

Reason

July 2011

The devil's bargain: how plea agreements, never contemplated by the framers, undermine justice

SECTION: Pg. 68 Vol. 43 No. 3

LENGTH: 701 words

DATELINE: United States

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Most Americans are under the mistaken impression that when the government accuses someone of a crime, the case typically proceeds to trial, where a jury of laypeople hears arguments from the prosecution and the defense, then deliberates over the evidence before deciding on the defendant's guilt or innocence. This image of American justice is wildly off the mark. Criminal cases rarely go to trial, because about 95 percent are resolved by plea bargains. In a plea bargain, the prosecutor usually offers a reduced prison sentence if the defendant agrees to waive his right to a jury trial and admit guilt in a summary proceeding before a judge.

This standard operating procedure was not contemplated by the Framers. The inability to enter into plea arrangements was not among the grievances set forth in the Declaration of Independence. Plea bargaining was not discussed at the Constitutional Convention or during ratification debates. In fact, the Constitution says "the Trial of all Crimes, except in Cases of Impeachment; shall be by Jury." It is evident that jury trials were supposed to play a central role in the administration of American criminal justice. But as the Yale law professor John Langbein noted in a 1992 Harvard Journal of Law and Public Policy article, "There is an astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers."

No one ever proposed a radical restructuring of the criminal justice system, one that would replace jury trials with a supposedly superior system of charge-and-sentence bargaining. Like the growth of government in general, plea bargaining slowly crept into and eventually grew to dominate the system.

From the government's perspective, plea bargaining has two advantages. First, it's less expensive and time-consuming than jury trials, which means prosecutors can haul more people into court and legislators can add more offenses to the criminal code. Second, by cutting the jury out of the picture, prosecutors and judges acquire more influence over case outcomes.

From a defendant's perspective, plea bargaining extorts guilty pleas. People who have never been prosecuted may think there is no way they would plead guilty to a crime they did not commit. But when the government has a "witness" who is willing to lie, and your own attorney urges you to accept one year in prison rather than risk a to-year sentence, the decision becomes harder. As William Young, then chief judge of the U.S. District Court in Massachusetts, observed in an unusually blunt 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."

One point often stressed by progressives is that trials bring scrutiny to police conduct. But when deals are struck in courthouse hallways, judges never hear about illegal searches or detentions. This only encourages further misconduct. Conservatives, meanwhile, are right to wonder whether

overburdened prosecutors give the guilty too many lenient deals. Why should an armed robber get to plead guilty to a lesser crime such as petty theft?

It is remarkable how few people will openly defend the primary method by which our courts handle criminal cases. The most common apologia for plea bargaining is a pragmatic argument: Courthouses are so busy that they would grind to a halt if every case, or even a substantial share of them, went to trial. But there is nothing inevitable about those crushing caseloads. Politicians chose to expand the list of crimes, eventually turning millions of Americans into criminals. Ending the disastrous war on drugs would unclog our courts in short order.

In any case, trials are one of the few things the government indisputably should be spending money on. If additional funds are needed, free them up by stopping the nation-building exercises abroad and the corporate welfare here at home. The administration of justice ought to be a top priority of government.

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