

*Government should not retaliate against individuals who exercise their right to trial by jury.*

# The Case Against Plea Bargaining

BY TIMOTHY LYNCH

*Cato Institute*

**P**LEA BARGAINING HAS COME TO DOMINATE the administration of justice in America. According to one legal scholar, “Every two seconds during a typical workday, a criminal case is disposed of in an American courtroom by way of a guilty plea or nolo contendere plea.” Even though plea bargaining pervades the justice system, I argue that the practice should be abolished because it is unconstitutional.

## THE RISE AND FALL OF ADVERSARIAL TRIALS

Because any person who is accused of violating the criminal law can lose his liberty, and perhaps even his life depending on the offense and prescribed penalty, the Framers of the Constitution took pains to put explicit limits on the awesome powers of government. The Bill of Rights explicitly guarantees several safeguards to the accused, including the right to be informed of the charges, the right not to be compelled to incriminate oneself, the right to a speedy and public trial, the right to an impartial jury trial in the state and district where the offense allegedly took place, the right to cross-examine the state’s witnesses, the right to call witnesses on one’s own behalf, and the right to the assistance of counsel.

Justice Hugo Black once noted that, in America, the defendant “has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process, the defendant has a fundamental right to remain silent, in effect challenging the State at every point to ‘Prove it!’” By limiting the powers of the police and prosecutors, the Bill of Rights safeguards freedom.

Given the Fifth Amendment’s prohibition of compelled self-incrimination and the Sixth Amendment’s guarantee of

impartial juries, one would think that the administration of criminal justice in America would be marked by adversarial trials — and yet, the opposite is true. Fewer than 10 percent of the criminal cases brought by the federal government each year are actually tried before juries with all of the accompanying procedural safeguards noted above. More than 90 percent of the criminal cases in America are never tried, much less proven, to juries. The overwhelming majority of individuals who are accused of crime forgo their constitutional rights and plead guilty.

The rarity of jury trials is not the result of criminals who come into court to relieve a guilty conscience or save taxpayers the costs of a trial. The truth is that government officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used. And plea bargaining is the primary technique used by the government to bypass the institutional safeguards in trials.

Plea bargaining consists of an agreement (formal or informal) between the defendant and the prosecutor. The prosecutor typically agrees to a reduced prison sentence in return for the defendant’s waiver of his constitutional right against self-incrimination and his right to trial. As one critic has written, “The leniency is payment to a defendant to induce him or her not to go to trial. The guilty plea or no contest plea is the quid pro quo for the concession; there is no other reason.”

Plea bargaining unquestionably alleviates the workload of judges, prosecutors, and defense lawyers. But is it proper for a government that is constitutionally required to respect the right to trial by jury to use its charging and sentencing powers to pressure an individual to waive that right? There is no doubt that government officials deliberately use their power to pressure people who have been accused of crime, and who are presumed innocent, to confess their guilt and waive their right to a formal trial. We know this to be true because prosecutors freely admit that this is what they do.

Timothy Lynch is director of the Cato Institute’s Project on Criminal Justice. He can be contacted by e-mail at [tlynch@cato.org](mailto:tlynch@cato.org).

**Watershed precedent** Paul Lewis Hayes, for example, was indicted for attempting to pass a forged check in the amount of \$88.30, an offense that was punishable by a prison term of two to 10 years. The prosecutor offered to recommend a sentence of five years if Hayes would waive his right to trial and plead guilty to the charge. The prosecutor also made it clear to Hayes that if he did not plead guilty and “save the court the inconvenience and necessity of a trial,” the state would seek a new indictment from a grand jury under Kentucky’s “Habitual Criminal Act.” Under the provisions of that statute, Hayes would face a mandatory sentence of life imprisonment because of his prior criminal record. Despite the enormous pressure exerted upon him by the state, Hayes insisted on his right to jury trial. He was subsequently convicted and then sentenced to life imprisonment.

On appeal, Hayes argued that the prosecutor violated the Constitution by threatening to punish him for simply invoking his right to a trial. In response, the government freely admitted that the only reason a new indictment was filed against Hayes was to deter him from exercising that right. Because the indictment was supported by the evidence, the government maintained that the prosecutor had done nothing improper. The case ultimately reached the U.S. Supreme Court for a resolution. In a landmark 5–4 ruling, *Bordenkircher v. Hayes*, the Court approved the prosecutor’s handling of the case and upheld the draconian sentence of life imprisonment. Because the 1978 case is considered to be the watershed precedent for plea bargaining, it deserves careful attention.

The *Hayes* ruling acknowledged that it would be “patently unconstitutional” for any agent of the government “to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights.” The Court, however, declined to overturn Hayes’s sentence because he could have completely avoided the risk of life imprisonment by admitting his guilt and accepting a prison term of five years. The constitutional rationale for plea bargaining is that there is “no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”

#### **WHY THE SUPREME COURT WAS WRONG**

Initially, the Court’s proposition in *Hayes* seems plausible because criminal defendants have always been allowed to waive their right to a trial, and the executive and legislative branches have always had discretion with respect to their charging and sentencing policies. But a closer inspection will show that the constitutional rationale underlying plea bargaining cannot withstand scrutiny.

First, it is important to note that the existence of some element of choice has never been thought to justify otherwise wrongful conduct. As the Supreme Court itself observed in another context, “It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.”

The courts have employed similar reasoning in tort disputes between private parties. For example, a



woman brought a false imprisonment action against a male acquaintance after he allegedly forced her to travel with him in his automobile when it was her desire to travel by train. According to the complaint, the man boarded the train, seized the woman's purse, and then disembarked and proceeded to his car. The woman then left the train to retrieve her purse. While arguing with the man in the parking lot, the train left the station. Reluctantly, the woman got into the vehicle to travel to her destination. The man maintained that the false imprisonment claim lacked merit because he exercised no physical force against the woman and because she was at liberty to remain on the train or to go her own way. The court rejected that defense and ruled that the false imprisonment theory had merit because the woman did not wish to leave the train and she did not wish to depart without her purse. The man unlawfully interfered with the woman's liberty to be where she wished to

criticize a politician and then to deny that politician a "right to equal space" in the paper to defend himself against such criticism. Even though Florida newspapers remained free to say whatever they wished, the Court recognized that the statute exacted a "penalty" for the simple exercise of free speech about political affairs.

Finally, the ad hoc nature of the *Hayes* precedent becomes apparent when one extends its logic to other rights involving criminal procedure. The Court has never proffered a satisfactory explanation with respect to why the government should not be able to use its sentencing powers to leverage the waiver of constitutional rights pertaining to the trial itself. Can federal prosecutors enter into "negotiations" with criminal defendants with respect to the exercise of their trial rights? For example, when a person is accused of a crime, he has the option of hiring an experienced attorney to prepare a legal defense on his behalf or representing himself without the aid of counsel.

## Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury.

be. The fact that the man had given the woman some choices that she could "accept or reject" did not alter the fact that the man was a tortfeasor.

Second, the Supreme Court has repeatedly invalidated certain governmental actions that were purposely designed to coerce individuals and organizations into surrendering their constitutional rights. In the 1978 case *Marshall v. Barlow's Inc.*, the Court ruled that a businessman was within his rights when he refused to allow an Occupational Safety and Health Administration inspector into his establishment without a search warrant. The secretary of labor filed a legal brief arguing that when people make the decision to go into business, they essentially "consent" to governmental inspections of their property. Even though the owner of the premises could have avoided such inspections by shutting down his business, the Court recognized that the OSHA regulations penalized commercial property owners for exercising their right under the Fourth Amendment to insist that government inspectors obtain search warrants before demanding access to the premises.

In the 1978 case *Nollan v. California Coastal Commission*, the Court ruled that the state of California could not grant a development permit subject to the condition that the landowners allow the public an easement across a portion of their property. Even though the landowners had the option of "accepting or rejecting" the Coastal Commission's deal, the Court recognized that the permit condition, in the circumstances of that case, amounted to an "out-and-out plan of extortion."

Similarly, in the 1974 case *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court invalidated a so-called "right of reply" statute. The Florida legislature made it a crime for a newspaper to

Can a prosecutor induce a defendant into waiving his right to the assistance of counsel with a recommendation for leniency in the event of a conviction? Such prosecutorial tactics are presently unheard of. And yet, under the rationale of the *Hayes* case, it is not obvious why such tactics should be constitutionally barred. After all, under *Hayes* there is no element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer.

**Sophistry to pretend otherwise** Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury. Although the fictional nature of that proposition has been apparent to many for some time now, what is new is that more and more people are reaching the conclusion that it is intolerable. Chief Judge William G. Young of the Federal District Court in Massachusetts, for example, recently filed an opinion that was refreshingly candid about what is happening in the modern criminal justice system:

Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible.... Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence 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. It is the sheerest sophistry to pretend otherwise.

### **SANDEFUR'S CHALLENGE**

Attorney Timothy Sandefur, whose comments follow this article, concedes that plea bargaining is “rife with unfair prosecutorial tactics” and needs “reform.” But he rejects the proposition that plea bargaining is unconstitutional. Let us examine Sandefur's defense of plea bargaining.

First, everyone acknowledges that the state may not punish or penalize a person for simply invoking a right that is supposed to be guaranteed under the Constitution. And yet, this is precisely what the government does with plea bargaining. For example, every month police officers in Washington, D.C. encounter tourists who are carrying handguns. The tourists are unaware of the District's strict laws against handgun possession. They regularly surrender handguns to police officers who are supervising metal detectors at museums around the capital. When the tourists openly surrender their firearms, they mistakenly believe that they are doing nothing illegal. The gun is then confiscated and the tourist is arrested. If a tourist agrees to forgo a trial and plead guilty, prosecutors do not request jail time. However, if a tourist were to seek a jury trial, prosecutors would respond with additional charges, such as possession of illegal ammunition (conceivably, a count for each bullet in the pistol chamber). Not surprisingly, 99.9 percent of the tourists decide to plead guilty.

Sandefur argues that, in such cases criminal defendants are not being punished for a refusal to bargain; they are instead being punished for “violating the law.” According to Sandefur, the tourists have no right to complain because they have no “right to leniency.” That line of argument has surface appeal, but it is defective. The logical fallacy of division says that what may be true for the whole is not necessarily true for the parts. Thus, a prosecutor can indeed “throw the book” at any given tourist. However, if it came to light that the prosecutor was targeting, say, Hispanics for harsher treatment, we would know that something was very wrong. The retort that Hispanic arrestees do not have a “right to leniency” would be an unsatisfying defense of the prosecutor's handling of such cases. Plea bargaining tactics fail for similar, though perhaps more subtle, reasons. Just because the state can throw the book at someone does not mean that it can use its power to retaliate against a person who wishes to exercise his right to a trial.

Sandefur's defense of plea bargaining repeatedly returns to the idea that criminal defendants have the “right to make a contract,” as in other free-trade situations. But plea bargaining is not free trade. It is a forced association. Once a person has been charged with a crime, he does not have the option of walking away from the state.

Sandefur argues that because individuals can waive many of their constitutional rights, they can also “sell” their rights. Even if that argument had merit, it is not the law. But, more impor-

tantly, one suspects that it is not the law because the argument lacks merit. Imagine four people who are charged with auto theft. One defendant pleads guilty to the offense and receives three years of jail time. The second defendant insists upon a trial, but sells his right to call his own witnesses. After conviction, he receives four years. The third defendant insists on a trial, but sells his right to be represented by his famous attorney-uncle, F. Lee Bailey. Instead, he hires a local attorney and, in addition, sells his right to a speedy trial. After conviction, he receives five years. The fourth insists upon a trial, presents a rigorous but unsuccessful defense and, after conviction, receives a prison sentence of 10 years. Are the disparate punishments for the same offense sensible? The courtroom just does not seem to be the proper place for an auction and haggling.

The constitutional defect with plea bargaining is systemic, not episodic. The rarity of jury trials is not the result of some spontaneous order spawned by contract negotiations between individuals.

### **CONCLUSION**

Thomas Jefferson famously observed that “the natural progress of things is for liberty to yield and government to gain ground.” The American experience with plea bargaining is yet another confirmation of that truth. The Supreme Court unleashed a runaway train when it sanctioned plea bargaining in *Bordenkircher v. Hayes*. Despite a steady media diet of titillating criminal trials in recent years, there is an increasing recognition that jury trials are now a rarity in America — and that something, somewhere, is seriously amiss. That “something” is plea bargaining.

As with so many other areas of constitutional law, the Court must stop tinkering around the edges of the issue and return to first principles. It is true that plea bargaining speeds caseload disposition, but it does so in an unconstitutional manner. 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. The Framers believed the Bill of Rights, and the freedom it secured, was well worth any costs that resulted. If that vision is to endure, the Supreme Court must come to its defense. R

### **READINGS**

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