Will There Be Plea Bargaining in the Year 2000?

Albert W. Alschuler

Although the Anglo-American legal system managed to survive without plea bargaining for most of its history, this practice has been a significant feature of our criminal justice system for the past 100 years. To predict its demise within the next decade and a half would be extraordinarily rash; and rash though I intend to be in these remarks, I am not about to venture that prediction.

Nevertheless, the speed with which laws and legal institutions sometimes change can be astonishing. For example, it was a matter of almost unquestioned faith 15 years ago that legislatures should afford judges and parole boards broad discretion in sentencing. That faith had dominated American sentencing policy for the better part of a century, but it dissipated almost overnight. Within the past decade, more than 20 states and the federal government have reformed objection that reformers have advanced to the sentencing discretion of judges and parole boards has applied with equal force to the sentencing discretion that prosecutors and defense attorneys have exercised in plea bargaining. With the sole exceptions of the New York and the federal statutes, however, none of the major sentencing reforms of the past decade have taken even token steps toward confining the discretion exercised in plea bargaining.

Some purported political restrictions of plea bargaining have been so riddled with disingenuous loopholes that their authors probably ought to be convicted of fraud. A very few genuine reforms, notably Alaska’s prohibition of plea bargaining in 1976, have demonstrated that prohibiting this practice does not cause the sky to fall. In the main, however, despite the widespread criticism that it has engendered, plea bargaining has seemed politically impregnable.

In large measure, this circumstance seems to reflect the political power of lawyers. When I suggested to a Congressional staff member that the Senate Judiciary Committee ought to consider legislation prohibiting plea bargaining in the federal courts, the staff member was astonished. He replied, “Why, we’d have the United States Attorneys against us, and the federal judges, and the defense attorneys too!”

“Yes,” I said, “and who else?”
Lawyers and judges do not account for as much as 1% of the voting population. Plea bargaining commonly incurs the opposition of prisoners' unions, police unions, corrections officials, victims of crime, civil libertarians, law-and-order conservatives, and almost everyone else. About three-quarters of the respondents to public opinion polls in Michigan and Wisconsin voiced their opposition to this practice. Plea negotiation is a "strange bedfellows" issue on which prosecutors and defense attorneys who disagree about almost everything else suddenly see eye to eye—and on which most nonlawyers see eye to eye as well. The public disapproval of plea bargaining, coupled with the persistence of widespread plea bargaining, raises an obvious question: Who owns the criminal justice system?

Lawyers frequently claim that the public does not understand plea bargaining. The problem, however, may be less public misunderstanding than the fact that lawyers get used to it. As Justice Walter V. Schaefer once remarked, "What is familiar tends to become what is right."

The public opposition to plea bargaining probably rests in part on a desire for increasingly severe punishments, but there may be more to it. Members of the public may remember some basic precepts of criminal justice that some prosecutors, defense attorneys, and trial judges have forgotten. One of these precepts is that before convicting someone of a crime, it is important to hear what this person may be able to say in his defense. Discouraging a defendant from obtaining a hearing before a judge or jury is indecent.

A second basic precept is that criminal guilt should be established beyond a reasonable doubt. Compromising criminal disputes—effectively treating defendants as half-guilty—is inconsistent with this principle. Although bargaining prosecutors claim that half a loaf is better than none, members of the public may take a different view.

When a prosecutor can prove a defendant's guilt of the crime that the prosecutor has charged, they may believe that the defendant should be punished for this offense and no other. When, however, the prosecutor lacks sufficient evidence to establish the defendant's guilt of this offense, most folks in the street may believe that the prosecutor should, without bargaining, simply dismiss the unprovable charge and file a lesser charge or none at all.

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A third basic precept of criminal justice concerns the imposition of punishment rather than the adjudication of guilt. Sentences should be based on what offenders have done (and possibly on their personal characteristics). To turn their sentences in significant part on their strategies rather than their crimes is unjust. It is wrong deliberately to punish a person, not for what he did, but for asking that the evidence be heard.

Finally, even if the precepts just discussed might be questioned in principle, our Constitution has enshrined them into law. Consider a prosecutor who offered to recommend a favorable sentence if a defendant then on trial waived his right to cross-examine the state's witnesses. Would anyone defend this calculated subversion of the right to cross-examination? Nevertheless, a guilty plea waives this right and more. American courts appear to abandon their usual principles of waiver when they confront the most persuasive

waiver that the criminal justice system permits.

In preparing these remarks, I have tried to reflect in greater detail on what separates my views on this subject from those of most practicing lawyers. The lawyers might say that it is my simple-minded ignorance; and it would be as easy for me to say that it is their economic and bureaucratic self-interest. As Judge Arthur Alarcon once observed, "It is easier to sit in an overstuffed chair drinking coffee than to stand in the courtroom trying cases." Negotiating, bantering about kids and lakehouses, being reasonable, and then splitting the difference is less work than trying cases, and it usually pays better.

Nevertheless, most of the prosecutors whom I know are dedicated to advancing the public interest, and most defense attorneys to advancing the interests of the defendants whom they represent. In addition, most of these lawyers are reflective, hard-working and concerned. To dismiss their defenses of plea bargaining as nothing more than rationalizations of self-interest would be unfair. Moreover, I am increasingly convinced that the root disagreement between those who defend plea bargaining and those who oppose it does not rest on differing factual perceptions of the bargaining process or even on differing conceptions of what results are appropriate in individual cases. It rests on something more elusive—on differing views of how a complex and variable institution that sometimes yields just results and sometimes unjust results should be evaluated.

Practicing lawyers observe plea bargaining primarily through their own cases. They are convinced that the results they achieve in these cases are appropriate, and they tend to become indignant when they interpret criticisms of plea bargaining as challenges to their own performance and to outcomes that they consider fair. Although the rest of us probably do have less confidence in the lawyers' concepts of justice than they do themselves, I do not doubt that, in most situations, the lawyers are correct.

None of the critical things that I have said about plea bargaining deny that the results of most plea bargained cases are appropriate. Plea bargaining provides a direct, expeditious way to achieve rough justice in most cases.

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5See D. Fogel, "... We are living proof ..." 300 (app. III) (1975) (Michigan); Metropolitan Milwaukee Council, Survey 600 at 36 (1980).

Moreover, as the defenders of plea bargaining commonly observe, no system can achieve perfection, and any system can be abused. Still, some systems are more imperfect and lend themselves more to abuse than others. For me, achieving rough justice in most cases is not enough.

Were a critic of the Soviet system of justice to object to the treatment of Andrei Sakharov and Yelena Bonner, a defender of that system might respond that their cases are atypical and that any system yields unjust results sometimes. He might contend that in most cases the Soviet system of justice does not work unfairly. After all, most of the people convicted of shoplifting in the Soviet Union are undoubtedly guilty, and most of them probably receive sentences appropriate to their crimes.

Similarly, if some individual selected at random from the waiting room of a bus station were appointed criminal justice czar and empowered to imprison whomever he chose, he probably would not act vindictively very often. Instead, if he were at all like the rest of us, he probably would take his responsibilities rather seriously and would achieve rough justice in most cases. In a sense, all of the additions to our own system of justice—the law, the lawyers, the rules of evidence, the presentence reports, the appellate courts, and all the rest—exist for the exceptional case. They exist because we care about the one defendant in 100 who may be innocent and about the one case in 10 in which a quick, intuitive assessment of the sentence may be inappropriate.

Most defenses of plea bargaining judge this practice only in terms of bottom-line results and only in terms of typical cases. From this perspective, the choice between plea bargaining and trial may not matter very much. Indeed, no choice may matter very much. Competing criminal justice institutions are unlikely to differ greatly from one another in the aggregate or at the center. Whether we have plea bargaining, trials, Soviet justice or a czar from the bus station, a first-offense shoplifter is likely to be fined or placed on probation, and an armed robber who shoots and wounds his victim is likely to be locked up for a long time. An appropriate perspective evaluates institutions, not in the aggregate, but at the margin.

Judged from a perspective that takes
account of atypical cases and assesses the likelihood of abuse, plea bargaining is a thoroughly appalling institution. Most defense attorneys are undoubtedly dedicated and conscientious, but even these lawyers are occasionally influenced by the pressures of their office caseloads, by the fact that they have pocketed their fees in advance, and by the fact that a guilty plea saves days of work.

Moreover, some unscrupulous lawyers handle large volumes of cases for less-than-spectacular fees, plead virtually all of their clients guilty, and sometimes even deceive their clients for the sake of turning a fast buck. Similarly, the desire of some prosecutors to "move" cases, to maintain high "batting averages," to keep desirable job assignments, to please influential defense attorneys, and to avoid the wrath of trial judges sometimes lead these officials to sacrifice the public interest. To round out this picture of atypical (but not utterly atypical) performances, one need not search very far to discover some trial judges who spend only two or three hours a day on the bench, who "look for guilty pleas the way that salesmen look for orders," and who commonly greet each other with the inquiry, "How are your dispositions this month?"

Plea bargaining provides extraordinary opportunities for lazy lawyers and judges whose primary goal is to cut corners and to get on to the next case. It increases the likelihood of favoritism and personal influence. It conceals other abuses. It maximizes the dangers of representation by inexperienced attorneys who are not fully versed in an essentially secret system of justice. It promotes inequalities. It merges the tasks of adjudication, sentencing, and administration into a single amorphous judgment to the detriment of all three. And it almost certainly increases the number of innocent defendants who are convicted.

Plea bargaining, in fact, has warped almost every aspect of our criminal justice system from the legislative drafting of substantive offenses through the efforts of correctional officials to rehabilitate convicted offenders. Probation officers currently complain that when they interview convicted defendants in an effort to prepare presentence reports, the defendants begin by telling the officers what sentences they are going to get. A system that first determines the sentence and then collects information relevant to sentencing is bizarre.

This system not only makes figureheads of probation officers, it also tends to make figureheads of judges whose power over the administration of justice largely has been transferred to encouraging them to believe that they have "sold a commodity and that they have in a sense gotten away with something." This practice has reinforced the view of defendants who see the world as a network of processes and connections and who believe that justice is just a matter of whom you know.

A last resort of apologists for plea bargaining is the claim that our nation cannot afford to give its defendants their day in court. Nevertheless, a paper that I published two years ago did some cost accounting and concluded that America could provide a three-day jury trial to every felony defendant by adding no more than $850 million to current criminal justice expenditures. That figure assumed no guilty pleas whatever and much more lengthy trials than would in fact be necessary. Even on those extraordinary assumptions, the cost of abolishing plea bargaining in felony cases would be less than the cost of a single Aegis cruiser and less than the amount that the now disbanded Law Enforcement Assistance Administration once spent annually on improving state criminal justice.

Americans might in fact do away with plea bargaining without adding anything to current expenditures. They could do so by simplifying the trial process and thereby making trials more available to defendants who want them. After creating the most cumbersome factfinding mechanism in criminal cases that humankind has yet devised, we have decided that we cannot afford to provide this mechanism to more than a tiny minority of defendants. Instead we press most defendants to waive the right to any kind of trial whatever. In other words, we allocate our resources about as sensibly as a nation that decided to solve its transportation problem by giving Cadillacs to 10% of the population and requiring everyone else to travel by foot. Perhaps less would be more.

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Plea bargaining judges. This phenomenon has not escaped the attention of defendants. One told an interviewer, "I feel that a judge really ain't shit, you know. He's just put up there—he's supposedly to be the head of the show, but he ain't nothing... The person who runs the show is the prosecutor."" Plea bargaining also has transformed the role of defense attorneys. These lawyers are no longer able to act simply as advocates. Even when they conscientiously serve their clients' interests, they frequently lose these clients' confidence by pressuring them to sacrifice their constitutional rights. In addition, plea bargaining has transformed the role of parole boards and other correctional officials. Sensing that the offenses of which inmates have been convicted through plea bargaining bear little relationship to what they did, these officials unabashedly redefine the facts of each prisoner's case in deciding when to release him on parole. They call this mockery of due process "real offense sentencing."

Plea bargaining also has affected the attitudes of defendants themselves, encouraging them to believe that they have "sold a commodity and that they have in a sense gotten away with something."

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There is a third alternative to plea bargaining—bargaining with defendants to waive the right to jury trial but not to waive the right to trial before a court. This alternative would emulate the criminal justice system that has existed for a long time in Philadelphia. Basically, defendants convicted at jury trials in Philadelphia receive tough sentences just as they do almost everywhere else in America. But defendants convicted at nonjury trials do not ordinarily receive more severe sentences than defendants who plead guilty. Partly as a result of this sentencing policy, nonjury trials have become the most common method of resolving criminal cases. Although some observers assume that speedy nonjury trials in Philadelphia must be the functional equivalent of guilty pleas elsewhere, the acquittal rate at these nonjury trials exceeds that at jury trials. A 30% or 40% acquittal rate does not sound like the equivalent of plea bargaining to me.  


Although bargaining for a waiver of the right to jury trial has a great deal in common with plea bargaining and is disturbing for some of the same reasons, it has three distinct advantages over the more common plea bargaining alternative. Nonjury trials in Philadelphia are public rather than closed-door proceedings; defendants have an unfettered opportunity to present their side of the story to an impartial third party; and most importantly, defendants do not surrender their chances for acquittal.

Between now and the year 2000, America will celebrate the 200th anniversary of the Bill of Rights. The framers of this document made the judgment that the expenses of trials were worth paying. Reasserting their judgment on this subject would not be beyond our capacity, and doing so would be a marvellous way to mark the bicentennial.