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Plea Bargaining and the Death Penalty

Albert Alschuler

PLEA BARGAINING AND THE DEATH PENALTY

*Albert W. Alschuler**

I am about to describe the intersection of two dreadful monsters of American criminal justice: the practice of capital punishment and the practice of plea bargaining.

I. THE DEATH TARIFF

With other scholars, I once applied for a federal grant to determine how many of the inmates on death row were there only because they had declined plea bargains that could have saved their lives. We applied during the Reagan years and didn't get the grant. The number remains unknown.

But one of my co-applicants, the late Welsh White, asked experienced capital defenders to make their best estimates. Millard Farmer

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This Article is an edited version of my remarks to the Symposium *Media, Race, and the Death Penalty* at the DePaul University College of Law on March 6, 2008. I was not a scheduled speaker but was to moderate a panel discussion. One of the scheduled speakers was a long-time friend, mentor, and hero, Judge R. Eugene Pincham. When I telephoned Judge Pincham a few days before the symposium, he had just returned home after a twenty-day stay in the hospital. We discussed briefly the cancer ravaging his body. Then we reminisced for fifteen or twenty minutes, touching on the wonderful argument he made to the Illinois Supreme Court the first time I first heard him speak, a memorable train ride we shared, an even more memorable Christmas party in Bridgeport (parts of which might better be forgotten), the help he gave me in preparing my first law review article, the fun we had when he ran for office (it would have been more fun to win), and the series of student interns I sent him while teaching out of state—interns who not only worked in his office but also, at his unsolicited invitation, lived with him throughout the summer. Judge Pincham's voice was strong, and he was entirely himself. He said that he still planned to speak at the symposium. It was only on the morning of March 6 that he concluded speaking that day was impossible. He died four weeks later.

When Judge Pincham withdrew from the symposium, I designated myself pinch-hitter and cobbled together some remarks on plea bargaining and the death penalty, a subject on which I'd touched in publications that focused primarily on other subjects. Most of the material presented here has appeared before, but Andrea Lyon and the editors of the *DePaul Law Review* thought it would be good to bring it together. They encouraged me to publish these remarks.

I flatter myself that Judge Pincham would not have minded what I have to say. Lawyers (especially judges and defense attorneys) who oppose plea bargaining are a small minority. They say things that mark them as screwy in the eyes of many other lawyers. Pincham happily paid that price, and what he told me in 1967 is still the truth: "Plea bargaining cheapens the system. It encourages the defendant to believe that he has sold a commodity and that he has, in a sense, gotten away with something." Amen, Gene, and rest in peace.

declared that "75 percent of the defendants who have been executed since 1976 could have avoided the death sentence by accepting a plea offer."[1] Stephen Bright and Michael Burt maintained that half of the defendants executed in America "at some point had an opportunity to enter a guilty plea that would have eliminated the possibility of a death sentence."[2]

Consider what those numbers mean. America executes people not only for the crime of committing an aggravated murder but also for the crime of standing trial. In many cases and probably most, standing trial is as much a necessary condition of execution as committing a capital offense.

The case of John Spenkelink shows how the system works. Spenkelink was the first person executed involuntarily in the United States after a de facto moratorium on executions that began in 1967 ended ten years later.[3] His lawyer, Brian T. Hayes, explained why his case was not resolved through plea bargaining:

> We bargained. The judge began the process by complaining to me and the prosecutor that he did not want to try the case. "One drifter kills another drifter," he said. "That's not worth two weeks of the court's time." The prosecutor responded by offering a guilty plea to second-degree murder with the recommendation of a life sentence. It was a good deal, but Spenk turned it down.
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> I'd encountered clients like him before, and I thought I knew how to handle them. I drew up a formal statement that said, "I, John Spenkelink, have been offered such and such a deal. I have been advised by my attorney that I have little chance of acquittal and that, if I reject the deal, I will probably be executed. Nevertheless, being of sound mind, I hereby reject the proposed bargain and instruct my attorney to present my case to a jury." I put lines on the statement for Spenk and three witnesses to sign, and I walked into Spenk's cell with three jail guards. In other cases, my clients have looked at the statement, looked at the guards, and said, "Let's talk."

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1. WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 145 (2006).

2. *Id.* at 146.

3. *See* Wikipedia, John Arthur Spenkelink, http://en.wikipedia.org/wiki/John_Arthur_Spenkelink (last visited Mar. 16, 2009). The execution of Gary Gilmore in 1977 marked the end of the death penalty moratorium, but Gilmore was a "volunteer" who instructed his lawyers not to seek a stay of execution and who complained to the courts that his execution had been improperly delayed. *See* Gilmore v. Utah, 429 U.S. 1012, 1013, 1015 nn.1 & 4 (1976) (Burger, C.J., concurring). Spenkelink's execution came two years after Gilmore's. The ten-year moratorium that preceded Gilmore's execution resulted from the vigorous litigation of death penalty issues in the Supreme Court and other courts and from a 1972 Supreme Court decision holding all existing death penalty statutes unconstitutional. *See* Furman v. Georgia, 408 U.S. 238 (1972).

> Not Spenk. He took a pen and signed, and the three guards signed as witnesses.[4]

John Spenkelink's final words before the State of Florida electrocuted him were probably not original. He declared, "Capital punishment: Them without the capital get the punishment."[5]

When Hannah Arendt spoke of the banality of evil, she referred to the Holocaust and to a greater evil than that of the American criminal justice system.[6] But Arendt's phrase may come to mind as one hears bargaining lawyers discuss whether to take or spare a life. As in Spenkelink's case, the answer may turn on whether the prosecutor and judge believe that killing a particular defendant is worth a week or two of their time.

An Oakland, California defense attorney recalled a more aggravated case than Spenkelink's.[7] The defendant had planned a robbery-murder and shot his crippled victim in the face three times. "If he had killed his mother," the attorney said, "I might have been able to do something for him."[8] The prosecutor offered to permit a guilty plea to

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4. Telephone Interview with Brian T. Hayes (1984). A law review article by the late John Kaplan prompted me to call Hayes. *See* John Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177 (1984). Kaplan, an opponent of the death penalty, based his opposition partly on the danger of executing the innocent. Writing in 1984, however, five years before history's first DNA exoneration, *see* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 57 (2008), he made a concession that no death penalty opponent would make today. "It is true," he declared, "that in the modern history of the death penalty, the last thirty-some years, probably no innocent person has been executed." Kaplan, *supra*, at 186. Kaplan then wrote:

> If we regard as innocence merely innocence of a capital crime, despite guilt of a lesser crime, the chances of executing somebody who is innocent go up very sharply. Indeed, . . . I am convinced that the first involuntary execution in the United States since the long moratorium was in this category. John Spinkellink had killed a man in what appeared to be a classic case of voluntary manslaughter, as his victim had homosexually assaulted him earlier.

Id. Justice Brennan later reiterated Kaplan's claim in a dissenting opinion. *See* Pulley v. Harris, 465 U.S. 37, 69 n.5 (1984) (Brennan, J., dissenting). In Justice Brennan's view, Kaplan's analysis showed the arbitrariness of Florida's post-*Furman* regime of capital punishment.

Skeptical of Kaplan's claim, I telephoned Hayes, who confirmed my suspicion that Spenkelink's crime was not manslaughter. The defendant's testimony that the victim had assaulted him was uncorroborated. In addition, the alleged sexual assault had occurred two weeks before the killing, and Spenkelink had continued to travel with the victim throughout the two-week period. Spenkelink's case may illustrate the arbitrariness of the post-*Furman* regime of capital punishment, but a case in which the alleged provocation occurred two weeks before the homicide was not "a classic case of voluntary manslaughter." The jury probably did not convict John Spenkelink of the wrong crime. The critical roll of the dice in our arbitrary system of capital punishment had come earlier.

5. Wikipedia, *supra* note 3.

6. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964).

7. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 664 (1981).

8. *Id.*

murder and to recommend a life sentence. This sentence would have made the defendant eligible for parole in seven years. The defense attorney urged the defendant to accept the offer and advised him that he would probably be executed if he stood trial. The defendant's only response was, "You don't believe in my case."[9] The jury convicted the defendant in less than an hour, and the death penalty was imposed. This defendant was executed not only for the crime of being a murderer but also for the crime of being an optimist—for what his attorney called an inability to think 100 yards in front of himself. We live in a nation that kills people for exercising their constitutional rights.

II. MOCKING THE DEATH PENALTY

Plea bargaining undermines the most common rationale for the death penalty. Proponents of this penalty maintain that some crimes are so horrible that they simply require it. They insist that no lesser punishment can adequately express the community's condemnation.[10] But the actions of American prosecutors convey an entirely different message: No lesser punishment can adequately express the community's condemnation *unless* the accused pleads guilty. For defendants who agree to save the government the costs of a trial, lesser punishments are just fine. These defendants' horrible crimes do not demand death after all. In the immortal words of Gilda Radner, "Never mind." Plea bargaining devalues the death penalty. It changes what the death penalty is about.

III. ENSURING INEQUALITY

Plea bargaining also reveals that efforts to promote the even-handed administration of capital punishment are empty and cosmetic. Ted Bundy was one of the worst of the worst. He was executed, but only because he turned down a deal that his lawyers begged him to accept.[11] Sandra Lockett, the defendant in one of the Supreme Court's leading death penalty decisions,[12] was far from the worst of the worst. She was minimally involved in a robbery that ended in an

9. *Id.*

10. The Supreme Court wrote in *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976), "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." The Court quoted a columnist's statement that "a crime, or a series of crimes [may be] so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response." *Id.* at 184 n.30 (quoting William Raspberry, *Death Sentence*, WASH. POST, Mar. 12, 1976, at A27).

11. *See* WELSH S. WHITE, THE DEATH PENALTY IN THE NINETIES 57–60 (1991).

12. Lockett v. Ohio, 438 U.S. 586 (1978).

unanticipated killing by a co-felon. She was sentenced to death because she had a possible defense and turned down offers that could have saved her life. Lockett's co-felon, the triggerman without a defense, pleaded guilty in exchange for a life term.[13]

When Berkeley law professor Malcolm M. Feeley visited death row in Tennessee, he noticed an inmate in kitchen whites delivering meals to the death row inmates.[14] It took a moment before Feeley realized that the inmate was James Earl Ray.[15] Ray, the probable assassin of Martin Luther King, Jr.,[16] had entered a plea agreement. He was therefore on one side of the bars while less iniquitous killers awaited execution on the other.

In America's bizarre system of criminal justice, a serial killer may reduce the likelihood of his execution by committing additional murders. The more unexplained disappearances a killer can solve, the greater his bargaining power. In 2003, the very worst of the worst, Gary Leon Ridgway, the Green River Killer, escaped execution through a plea agreement that required him to assist in locating the remains of his victims.[17] Ridgway, the most prolific serial killer in American history, pleaded guilty to forty-eight charges of aggravated first degree murder.[18] King County Prosecuting Attorney Norm Maleng then congratulated himself: "This agreement was the avenue to the truth. And in the end, the search for the truth is still why we have a criminal justice system."[19]

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13. *See* WHITE, *supra* note 11, at 60–62.

14. *See* E-mail from Malcolm Feeley to author (Mar. 28, 2006) (on file with author).

15. By keeping Ray physically separated from both the general prison population and death row inmates, his work assignment protected him from the private death penalty that some of his fellow inmates might have been pleased to administer. It also kept Ray, an earlier escapee, in a secure place away from the perimeter of the prison.

16. In 1997, with the approval of Dr. King's widow and his other children, Dexter King shook Ray's hand and expressed his belief in Ray's innocence. *See* Kevin Sack, *A Visitor for James Earl Ray*, N.Y. TIMES, Mar. 30, 1997, at E2. There is no reason whatever to credit confessions induced by the threat of death, and plea bargaining in capital cases settles the question of an accused killer's guilt in a way that should satisfy no one.

17. Defense Proffer at 3–4, Washington v. Ridgway, No. 01-1-10270-9 SEA (Wash. Sup. Ct. June 10, 2003), *available at* http://seattletimes.nwsource.com/news/local/links/plea_agreement.pdf.

18. Statement of Defendant on Plea of Guilty at 7, Washington v. Ridgway, No. 01-1-10270-9 SEA (Wash. Sup. Ct. June 10, 2003), *available at* http://seattletimes.nwsource.com/news/local/links/statement_of_defendant.pdf.

19. *See* Wikipedia, Gary Ridgway, http://en.wikipedia.org/wiki/GaryRidgway (last visited Mar. 16, 2009).

IV. DOES BARGAINING REALLY SAVE LIVES?

It may take a great lawyer to save an exceptionally brutal killer from a death sentence by arguing to a jury, but almost any lawyer can save a brutal killer by bargaining. Philadelphia District Attorney Lynne Abraham has been called the "deadliest D.A." because she seeks the death penalty in nearly every case in which the defendant is eligible.[20] In even the most egregious cases, however, Abraham's office reputedly foregoes the death penalty when capital defendants agree to plead guilty.[21]

District Attorney Abraham may be a well-meaning public servant. Like others socialized to treat plea bargaining as routine, she is probably oblivious to the fact that her methods are the twenty-first century equivalent of Torquemada's. Abraham may not fully realize the purpose for which she uses the death penalty. What is familiar tends to become what is right.

Defense attorneys who champion plea bargaining in capital cases maintain that it saves lives, and of course it does save individual lives. Lynne Abraham's prosecutors may seek the death penalty partly to gain plea bargaining leverage, but they are prepared to carry out their threats when defendants refuse to yield. Whether plea bargaining reduces the total number of executions, however, is an open question. Would District Attorney Abraham continue to seek capital punishment in almost all death-eligible cases if she could gain no bargaining leverage by doing so? Would the taxpayers of Philadelphia—indeed, would even the taxpayers of Texas—be prepared to pay the high cost of capital trials and prolonged capital appeals in all or most of the cases in which prosecutors threaten the death penalty today? Fiscal concerns aside, do Americans truly want more state-sponsored killing than they have? Might the elimination of plea bargaining in capital cases leave the number of executions constant but produce a system in which the executed were selected more on the basis of what they did and less on the basis of whether they exercised their rights? Might eliminating the use of official death threats as leverage make capital punishment less useful to prosecutors and legislators and actually hasten its abolition? No one knows the answers to these questions. Plea bargaining allows guerilla warfare against the death penalty in individual cases, but in the absence of this practice, the warfare might be unnecessary.

20. Tina Rosenberg, *The Deadliest DA*, N.Y. TIMES, Jul. 16, 1995, at 22.

21. *See* WHITE, *supra* note 1, at 147–48.

V. WASTE AND OTHER BARGAINING TACTICS

The key to successful bargaining may lie in threatening to increase the financial burdens of the other side. The defense attorney's goal is often to persuade the prosecutor that a trial will cost too much. Welsh White describes how Edward Staffman saved the life of Sampson Armstrong by bargaining with five county commissioners.[22] Staffman first secured the court's permission to retain six expert witnesses. Then he met with each of the county commissioners individually and observed that compensation for the defense experts would exceed $100,000 if the case went to trial. Staffman suggested that this expenditure would not be a good use of resources. The commissioners were persuaded, and they in turn convinced the prosecutor to make a deal. Staffman's proposal included a face-saver for the officials: Some of the money saved by avoiding trial could "be used to provide a suitable memorial for the victims."[23]

Similarly, Michael Burt saved the life of Mendes Brown by alleging that for thirty-six years no Chinese American, Filipino American, or Hispanic American had served as foreperson of a San Francisco grand jury.[24] In a criminal justice system that is alternately miserly and profligate, this allegation generated three years of costly pretrial litigation. Eventually the victim's son withdrew his opposition to a plea agreement that would preclude the death penalty, and the prosecutor made a deal.

As the Brown case illustrates, many prosecutors have delegated de facto control of the state's most awesome penalty to private parties, the victims' families. The attitudes of these families range from adamant opposition to the death penalty to insistence that death is the only appropriate punishment and that prosecutors should not bargain about it. People who would be immediately disqualified from serving on a defendant's jury direct the government's power to decide whether he will live or die. Deferring to survivors makes application of the death penalty more arbitrary.

Defense attorneys now find it advantageous to bargain with family members as well as prosecutors. They may promise to conceal embarrassing information (for example, that the victim was a prostitute), to disclose information that the prosecutor has not revealed to the families, to make no statements to the press, to ensure that the defendant will not seek to profit from his crime by writing or granting interviews,

22. *Id.* at 150.
23. *Id.*
24. *Id.* at 150–51.

and to arrange a meeting between the defendant and the family members at which the defendant will explain his crime and express his remorse.[25]

Defense attorneys also approach their clients' families, for "[t]he participation of a defendant's family members or loved ones will often be critical" in persuading the defendant to plead guilty.[26] A defense attorney's most challenging bargaining sessions are often those he conducts with his client. Many defendants, uncertain that life without parole is worth living, seem more willing to risk their own deaths than their lawyers can stomach. Attorneys sometimes go to extraordinary lengths to persuade clients to accept what the lawyers, at least, regard as life-saving deals.

The record in *Brady v. United States*,[27] in which the Supreme Court upheld the constitutionality of plea bargaining, is revealing.[28] The defendant, charged with a capital crime, was detained for several months. He insisted throughout this period that he was innocent and that he wanted a jury trial. After conscientious investigation, however, his attorney concluded that he had "never had [a case] where the defendants had tied themselves up in a sack like they had in this one."[29] The attorney informed the defendant that he "just couldn't go to a jury . . . [b]ecause it would be almost sure conviction and possibly a death penalty."[30] The attorney told the defendant that "he would be convicted beyond a shadow of a doubt."[31]

The defense attorney had two allies in his effort to persuade the defendant to plead guilty, the trial judge and the defendant's mother. The trial judge announced from the bench that he thought the defendant "might get the death penalty."[32] Moreover, when the defense attorney told the judge in chambers that he thought a guilty plea probably would be entered at a later date, the judge replied, "Well, I think you are very wise, because I was certainly going to submit the death penalty to the jury."[33] The attorney dutifully reported this comment to the defendant.[34]

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25. *See id.* at 153–55.

26. *Id.* at 159.

27. 397 U.S. 742 (1970).

28. *See* Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 55–58 (1975).

29. Appendix to the Briefs at 64, Brady v. United States, 397 U.S. 742 (1970) (No. 119963).

30. *Id.* at 74–75.

31. *Id.* at 70.

32. *Id.*

33. *Id.* at 72.

34. *Id.* Entirely disregarding these facts, the Supreme Court wrote in a footnote, "In Brady's case, there is no claim . . . that the trial judge threatened Brady with a harsher sentence if

The defendant's mother later attempted to visit the defendant in jail but found that "it wasn't visiting hours."[35] She testified:

> I went through the alley of the city jail where he was being held and I kept yelling, "Brady, Brady." Then—then there was somebody, some fellow up there that yelled, "Is there a Brady here?" So then Brady came to the window. It was upstairs. I don't know how many floors. Brady came to the window and he said, "Mom, what are you doing? You are going to get yourself in trouble," and I just said, "For God's sake, plead guilty. They are going to give you the death sentence."[36]

When it became apparent that a co-defendant would probably testify against him, the defendant agreed to plead guilty. The defense attorney reported that he "felt very gratified when [the defendant] decided to change his plea in that we saved him from a death penalty in my opinion."[37]

The Supreme Court held in *Brady* that the threat of execution did not render the defendant's guilty plea involuntary.[38] It distinguished a nineteenth century case, *Bram v. United States*,[39] in which the Court had said that every confession must be "free and voluntary: that is, . . . not . . . extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight."[40] The *Brady* Court wrote, "*Bram* and its progeny did not hold that the possibly coercive impact of a promise of leniency could not be dissipated by the presence and advice of counsel."[41]

Professor White described a three-hour meeting in which Scharlette Holderman, a mitigation specialist, encouraged Pierre Rausini, a capital defendant, to consider how his execution would affect his family:

> [Holderman] talked about her experiences in "attending Florida executions." Among other things, she talked about the anguish suffered by Ted Bundy's mother when she witnessed Bundy's execution. Bundy's mother not only had to witness her son's execution but was taunted and harassed by death penalty supporters. . . . After hearing what she said, Rausini said, "I'll think about it." Later, he accepted the [prosecutor]'s offer.[42]

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convicted after trial in order to induce him to plead guilty." Brady v. United States, 397 U.S. 742, 751 n.8 (1970).

35. Appendix to the Briefs, *supra* note 29, at 38.

36. *Id.*

37. *Id.* at 66.

38. *Brady*, 397 U.S. at 755.

39. 168 U.S. 532 (1897).

40. *Id.* at 542–43.

41. *Brady*, 397 U.S. at 754. *Contra* Alschuler, *supra* note 28, at 55 ("A guilty plea entered at gunpoint is no less involuntary because an attorney is present to explain how the gun works.").

42. WHITE, *supra* note 1, at 162–63.

VI. DEMEANING THE ADVOCATE'S ROLE

The practice of plea bargaining often transforms criminal defense attorneys from courtroom champions into the point men and women of a coercive system. The principal function of counsel is to explain to their clients just how the legal system's armaments work and to force these clients to recognize the coercive power of the alternatives they face. Of course the lawyers are not to be faulted for the message they deliver. They would violate their duty to their clients if they failed to deliver it. How forceful a lawyer should be in advising a client not to exercise his rights, however, can be an excruciating question. More than thirty years ago, a Chicago public defender declared, "A lawyer shirks his duty when he does not coerce his client."[43] I commented:

> [T]his statement suggests a fundamental dilemma for any defense attorney working under the constraints of the guilty-plea system. When a lawyer refuses to "coerce his client," he insures his own failure; the foreseeable result is usually a serious and unnecessary penalty [even his client's execution] that . . . it should have been the lawyer's duty to prevent. When a lawyer does "coerce his client," however, he also insures his failure; he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve. The defense attorney's lot is therefore not a happy one—until he gets used to it.[44]

Plea bargaining perverts the role of counsel as it trivializes the purposes of the death penalty.

43. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1310 (1975).

44. *Id.*