

*The practice is flawed, but not unconstitutional.*

# In Defense of Plea Bargaining

BY TIMOTHY SANDEFUR

*Pacific Legal Foundation*

**P**LEA BARGAINING, LIKE ALL GOVERNMENT activities, is liable to abuse. Defendants, often too poor to afford their own attorney, unfamiliar with court proceedings, and threatened by the full force of the prosecutor's office, are likely to be very intimidated. They find themselves confronted by experienced and confident officers of the state, in suits and robes, speaking the jargon of the law and possessing wide discretion to engage in hardball tactics before trial. Prosecutors know how to exploit limits on habeas corpus rights, mandatory sentencing rules, and loopholes that allow evidence collected under questionable circumstances to be admitted. All of this would scare even the most hardened criminal, let alone an innocent defendant. And it could intimidate a defendant into accepting a plea bargain that may not be truly just.

Yet the mere fact that a process can be abused does not necessarily make that process unconstitutional or immoral. Plea bargaining is rife with unfair prosecutorial tactics, and it needs reform. But the process itself is not unconstitutional, nor does it necessarily violate a defendant's rights.

## **AN ALIENABLE RIGHT TO TRIAL?**

A plea bargain is a contract with the state. The defendant agrees to plead guilty to a lesser crime and receive a lesser sentence, rather than go to trial on a more severe charge where he faces the possibility of a harsher sentence. Plea bargaining is enormously popular with prosecutors; according to researcher Douglas Guidorizzi, something like 90 percent of criminal cases end in a plea bargain.

In recent decades, courts have upheld extreme and unfair prosecutorial tactics in negotiating plea bargains. Last year, in *United States v. Ruiz*, the U.S. Supreme Court held that the Constitution does not require prosecutors to inform defendants

during plea bargaining negotiations of evidence that would lead to the impeachment of the prosecution's witnesses. As Timothy Lynch noted in his 2002 article "An Eerie Efficiency," this rule would allow the prosecution to not disclose during plea negotiations that its only witness was too drunk at the time of the crime to provide any reliable evidence. Such tactics are unfair. If a plea bargain is a contract, it should be subject to the same rules that apply to other contracts, including the requirement that parties disclose relevant information. If a car dealer must tell you that the car he sells you is defective, prosecutors ought to be required to disclose when their cases are defective. But the sad fact that such inappropriate bargaining tactics exist does not obviate the freedom of contract itself.

One argument against plea bargaining is that the Sixth Amendment guarantees a right to a jury trial, not to a faster, more potentially error-prone procedure like plea bargaining. As Lynch has written, "The Framers of the Constitution were aware of less time-consuming trial procedures when they wrote the Bill of Rights, but chose not to adopt them." But that does not prove plea bargaining is unconstitutional. After all, at the time the Sixth Amendment was written, there were no Federal Rules of Evidence, no Miranda rights, no court-appointed attorneys, and no bench trials. The Framers' notion of a "fair trial" differs greatly from ours. The Constitution's limits on criminal procedure are certainly indispensable protections for individual liberty, a great advance over British rule, and a testament to the Founders' greatness — but they only go so far.

The fundamental question is, is the right to a jury trial inalienable? Although some natural rights are inalienable, most rights make sense only if they can be bought and sold. In which category does the right to a trial belong? In early American history, a defendant could waive his right to a jury in felony cases, but by the time of the American Revolution, that practice had died out. In the 1858 case *Cancemi v. People*, a New York court held that a defendant could not waive a jury trial because, while "the law does recognize the doctrine of waiver to a great extent...even to the deprivation of constitutional private rights,"

**Timothy Sandefur** is the lead attorney of the Economic Liberties Project at the Pacific Legal Foundation, and a contributing editor of *Liberty* magazine. He can be contacted by e-mail at [tms@pacificlegal.org](mailto:tms@pacificlegal.org).

the public's interest in fair trials overrode the defendant's right to choose his own trial tactics.

But after the Civil War, the bench trial reappeared. In 1879, the Iowa Supreme Court held in *State v. Kaufman* that a defendant could waive a jury trial if he wished — after all, defendants can waive other procedural rights, including the right to a speedy trial. A guilty plea, the court noted, also “dispenses with a jury trial, and it is thereby waived.” Yet the defendant still had the right to plead guilty. “This, it seems to us, effectually destroys the force of the thought” that public interest could prohibit defendants from waiving their right to a jury. According to the court,

Reasons other than the fact that he is guilty may induce a defendant to so plead...yet the state never actively interferes in

such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect.... Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interests? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule.

The debate over inalienability continued, however. The Iowa Supreme Court changed its mind a few years later in *State v. Carman*, then changed back in the 1980 case *State v. Henderson*. Connecticut prohibited jury waivers in the 1878 case *State v. Worden*;

Louisiana allowed them in the 1881 case *State v. White*. At the California Constitutional Convention of 1878, a lengthy debate ensued over a provision allowing criminal defendants to waive their right to a jury; proponents argued that a defendant had the right to do as he pleased in his own defense, while opponents claimed the public interest was too great and defendants were often too intimidated to make reasonable decisions in their own defense. The proposal was defeated, although today California does allow defendants to waive a jury trial.

The U.S. Supreme Court held in the 1979 case *Gannett Co. Inc. v. DePasquale* that the public does not “have an enforceable right to a public trial that can be asserted independently of the parties in the litigation.” That seems reasonable; while requiring jury trials may make sense as a matter of policy, it is not an inalienable right. Life, liberty, and the pursuit of happiness are inalienable by nature. But the right to a jury is a civil right, not a natural right. If defendants can waive personal jurisdiction, and waive their right to an attorney, there seems little sense in saying that the jury right is inalienable. Today, it seems to be universally conceded that the right to a jury trial is alienable, and nothing in the Constitution says otherwise. It follows that a defendant can “sell” his right to trial if he so chooses. And at least some defendants — often guilty ones — benefit from doing so.

#### **THE RIGHT TO LENIENCY?**

Another argument against plea bargaining is that it punishes defendants



for invoking their right to a trial. Consider the landmark case *Bordenkircher v. Hayes* (1978). The defendant, Paul Lewis Hayes, was indicted for a relatively minor fraud charge, punishable by a two- to 10-year sentence. The prosecutor offered Hayes a bargain: If he pled guilty, the prosecutor would seek a five-year sentence. If not, the prosecutor would indict him under the state's Habitual Criminal Act. Because he was a repeat offender, conviction under the Act meant a lifetime sentence. Hayes refused the deal, and the prosecutor got the second indictment. Hayes was tried and convicted under the Act, and given a life sentence. On appeal to the U.S. Supreme Court, he argued that the sentence was an unconstitutional punishment for insisting on his right to a jury trial.

The Court ruled against him. In a confusing opinion, it held that so long as the procedure included no actual coercion, the plea bargain did not amount to punishment. But the Court frankly appealed to necessity: "The imposition of these difficult choices," the Court wrote, is an "inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." The Court thus upheld the practice of plea bargaining solely on pragmatic grounds: "A rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged."

This begs the question. If a practice offends the Constitution, it ought to be driven into the shadows, just as segregation was. By basing its entire theory on pragmatism rather than the Constitution, the *Hayes* Court opened itself to the charge that it was editing the Constitution to suit current needs. If a practice is unconstitutional, efficiency cannot excuse it. "It is highly probable that inconveniences will result from following the Constitution as it is written," wrote dissenting New York Court of Appeals chief judge Greene Bronson in the 1850 case *Oakley v. Aspinwall*. "But that consideration can have no weight with me.... There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power — some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown."

There is a far better reason for the *Hayes* decision: The defendant was simply not being punished for his refusal to plea bargain; he was being punished for violating the Habitual Criminal Act. Had he been tried for that at the outset — which he legitimately could have been — he would have received the very same punishment: life in prison. Regardless of whether such habitual offender laws are wise, Hayes violated that law, and had, so to speak, incurred the liability of a lifetime prison term. He thus had no right, strictly speaking, to any lesser sentence, let alone to escape indictment completely. Instead, the prosecution had the right to indict him for all the crimes he committed, and Hayes had the right to a jury trial on all those charges. Once each side possessed those rights and liabilities, they had the right to exchange them; Hayes could trade his jury right for prosecutorial leniency. The prosecution's bargaining tactics may have been severe, and perhaps statutory reform of those tactics is called for. But the legitimacy of the

procedure itself is not refuted by abuses. In short, because Hayes had no right to leniency, his failure to get leniency is not a deprivation, and he could not claim his rights were violated when he failed to receive it.

**Other analogies** This is the response to Lynch's analogy regarding tourists arrested in Washington, D.C. for possessing firearms. He argues that the government must not permit the tourist to waive his right to a jury trial on the charge of firearm possession, because that decision is "coerced" by the fact that, if the tourist refuses to plead, the prosecutor will also bring charges for ammunition possession. But the tourist who possesses a gun and ammunition has violated both the gun law and the ammunition law; assuming those laws to be otherwise constitutional, the tourist has therefore incurred the liability of sentence for both crimes. There is nothing unjust (or, more relevantly, unconstitutional) in the prosecutor offering to drop one of the charges in exchange for a guilty plea on the other. If the tourist refuses and goes to trial on both charges, the tourist has incurred no greater punishment than he deserved at the outset.

Or consider another analogy Lynch adopts from the 1935 false imprisonment case *Griffin v. Clark*. In *Clark*, the defendant was found liable for false imprisonment when he seized the plaintiff's purse and would not return it unless she rode with him in a car. Since the plaintiff's freedom of movement could not rightly be conditioned on her giving up her purse, the court found that the defendant could not escape liability by arguing that he had not physically restrained her. Lynch argues that government bargains requiring defendants to give up the right to a trial are, in the same way, illusory choices.

But the analogy dissolves on closer inspection: The woman had a natural right to freedom of movement with her purse at any time. A criminal defendant, by contrast, has no right not to be indicted for his crimes. As Lynch says, the criminal may not walk away from the state; he is rightfully subject to any indictment consistent with the facts and law. The government may offer leniency and give up its right to indict him in exchange for a plea, just as it may offer to forgive other debts or confer other benefits. But the defendant has no grounds for complaint if the government chooses not to. (On the other hand, if the state indicts him without a factual or legal basis, his due process rights have been violated regardless of the legitimacy of plea bargaining.)

In the 2001 case *Berthoff v. United States*, Judge William Young decried the disparity of plea bargaining and criminal sentences:

Between two similarly situated defendants...if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence [imposed under federal sentencing rules] for the one who exercises his right to trial by jury and is convicted will be 20 years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people — punish them severely — simply for going to trial.

But both of the criminals in Judge Young's example committed crimes for which they might be sent to jail for 20 years; neither has a right to demand a four-year sentence. A four-year sentence for one does not increase the punishment for the other; it simply fails to decrease the other's sentence — something to which neither defendant is entitled to begin with. The disparity of their sentences does not represent greater punishment being visited on the party that refuses the bargain; rather, it represents a benefit conferred on the party that did bargain.

### CONVICTION OF THE INNOCENT?

Some commentators claim that plea bargaining creates an incentive system designed to discourage the exercise of constitutionally protected rights. If the defendant faces a far greater potential sentence at trial than through a plea bargain, this increases the incentive to bargain, which increases the potential that innocent parties will be sent to prison for crimes they did not commit.

Government policies that chill the exercise of constitutional rights ought to be regarded with great suspicion. But they are not per se unconstitutional or unjust. Government, like private businesses, often purchases the rights of citizens: members of the military are forbidden to criticize the president, for instance, and private contractors doing business with the government must often comply with "living wage" requirements. Unwise as those policies may be, they are not a violation of anybody's rights, because they are based on the parties' consent. If the tactics used to induce consent are so overbearing as to obviate that consent, then the procedure should be reviewed under due process standards and, in a case in which the prosecution's tactics are fraudulent, they should be struck down. But where that is not the case, a plea bargain does not itself violate the Constitution.

**Disparate punishments** In short, Lynch's claim that plea bargaining is unconstitutional comes down to his complaint that "disparate punishments for the same offense [are not] sensible." But similarly situated defendants who make different choices in legal strategy often end up with different sentences. One defendant might choose to waive his right to testify, while another might exercise that right. The result might be disparate sentences, or even sentences that are insensible to outside observers. But that choice is entirely constitutional. The courtroom may not seem like a place for haggling, but that is exactly what it is, in both civil and criminal contexts. A civil defendant can settle his case for a certain sum; a criminal defendant for a certain amount of time. If the calculations made by prosecutors, or plaintiffs, and defendants are influenced by fear or intimidation rather than calm deliberation, then statutory reform is certainly warranted. But nothing in the Constitution compels it.

Lynch makes many valid points in criticizing plea bargaining. *Ruiz* was wrongly decided; courts should not give free reign to prosecutors; the criminal justice system should not be manipulated, or constitutional guarantees watered down, in order to prosecute the war on drugs more efficiently. But those criticisms surround plea bargaining without quite hitting the

target. For instance, Lynch wrote in his 2002 article, "It is easy for some people to breezily proclaim that they would never plead guilty to a crime if they were truly innocent, but when one is confronted with the choice of two years in jail or quite possibly 20 years' imprisonment, the decision is not so easy." That is true, but note that Lynch assumes that the innocent defendant will be convicted and sentenced to 20 years. Without that assumption, the hypothetical defendant's risk profile changes, and surely innocent defendants have reason to believe that they are less likely to be convicted. If not, then our target should be the trial system, not plea bargaining.

Innocent defendants are convicted all too often, but if defendants are so afraid of trials that they regularly plead guilty to crimes they did not commit in order to avoid a trial, then that is an indictment of the trial system, not plea bargaining. And while it is true that plea bargains are often the product of overbearing prosecutorial bargaining tactics, that is a criticism of the negotiating process, not of the right to make the contract. Finally, it is true that the Framers included a right to trial by jury among our vital constitutional guarantees, but that does not mean defendants lack the freedom to waive that right or trade it to the state in exchange for a lighter sentence. Mere efficiency does not justify resorting to a constitutionally flawed procedure. But there are sufficient justifications for plea bargaining. Its flaws are procedural, not constitutional, and it needs reform, not abolition. **R**

### READINGS

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