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DISPUTE RESOLUTION IN CRIMINAL LAW

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This issue of the *Marquette Law Review* features papers presented at the Marquette Law School Conference on Plea Bargaining on April 14, 2007. We organized the Conference to promote the development of an interdisciplinary dialogue on plea bargaining between criminal law and dispute resolution scholars. Our participants included distinguished scholars in both fields, and readers of the following papers will soon appreciate the wonderful depth and diversity of their insights into the theory and practice of plea bargaining.

Although plea bargaining would seem a natural area for collaboration and dialogue between students of criminal law and dispute resolution, there has been remarkably little cross-fertilization between the fields. This is unfortunate. For instance, scholars (and practitioners) of criminal law may benefit from research in the dispute resolution area on the psychological dynamics of negotiation,¹ the significance of procedural justice,² and the neurobiological aspects of negotiation.³ For

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1. For instance, a colleague recently reported to one of us that, in a roomful of public defenders from around the country, not one reported having ever even considered the possibility of presenting the opening offer in plea negotiations—even though it is well-understood by students of dispute resolution that the opening offer tends to exert considerable influence over all subsequent negotiation. See, e.g., MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 29 (1992) (discussing anchoring effects).

2. See, e.g., Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753 (2004).

3. See, e.g., Douglas H. Yarn & Gregory Todd Jones, *In Our Bones (or Brains):*

their part, scholars of dispute resolution may benefit from the focused attention criminal law scholars have given to the culture of the courthouse,⁴ the influence of sentencing guidelines on settlement,⁵ and lawyer-client agency problems.⁶

Although we believe that criminal law and dispute resolution scholars have much to learn from one another, plea bargaining is undoubtedly a unique form of dispute resolution, and any attempt to apply the generic lessons of negotiation theory to criminal law must be undertaken with great care. Indeed, one may object even to our premise that plea bargaining can appropriately be labeled a form of dispute resolution—a term that calls to mind the allocation of limited material resources between two parties of roughly equal legal and moral status. By contrast, it might be said that plea bargaining is a transaction between very different sorts of parties (the state and the citizen), and one whose ultimate goal is the moral condemnation of one by the other. Viewed this way, there seems a fundamental asymmetry between the status, power, and objectives of the two sides that differentiates plea bargaining in profound ways from other sorts of negotiation more commonly studied by dispute resolution scholars.⁷

Yet, this picture does not fully convey what plea bargaining is or should be. Characterizing one side in plea bargaining as the state bent on moral condemnation misses the important and complex role played by the prosecutor, nominally as representative of the state, but in practice (given agency problems and the broad discretion traditionally enjoyed by American prosecutors) doubtlessly self-serving to a not inconsiderable extent. Moreover, the increasingly robust role played by victims in the criminal justice system further undermines the practical significance of the state-versus-citizen structure of criminal disputes and adds a new dimension to the agency problems.⁸ At the extreme, when

Behavioral Biology, in THE NEGOTIATOR'S FIELDBOOK 283 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

4. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 920–23 (2006).

5. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2486–91 (2004).

6. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975).

7. This probably explains why dispute resolution scholars, with some prominent exceptions, have not written about plea bargaining. See, e.g., Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205; Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997).

8. We learned recently of one district attorney's office that expressly instructs its law

prosecutors find themselves negotiating with defendants over restitution for victims, there seems little to differentiate plea bargaining from conventional civil dispute resolution. And, even short of that extreme, plea bargaining discussions may focus on a variety of considerations that relate only obliquely to moral condemnation: the place where the sentence will be served; the conditions imposed for probation or supervised release; the defendant's ability and willingness to testify against other offenders; the precise package of procedural rights to be waived by the defendant (e.g., whether the right to appeal the sentence will be waived); the factual basis of the plea; the collateral consequences that will be triggered by the guilty plea (e.g., sex offender registration); fines; forfeiture; the release of civil claims; and so forth. Plea bargaining is not primarily about each side's efforts to maximize financial returns, nor is it exclusively an exercise in moral judgment. The parties, rather, may have a rich variety of ends in mind, some of which inevitably must be traded off against one another—a dynamic not so fundamentally different from what one finds in the negotiated resolution of civil disputes.

Nor, from a normative standpoint, do we find the pure moral condemnation model an entirely appealing account of the criminal justice system. Some of the most successful recent innovations in criminal procedure (for instance, restorative justice programs and therapeutic courts) speak to a deeply felt need for more pragmatic, problem-solving responses to criminal offenses.⁹ Indeed, thoughtful prosecutors have long recognized this need and sought through plea bargaining not only to hold offenders accountable for their misdeeds, but also to address the needs of victims more broadly and to establish a framework for the offender's successful reintegration into the community. Such problem-solving approaches are to be encouraged as a more constructive response to crime than the "get-tough" ethos of the 1980s and 1990s, which produced a shameful and unprecedented explosion in American prison populations.¹⁰ To the extent that plea

student interns that they should regard victims as their clients.

9. See, e.g., Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 254–63 (2005) (describing premises and growing importance of restorative justice programs).

10. See Michael M. O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 305–06 (2005). Professor James Whitman has described subtle and important connections between the growth of prison populations and an emphasis on moral condemnation as the overriding purpose of the criminal justice system. See, e.g., James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 89–90, 106–07 (2003).

bargaining moves increasingly in the problem-solving direction, it will (and should) look increasingly like court-connected alternative dispute resolution processes in the civil arena. Although criminal dispute resolution will always retain distinctive characteristics, thoughtful and constructive plea bargaining should function in ways that make continued dialogue between criminal law and dispute resolution scholars a mutually beneficial enterprise.

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The Conference was comprised of three panels and a roundtable discussion of practitioners. The first panel dealt with the classic observation in the dispute resolution literature, that negotiation occurs in the shadow of the law. Put differently, the concept is that negotiated outcomes are shaped, to a greater or lesser extent, by what the parties expect would happen if the case went to trial.¹¹ To what extent, though, does this hold in the criminal law field? In their paper, Professors Ronald Wright and Rodney Engen explore the relationship between criminal code structure, particularly, the number and nature of charging options available for different types of crimes, and the outcomes of plea bargaining.¹² Their work offers an important caveat to recent scholarship that has tended to downplay the significance of formal law in plea bargaining.¹³ Professor Richard Birke's article¹⁴ builds on his earlier pathbreaking work that first recognized the contradiction between theories based on cognitive psychology about when parties should "rationally" settle and the reality of what was actually occurring in plea bargaining.¹⁵ He argues in his new article that doctrines and practices that make trials readily available in criminal litigation play a greatly underappreciated role in promoting cooperative behavior between prosecutors and criminal defense lawyers and suggests that

11. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law*, 88 YALE L.J. 950 (1979).

12. Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9 (2007). They expand here on their innovative earlier work on this subject. See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

13. See, e.g., Bibas, *supra* note 5.

14. Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQ. L. REV. 39 (2007).

15. Birke, *supra* note 7.

increasing the availability of trials on the civil side may have similar salutary effects. Professor Andrea Schneider's article also focuses on how the negotiation practices of criminal lawyers differ from that of their civil counterparts.¹⁶ Based on data from her earlier study of lawyer negotiation styles,¹⁷ Schneider reveals that criminal lawyers, especially on the defense side, are remarkably problem-solving. She questions whether this tendency is a result of long-term relationships and shared goals in justice-promoting, efficient settlements, or a result of overwhelmed attorneys representing uneducated and poor defendants with few options. In his article, Professor Josh Bowers identifies another source of the "shadows" in which plea bargaining takes place: community views of police practices.¹⁸ Based on the experience of New York City with order maintenance-policing in the 1990s, he describes how and why prosecutors may reduce going plea rates in order to enhance community acquiescence to controversial law enforcement policies. Finally, in his contribution, framed as a response to Professors Wright, Engen, Birke, and Bowers, Professor Daniel Barnhizer draws helpful comparisons between plea bargaining and consumer contracts.¹⁹ In the power imbalance between prosecutors and defendants, Barnhizer sees a reflection of the power imbalances between producers and consumers, resulting in the equivalent of standard form contracts that leave defendants with limited options and prosecutors with the ability to harvest information that can be used to gain leverage in future plea bargaining interactions.

The second panel addressed what the field of psychology has to teach us about plea bargaining. In classic economic models of plea bargaining, all of the participants are so-called "rational utility-maximizers" who pursue consistent objectives in a neatly predictable fashion. Psychology research, which is increasingly being drawn on by legal scholars of all stripes, gives us a much more complicated picture of human thinking and behavior. In her article, Professor Rebecca Hollander-Blumoff explains why the current understanding of how the rational actor model paradigm does not capture the reality of plea

16. Andrea Kupfer Schneider, *Cooperating or Caving in: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?* 91 MARQ. L. REV. 145 (2007).

17. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

18. Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007).

19. Daniel D. Barnhizer, *Bargaining Power in the Shadow of the Law*, 91 MARQ. L. REV. 123 (2007).

bargaining.²⁰ Moreover, notwithstanding what is assumed about their role in other negotiations, lawyers do not actually lessen the effect of cognitive biases and heuristics in plea bargaining. As Hollander-Blumoff explains, a broader social psychological approach is needed to understand the motivations of the individuals engaged in plea bargaining. In her contribution, Professor Alafair Burke focuses on how individuals rather than systematic pressures can affect plea bargaining.²¹ Particularly, she argues that the prosecutor's passion for a case influences the prosecutor's willingness to bargain. This passion can also serve to strengthen the cognitive biases and heuristics described by Hollander-Blumoff. Professor Russell Covey's article starts with the question of why plea bargains are so common given the existence of plea-discouraging cognitive biases.²² He argues that the structure and features of the criminal justice system are, in fact, often designed to counteract what would otherwise be strong tendencies to go to trial. Professor Chad Oldfather introduces a note of caution regarding the applicability of behavioral economics to the behavior of criminal defendants.²³ He suggests that both the psychological atypicality of criminal defendants and the unique context of the criminal justice system ought to give us pause before assuming that defendants will act in the manner predicted by research involving a broader slice of the population making different sorts of decisions under different constraints.

The third panel considered the role of victims, apology, and restorative justice in plea bargaining. Professor Erik Luna's article offers a libertarian critique of plea bargaining.²⁴ Although plea bargaining might seem attractive to libertarians as a seemingly market-based means of resolving criminal cases, Luna points out that this superficial view neglects victims; as the individuals whose rights have been violated by the offender, victims should play a central role in case resolution. In Luna's view, prosecutor-dominated plea bargaining

20. Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163 (2007).

21. Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007).

22. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213 (2007).

23. Chad M. Oldfather, *Heuristics, Biases, and Criminal Defendants*, 91 MARQ. L. REV. 249 (2007).

24. Erik Luna, *Traces of a Libertarian Theory of Punishment*, 91 MARQ. L. REV. 263 (2007).

should thus be replaced by restorative justice practices that more fully empower victims. In their article, Professors Margareth Etienne and Jennifer Robbennolt describe the potential benefits to victims of offender apologies,²⁵ which might be one of the chief advantages of the sort of restorative processes favored by Luna. As Etienne and Robbennolt demonstrate, however, the marginalized position of victims and offenders in the existing criminal litigation framework substantially diminishes the likelihood that apology can be integrated effectively into plea bargaining processes. In his article, Professor Michael O'Hear discusses the potential benefits of victim participation in plea bargaining and proposes a new model for victim participation structured around transparent charging and bargaining guidelines for prosecutors.²⁶ Finally, Professor Douglas Beloof briefly responds to O'Hear's proposal, finding it a novel and promising approach to the problem of better integrating victims into the criminal justice system without losing sight of the system's public-regarding objectives.²⁷

In addition to panels, the Conference included a roundtable discussion of plea bargaining in Wisconsin, the transcript of which is included in this issue of the *Marquette Law Review*.²⁸ The discussion included several of the state's most respected criminal justice leaders and practitioners. Plea bargaining is a notoriously opaque practice to outsiders. Our scholarly conversation on plea bargaining thus benefitted considerably from some well-informed insider perspectives. Of course, more systematic empirical research, both qualitative and quantitative, remains one of the most pressing needs in the plea bargaining field.

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We would like to thank all of our authors and other participants for a lively and productive conversation about plea bargaining, first in person and now in print. We are also grateful to Marquette Law School's Dean, Joseph Kearney, for his generous support and

25. Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295 (2007).

26. Michael M. O'Hear, *Victims and Plea Bargaining: From Consultation to Guidelines*, 91 MARQ. L. REV. 323 (2007).

27. Douglas E. Beloof, *Dignity, Equality, and Public Interest for Defendants and Crime Victims in Plea Bargains*, 91 MARQ. L. REV. 349 (2007).

28. *Plea Bargaining from the Criminal Lawyer's Perspective: Plea Bargaining in Wisconsin*, 91 MARQ. L. REV. 357 (2007).

encouragement, and to the many other administrators and staff members at Marquette who helped to make the Conference a success. Finally, we would like to thank the editors of the *Marquette Law Review* for their hard work in bringing the Conference papers into print.