Plea-Bargaining

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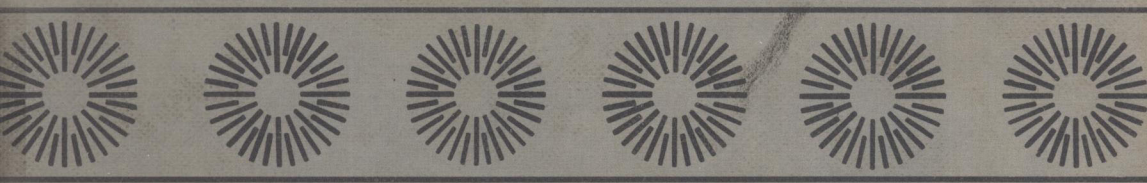

Lexington Books

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LexingtonBooks
D.C. Heath and Company
Lexington, Massachusetts
Toronto

Library of Congress Cataloging in Publication Data

Main entry under title:
Plea-bargaining.

Includes bibliographical references and index.
1. Plea bargaining—United States—Addresses, essays, lectures. 2. Plea bargaining—Great Britain—Addresses, essays, lectures, I. McDonald, William Frank, 1943- II. Cramer, James A.
KF9654.A75P54 345.73'072 78-2102
ISBN 0-669-02363-9

Published simultaneously in Canada.

Printed in the United States of America.

International Standard Book Number: 0-669-02363-9

Library of Congress Catalog Card Number: 78-2102

This book is dedicated to
Lisa Latini McDonald and
Irene Angela McDonald, and to
the memory of Rosalie Cramer Learn.

Preface

Plea-bargaining, in one form or another, has existed in this country for more than a century (or longer, depending on one's definition of terms). It has repeatedly been the source of controversy.[1] Questions have arisen as to its propriety, legality, and necessity. In the last decade and a half, the controversy has heated up once again. Some researchers have shown the inequities and shortcomings of the plea-bargaining system and have suggested that it is too great a compromise with our principles of justice.[2]

In 1971 the Supreme Court made its first ruling on plea-bargaining. Notwithstanding the criticisms of the practice at that time, it approved plea-bargaining and described it as an essential feature of the administration of justice.[3] But two years later, the prestigious National Advisory Commission on Criminal Justice Standards and Goals recommended that plea-bargaining be eliminated by 1978.[4] While the Supreme Court and legal commentators were debating the desirability of the practice, the general public's concern about plea-bargaining was aroused by the Watergate incident, and particularly by the prosecution of Vice-President Spiro Agnew, who was able to bargain with prosecutors for what was regarded as a lenient disposition.

The year 1978 has come and gone, and plea-bargaining is still with us, but the controversy has not been without impact. Experiments with no plea-bargaining, limited plea-bargaining, and new methods of plea-bargaining have been tried; studies have been conducted; and a special national workshop has been held.[5] In this book, we have assembled original, unpublished research on plea-bargaining drawn from several recent sources of experimentation and analysis. Our purpose is to provide readers with some of the highlights of the research generated by this most recent round of controversy. We believe that this subject is destined to a life of continued reassessment and review. Therefore our concern has been not only to provide contemporary readers with the major findings of current research but also to anticipate the needs of the next generation of adversaries in this protracted public debate.

This book contains separate reports on the three major experiments in plea-bargaining that were recently conducted in this country. In Texas and Alaska, attempts were made to eliminate plea-bargaining. The goal was the same in both cases, but the strategies and the outcomes differed. Each of these efforts is reported in a separate chapter. In Florida, a different kind of experiment was conducted. It was designed to restructure rather than eliminate plea-bargaining. Defendants and victims were brought together

with prosecutors, defense attorneys, and judges in predisposition conferences. A report of victim participation in those conferences is presented in chapter 8.

Three chapters are based on a three-year national study, conducted by the Institute of Criminal Law and Procedure at Georgetown University, which focused on plea-bargaining in the state courts. Plea-bargaining in the federal courts is the subject of a separate study, which is reported in chapter 7. Chapter 5 reports the work of yet another project that examined plea-bargaining in the District of Columbia, using the detailed database in PROMIS. Finally chapter 9 examines plea-bargaining in England and is drawn from a study with a substantially broader base of interviewing and data-gathering than was used in previous English studies, such as the controversial work by Baldwin and McConville.[6]

We would like to acknowledge the support of the Law Enforcement Assistance Administration of the U.S. Department of Justice. This book itself is not a funded product of LEAA; however, eight of the nine chapters in it are based on research made possible by LEAA funding. Our contributions to this work are based on the plea-bargaining study of the Georgetown University Institute of Criminal Law and Procedure. That study was directed by Herbert S. Miller. Finally we would like to thank Mary Ann DeRosa for her tireless typing and clerical support.

Notes

1. The history of plea-bargaining is a matter of some dispute. See A. Alschuler, "Plea Bargaining and Its History," *Law and Society Review* 13 (Winter 1979), and W.F. McDonald, "From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept," *Law and Society Review* 13 (Winter 1979).

2. A.S. Blumberg, *Criminal Justice* (Chicago: Aldine, 1967); A.S. Blumberg, "Lawyers with Convictions," in *The Scales of Justice*, ed. A.S. Blumberg (Chicago: Aldine, 1970); and A.W. Alschuler, "The Prosecutor's Role in Plea Bargaining," *University of Chicago Law Review* 36 (1968): 50-112.

3. *Santobello* v. *New York*, 404 U.S. 257.

4. National Advisory Commission on Criminal Justice Standards and Goals, *Courts Report* (Washington, D.C.: U.S. Government Printing Office, 1973).

5. For the proceedings of that workshop, see the special issue on plea-bargaining in *Law and Society Review* 13 (Winter 1979).

6. J. Baldwin and M. McConville, *Negotiated Justice* (London: Martin Robertson, 1977). For a description of the controversy associated with the

publication of this work, see J. Baldwin and M. McConville, "Plea Bargaining and Plea Negotiation in England," *Law and Society Review* 13 (Winter 1979).

Plea-Bargaining

Contents

1 Prosecutorial Bluffing and the Case against Plea-Bargaining

William F. McDonald, James A. Cramer, and *Henry H. Rossman*

The case against plea-bargaining is based on objections to various aspects of it regarded as repugnant to our notions of the fair and proper administration of justice. One such feature is the practice of bluffing by prosecutors to secure guilty pleas. According to Alschuler, the only author to provide a significant report of this practice, bluffing is widespread, unseemly, and in conflict with the ideal of due process of law. He found that prosecutors engage in elaborate frauds to sustain their bluffs and that this is part of a routine phenomenon of "deceptive sales practices among prosecutors." He concluded that "very few prosecutors apparently disapprove of bluffing."[1]

This chapter examines the matter of prosecutorial bluffing, relying on data gathered in a two-stage national study of plea-bargaining conducted by the Georgetown University Institute of Criminal Law and Procedure. We address four main questions about bluffing: its meaning, its frequency, the extent to which it is accompanied by elaborate frauds, and the degree to which it involves illegal or unethical behavior.

Method

A major weakness in Alschuler's work lies in his method. He explicitly disavows any claim to scientific rigor:

> Lawyers may note that all the information I present is hearsay, and sociologists may view my lack of method even less kindly. I believe,

This research was supported by grants 77-NI-99-0049 and 75-NI-99-0129 from the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice. We wish to thank several people for their contribution to the research project upon which this is based: J. Baker, M. Budish, J. Connally, H. Daudistel, M. DeRosa, S. Foster, J. Klein, V. Kullberg, and H.S. Miller, the project director. Points of view and opinions stated in this chapter are the authors' and do not necessarily represent an official position or policies of the U.S. Department of Justice, Georgetown University, or anyone else acknowledged here.

> however, that in the absence of better information, even unverified gossip can sometimes serve a useful purpose. Its utility lies in isolating potential problems and in guiding analyses, rather than in measuring the extent of the problems it suggests. On occasion, however, my conversations revealed so complete a consensus on factual and quantitative questions that I felt justified in reporting this consensus without explicit qualification.[2]

His conclusions are based on open-ended interviews with criminal justice actors in ten jurisdictions. His method is that of the investigative journalist with a penchant for the quotable quote and the dramatic case. This makes for provocative reading and serves well his purpose of "isolating potential problems," but it leaves unanswered the question of typicality. One is never sure whether the incidents reported are rare events or standard operating procedures. The evidence for some of his more controversial conclusions seems to rest on nothing more than innuendo. For instance, the case that Alschuler uses to support the conclusion that prosecutors engage in deliberate misrepresentations in order to sustain bluffs is not very convincing. A defense counsel could not locate a key prosecution witness and therefore suspected that neither could the prosecutor. Consequently defense counsel pressed for a very good plea-bargain. But the prosecutor wanted stiffer terms, saying that he had found the witness and would go to trial if the terms were not met. Counsel refused. He "was not Little Red Riding Hood; he suspected that the process server had been made a party to the bluff and had filed a fraudulent return."[3] When the plea offer was refused, the case was dismissed.

Engaging in the logical fallacy of affirming the consequent, the defense counsel and Alschuler took the fact of the dismissal as proof that the prosecutor had been bluffing and that he had made the process server a party to the bluff. But anyone familiar with the numerous reasons why cases are dismissed, even when witnesses are available to go to trial, will hardly accept this conclusion. This anecdote cannot be regarded as proof of the proposition that prosecutors stage elaborate frauds to secure guilty pleas.

We can appreciate the difficulty of obtaining reliable and systematic data in research of this kind. We too used the interview method and could not always verify what we were told. However, we differed from Alschuler in that we used standardized interview protocols and made special efforts to determine whether reports interviewees were giving us described typical practices or rare events. In phase one of our study, bluffing was one of many issues discussed in open-ended, unstructured interviews with prosecutors in thirty-one jurisdictions. In phase two of our study, bluffing was dealt with in structured interviews conducted in six jurisdictions studied in depth. Twenty of the thirty-one phase one jurisdictions represent a 10 percent random sample of American jurisdictions with populations of one hundred thousand or more stratified by size. The balance were chosen purpose-

fully because of special features relating to plea-bargaining. The six phase-two jurisdictions were selected to represent different styles of managerial control in the prosecutor's office. They fall along a continuum from centralized to decentralized control. Offices were placed along this continuum after site visits and interviews to determine the degree to which all decisions in the office were set and reviewed by the executive officer and her or his command staff.

Findings

In some respects our findings agree with Alschuler's. For instance, it is true that the majority of prosecutors approve of bluffing, and most would bluff to obtain a guilty plea. But what they mean by that term is different in several important respects from what Alschuler implies. What is more, in those cases where the prosecutors we interviewed agreed with Alschuler regarding whether they bluff in certain circumstances, they disagreed with him as to the propriety of the practice under those conditions. In short, while Alschuler's discussion implies that all bluffing is improper, prosecutors in the field regard only some bluffing as clearly improper and other bluffing as not only proper but desirable. In addition, there is a large area where prosecutors disagree among themselves as to where the line of propriety should be drawn.

Alschuler's treatment of this topic does not focus upon these distinctions. Consequently his conclusions as to the frequency of bluffing are misleading. It is true that bluffing of a certain kind and in certain circumstances is common, but much of this bluffing does not appear to be as unseemly as he suggests. Moreover bluffing involving the kind of elaborate fraud that he describes does not—as far as we can determine—exist with any frequency. Finally the premise for his criticism of what he regards as the most deplorable type of bluffing—bluffing when the prosecutor has no case at all—is seriously flawed. In order to make these points clear, it is necessary to provide some distinctions and to review the various circumstances under which bluffing might occur.

Central to the entire discussion of bluffing is the notion of a weak case, since the essence of bluffing is to pretend that one is in a stronger position than one actually is. Thus to understand the nature, extent, and propriety of bluffing, one must appreciate the ways in which cases can become weak and also to learn about the existing norms governing such situations. This will allow us to show that the bluffing that prosecutors do engage in does not typically involve violations of legal or ethical norms. Rather it occurs in a normative no-man's land between legally prohibited deception and withholding of information, on the one hand, and total unsolicited revelation of every strength and weakness in one's case, on the other. This territory

is not governed in any clear way by law or professional ethics, but it is ruled by certain unwritten work norms. The bluffing that Alschuler condemns does not encompass all of the types of behavior that might be called bluffing. Rather it is limited primarily to the handling of one type of weak case, which he describes as being so weak as to be no case at all. But prosecutors do not agree that the situation he describes is as weak as he portrays it to be, nor do they agree with the normative standard that he implies should govern bluffing in these circumstances. They do not feel that prosecutors should be required to notify defense counsel of the kind of weakness involved in Alschuler's noncase.

The ultimate kind of weak case is the one in which completely groundless charges are brought against an unquestionably innocent defendant. In such a situation, the bluff would involve pretending that one had a case when in fact there was no evidence against the defendant. A prosecutor who engaged in such treachery would clearly be acting not only unethically but illegally.[4] We found no indication that this type of bluffing was engaged in by any of the prosecutors' offices covered by our study. There is little doubt that bluffing under these conditions would be unanimously condemned by prosecutors. It is also clear that this is not what we or Alschuler have in mind in our respective discussions of bluffing. This is not what Alschuler is referring to when he says prosecutors bluff when they have no case at all, nor is it what he has in mind when he speaks of elaborate frauds engaged in by prosecutors.

A second kind of weak case is one in which there is some evidence to suspect that a person committed a crime, but the evidence is weak at the time the case reaches the prosecutor's office for initial review. For example, an elderly victim with bad eyesight may be the sole witness of a robbery on a dark street. The key to the propriety of the prosecutor's decision to proceed with this type of case is whether he or she made a good-faith judgment that the case was at least strong enough to meet the legally required standard of probable cause. If the prosecutor believed that it did not meet that standard but accepted it anyhow, he or she would be indulging in a bluff that was virtually as illegal and unethical as the first example. But this kind of bluffing is not what either we or Alschuler have in mind. We found no evidence of this kind of activity during our fieldwork.

If the prosecutor in the second example had concluded in good faith that probable cause did exist, then he or she would have been within rights to charge the case. This would have been true even if he or she believed the case would probably not meet the higher standards of proof required at the later stages of the criminal justice process. Prosecutors regularly accept such cases for prosecution even in jurisdictions where their office policies require that cases have more than probable cause before being charged. Exceptions are made for certain kinds of cases, such as sexual offenses against

children and high-notoriety cases that prosecutors feel they must charge. No one regards the mere accepting of such cases into the system as a form of bluffing (although, conceivably, someone could say this was a kind of passive bluff). Only if a prosecutor subsequently takes some action to mislead the defense into believing that the case was stronger than it actually was or to prevent the defense from gaining access to information to which she or he has a legal right is it appropriate to refer to these actions as bluffing.

Two additional sets of circumstances can produce weak cases. Some cases are or appear to be quite strong at the time the prosecutor charges them but subsequently become weak. Here there is no question that the prosecutor was not bluffing at the time the case was charged. Yet he or she may be tempted to bluff at a subsequent point in time in order to assure himself of getting a little punishment rather than none at all. Two types of weaknesses occur. One is related to the inherent quality of the evidence. For instance, a reliable alibi witness may be discovered; the prosecutor's star witness may not be able to pick the defendant out of a lineup; or a subsequent interview may reveal that a witness is confused and inconsistent. These kinds of weaknesses must be distinguished from those generated by logistical and administrative problems that may affect whether the case can be proved. For instance, a case may be strong but due to an administrative error, the physical evidence may be lost or the witness may not have been notified to appear at a court hearing. This distinction between weaknesses in the inherent quality of the evidence and those due to administrative problems is important because it is the basis for one of the informal courthouse norms regarding the limits of proper bluffing. Most prosecutors have no compunctions about hiding weaknesses caused by administrative problems, but they do have reservations about suppressing information regarding the inherent quality of the evidence.

The range of potential deceptiveness in bluffing varies widely from the mild puffery of an offhand remark such as "We've got the goods on your client," to much more elaborate frauds. Some of this territory is governed by law and by codes of professional ethics. However, it is not until one reaches the territory that lies either outside or on the boundary of that area clearly governed by official norms that practices become problematic. Here is where one finds the practices identified by Alschuler as bluffing, and therefore this is where we concentrated our research.

There are official restrictions on bluffing. Prosecutors may not file completely groundless charges, nor may they charge in a case where some evidence exists but it does not meet the probable-cause standard. Beyond that, there are two other important legal restrictions on potential bluffing situations. Prosecutors are no longer permitted to hide certain aspects of their cases. Upon request of defense counsel, prosecutors must make available the results of ballistics tests, chemical analyses, lineups, statements

made by the defendant to the police, and other aspects of the case.[5] In addition, prosecutors have a duty to turn over any exculpatory evidence, even without a prior request having been made for it.[6] Thus if a bluff involved suppressing discoverable or exculpatory evidence, it would be illegal.

In his discussion of bluffing, Alschuler does not suggest that prosecutors are suppressing discoverable evidence. As for exculpatory evidence, his findings are less clear largely because of the ambiguity in the notion of exculpatory evidence. In our research we found no evidence that prosecutors were suppressing discoverable evidence, although we, like Alschuler, regularly heard that prosecutors will make the discovery procedure more cumbersome for certain defense attorneys whom they disliked or distrusted. In regard to exculpatory evidence, this situation is more difficult to assess because exculpatory evidence is not clearly defined.[7] Some evidence is clearly exculpatory; for example, reliable evidence may be found to show that the defendant was at some other place at the time of the crime. But as one moves away from this polar situation, the notion of what is exculpatory becomes clouded. Should weak inculpatory evidence be also regarded as weak exculpatory evidence? Must the prosecutor reveal every piece of evidence that weakens his case?

The source of some of the confusion here can be better understood by distinguishing among factual guilt, legal guilt, and whether the case can be proved.[8] Factual guilt refers to whether the person did the act involved in the crime. Legal guilt refers to whether all of the procedural and substantive legal requirements can be met in proving the case against the defendant. Legal and factual guilt are quite different matters. For instance, a person may shoot and kill another person without committing the crime of murder if the legally required state of mind did not exist. Even if that state of mind did exist, the killer may not be prosecuted for the crime if the statute of limitations has expired. The concept of legal guilt also contains within it such practical considerations as whether a conviction can be had in a particular case. Defendants are not legally guilty until they have been found so by an appropriate court of law. Thus if a person committed a criminal act and there are no legal obstacles to proving that in court, but for some practical reason such as local bias among the jury members, the case could not be proved, then the legal guilt could not be established. The concept of whether a case can be proved refers to this estimate of the practicality of establishing factual and legal guilt in a particular case given all of the contingencies involved in getting a conviction in that case.

In interpreting the concept of exculpatory evidence, one could take the narrow view that it refers only to evidence that clearly indicates factual innocence. But if exculpation were thought of as something akin to the probability of obtaining a conviction at trial, then its meaning would be far broader. Most prosecutors seem to take a narrow view of exculpatory

evidence. They would feel an obligation to produce evidence indicating factual innocence, and they also feel obliged to deal with certain aspects of legal guilt—for instance, ensuring that the statute of limitations has not expired. But most of them do not feel under an obligation to notify the defense about logistical or administrative problems that may reduce the probability of obtaining a conviction in a case. Here is where they part company with Alschuler.

The situation he describes as being one where the prosecutor has no case at all is not one involving a totally innocent defendant. Rather it is a case that he claims would not be provable in court:

> A typical situation is one in which a critical witness has died, refused to testify, or disappeared into the faceless city. If a prosecutor hopes to extract a plea of guilty in this situation, he must exude limitless confidence in his ultimate success and keep the defense attorney unaware of the *fatal defect* in his case.[9]

In our phase one visits to thirty-one jurisdictions, we asked prosecutors if they had had such cases and whether they had tried to bluff defendants into pleading guilty. Several of them had bluffed in such situations, but they took exception to the description of these circumstances. Experienced practitioners know that there are no cases with a zero probability of conviction. Nor are there cases with a 100 percent probability of conviction.[10] There is nothing certain about case outcome. It is possible that an innocent individual can be successfully prosecuted even with quite flimsy evidence. Similarly there is no such thing as a truly dead-bang case. Experienced lawyers all know of instances illustrating these points. They have seen juries acquit defendants who did not have a chance of winning, and they have seen them convict those whose innocence seemed clear. It is precisely such cases that cause some attorneys to be quite cynical about the administration of justice and analogize it to a game of Russian roulette. Even though these cases are the exception and not the rule, the principle they establish has important consequences for the actors in the system. The fact that nothing is certain becomes an important incentive for plea-bargaining and an important justification for bluffing.

We presented prosecutors with the distinction Packer made between factual and legal innocence. We also presented the argument that bluffing defendants into accepting plea offers was a means by which the state secures convictions in cases that it would have lost had they gone to trial. Hence bluffing is, in effect, a way of convicting legally innocent defendants. Therefore plea-bargaining and its associated practice of bluffing defeat the basic principle of legality in our system of justice.

This line of argument was easily and regularly dismissed by prosecutors on two grounds. The first was the uncertainty of case outcome. Since any

case might result in conviction, the notion of legal innocence is not undermined by plea-bargaining or by bluffing. That notion itself is predicated on the idea that outcomes in criminal justice are only probabilities. Our examples of the dead witness or the lost drugs were not regarded as all that weak.[11] Many prosecutors had had or had known of weaker cases that had gone to trial and resulted in convictions, so they did not feel that a plea-bargain in such circumstances circumvented the principle of legality. They did not regard bluffing in such cases as wrong provided that the bluff did not include withholding exculpatory evidence and (for many of them) provided that it did not require them to cross that imaginary line between legitimate puffery, posturing and gamesmanship, on the one hand; and outright lies, on the other. Many of them draw that line at the same specific point. They would not stand up in court and say they were ready for trial if a critical witness or piece of evidence were lost.[12] But they might do everything they could to make the defense think they were ready for trial. Many of them said they would willingly tell defense counsel that they were not ready for trial if defense counsel had asked that question directly. But, surprisingly, prosecutors say counsel never do.

A major incentive for not crossing that line between legitimate puffery and outright deceit is self-interest. Attorneys' personal credibility and reputation are at stake. Credibility is an essential characteristic for lawyers, particularly in the criminal courts. There seems to be no middle ground. One is trustworthy or not. Once lost, credibility is hard to regain. Without it, the practice of law can be considerably more difficult. Much of what lawyers do, especially in plea-bargaining, depends upon trust between parties to represent the truth and to honor commitments. Ironically although truthfulness is demanded, some deception is both expected and tolerated. The boldface liar, however, finds that other lawyers will impose whatever informal sanctions are available. Defense counsel who are notoriously deceitful will find that the only discovery they will ever get from prosecutors is what they can pry out of them through the time-consuming process of filing motions. Sometimes the sanctions are more severe. Judges occasionally have informally barred certain defense attorneys from practicing in their courts because of some past deceitful act. Judges also have a variety of informal sanctions they can apply to assistant prosecutors in their courts ranging from a mild rebuke to removal from their court or negative feedback to the assistant's superiors.

Thus prosecutors are restrained in bluffing by their awareness of the occupational norms regarding the limits of honesty and the importance of credibility. They are guided by general rules known to courthouse regulars that define the limits of the occupational norms concerning acceptable bluffing. Some of those limits are congruent with those set by the law of discovery and the law on the production of exculpatory evidence. But some