Hofstra Law Review

Volume 5 | Issue 1 Article 10

1976

Justice By Consent: Plea Bargains in the American Courthouse. By Arthur Rosett & Donald R. Cressey.

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BOOK REVIEWS

JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE. By ARTHUR ROSETT* & DONALD R. CRESSEY.** Philadelphia: J.B. Lippincott & Co. 1976. Pp. xvi, 227. $10.00.

Editors note: Plea bargaining is one of the most controversial issues of the law today. To give this book a fair and balanced review, the Editorial Board has chosen two reviewers with distinctly different backgrounds in the criminal justice system.

*Reviewed by Steven F. Gillers****

The practice of bargaining for pleas allows men and women to accept conviction and punishment, often under great pressure, sometimes with only casual concern for real guilt or innocence. No doubt defendants plead guilty who would not be found guilty at trial (whether or not they actually "did it"). No doubt, too, defendants guilty of grave crimes accept pleas to comparatively minor ones. Many other defendants plead guilty to crimes more or less descriptive of their conduct and receive a sentence roughly appropriate.

Who is happy with plea bargaining? Probably only courthouse bureaucrats and realists—or do I repeat myself? Surely, to those in the world of the county courthouse, whoever does not work there is an idealist. Partisans of the left and right, those who would handcuff the police and those who would unhandcuff them, people who believe all crime flows from poverty and adversity and others who think greed plays the major role—all these folks live in a fool's paradise when criticizing what we've come to call the criminal justice system. Even this name—criminal justice system—is two-thirds wrong (it is neither just nor a system) and one-third ambiguous (it is not always clear who is the criminal or what is the crime). If we can't even name the subject properly, how can we expect clarity on the issues? The value of

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Justice by Consent is that it enhances the possibilities of communication between professionals and the public through careful depiction of the world in which plea bargains are made and needed.

This communication is important. Bargaining over pleas has now become respectable, and a host of rules has arisen that may make plea bargaining even less comprehensible to thinking people. Let us review a few.

In *Santobello v. New York*[1] the Supreme Court fully recognized the practice and value of bargaining for pleas. It put teeth into bargains by holding that if a prosecutor fails to keep his part of a deal, the defendant may be entitled to specific performance or to withdraw the consideration—the plea itself. The analogy to contract law seemed to fit nicely.

The participants in the bargain have also become a focus of judicial concern. In state courts judicial participation is commonplace since state courts literally depend on volume pleas; guilt is more freely admitted when the court commits itself to a maximum sentence in advance. The practice has been upheld.[2] On the other hand, in federal courts, where volume is less and the deliberative process still prevalent, trial judges have been told to stay out of the negotiations. In *United States v. Werker*,[3] for example, the defendant tried to bargain for a sentence recommendation from the prosecutor in return for a plea. The prosecutor declined. District Judge Werker, after reading a presentence report with the defendant's permission, said he was willing to tell the sentence he would impose after plea. The Government protested and petitioned for a writ of mandamus against Judge Werker.

The Second Circuit concluded that Federal Rule of Criminal Procedure 11 prohibits a district judge from participating in a plea bargain and that, in any event, even without the rule the court would have prohibited participation under its supervisory powers.

There is another side to this judicial participation coin. Consider a case where the Government agrees to dismiss an indictment in return for cooperation. The defendant cooperates, the Government moves to dismiss the indictment, but the judge won't go along. District Judge Hill took that position recently

1. 404 U.S. 257 (1971).

2. Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970); United States *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968).

3. 535 F.2d 198 (2d Cir. 1976).

when the Government (as part of a plea bargain) moved to dismiss an indictment against Jake Jacobsen in the Northern District of Texas. Jacobsen had cooperated with the Government in testifying against former Treasury Secretary John Connally. As part of the deal, Jacobsen had entered a guilty plea to another indictment in the District of Columbia.

The Government was understandably concerned when Judge Hill declined to follow through. If a judge has that power, the Government can hardly promise to dismiss indictments in exchange for something else. The Government contended that it had "absolute power" to dismiss the indictment, even without court approval. It cited the separation of powers doctrine. Judge Hill relied on Rule 48(a) for his conclusion that he had discretion to deny the Government's motion.

The Fifth Circuit split the difference.[4] It agreed that Judge Hill had "judicial discretion" to deny the Government's motion but would review its exercise with "closer scrutiny than in the ordinary case" because it was "constitutionally sensitive."[5] The court held that Judge Hill abused his discretion. "The exercise of [governmental] discretion with respect to the termination of pending prosecutions should not be judicially disturbed unless clearly contrary to manifest public interest."[6] The United States Supreme Court denied certiorari.[7]

Other rules have developed. For example, a plea waives some claims[8] but not others.[9] In New York, a state judge's promise of a particular sentence "at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in light of the subsequent presentence report . . . ."[10] Finally, there are extensive rules for taking a plea to assure that it is given knowingly, voluntarily and with an understanding of the consequences.[11] Nevertheless, a defendant can still plead guilty

4. United States v. Cowan, 524 F.2d 504 (5th Cir. 1975).

5. *Id.* at 513.

6. *Id.*

7. Woodruff v. United States, 96 S. Ct. 2168 (1976).

8. Tollett v. Henderson, 411 U.S. 258 (1973) (guilty plea waives contention, unknown at time of plea, that the indicting grand jury was unconstitutionally composed).

9. Blackledge v. Perry, 417 U.S. 21 (1974) (guilty plea does not waive claim that the state, by charging the defendant with a crime, violated his due process rights); Menna v. New York, 423 U.S. 61 (1975) (guilty plea does not waive double jeopardy claim).

10. People v. Selikoff, 35 N.Y.2d 227, 238, 360 N.Y.S.2d 623, 633 (1974).

11. FED. R. CRIM. P. 11. *See* McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969). For an interesting case see Irizarry v. United States, 508 F.2d 960 (2d Cir. 1975), holding a conspiracy guilty plea involuntarily taken because the

without admitting actual guilt.[12]

With all these rules, is it short of amazing that ordinary people believe charges about easy judges and light sentences? Can guilt and innocence be all that complicated? Isn't this the one issue that still remains clear? Picture trying to explain to a friend who is not a lawyer that it is possible for a defendant to plead guilty, graphically describe his or her vicious crime, and then withdraw the plea under certain circumstances and go to trial. At trial, the judge, prosecutor and defense lawyer suddenly shift roles and pretend they never heard the plea at all. The defense lawyer staunchly maintains his client's innocence, the judge acts neutral, and the prosecutor cannot tell the jury about the confession. Your friend would think you'd gone mad—that the entire administration of the criminal law had gone mad—and your friend would be right. Except for one thing: it won't work any other way.

Feeble and unsystematic as the administration of the criminal law (I don't say "justice") is, at least it churns out results that in most cases approximate fairness. Perhaps the approximation is too rough—I believe so—and perhaps at times it works grave injustice—I personally know that it does—but the solution is not to scrap it for something likely to be less precise. The solution is to take the model we have, which is really the distillation of many false starts and cautious experiments, and improve it. That model includes plea bargaining. It always will. I do not believe it is possible to construct a "criminal justice system" that does not include plea bargaining at some level, and if it is, I am not sure I would want to live under it.

For example, even if we require the judge to impose a minimum sentence for certain crimes, we are simply giving the prosecutor the power *not* to charge those crimes in exchange for something else, *e.g.*, becoming an informant or extracting an agreement from a defendant to plead guilty to another crime, which allows judicial discretion at sentencing. And if we prohibit a prosecutor from bargaining when certain offenses are charged in an indictment, we are simply shifting the bargaining process to the preindictment stage. There is no getting around discretion without becoming barbaric.

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trial judge had not adequately described to the defendant the elements of the crime of conspiracy.

12. North Carolina v. Alford, 400 U.S. 25 (1970).

This is the value of Rosett and Cressey's contribution. It will not tell lawyers anything new about the administration of criminal law. It even errs in some of its historical facts.[13] It also fails to analyze the important differences between limits on judicial sentencing discretion and limits on the prosecutor's discretion to bargain. But what Rosett and Cressey do well is to convey the factory-like atmosphere of, and the ambiguity in, local criminal courts. This atmosphere is more or less inevitable in state courts, which process vast numbers of defendants. Through the intelligent device of simulating an actual case—a small burglary—and showing the interests and pressures on each of the individuals involved in the plea bargain—the judge, defense lawyer, prosecutor and defendant—the authors solidly portray the strange world in which the criminal law is administered. They also show that guilt and innocence are rarely as clear as the public believes, even to the defendant who supposedly knows the truth.[14]

The authors' recommendations for corrective action are not new: more community involvement, break up courthouse bureaucracy so that defendants are more likely treated as individuals, reduce maximum sentences, decriminalize the law. The proposal to reduce maximum sentences is likely to assure more accurate pleas. The pressure to plead guilty, even if guilt cannot be proved, to a crime carrying a one-year sentence or with a promise of time served, must be enormous on a defendant facing a possible ten-year sentence for the crime charged in the indictment. This is especially true given the still outrageous conditions of most of our jails and, despite a host of speedy trial rules, the time it takes actually to get a trial. Decriminalization would decrease the volume and make it easier for the system's bureaucrats to tolerate trials.

Plea bargains are neither bad nor good by themselves. They are bad if they exist in a system that subtly encourages false pleas. They are good if they are used in a system that permits a knowledgeable judge, prosecutor, defense lawyer and defendant

13. For example, the New York State legislature did not "substantially" amend the Rockefeller drug law in 1975. Only recently have substantial changes even been suggested.

14. Another recent volume that also attempts to convey the workaday world of the criminal court is *The Judge*, by James F. Simon (McKay, 1976). Simon accompanies a real but anonymous judge as he carries out his duties in the criminal court of a large northeast American city. The result is a piercing description of the criminal law system from the perspective of the bench, a perspective often missed because of confining ethical and similar rules.

to determine a fair penalty in exchange for an informed and accurate guilty plea. The justice of plea bargaining depends on the justice of the system within which it operates.

*Reviewed by Robert L. Clarey**

> In motion, the organization of the courthouse comes to resemble a Rube Goldberg contraption held together by Scotch tape, spit and baling wire, with amazing and ridiculous wheels and gears powering a useless assembly line.[1]

Any layman, fledgling lawyer, or newly appointed judge finding himself suddenly and cruelly thrust into the hostile bureaucracy of the courthouse would be tempted to agree with the import of this statement. The structure of the American criminal courthouse is essentially three independent bureaucracies: prosecution, judiciary and defense counsel. All are intended to work in opposition to one another, yet all seek to accomplish a common goal—to move cases through the system.

The authors of *Justice by Consent* have produced a highly readable, thought-provoking look inside the system of plea bargaining, the backbone of the American justice system. Arthur Rosett has served as an Assistant United States Attorney and as a Deputy District Attorney in California. Donald Cressey is a sociologist who has done extensive clinical work inside and outside the criminal justice system. The blending of these very different backgrounds may well be the key to the effectiveness of their book.

Rather than taking a technical approach, the authors' analysis focuses on the progression of a hypothetical criminal case as it passes from arrest through sentencing. The reader is permitted to see the burglary case of Peter Randolf from the perspectives of policeman, prosecutor, probation officer, judge, public defender and defendant. The authors present a rare view, even for those of us within the system, of the pressures put upon each participant. They detail the factors, both real and imagined, which each

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1. P. 136.

takes into account in determining Peter Randolf's freedom and future role in society.

Rosett and Cressey have made a convincing showing that judges, commonly assumed to bear the primary responsibility and discretion for dealing with offenders, have abdicated their function and actually exercise only minimal control. The great bulk of discretionary decisions concerning arrest and ultimate disposition of a particular criminal defendant are made by far less visible public servants.

A patrolman has awesome discretion in deciding whether to make an arrest. His police superiors later decide whether a particular person arrested will be charged with a felony or misdemeanor or indeed, whether he will be charged at all. A prosecutor, at the initial stages, has power to review all prior decisions. He can upgrade, downgrade or dismiss charges outright. The same prosecutor or a colleague will decide to what charge a defendant will be permitted to plead and often what sentence "the people" will consent to. The public defender will determine, often at a very early stage of the proceedings, whether the case is a "trial" or a "plea."

The judge, by law possessed of the ultimate discretion in sentencing, must be aware that in order to exercise it, he may have to overturn and nullify all of the carefully thought-out and negotiated actions of his predecessors in the system. Therefore, judges often consider as binding, rather than suggestive, the recommendation contained in the probation officer's presentencing reports.

This wide discretion at all levels, condemned by many as the villain of the system, is rightfully deemed its hero and savior by the authors. Their unimpeachable conclusion is that discretion, whether or not those within the system realize or admit it, is in fact exercised "in the interest of justice." If there were no opportunity for its exercise, there would be no justice. Efforts to eliminate discretion entirely, such as the draconian New York State Law mandating life sentences for certain narcotics offenders, have been dismal failures.[2] Alternatively, efforts to limit discretion too severely have given rise to elaborate schemes to circumvent and frustrate the adopted rules.[3]

The real villain and the crux of the problem in the plea

2. Pp. 166, 192 n.4.
3. Pp. 157, 171, 172.

bargaining system, the authors assert, is the overwhelmingly coercive pressure the system places upon a defendant to plead guilty and the pressure upon those who work within the system to persuade him to do so. Police and prosecutors overcharge and overindict. Their behavior is based on a valid assumption: where a defendant is faced with a charge carrying a penalty of, for example, 25 years, rather than risk conviction after trial, he literally will jump at a chance to plead to a charge carrying a maximum penalty of four years. Public defenders know they can only try a small percentage of their cases. They would rather try those they have a chance of winning. Therefore, the defenders exert pressure on most defendants to plead. Judges, under pressure to move their calendars and close cases, will promise a lenient sentence for a plea. At the same time, they subtly imply that if a defendant exercises his right to trial he risks harsher treatment thereafter.

The authors argue that the defendant is not the only victim of the coercive atmosphere of the guilty plea system. While he may feel cheated once the prison door closes behind him, the public is dissatisfied that he will not be there longer. Prosecutors and defense counsel, who once envisioned themselves as hard hitting independent-minded trial advocates, begin to feel like scrap metal dealers haggling over the price of a pound of iron. Judges, even if not involved in the crass negotiating process, find themselves taking plea after plea.

The dilemma, of course, is that the system could not work without a very high percentage of guilty pleas. If there were no pressure or "reward" for pleading guilty, most defendants would take their chances on trial. This would cause the system virtually to grind inexorably to a halt. Where, we ask ourselves, are the solutions?

In their closing chapter, Rosett and Cressey examine and reject as unworkable some of the previously suggested panaceas for the evils of plea bargaining. Included are those put forth by politicians and legislators, the "try every case" approach[4] and the "lawyer's solution," essentially judicial intervention involving "open court hearings."[5] The authors, surprisingly and refreshingly, propose new solutions of their own to the dilemma of how to eliminate, or reduce to a minimum, the coercive pressure on a

4. P. 165.
5. Pp. 168, 169.

defendant to plead and still operate on a 70-90 percent guilty plea basis.

Above all else, it is posited, the great impersonal bureaucratic assembly lines must be broken up or at least rearranged. Large downtown courthouses must be decentralized into community courthouses. Localization would encourage and enable participation in the system by members of the community, the defendant's friends, family and even perhaps his victim.

Especially thought-provoking is the authors' recommendation for reducing the severity of penalities.[6] To my surprise, they document the penalties in the United States as being higher than in any nation in the world.

These proposed solutions should be given careful consideration, principally in the large metropolitan centers where the plea bargaining problems are magnified by overwhelming caseloads. In less congested systems problems are often minimal. In some localities, meaningful reforms have reduced them drastically. As a prosecutor of nine years experience in three separate and vastly different systems,[7] my law school vision of myself as a no-compromise trial lawyer has altered a bit. It should be emphasized, however, that the systems in which I have worked are not nearly as stifling as the one described by Rosett and Cressey. The caseloads in military and federal courts can in no way fairly be compared with those of a local state court. Thus, for purposes of comparison I will confine myself to what I have experienced and observed in my eighteen months in Nassau County, New York.

The plea bargaining system is most assuredly coercive, perhaps more so than is necessary. The coerciveness here, however, is tempered by certain enlightened procedures. Legal Aid lawyers, unlike Peter Randolf's public defender, are assigned on an individual case basis and stay with a defendant from arrest through sentencing. Assistant District Attorneys, though assigned to parts,[8] are rotated to other parts periodically. Hence, the problem inherent in an overly familiar relationship among judge, prosecutor and public defender, *i.e.*, the "committee on

6. P. 182.

7. U.S. Navy Judge Advocate General's Corps. 1968-1971; United States Attorney, E.D.N.Y. 1971-1975; Nassau County District Attorney 1975-present.

8. The Nassau County Court, which has primarily felony jurisdiction, is comprised of eleven trial parts and one arraignment part. Each is presided over by a judge of the County Court. Two, or in some cases three, prosecutors are assigned to each part on a rotating basis.

criminal justice,"[9] is substantially alleviated.

Overcharging and overindicting have been drastically reduced by formalized case screening procedures both in the District Attorney's Office and at Legal Aid. These procedures allow many defendants to plead to misdemeanors even though a grand jury could technically indict them for felonies. Calendar pressures are thereby reduced to the benefit of all.

Oppressive calendar pressures on procecutors and judges have further been relieved by the formation within the District Attorney's Office of a Major Offense Bureau. This office is staffed by experienced prosecutors who are prepared to take to trial, in special trial parts, any and every case accepted by them as a "major offense."[10] Thus, in such cases coercion is eliminated since a guilty plea is not specifically sought.

More uniformity with regard to pleas is insured by a rule in the District Attorney's Office relating to charge reduction. All reductions of more than one grade are barred without prior approval of a bureau chief. Uniformity of pleas should lead to uniformity of sentences.

Judges in Nassau County are especially careful to avoid coerced pleas. They will not accept a guilty plea until the defendant answers, to the judge's satisfaction, one or another form of the question: exactly what criminal conduct did you perform to violate the law? The question, asked during a lengthy colloquy between judge and defendant, is designed to insure that a defendant understands precisely what he is doing and is aware of his alternatives. A complete and open discussion of any previously arranged plea bargain is also part of the interchange.

These procedures differentiate Nassau County from Rosett and Cressey's hypothetical jurisdiction. However, their fictional prosecutor, Joe Carbo, would in many ways feel very much at home working here. He would encounter young attorneys in the felony trial bureau, who, for the most part, are there to gain trial experience and who, quite naturally, want to win their cases. As a trial assistant assigned to a part, he would similarly find himself

9. Pp. 173, 175.

10. A major offense is a serious felony involving a potential danger to the community. It is committed by a defendant who, due to a prior criminal record or propensity for violence, evinces a substantial need for incarceration. Since its inception approximately 10 months ago, the Major Offense Bureau (M.O.B.) has accepted 161 cases as major offenses. This represents 35-40 percent of all eligible A, B, and C felonies and 16 percent of all felonies pending in Nassau County.

serving two masters, judge and bureau chief. He would be subjected to calendar pressures necessitating a high percentage of guilty pleas. Additionally, he would be subjected to a form of pressure not developed in the book. Along with his trial partners, the prosecutor would be strongly encouraged to keep his part continually occupied by trials and hearings. In Nassau County an idle courtroom is considered as great an evil as a clogged calendar.

Since the Nassau County District Attorney's Office is much larger than Joe Carbo's fictional office, he would find that formal meetings, such as the one at which he discussed Peter Randolf's charge and plea with his colleagues, are simply impossible. He would, however, see that all but the most routine cases are the subject of lengthy and meaningful discussions between trial assistants and supervisors.

These discussions raise pragmatic questions. In part, they are concerned with the strength of the prosecutor's case:

> What kind of a lawyer does he have?
> Will he plead?
> If so, to what?
> What will the judge give him?
> Can we convict him?
> Can he help us get someone bigger?

Other questions raised in these meetings relate to the essence of individual justice:

> What kind of a "sheet" (criminal record) does he have?
> Does he have a job?
> Does he have a family?
> Is this alleged crime an isolated instance or part of a larger continuous series of crimes?

That these latter questions are considered as a matter of course by prosecutors and all other participants in the criminal justice system exemplifies the most important point made by the authors of *Justice by Consent*. True justice is indeed the product of a system which allows for the broad exercise of discretion. Although improvement is necessary, desirable and possible, it must be achieved by means which allow for continued flexibility in handling individual cases.