decisions reached in previous cases, but they will also refer to general principles of social and political morality. In addition, that judges have decided cases in a certain way may not determine what the law *is*. If their decisions rest on unsound principles of social and political theory, or if they do not correctly apply sound principles, we may argue that their decisions are wrong. Of course, given the role of *stare decisis* in legal decisions, the extant criteria of legal wrongfulness may not be coterminous with what we would otherwise want them to be.[11] Even so, legal wrongfulness remains a matter of social and political morality.

Philips poses two hypothetical cases as counter-examples to my theory and in support of his claim that I overlook the important distinction between the legal and extra-legal question. In this paper, I shall consider only the first.[12]

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[10] Philips says, "*If* Dworkin is right, moral considerations may enter judicial deliberations as principles" (1982: 217; emphasis added).

[11] Moreover, there may be good moral reasons for believing that *stare decisis* should play an important role in judicial decisions, so that what we may think is morally desirable in a judicial decision is not necessarily the same as the decision we would have found desirable in the absence of any previous decisions.

[12] Philips' second example is extremely complicated and it would take too much space to sort it out. It is intended to show that a threat may be morally

> . . . gallery owner B owns something of great sentimental value to Artist A, e.g. journals and photographs of A's dead grandparents. . . . 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. . . . [A]fter one year A can stand it no longer and decides to exhibit it at a competing gallery. B, scoundrel that he is, takes A to court (1982: 216).

Philips' argument is this: (1) A's agreement is induced by B's threat; (2) B's threat is immoral; (3) if (1) and (2), then Wertheimer must hold that A's agreement is involuntary; (4) but it is not "clear" that a judge who so ruled would be making the "proper legal choice"; (5) therefore, Wertheimer is wrong.

Philips' example does not support his conclusion—for several reasons. First, the two-pronged test maintains that the immorality of a threat is a necessary, but not sufficient condition of involuntariness. To hold that A's agreement is involuntary, a judge must find that the *empirical* test is satisfied, and that is by no means clear in this case. Consider the ruling in *Kaplan* v. *Kaplan*, where a husband, having signed over property to his wife, claimed that he did so under duress because she threatened to publicize his extra-marital affairs:

> Even if we assume . . . that the threat of an outraged and humiliated wife to publicize the affair of her husband is wrongful . . . we are not prepared to say . . . that a threat of personal embarrassment . . . was such as to control the will of the plaintiff, or to render him bereft of the quality of mind essential to the making of a contract.

Similarly, since (1) does not establish that A was empirically compelled to agree to B's terms, even if (1) and (2) are true, I am not committed to (3).

Second, suppose that we grant that the empirical test is satisfied and that B's threat is immoral. Philips argues that proposals may be immoral in various ways (1982: 216), that "[i]mmorality *per se* is not enough" (1982: 217), and that the moral test applies only to those moral precepts for which the law "makes room" (1982: 217). Now I did not say nor intend to

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defensible but still legally wrongful and that an agreement may therefore be involuntary even though the threat is not, in fact, morally wrong. But Philips' example does not show this, for it shows only that the end secured by a threat might be morally defensible. It does not show that the threat *itself* is morally defensible.

suggest that *any* form of wrongfulness is sufficient to satisfy the moral test. Clearly, a proposal must be wrongful in particular ways. If I can be understood as arguing that any form of wrongfulness would be sufficient, then Philips' suggestion is a useful refinement of my argument. It is important to note, however, that Philips' point also holds with respect to his extra-legal question. Morality is complex. There may be good moral reasons for holding that A *should be legally* required to keep an agreement with B, even if B's proposal were immoral in some way.

Finally, suppose that we grant (3). Philips states that it is not "clear" that a judge who ruled in A's favor would be making "the proper legal choice" (1982: 206). So what? It is certainly arguable that if A was compelled to agree to B's terms and if B's threat was wrongful, then a judge *should* find in A's favor. That is all I need maintain. Not even Dworkin (1977: 81-130) maintains that the "right answer" to a "hard case" should be *clear* to any competent judge. No human judge is a Hercules.

Legal questions aside, Philips proposes that my account might be construed as an answer to the extra-legal question. So construed, I would be claiming that agreements made in response to wrongful threats *should* have no legal standing, whatever their actual legal status, given the extant criteria of legal wrongfulness. Philips argues that this is by no means "obviously correct," and he tells us that the truth of this view depends on answers to deeper questions about the legitimate authority of the state and the rights of citizens:

> Some political philosophers would hold . . . 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 (1982: 218).

Philips goes on to state that if this (laissez-faire) view is correct, my account is "fundamentally flawed" for, according to Philips, it rests on a more interventionist view of the proper role of the state (1982: 218). He adds, "Wertheimer does not seem to recognize that the issue is so deep" (1982: 219).

Putting aside questions as to what I do and do not recognize, Philips is wrong. My theory of voluntariness does *not* turn on the correctness of any general theory of the state—even if construed as an answer to the extra-legal question. In answering that question, we might settle on something like the laissez-faire view, defining wrongfulness in very narrow terms; or, we might adopt a more interventionist view of the state,

defining wrongfulness in broader terms. My theory of voluntariness is neutral in that respect, for it argues only that voluntariness has a certain *structure*, the two-pronged test, and does not entail any particular conception as to how that structure is fleshed out. Interestingly, within the laissez-faire view that Philips describes, the voluntariness of a contract depends upon its meeting "certain minimal moral constraints" (1982: 218). Thus, it would seem, Philips implicitly concedes that at least some moral test is necessary.

In fact, Philips' endorsement and incorporation of my theory is more explicit than the previous remark suggests. In the second section of his paper, Philips argues that much discussion of voluntariness is confused because "voluntariness$_1$" is not distinguished from "voluntariness$_2$" (1982: 220-21). Voluntariness$_1$ refers to behaviors that are literally "beyond choice," e.g., seizures and twitches. When we treat acts as involuntary if performed after brainwashing, involuntariness$_1$ is the operative notion. Involuntariness$_2$, on the other hand, refers to situations in which the agent makes a rational choice but is "forced" to choose "one unattractive alternative to avoid another still more unattractive alternative" (1982: 211).

Now Philips argues that voluntariness$_1$ is irrelevant to plea bargaining, a point which I have made (1979b: 206). Furthermore, he maintains that involuntariness$_2$ is not sufficient:

> . . . 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 (1982: 222-23; emphasis added).

I hope that I can be forgiven for feeling somewhat proprietary here, but after several pages of criticism, Philips has endorsed the major point of my articles. He has adopted the two-pronged test.[13]

Let us take stock. There may be some, but probably not much, distinction between: (a) a legal question—are negotiated pleas involuntary, given the extant criteria of legal

[13] Philips suggests that we should replace involuntariness$_2$ with the term "duress," reserving involuntariness for those behaviors captured by involuntariness$_1$. If this suggestion helps those interested in the problem, then who could object? It would, however, remain a purely semantic proposal.

wrongfulness? and (b) an extra-legal question—should negotiated pleas be regarded as involuntary, given the correct principles of social and political theory? In any case, the structure of the concept of voluntariness is identical in both contexts, for answering both (a) and (b) requires the application of the two-pronged test. To answer either question, we need a theory of the morality of proposals—a theory that tells us when a proposal is wrongful in a way that justifies invalidating an agreement.

A final point. Suppose that we develop an adequate theory of the morality of proposals and that, on this theory, it turns out that negotiated pleas *are and should be* regarded as legally voluntary. It is very important to note that although moral criteria are built into the test of voluntariness, the voluntariness of plea bargaining is nevertheless *not* coterminous with its moral acceptability. There may be good reasons for regarding negotiated pleas as voluntary but this does not mean that plea bargaining should not be abolished—say, because it weakens deterrence or because it results in punishments systematically unrelated to principles of criminal desert.

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