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Bargaining Power in the Shadow of the Law: Commentary to Professors Wright and Engen, Professor Birke, and Josh Bowers

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BARGAINING POWER IN THE SHADOW OF THE LAW: COMMENTARY TO PROFESSORS WRIGHT AND ENGEN, PROFESSOR BIRKE, AND JOSH BOWERS

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This essay approaches the subject of plea bargaining as a general topic and also contains my commentary on papers presented by Professors Wright and Engen, Professor Birke, and Josh Bowers specifically. It does so with some trepidation. My scholarship and teaching focuses upon contracts and negotiation. Plea bargaining, on its face, doesn't immediately seem to fit within the classical contracts paradigm of informed and voluntary offer, acceptance, and consideration. At the theoretical level, at least, the classical model of contract envisions parties of roughly equal bargaining power voluntarily negotiating the terms of their bargain. Against this theoretical background of a deal struck between persons in a posture of rough parity, criminal law, in contrast, is deeply suspect. The resulting agreements likely would not survive in many civil litigations based upon factors such as duress, unconscionability, fraud, incapacity, incompetence, undue influence, frustration of purpose, and mistake. In the criminal context, one of the parties has all the resources of the state, and the other often has no meaningful resources. In the criminal context, one party threatens force and deprivation of liberty if the other does not submit to the proposed exchange. In the criminal context, one party possesses a host of alternatives and may cheaply impose additional risks and costs upon the other merely by exercising relatively unfettered discretion with respect to the charge against the accused. Over-indictment provides prosecutors with a powerful tool to intimidate noncooperative defendants or defense counsel, even if it is rarely used. Indeed, from a contract law standpoint, it is difficult to think of plea

* Associate Professor of Law, Michigan State University College of Law. I am grateful to Andrea Schneider and Michael O'Hear for their invitation to participate in this symposium. Likewise, I am honored by the opportunity to comment upon the papers delivered by Professors Ronald F. Wright and Rodney L. Engen, Professor Richard Birke, and Josh Bowers. Both the symposium and the detailed interactions I have had with these three papers have been immensely enriching.

bargains as "contracts" in any sense.

But once we retreat from the unreality of the classical model of contract negotiation and formation, the dynamics of criminal plea bargaining can provide important insights for civil contract disputes and, I hope, vice versa. The problem with criminal plea negotiations isn't really that the resulting agreements aren't contracts. It is that the power relationship between the parties appears so one-sided that even innocent parties may have strong incentives to accept a guilty plea rather than face trial—their best, worst, and only alternative to a negotiated agreement. Such agreements are, in fact, merely one more point on a continuum of bargaining, promissory, and contractual relationships based upon the relative bargaining power of the parties.

As I have argued elsewhere, the question of whether a promise or agreement should be enforceable under contract law depends entirely upon whether both parties to the transaction possessed bargaining power of a type that courts can consistently and credibly identify.[1] Because of the blatant power disparities between prosecutor and accused, my own work predicts the regulation of such agreements under a set of safeguards that exist outside the domain of contract law. These include representation of the accused by counsel, constitutional guarantees, and judicial review of the terms of the agreement and (at least superficially) the actual consent of the parties. Such safeguards are distinct from classical contract law models that presume private

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1. LARRY A. DIMATTEO, ROBERT A. PRENTICE, BLAKE D. MORANT & DANIEL D. BARNHIZER, VISIONS OF CONTRACT THEORY: RATIONALITY, BARGAINING, AND INTERPRETATION 121 (2007) [Chapter 6 hereinafter BARNHIZER, BARGAINING POWER AS CONTRACT THEORY].

> On a macro level, removed from individual cases, bargaining power operates as the cover charge to the exclusive club of contract law. When both parties to a transaction possess some ability to affect the outcome of their interaction, they may take advantage of the relatively flexible and unregulated regime of private contract. If one party lacks bargaining power—as in cases of duress and coercion—or even if that party has real bargaining power but legal decision makers cannot consistently and credibly identify and assess that power—as with intrafamilial gifts—the parties cannot make promises that are enforceable as contracts. Instead, their transaction gets bounced to one of many alternative venues, such as labor law, tort, promissory estoppel, criminal law, or property, in which the bargaining process and even the terms of their interaction are subject to steadily greater degrees of public regulation. Bargaining power thus works to move promises along a continuum from strong private autonomy to strong state intervention.

Id. at 121.

autonomy and private orderings in which the abuse of state power is usually not a direct concern.[2]

Moreover, despite generating a comforting warm glow of objective, formalist, Langdellian certainty, classical contract law provides a poor model against which to analyze the dynamics of criminal plea bargaining and the contributions by the four authors whose papers are the subject of this essay. Rather, plea bargaining generally, and these three papers specifically, provide strong analogies and points of similarity to the reality of modern contract practice based upon transactions pursuant to standard form contracts—often adhesive in nature—between producers and consumers.[3]

My argument is based upon a model of prosecutors as nothing more (and nothing less) than producers and producers' agents, who offer an array of products and services for sale to their customers through standard form contracts. Their customers, of course, comprise defendants, defense counsel, judges, and the non-criminal and potentially criminal public. As with many standard form contracts, the criminal plea bargain also provides in some cases for dickering over salient terms such as price, optional features, and time and place of delivery.

In the real world, standard form agreements between producers and consumers likely now describe more than ninety-nine percent of all contractual interactions.[4] Parties to such agreements rarely, if ever,

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2. *See id.* at 126–30.

> By moving transaction types characterized by systemic inequalities of bargaining power along a continuum away from "core" contract law and relatively unfettered private autonomy toward regimes involving greater degrees of public intervention, courts and legislatures express indirectly the permissible boundaries within which parties may exercise legitimate forms of bargaining power.

Id. at 128.

3. *See* W. DAVID SLAWSON, BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW 23–26 (1996). A producer is one who produces goods and services for sale, while a consumer is an individual, business firm, or other organization that purchases such goods and services in order to consume them. *Id.* at 24. In the commercial context, any entity may be a producer or a consumer depending upon the transaction. In the criminal plea bargaining context, of course, prosecutors will virtually always occupy the producer position, and criminal defendants, potential criminal defendants, the community at large, and the police will be consumers of the prosecutor's products.

4. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) ("Standard form contracts probably account for more than ninety-nine percent of all the contracts now made."); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203

stand on an equal footing with respect to their relative bargaining power. Producers—sellers of goods and services—almost always have superior information regarding their products, contract terms, and their pricing structure. This information advantage, in turn, creates a ubiquitous bargaining power advantage over consumers of those goods and services.[5] An auto manufacturer, for example, designs, builds, tests, and deals with consumer complaints regarding its products and possesses greater information about the strengths and weaknesses of its products than consumers. Moreover, the auto manufacturer also possesses superior information regarding the terms of its standard form contracts, and the likelihood and actual value of particular aspects of those contracts such as warranty terms and choice of forum clauses.[6] A consumer cannot afford to investigate the reliability of every physical component of the vehicle.[7] Nor do consumers bother spending time reading or attempting to vary non-salient terms of the manufacturer's contract.

As repeat players in transactions regarding sales of their products, producers have incentives to develop information not just about their products but also about consumers themselves.[8] Particularly in the information age, consumers voluntarily—and usually unknowingly—

(2003).

5. *See* SLAWSON, *supra* note 3, at 23–27. According to Slawson, this informational advantage is a natural consequence of the fact that producers only have to have information about their own products, while consumers must spend scarce resources investigating and analyzing characteristics of many products and producers. *Id.* at 26.

6. *See id.* at 23–27.

7. *See id.*

8. *See, e.g.*, Daniel D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 CLEV. ST. L. REV. 69, 70–71 (2006).

> Specifically, producers in the information era have the ability to collect extraordinarily detailed personal information about individual consumers and then use that data to develop a high-definition electronic double—a doppelganger—of those individuals. Producers can then use this electronic reflection of a consumer's interests, wants, habits and needs, to invade a consumer's control over personal choices and interests. The doppelganger identifies the targets most susceptible to particular products and pitches, assists the producer in making the sale, and perhaps even suggests means of exploiting known cognitive biases that can interfere with free and rational choice by the consumer. And, most importantly, the doppelganger is the property of the producer or data miner who created it—individual consumers currently have no power to restrict or control others' uses of these electronic manifestations of their selves.

Id. at 70–71.

give away personal information in terms of web browsing and shopping histories, website registrations, warranty registrations, frequent shopper cards, contest entries, and a host of other privacy invasions.[9] Producers, in turn, develop this information or purchase it from data miners for the purpose of crafting detailed electronic doppelgangers of consumers. With the assistance of such virtual doubles, producers can target consumers individually or collectively to exploit known wants, preferences, and weaknesses and increase the likelihood of successful future sales.[10] Importantly, this personal information belongs to producers, and consumers lose all ability to restrict producer use of this information once it has been surrendered.[11]

Consumers do possess some defenses or countermeasures against producer bargaining power advantages. First, consumers are heterogeneous and possess widely varying degrees of sophistication, interest in particular transactions, access to information about a product or producer, and willingness to engage in shopping or bargaining.[12] Sophisticated individual consumers may possess, or invest in developing, information with respect to producers or products that, while unlikely to counteract completely the systemic advantages of producers, nonetheless protect against extreme abuses of bargaining power. Likewise, sophisticated consumers may recognize the value of third party assistance and expertise in shopping and bargaining for large-scale transactions. In contrast, individuals at the other end of the spectrum lack the sophistication, resources, or practical ability to affect meaningfully the outcome of the bargaining process. While all consumers possess some bargaining power—the ability to affect a preferred outcome in the bargaining transaction—that power may not be legally cognizable in that courts are incapable of credibly and consistently observing and policing that bargaining power.[13] In such situations, the parties' agreement is unenforceable under contract law and must be regulated under some other paradigm such as family law,

9. *See* Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2060–68 (2004) (analyzing four case studies of methods by which consumers voluntarily and involuntarily generate personal information for commodification and sale by producers); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1283–84 (2000) (listing a broad array of mechanisms by which producers collect information from individuals' transactional lives).

10. *See* Barnhizer, *supra* note 8, at 90–92.

11. *See* Litman, *supra* note 9, at 1284.

12. Barnhizer, *supra* note 8, at 92–101.

13. *See* BARNHIZER, BARGAINING POWER AS CONTRACT THEORY, *supra* note 1, at 129–33.

property law, or criminal law.

Second, by virtue of their limited resources, consumers are rationally ignorant or boundedly rational regarding the merits of any given transaction.[14] Consequently, they tend to rely upon surrogates for actual information about products such as producer reputation or heuristics for lowering the costs of the decision making process.[15] Sophisticated producers can expend resources improving, maintaining, and manipulating their reputations and in exploiting known heuristics and cognitive biases of consumers. Producers in such situations likewise may have incentives to impose inefficient standard form terms upon consumers, knowing that consumers are unlikely to have sufficient information or bargaining power to identify or negotiate away from such terms.

This model of modern, information era, standard form contracting practices fits well with the dynamics of criminal plea bargaining in general and with the insights offered by Wright and Engen, Birke, and Bowers. Prosecutors, viewed from the lens of contract law and negotiation theory, are producers of a particular product—criminal prosecutions. Prosecutors offer their product in a variety of models ranging from a full blown criminal trial (with optional state and federal appeals for an additional fee), to a plea agreement that purportedly manages the risks of going to trial, to a decision not to indict or charge the defendant. The standard terms of such contracts are contained in federal, state, and municipal criminal codes, rules of criminal procedure, and office norms and practices. Finally, consumers of the prosecutor's product can bargain only over certain salient terms, such as sentence length or degree of charge.

In this system, prosecutors possess superior information regarding their products than their consumers, and consumers come with varying degrees of sophistication and resources. Given that criminal prosecutions are large-scale transactions in the lives of most criminal defendant consumers, third party advice, negotiation, and brokerage services are typically available and usually required. Thus, criminal defendant consumers must depend upon defense counsel to advise and negotiate a plea agreement, despite that such parties often have their

14. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 214–22 (1995).

15. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1203 (2003) (describing consumers as "boundedly rational decisionmakers who will normally price only a limited number of product attributes as part of their purchase decision.").

own agendas and interests and may themselves be consumers of the products offered by the prosecutor. And finally, criminal defendant consumers necessarily rely upon surrogates for full information regarding the product such as producer reputation and heuristics and cognitive biases that are often less than fully rational.

As discussed more fully below, each of the articles addressed in this commentary essay offers useful and important insights into the bargaining dynamics underlying the transaction between prosecutor and criminal in the plea agreement process.

I. *CHARGE MOVEMENT AND THEORIES OF PROSECUTORS* BY PROFESSORS WRIGHT AND ENGEN

In *Charge Movement and Theories of Prosecutors*,[16] Professors Wright and Engen illustrate the similarities between plea bargaining and standard form contracting in two important respects. First, their analysis of the relationship between charge depth and the ability of parties to reach more easily a customized, preferred outcome parallels the strange tension between standardization and customization of boilerplate terms in an information-based transactional context.[17] Second, their models of prosecutor as agent and the goals of that agent in the bargaining process illustrate how even in a regime of high degrees of term standardization, individual bargaining agents can still manipulate the process to respond to their individual goals and, probably to a lesser extent, the goals of their bargaining partnership with defense counsel.

Professors Wright and Engen begin with a theory of charge movement that explains to some extent the relative "stickiness" or psychological inertia of the standard terms available for plea bargains for some crimes (such as kidnapping) and the relative fluidity of standard terms in other situations (such as assault).[18] Wright and Engen propose that the relative "depth" of charges available in a criminal code at least partly determines the likelihood of charge movement in plea bargaining.[19] Thus, in the context of kidnapping, the criminal code

16. Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9 (2007).

17. *See* Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125, 1126–27 (2002) (arguing the impossibility of wholly standardized or wholly customized transactions).

18. Wright & Engen, *supra* note 16, at 16, 19–24.

19. *Id.* at 16–17.

provides a relatively limited menu of standard terms over which the prosecutor and defense counsel can bargain. Because of the relatively high cost of dropping the charge from a more serious crime to a less serious offense, the initially proposed terms are more likely to be, in Russell Korobkin's terms, "sticky."[20] In other words, just as in commercial bargains, once a standardized term is proffered as the default term, the parties incur a psychological cost to move off of that initial position. Prosecutors, as offerors of the initial default terms, should move off of that initial standard term where the benefits—defined in terms of increased attainment of enforcement goals, office policies, personal goals, or some other metric—exceed the costs, including the psychological and reputational costs of doing so.[21]

The interaction between the initial charging decision and later charge movement through plea bargaining should reflect this inertia. Where a prosecutor asserts an initial charge in a deep charge context, such as Wright and Engen's many varieties of assault-based crimes, both parties are aware that it is a low-value default position. The costs to the prosecutor to agree to each level of downward departure are relatively low compared to those in a shallow charge context.[22] Consequently, prosecutors should be relatively less concerned with initial charging decisions in deep charge level contexts because they know that they can bargain off those positions with little cost. In essence, the initial charge decision in such situations should, according to this model, more nearly resemble a statement that, "if you are interested in this product, here are a range of available options, and maybe we can talk some on the price."[23]

The deep charge level context, such as assault, thus resembles in some respects the *a la carte* computerized contracting paradigm proposed by Margaret Jane Radin in which she suggests that, because of reduced information costs, Internet-based producers could theoretically provide consumers with a smorgasbord of boilerplate terms. The

20. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1584, 1608 (1998) ("The psychological power of inertia suggests that negotiators who are able to define the status quo position, against which all proposed terms are judged, are likely to enjoy an important bargaining advantage.").

21. *See* Wright & Engen, *supra* note 16, at 29–30.

22. *See id.* at 17.

23. The temptation to discuss pleas by conspirators as "trade-ins" in which they rat out their co-actors is nearly overwhelming, but likely exceeds the scope of this analogy and the bounds of good taste.

consumer identifies a product she wants to buy, and the producer provides a menu of standardized terms. The producer dictates the array of terms and the prices of each standard term, but a consumer who values, say, retaining the right to litigate rather than arbitrate, could check an appropriate box in an online form and pay an additional fee to have a different but still standardized choice of forum or choice of law clause inserted into the contract.[24] This type of bargaining is theoretically possible only in situations in which the producer has good information regarding the cost of each different combination of standard terms. While some information, like the cost of manufacturing, is solely within the producer's control, other types of information require a large number of repeat transactions, such as the likelihood of warranty claims and the costs of litigating versus arbitrating. Consequently, *a la carte* contracting over boilerplate terms is theoretically possible only in situations where producers have a large number of very similar transactions, which is exactly what we should expect to see in deep charge level contexts such as assault.

In contrast, in shallow charge level contexts, prosecutors should theoretically be more cautious in making initial charge and charge bargaining decisions because both they and defense counsel lack finely-grained information and nuanced menu options to move from that charge. In the former case, the difference is akin to a consumer hoping to buy a Chevy Malibu and dickering or purchasing different options such as an extended warranty and sunroof versus being offered the choice between a fully loaded Corvette and the Malibu. In the latter situation, as Wright and Engen observe, it is more difficult to negotiate a plausible movement from the prosecutor's initial offer to the defense's

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24. *See* Radin, *supra* note 17, at 1144.

> [C]ustomization of terms and conditions is possible. Instead of a take-it-or-leave-it set of fine print terms, a website could offer a menu of choices for various clauses, and the user could check boxes for which ones were desired. One might choose the warranty disclaimer (free) or the two-year warranty (pay $1 extra); one might choose to accede to the arbitration clause (free) or the clause allowing litigation in one's home state (pay $2 extra).
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> This kind of customization of terms offline is, to some extent, already apparent (purchasing service contracts or extended warranties on big-ticket items, for example). It would be inexpensive to do the same thing online even for small transactions . . . .

Id. at 1144.

preferred position.[25]

Given that some criminal charge categories—such as kidnapping and murder—are relatively shallow compared to others such as assault, an important question is why the consumers of criminal law have not demanded a regularizing shift in one direction or the other. At first blush, defense counsels, as the most immediate group of consumers of criminal law, should prefer to operate in a deep charge context in which they can demonstrate to themselves and their clients that they provide value in the exchange by more often obtaining downward movements from prosecutors' initial charge decisions or threats. On the other hand, the relative depth of different criminal charge categories may represent an unconscious moral judgment by other criminal law and plea bargaining consumers, including the non-criminal-defendant public and legislatures, that some types of crimes are so serious and extraordinary that they demand special attention. In such situations, the shallowness of the criminal code normatively makes both the initial charging decision and downward charging departures more difficult and costly for the decision maker—the prosecutor—by increasing the cost of the psychological luxury of splitting the baby. Just as producers of luxury goods use the structure of their menus of standard terms (including price, warranty, service, and actual characteristics of the products) to differentiate luxury goods from more run-of-the-mill products, the shallowness of the criminal code morally differentiates "special" crimes like kidnapping and murder from more common crimes such as assault.

This attempt, whether purposeful or not, to structure criminal codes to force prosecutorial decision makers to consider initial charges and charge movements more carefully in some circumstances may be relevant to whether the charge movement phenomenon is normatively positive, neutral, or negative. The second part of the *Charge Movement* article explores the normative impact of the deep or shallow structure of the criminal codes on different theories of prosecutorial decision makers. Broadly, Professors Wright and Engen identify two characterizations of prosecutorial decision making. First, prosecutors may be viewed as individuals with subjective discretion to pursue individual goals such as crime control, crime punishment, or more personal goals.[26] Second, prosecutors may be characterized as being part of a highly-connected network of supervisors, police, communities,

25. *Cf.* ROGER FISHER ET AL., GETTING TO YES 177 (2d ed. 1991) ("Of course, no matter how skilled you are, there are limits to what you can get through negotiation.").

26. Wright & Engen, *supra* note 16, at 29–31.

offices, and legislative bodies.[27] In this second characterization, the prosecutor's ability to make decisions depends largely upon the priorities and restrictions placed on the prosecutor by other actors within the network.[28] In the former, charge movement itself is morally neutral and the normative implications depend upon whether the prosecutor uses this tool to achieve public-oriented or self-oriented goals.[29] In the latter case, charge movement is problematic because it deprives the charge initiation and charge negotiation processes of transparency.[30]

But even in the morally problematic cases, charge movement represents a species of backdoor bargaining that occurs in every bureaucratic context.[31] Such backdoor bargaining is inevitable in every bureaucratic system, from dickering with a clerk at Wal-Mart over a return policy decision to influencing presidential or gubernatorial pardons for relatives and political supporters, because a necessary response to any position of power is that the powerless will build their own, countervailing source of power.[32] And, as *Charge Movement*

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27. *See id.* at 33.

28. *See id.*

29. *Id.* at 32.

30. *See id.* at 36.

31. *See, e.g.*, Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 980–81 (2006). The standard form contracts used by the American Big-Three auto manufacturers to regulate their contracting with their Tier-1 suppliers bear strong similarities to criminal codes. Just as line prosecutors cannot bargain over the content of the criminal code, General Motors (GM) purchasing agents have no authority to negotiate any changes to the thirty-one-paragraph standard terms, instead "dickering" solely over price, quantity, warranty, and delivery terms in individual purchase orders governed by the standard terms. *See id.* at 957, 965–70. Nonetheless, Tier-1 suppliers do have bargaining power in the context of their interactions with the GM engineers who specify the requirements for the parts the purchasing agents must purchase. "[O]ne might get the engineers to agree to 'engineering change orders' that modify the specification of the part, enable the supplier to quote a new price (without going through a competitive bidding process), and increase the profit on the sale of the part." *Id.* at 980 (also noting the practice of convincing engineers to write specifications that can be satisfied only by that particular supplier or by negotiating side agreements for manufacturing rights to aftermarket parts not covered by the standard terms).

32. *See* JOHN KENNETH GALBRAITH, THE ANATOMY OF POWER 73 (1983) ("The usual and most effective response to an unwelcome exercise of power is to build a countering position of power. . . . As so often happens in the exercise of power, the resort to countervailing power is automatic."). As Justice Holmes opined in his dissent in *Vegelahn v. Guntner*,

> It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast,

demonstrates, it is at least possible to measure the depth and distance of downward departures between the original charge and the eventual conviction. An intentionally more shallow criminal code might invite an even less transparent form of backdoor bargaining than currently exists.

II. RICHARD BIRKE AND THE SIGNIFICANCE OF THE AVAILABILITY OF TRIALS

Richard Birke's article, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*,[33] explores the factors contributing to the relatively cooperative nature of the criminal bar compared to the cooperative (family law) and competitive (corporate) bars observed in Ronald Gilson and Robert Mnookin's influential 1994 article, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*,[34] and later analyses of negotiation practices in the family law bar by Andrea Schneider and Nancy Mills.[35] Specifically, Gilson and Mnookin analyzed their respective commercial and family law bars from a game theory perspective, ultimately concluding that the family law bar follows a more cooperative litigation, negotiation, and settlement model.[36] They theorize that this cooperation occurs because the relevant players in that legal market have a restricted geographic practice area, reputation mechanisms transmit information about the actions of parties in that bar, the parties frequently interact in repeat transactions, and the representations involved generally involve relatively low-stakes disputes.[37] In contrast, Gibson and Mnookin's model explains a greater degree of competitive behavior among practitioners of the corporate bar because the parties are not limited to practice in a specific geographic location, there is a low probability that the parties will encounter each other again in future transactions, and

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> means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting) (emphasis added).

33. 91 MARQ. L. REV. 39 (2007).

34. 94 COLUM. L. REV. 509 (1994).

35. Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are* Really *Doing When They Negotiate*, 44 FAM. CT. REV. 612, 618–20 (2006); *see also* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 147–48 (2002).

36. *See* Gilson & Mnookin, *supra* note 34, at 534–46.

37. *See id.* at 541–46.

the representations involve high-stakes disputes and transactions.[38]

While Gilson and Mnookin's model offers some explanatory and predictive justification for the perceived cooperative and competitive natures of the observed bars, Birke observes that it is likely incomplete given that the family law bar has become more competitive in the thirteen years since the original study, despite the fact that none of the factors supposedly contributing to that cooperative nature have changed significantly.[39] Birke proposes that the dominant factor explaining the shift from cooperation to greater competition in the family law bar—as well as the factor that best explains why the criminal law bar remains cooperative—is the ready availability of trials.[40] Specifically, as caseloads have expanded—along with increased demands upon judicial resources by priority matters such as criminal cases—the availability of trials in the family law context has decreased.[41] As a consequence, family law lawyers have lower incentives to cooperate with their opponents. In contrast, criminal trials, with easy access to speedy trials, promote cooperation for all the reasons observed in Gilson and Mnookin's original study plus the fact that either party may, at any time in the negotiation process, determine that the benefits of the best alternative to a negotiated plea agreement—going to trial—exceed the expected return of additional cooperation and any reputational costs that the attorneys may suffer.[42] Additionally, the ready availability of trial in criminal cases promotes price transparency as a steady flow of trials produces cheaply available public information about the "going rate" of various charges.[43]

Birke's article raises interesting issues with respect to situations in which reputation information, mutual availability of credible alternatives to a negotiated agreement, and relative standardization of available terms affect the relative bargaining power of the parties. First, the ready availability of trial in the criminal context provides both parties with significant information regarding the other's best alternative to a negotiated agreement (BATNA).[44] In the commercial context, parties may often communicate claims regarding their BATNAs as threats to convince their opponents of their ability and willingness to

38. *See id.* at 534–41.
39. *See* Birke, *supra* note 33, at 58.
40. *See id.* at 83.
41. *See id.* at 81.
42. *See id* at 77–78.
43. *See id.* at 71–72.
44. *See* FISHER ET AL., *supra* note 25, at 97–101.

walk away from the deal altogether. Indeed, in many situations, the walk-away power may be the only real bargaining power that a party possesses. The problem, of course, is that neither party in the civil context can be sure that the BATNA threat is real or deceptive. In other contexts, a negotiating party may choose to hide its BATNA, particularly if that alternative is particularly low-value compared to the possible bargain. In contrast, the parties to a criminal plea bargain negotiation know exactly what their opponent's BATNA is. Although there are substantial exceptions,[45] the structure of the criminal plea bargaining process either provides incentives for the parties to put their cards on the table (and thus make visible much of their bargaining power for assessment by the other side) or simply places those cards on the table for them. By systemically removing uncertainties about the parties' relative bargaining power, the criminal plea bargain process permits the parties to assess each others' positions more accurately and avoid unreasonable positions and contests that may cause the deal to fall through.

Second, as discussed above, the prosecutor is really only a producer of a limited menu of products offered on standardized terms. In many ways, the situation described by Birke approaches a competitive market in which producers must offer similar or standardized products on the same set of efficient terms.[46] Producers who vary terms or price away from the "going rate" or market terms will suffer a competitive disadvantage by either losing money on every sale or by pricing themselves out of the market. Consequently, consumers in such a market enter negotiations with producers aware of the market price, the applicable contract terms, and the relative inability of the producer to bargain away from those terms.

Likewise, prosecutors, within their jurisdictional "markets," are also subject to substantial pressures preventing significant deviation from the standard terms—the criminal statutes—and from the applicable pricing menu of normal sentencing rates for particular charges. To the extent that consumers in a prosecutorial market are aware of the going rate and standard terms, they will be more likely to cooperate and less likely to engage in unreasonable bargaining. The likely return on unreasonable behavior by criminal defense counsel is unlikely to

45. Josh Bowers' *Grassroots Plea Bargaining* article, discussed below, explores a systemic source of bargaining power that is largely hidden and may be based upon perception and deception. *See infra* Part III.

46. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 116 (6th ed. 2003).

produce significant returns except in unusual cases. Moreover, unreasonable, non-cooperative behavior imposes reputation costs upon the unreasonable party that are unlikely to be exceeded by any possible return from unreasonable behavior. And finally, both parties know that the most likely response to unreasonable, non-cooperative demands is that the opponent will simply go to trial. By removing potential hidden or deceptive sources of bargaining power from the equation, and circumscribing the ability of both parties to vary significantly the standard terms and prices for particular charges, the ready availability of trial creates incentives for cooperation that are unlikely to exist outside of highly competitive commercial markets.

III. *GRASSROOTS PLEA BARGAINING* BY JOSH BOWERS

Josh Bowers' article, *Grassroots Plea Bargaining*,[47] is especially intriguing to me because of its intersection with my own work on the nature of bargaining power. Specifically, Bowers identifies a potential new source of bargaining power with the potential to draw attention to hidden, deceptive, and unexercised forms of power that usually fail to register when we attempt to assess power relationships.

Bargaining power arises from a potentially infinite array of sources, but takes only a limited number of forms. Any circumstance, whether systemic or incidental to a particular case,[48] may create bargaining power in one or both parties to a transaction. Bowers begins with the common perception that "plea bargaining is shaped principally by

47. 91 MARQ. L. REV. 85 (2007).

48. By "systemic" sources of bargaining power, I mean those sources of power created by the background legal, social, political, and economic regime that tend to affect a wide range of transactions in a consistently observable fashion. Thus, the background property regime may systemically strengthen or weaken a seller's bargaining power in negotiating a sale of property—in most situations, the seller receives substantial power from the fact that other parties generally cannot force the seller to part with property against the seller's will. *Cf.* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 473–74 (1923). Likewise, in the criminal context, prosecutors clearly receive bargaining strength by virtue of their authority to subject the criminal defendant to prosecution and the risk of state-sanctioned force and violence. Defendants likewise possess systemic sources of power by virtue of background legal rights, such as the right to a speedy trial and to trial by jury that permit them to impose costs upon the state and the prosecutor.

In contrast, incidental sources of bargaining power comprise specific circumstances of the transaction that arise by virtue of characteristics of the parties or external events. A prosecutor facing re-election, for example, may feel pressure (and therefore be subject to a bargaining weakness) to bring prosecutions that would otherwise not be sought. An innocent criminal defendant who must support a family may be more willing to plead to avoid the risk of jail time that would threaten the family's well-being.

institutional pressures and cognitive errors, and hardly at all by penal codes."[49] Many such institutional pressures are facially obvious—prosecutors, for example, have the ability to impose costs on defendants without regard to their guilt or innocence.[50] By virtue of their ability to charge a particular defendant—and thus impose on the defendant the costs of trial and the risks of a guilty verdict—prosecutors seem to begin the process with an insurmountable advantage. On the flip side, of course, prosecutors rarely have a blank check in any particular trial and must allocate scarce state resources in deciding whether to pursue or drop a particular prosecution. Defendants likewise suffer from well-recognized power disadvantages in dealing with prosecutors. Many defendants have no personal resources to fund their defenses, little sophistication or information with respect to the plea bargain products offered for sale, systemic and institutional pressures to cooperate and plead rather than proceed through trial, and an extreme risk aversion of which the prosecutor is fully aware. Even the wealthiest and most sophisticated defendants suffer these deficiencies to some extent.

Bowers acknowledges the facially obvious factors affecting parties' relative abilities to affect a preferred outcome in the bargaining process, but importantly identifies a potentially new source of systemic bargaining power that may influence both prosecutors and defendants. Bowers focuses his analysis upon public order policing—an arrest and prosecution paradigm in which police specifically target offenses such as public urination, turnstile jumping, and jaywalking that, while relatively innocuous in themselves, purportedly contribute to an overall decline of quality of life and increase in other types of criminal activity.[51] With little evidence of criminal activity beyond a bare police report, and with an increasing number of first-time offenders being arrested, prosecutors face a difficult choice. If the prosecutor brings full charges against such defendants or extracts significant plea bargains, both the prosecutor and the police will likely face increasing community hostility and refusals to assist in future prosecutions and investigations.[52] On the other hand, a

49. Bowers, *supra* note 47, at 86.

50. The recent debacle in which North Carolina prosecutor Mike Nifong charged three Duke University lacrosse team players with rape, despite substantial exculpatory evidence and a lack of evidence to support the prosecution's case, illustrates the ability of prosecutors to impose costs. *See* Shaila Dewan, *Duke Prosecutor Is Jailed: Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007, at A8.

51. *See* Bowers, *supra* note 47, at 94.

52. *See id.* at 87 ("By grassroots plea bargaining, I mean a systematic prosecutorial reduction of plea prices—even in circumstances where prosecutors find such reductions otherwise unwarranted—in order to purchase communal acquiescence to enforcement

refusal to charge will generate friction between the prosecutor and the police who supplied the accused perpetrator. Bowers observes that such a system pressures prosecutors to offer relatively lenient plea bargains that will satisfy the community and mollify the police.[53] Even innocent defendants in this situation have a strong incentive to accept an offer of a low-price plea, such as time served for pleading to a minor misdemeanor offense.[54]

The main thrust of Bowers' argument is both interesting and insightful from a negotiation and bargaining power perspective. Plea bargaining appears to be a situation in which much of the parties' power relationship is visible, real, and exercised.[55] The systemic advantages of prosecutors are so open and obvious that, while accused defendants do possess some capacity to affect the outcome of the bargain by offering to spare the government the cost of going to trial, it seems likely that in most cases defendant bargaining power will have only a marginal effect on the outcome. Likewise, individual defendants and prosecutors may possess incidental sources of bargaining power, but vary too greatly for analysis. Bowers' grassroots plea bargaining potentially represents a new systemic source of bargaining power. Moreover, the bargaining power represented by grassroots plea bargaining pressures is not the visible, real, exercised form of systemic power that usually comes to mind when considering the relative bargaining strengths of prosecutors and defendants. Rather, grassroots plea bargaining—or the community pressures that drive such plea bargaining—represents a hidden form of power based upon prosecutors' perception and deception of their constituencies.[56] By drawing attention to one such hidden form of bargaining power, Bowers implicitly forces us to recognize that there may be other hidden, unexercised, or deceptive forms of power in the plea agreement relationship.

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policies that otherwise lack public support.").

53. *See id.* at 100.

54. *See id.*

55. Bargaining power may arise from an infinite array of potential sources, but may take only a limited number of forms. Specifically, bargaining power may be visible or hidden, real or deceptive, and exercised or unexercised. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 172–78 (2005) (discussing forms of power).

56. *Cf.* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 617 (1982) (noting the power of consumers as a group to force even the most powerful companies to provide desired products and terms—"[t]hose helpless buyers have somehow induced a proliferation of seller warranty experiments, and then more or less destroyed the auto industry by their preference for foreign cars").

Most importantly, however, Bowers' grassroots plea bargaining model, at least in the context of public order policing, raises substantial problems in terms of propertization of otherwise private personal information by the state. In commercial transactions between producers and consumers, especially in Internet-based, information-era transactions, producers routinely track and record every datum provided by consumers. In the commercial context, virtually everything that a consumer does in interactions with producers is recorded so that producers can use the resulting demographic database to create a finely-grained picture of the individual consumer's weaknesses and strengths, interests and disinterests, willingness to pay and when they will walk away from a deal.[57] Once a consumer has divulged private information, any other party may collect that information, store it, use it, and sell it to third parties.[58] And the point of all of this is to place producers in a stronger bargaining position the next time they interact with the individual consumers who surrendered their personal information.[59]

The results of producers "propertizing" such personal information in the commercial context are merely economic. At worst, individual consumers will be more likely to enter bargains, more likely to spend money, more likely to accept onerous, inefficient, or even abusive terms proposed by the seller. And consumers themselves have the capacity to counteract producer advantages gained through propertization of

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57. *See* Litman, *supra* note 9, at 1283–84.

> Almost everything each of us does seems to generate transactional information. Walks round the block are still unrecorded, except in those communities with cameras. Interactions that begin and end and stay within the home are still largely unreported, although everything entering and leaving by way of the phone lines, cable lines, satellite dishes or wireless, non-broadcast spectrum is documented. Non-cash purchases are memorialized and toted up. Large cash purchases are memorialized and turned in. Cash withdrawals and deposits are recorded and saved. Visits to the doctor, diagnoses, prescriptions, and referrals are coded and passed along. Everything we look at on the Internet is noted and retained. All of this information is collected, aggregated, and stored on computers. Anyone with reason to do so can correlate the information stored on one computer with the information stored on another, and another, and another. The resulting dossier may be used, sold, published, or correlated with other sources of data. In the United States, that's completely legal.

Id. (citations omitted).

58. *See* Paul M. Schwartz, *Privacy Inalienability and the Regulation of Spyware*, 20 BERKELEY TECH. L.J. 1269, 1270–72 (2005) (describing market failure with respect to consumer property rights in private information).

59. *See* Barnhizer, *supra* note 8, at 90–92.

personal information.[60] The same information tools that give producers access to massive amounts of personal information about consumers also permit consumers to share positive and negative experiences with particular producers and products easily, instantaneously, and at low cost.[61] Producer reputation information is freely and widely available to anyone with Internet access, as are other tools, such as brokers, buying guides, pricing information, and third-party warranties. A consumer who invests in developing bargaining power can counter producer power advantages to some extent and at some cost.

In contrast, the public order policing model, even softened by the grassroots plea bargaining observed by Bowers, still acts as an equivalent information gathering and propertizing device. But instead of merely giving commercial producers who own that information an economic advantage, the public order policing model creates a broad database on individuals—regardless of the severity of their crimes—that is owned by the state. While a first-time offender may escape trial and future punishment because of the pressures imposed by the community against rigorous prosecution, the fact remains that the prosecution (and therefore the state) retains a record of that interaction. Indeed, as Bowers suggests, this record-generating aspect of public order policing and grassroots plea bargaining may often be as, if not more, important as the maintenance of civil order by arresting people for petty offenses.[62] Just like commercial producers, the state can and will use the information and records it develops from interactions with its consumers to assist the state in closing the deal in future transactions.

Bargaining power is dynamic, both in terms of individual transactions and systemic sources of bargaining power. The propertization and databasing of personal information represents a profound and long-term shift in power relationships between

60. *See id.* at 95–101 ("The bottom line . . . is that both consumers and producers have a wider, more robust, and more clearly defined array of bargaining power tools available than at any time in the past.").

61. *See, e.g.*, Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus that the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH. 3, 62–73 (2005) (arguing for treatment of corporate complaint websites as protected speech under First Amendment); *see also* Jonathan L. Schwartz, *Making the Consumer Watchdog's Bark as Strong as Its Gripe: Complaint Sites and the Changing Dynamic of the Fair Use Defense*, 16 ALB. L.J. SCI. & TECH. 59, 65–72 (2006).

62. Bowers, *supra* note 47, at 88 ("For police, order-maintenance enforcement is more than just a way to fix 'broken windows,' it is a highly useful—albeit potentially normatively problematic—tool to search and catalogue data about large segments of the population of poor minority neighborhoods.").

prosecutors as producers of arrest-processing, plea bargains, and trial-related services and their consumer base of accused criminal defendants and not-yet-accused community members. This shift is all the more dangerous because it is long-term, gradual, and incremental, and because the sources and forms of bargaining power created by such databasing are subtle and hidden. While consumers clearly have the ability to invest in additional increments of bargaining power in the commercial context, such investments are not as clear in the criminal context.

On the one hand, to some extent accused criminal consumers have already maxed out their capacity for improving their bargaining positions. Every criminal defendant has a right to counsel, which in the civil context would insulate the vast majority of bargains from claims of duress, unconscionability, undue influence, and so on. Incremental investments in bargaining power resources, such as higher-quality representation or more extensive discovery, may provide additional leverage in plea bargain negotiations. Intuitively, however, such advantages should be mapped along a logarithmic curve, eventually reaching a point where power will not increase significantly with additional investment. For most defendants, access to counsel should place them near the plateau of that curve, leaving them little room to manipulate their power relationship with prosecutors. With the propertization and databasing of personal information offered by the public order policing and grassroots plea bargaining models, the state may slowly, subtly, and inexorably shift that entire curve downward.

IV. CONCLUSION

The model of plea bargaining negotiations as bargaining over relatively standardized terms by agents of limited authority acknowledges that plea bargaining—like the vast majority of other types of contracting—occurs in a standardized context that is relatively disconnected from classical contract law and practice. Contract law and negotiation theory have struggled for more than a century with the question of how to integrate standardized contracting practices into conceptions of consent, mutuality, and enforceability. With the exploration of bargaining power in the plea bargaining context, criminal law likewise is coming to grips with the nature of the sources of and limitations on the parties' relative abilities to affect a preferred outcome in their interactions. In terms of classical contract notions of consent and bargaining, plea bargaining remains highly suspect. But viewed properly as a species of highly standardized menu terms in a system

where both the prosecutor and the defense counsel negotiate with an array of complex and dynamic sources of power, criminal plea bargaining fits perfectly with the norm of bargaining as it exists in the real world.

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