

# The Washington Post

## Americans are bargaining away their innocence

Tim Lynch

January 20, 2016

The presumption of innocence helps to combat prejudice and prejudging in the U.S. criminal justice system. But because plea bargains have supplanted trials in our criminal justice system, that presumption does not apply to most cases in the United States.

Prejudice against the accused is quite common. Consider your own experience: If you see that a police car has pulled a driver over to the side of a highway, what do you make of the situation? Most people probably think to themselves, “Hmm, that driver was probably caught speeding.” Similarly, if you heard that one of your neighbors had been arrested, you would likely say to yourself, “I wonder what crime he committed.” It is a common reaction to presume that the authorities had a good reason to detain or arrest someone.

To protect the innocent, however, the law demands that incriminating evidence be presented in court. The Constitution says every person accused of a crime has the right to an impartial jury trial. If the jury is persuaded that a person is guilty, then that person can lose his liberty and be punished. That is a sensible procedure for a just system, and it is why Americans have taken pride in our Bill of Rights.

Unfortunately, the system that is described by our school teachers and that Americans see on television and in the movies is now defunct. Jury trials are now rare events in the United States. In fact, about 95 percent of the cases moving through the system will not go to trial. The overwhelming majority of cases will be resolved by plea bargains.

In a plea bargain, the prosecutor typically offers the defendant a reduced prison sentence if he agrees to waive his right to a jury trial and admit guilt in a brief hearing before a judge. Prosecutors use their power to pressure people who have been accused of a crime, and are presumed innocent, to waive their right to a trial and admit guilt.

We know this is true because prosecutors admit that this is what they are doing. The Supreme Court has approved these prosecutorial tactics in the landmark 1978 case, *Bordenkircher v.*

*Hayes*. By a close 5-4 vote, the court said there was no constitutional problem with pressuring the accused to waive his trial and admit guilt. According to the court, there is no illegal coercion “so long as the accused is free to accept or reject the prosecution’s offer.”

But from a defendant’s perspective, plea bargaining extorts guilty pleas. Casual observers of our legal system will sometimes say that they would never plead guilty to a crime if they were innocent. An easy claim to make — but it is another thing when your freedom is actually on the line.

Imagine learning that the government has a “witness” who is willing to tell lies about you in court. And then your own attorney tells you that his best advice is for you to go into court, say you’re guilty and accept one year in prison instead of risking a 10-year prison sentence should the jury believe the lying witness. It’s an awful predicament for innocent people who get swept up in criminal cases. As William Young, then chief judge of the U.S. District Court in Boston observed in a 2004 opinion: “The focus of our entire criminal justice system has shifted away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused.”

Prosecutors do not set out to deliberately lock up innocent people. They’re dealing with crushing caseloads and believe that they are doing the best they can to administer justice fairly.

What happens when an innocent person has pled guilty, but regrets that decision later? The law is not very sympathetic. Rules vary across jurisdictions, but it is generally very difficult to retract a guilty plea and obtain a new trial — even when the government’s witnesses change their tune about what really happened. The government fights these legal moves all the time with the argument that the public has an interest in the “finality of judgments.”

Ironically, the prisoners who keep insisting upon their innocence face greater punishment. At the sentencing phase of a case, the judge typically wants to know if the convicted person will “accept responsibility” for his conduct and the consequences of his actions. Maintaining one’s innocence at sentencing will mean more, not less, prison time.

The same cruel twist will come into play down the road — when the innocent person becomes eligible for parole. Parole boards are looking for candidates who are contrite. Candidates who express remorse for their past actions stand a better chance than those who claim they have been unjustly imprisoned because they never committed the crime.

Some say that the nightmare scenario of innocents behind bars is inevitable because the system has to be administered by people — and people make mistakes. That truth should not be invoked to deflect consideration of reform proposals that can minimize unjust convictions. A re-examination of plea-bargaining practices is long overdue.

*Tim Lynch is director of the Cato Institute’s Project on Criminal Justice.*