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Plea Bargaining is a Shadow Market

*Frank H. Easterbrook**

I need to begin with an apology for appearing by what TV used to call tape delay. Dean Gormley asked me to attend the conference in the flesh, but a combination of postal problems and competing commitments made that impossible. Still, it's the sort of academic gathering that interests me. One of my first scholarly essays concerned plea bargaining, which operates at the boundary of the criminal process and the economic system.¹ That essay was written more than thirty years ago. For more than twenty-five years, I've been patrolling that boundary in the hope that we judges can do more good than harm. Although one may doubt the outcome of many a decision, including my own, I think that these rules, created in common-law fashion, have been generally beneficial. So I recorded this talk in Chicago, and a video took the Internet to Pittsburgh.

The schedule does not give me much time, but I don't need much because most of what I have to say is just what any student of markets would say—though I do have a few comments about the interaction of plea bargaining and the law of ineffective assistance.

Plea bargaining is a form of contract, and its regulation through the common-law process is fundamentally no different from the way courts treat other contracts. People bargain to advance their view of their interests. We judges must be careful not to override real people's actual views about their actual interests in favor of what judges think those views and interests ought to be. We serve best by preventing fraud and ensuring that bargains reflect voluntary decisions.

To put this differently, proposals to regulate plea bargaining have the same limitations and consequences as proposals to regulate commercial contracts. Ban it, and it continues but goes underground, as in many states before they gradually recognized its

* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. © 2013 by Frank H. Easterbrook. This essay began as a remote oral presentation, and I have not tried to change its character.

1. *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

legitimacy during the 1960s and 1970s. Black markets predominate when lawful markets are forbidden—but black markets are characterized by less information, more fraud, and few guarantees of voluntary action. Far better to acknowledge the practice and get the terms in writing; contract law has a Statute of Frauds for very good reason.

People are bound to bargain. Defendants are risk averse and prefer the certainty of a year in prison to a 50/50 or 90/10 chance of a longer term. For many defendants the rights afforded by rules of criminal procedure have little value at trial but considerable value in trade; they can sell their rights back to prosecutors by dealing for shorter sentences through a guilty plea. Prosecutors have limited budgets and want to induce guilty pleas so that they can bring more cases, using the resources released when they don't have to take each defendant to trial. Both sides gain. So does society. It's as if there were an invisible hand . . .

Try to regulate one contractual term and others adjust. In commercial law, if a regulator sets the price term, then quality terms adjust—and, to be clear, judges are the regulators with the broadest portfolios, and thus the least knowledge, because we are not specialists. If regulators try to set not price but quality, price adjusts. If regulators try to set price and quality, something else adjusts. Self-interested people are determined, and lawyers are clever.

It is easy to use the legal system to set one or another term but almost impossible to use the power to make either side better off. As one of my judicial colleagues wrote:

The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because [the other side] will demand compensation for bearing onerous terms.²

That's as true of contracts about criminal punishment as it is of commercial contracts. As a result, no one should have been sur-

2. Original Great Am. Chocolate Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 282 (7th Cir. 1992).

prised that, when the Federal *Sentencing Guidelines* tried to regulate how much of a discount could be given as part of a plea bargain, charge bargaining ensued—and judges cannot regulate which charges prosecutors bring or pursue.³

Of course the terms of trade differ from those in economic marketplaces. People are not exchanging goods for money. They are exchanging probabilities of acquittal (which depend on the rules of evidence and the parties' procedural entitlements) for time in prison. But trades of intangibles are hardly unique. Insurance contracts also deal with risks rather than goods, as to financial contracts. Risks and rewards can be mapped to the parties' utility functions, so intelligent trades are possible.

What law can contribute is a framework for Pareto-superior deals, just as one of the common law's great achievements has been the establishment of reliable rules for making and enforcing commercial contracts. Economists who study growth have concluded that having a common-law system willing to enforce contracts reliably is the best predictor of which nations' economies flourish and which do not.⁴ Similarly, Professor Oliver suggested in a recent essay in the *Cato Supreme Court Law Review*,⁵ and in his contribution to this symposium,⁶ that a common-law infrastructure can make plea bargaining more productive. I agree.

I don't think that building this infrastructure is a matter of constitutional law, however. Decisions taken in 1787 and 1791 about the criminal process do not speak to the management of plea negotiations. These details are for the living—living rule-writers, living judges, and living legislators. Pretending that the grand generalities of the Constitution resolve them just exposes judges to ridicule. I'll come back to this.

It also seems to me that problems often attributed to plea bargaining have some other genesis. We need to fix those problems, not the system by which people bargain in the law's shadow.⁷ If defendants have bad lawyers, offer compensation high enough to

3. See, e.g., *In re United States*, 503 F.3d 638 (7th Cir. 2007).

4. Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008), summarize a large and growing literature. See also Kristina Nyström, *The Institutions of Economic Freedom and Entrepreneurship: Evidence from Panel Data*, 136 PUB. CHOICE 269 (2008).

5. Wesley M. Oliver, *The Present and Future Regulation of Plea Bargaining: A Look at Missouri v. Frye and Lafler v. Cooper*, 2011–12 CATO SUP. CT. REV. 257 (2012).

6. Wesley M. Oliver, *The Indirect Potential of Lafler and Frye*, 51 DUQ. L. REV. 633, 640 (2013).

7. I expand on this in *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992).

attract better quality. If prosecutors overcharge, compensate defendants who prevail at or before trial, or who have convictions set aside. It is scandalous that our legal system offers fee-shifting for age discrimination cases brought by over-the-hill salesmen, but leaves persons put upon by unjustified criminal charges, who vindicate their civil right to liberty, entirely to their own devices, so that they emerge from the process broken and impoverished. The Equal Access to Justice Act⁸ reimburses defendants if the government brings unjustified civil litigation, but there's nothing comparable for unjustified criminal prosecutions.⁹ Government must do better.

Similarly, if, like Professor Alschuler, you think the plea decision is defective because it was made in the shadow of abusive prosecutions and Draconian sentences following conviction at trial,¹⁰ you should fix that problem rather than try to interfere with defendants' ability to make the best they can of a bad position. Lots of federal judges, including me, support Professor Alschuler's view that many prosecutions are abusive (think honest-services fraud and the ways RICO has been stretched) and that statutory minimum sentences are too high.¹¹ You will even find that some judges, including me, think that many drugs should be removed from the criminal law and regulated as tobacco and alcohol are regulated,¹² and that many federal criminal statutes should be

8. 5 U.S.C. § 504 (2006).

9. I have not overlooked 28 U.S.C. §§ 1495 and 2513, which offer some prospect of compensation to federal defendants who can obtain certificates of innocence. Section 2513 makes these scarce by requiring the defendant to show not only vindication but also actual innocence. Many a criminal case should never have been brought, yet trying to prove innocence may be impossible.

10. Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 692-95 (2013).

11. Objections to minimum sentences are widespread. The Judicial Conference of the United States has called for their modification or repeal; so has the Sentencing Commission. And the Supreme Court has done its bit to rein in vague and overly creative readings of criminal statutes, *see* Skilling v. United States, 130 S. Ct. 2896 (2010); McNally v. United States, 483 U.S. 350 (1987), though Congress responded to *McNally* and some other decisions by enacting new, vaguer, and thus even easier to misuse language.

12. My reasons are fundamentally those given by John Stuart Mill in ON LIBERTY (1859) and reiterated by Milton Friedman when he endorsed decriminalization (*see* Jeffrey A. Miron, *Milton Friedman, 500+ Economists Call for Marijuana Regulation Debate*, PROHIBITIONCOSTS.ORG (last visited Apr. 24, 2013), <http://www.prohibitioncosts.org>): the government should not prohibit acts that do not injure third parties. "Victimless crimes" should not be crimes at all. They fill prisons at great cost to taxpayers (and to the economy) as well as to liberty, and they cause violence that does injure third parties. Because drug dealers can't use the courts to protect their businesses, they use guns instead and bribe the police to look the other way. Did this nation really learn so little from its experience with the prohibition of alcohol?

repealed and the subjects returned to the states. It is hard to get legislatures to reduce penalties, let alone decriminalize swaths of human conduct, but that's where the effort should lie. Plea bargaining just allows defendants to ameliorate a predicament beyond their control;¹³ defendants cannot be made better off by limiting their options.

Other proposals have less prospect of assisting defendants. Think of mandatory disclosure. There's already a good deal of this in criminal procedure (think Rule 16 of the *Federal Rules of Criminal Procedure* and state analogs). Many prosecutors open their files, seeing it as a way to induce pleas. And reducing the uncertainty about what the evidence will show brings the sides together in criminal bargaining, just as in civil settlements.

Defendants who want more information can insist on it; prosecutors want pleas, indeed need pleas, so information will be forthcoming if there is a demand for it. But forcing information on the defense won't help. Remember *United States v. Ruiz*,¹⁴ in which the prosecutor had a fast-track program offering deep sentencing discounts in exchange for a speedy plea with no discovery and no appeal. The Ninth Circuit held that defendants could get both the discount and disclosures that might help set up a defense at trial. The Supreme Court reversed, for what the Ninth Circuit had done was to destroy the fast-track program. Disclosure is one of those entitlements that may be waived—and, as *Ruiz* observed, the constitutional entitlement to exculpatory information is a trial right rather than a discovery right. Tinkering could make things worse. The Ninth Circuit did make them worse, helping one defendant but injuring thousands of others; defendants should be glad that the Supreme Court saved their bacon.

I'm sure that most of you could have predicted that I would say everything that I've just said. So let me turn from the economics of bargaining to the holdings of *Frye* and *Cooper*, which led to this conference.¹⁵ Perhaps you expect me to toe Justice Scalia's line, thinking that textualists have a mutual-support pact, but I don't see things the way he did.

The dissent in those cases went astray by concentrating on whether there is a "right to plea bargain." Counsel's job is to en-

13. People can of course control what acts they commit; my point is that defendants cannot control whether criminal laws are too vague, sentences too high, or prosecutors and judges too creative in extending the laws' reach.

14. *United States v. Ruiz*, 536 U.S. 622 (2002).

15. *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

force, for defendants' benefit, whatever rights exist under law or practice. So if the statute of limitations is five years, and the defendant is indicted a day late, counsel must assert the period of limitations unless the client waives it; no one would think to ask whether any given statute of limitations was constitutionally required. (This is why, even though the exclusionary rule cannot be enforced on collateral review,¹⁶ a lawyer's failure to invoke the exclusionary rule in state court may be the basis of federal collateral review.¹⁷)

My evaluation of *Frye* and *Cooper* concerns two subjects that the majority and dissent alike ignored, and a third that rarely gets attention—the level of generality. First, the remedy the majority supplied makes a defendant better off than if he had accepted the offer. *Frye* and *Cooper* went to trial and might have been acquitted. They were convicted and then tried to take the offers. Yet the prosecutors' offers provided a discount only because they exchanged the defendants' rights for the certainty of conviction. Total anticipated punishment is lower if you take a chance at outright acquittal and then take the offer. Equivalently, once you have had and missed a chance at acquittal, the terms of the offer will be less favorable.¹⁸ Any remedy that makes an accused better off than either trial or plea is hard to approve and cannot be stable. If *Frye* and *Cooper* give some defendants an opportunity to

16. *Stone v. Powell*, 428 U.S. 465 (1976).

17. *Kimmelman v. Morrison*, 477 U.S. 365, 372 (1986); *Owens v. United States*, 387 F.3d 607 (7th Cir. 2004). I doubt, however, that a federal court could use an attack on counsel's performance to review the substance of a Fourth Amendment contention indirectly if the state court finds that counsel's performance was adequate because the exclusionary rule does not apply, or that the police complied with the Fourth Amendment, making futile a motion to suppress. See *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012).

18. Suppose the probability of conviction after a trial is 0.9. Suppose too that by pleading guilty and releasing resources that the prosecutor can use to charge someone else, the defendant can achieve a discount of 50% from the result expected at trial. Finally, suppose that a given charge, if it leads to conviction at trial, would yield a sentence of 10 years' imprisonment. If the defendant goes to trial, the expected punishment is 9 years. If he pleads guilty, the expected punishment is 5 years. But if he first goes to trial and is convicted, and then is allowed to take the original bargain, the expected punishment is only 4.5 years. (In 10% of the tries, the accused will be acquitted and not punished; in the other 90% the punishment will be 5 years; the expected value of the two in sequence is 4.5 years.) Prosecutors could well respond to this by reducing the proffered bargain, so that defendants who initially plead guilty must serve 60% of the sentence that would have been imposed after conviction at trial. This would preserve aggregate deterrence, but the price would be paid by those defendants who get good legal advice, and hence can't take advantage of *Frye* and *Cooper*. That hardly seems like the set of people who should pay the price for others' earlier release.

play this game, then the terms of all offers to all defendants will be worse, *ex ante*.

Second, these decisions continue the sequence of cases—of which *Padilla v. Kentucky*¹⁹ is another—that bootstrap regulation of plea bargaining from the Sixth Amendment right to the assistance of counsel. The court is adding many details—and every one of these decisions spawns new questions. For example: does it matter after *Frye* if the offer is oral? Does the defendant have a right to be competent when the offer is conveyed?²⁰ A right to understand the offer's significance fully? To do that, he would have to have gone to law school and know the latest findings in the *Journal of Empirical Legal Studies*. Henry Friendly doubted that the Bill of Rights is a code of criminal procedure.²¹ I share his skepticism. What's happening now, just as it was in the days of the Warren Court, is that the Sixth Amendment, a generality, is being used as a fount of details that cannot plausibly be imputed to it.²² Far better to be candid that the common law is at work, and to apply it through rules devised for the conduct of judges than rules devised for the conduct of defense lawyers.

The Court has fundamentally changed the law of ineffective assistance without seeing what it is doing—because the lawyers have not called the change to its attention. The idea in *Strickland v. Washington*²³ was that the Sixth Amendment speaks of “counsel,” so it is necessary to determine whether the person assisting the defendant is one of these or a mere poseur. But that is a question about the quality of the agent, not the details of the representation. *Strickland* made that plain by saying that the entirety of representation must be examined, and that the ultimate issue is whether the defendant had the sort of “counsel” of which the Constitution speaks.²⁴

Later decisions establishing specific duties—such as *Padilla*, which held that defense counsel must give immigration advice—

19. 559 U.S. 356 (2010).

20. See *Overstreet v. Wilson*, 686 F.3d 404, 406-07 (7th Cir. 2012).

21. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

22. Despite what the Court said in *Johnson v. Zerbst*, 304 U.S. 458 (1938), this clause does not even apply, because it does not create a right to free counsel, any more than the First Amendment creates a right to free newspapers. The text of the Sixth Amendment says that, if you have a lawyer, the state can't keep him out. Whether the trial itself is adequate to separate the guilty from the innocent is better analyzed under the Fifth Amendment.

23. 466 U.S. 668 (1984).

24. My court expanded on this in *Williams v. Lemon*, 557 F.3d 534 (7th Cir. 2009).

are unmoored from both *Strickland* and the Constitution's text. They don't ask whether the lawyer was competent enough to count as "counsel." They don't examine the totality of work done. Instead, they add to the Code of Criminal Procedure that is being developed in the Constitution's shadow, though not as an interpretation of its text. Rules of criminal procedure should be derived from the Constitution's substantive norms, not indirectly through duties imposed on counsel, or they should be left to legislators and rule writers who are accountable to the people.

The Court's approach raises questions of legitimacy, given the rationale of *Marbury*,²⁵ which limits judges to enforcing real rules of law.²⁶ To take matters out of legislative hands, a rule must be in the Constitution—encoded in a way that puts it beyond the choice of the living. What's going on here, however, is that Justices are changing the level of generality from the abstract to the concrete. Filling in details is a necessary task, but why does it belong to the Court in a way that the legislature cannot review? When there's a general statute, the Court goes exactly the opposite way: the agency, not the judiciary, gets extra scope for choice.²⁷ The Justices have never tried to reconcile their claim to have exclusive authority to fill in details in the Constitution with the way *Chevron* works for statutes. When We The Living People must elaborate on the plan, The Living are entitled to speak through their elected or appointed representatives, free of impositions by people who cannot be thrown out of office.

I hope I have given you some provocative thoughts. I'm sorry that I can't be among you to work through them.

25. *Marbury v. Madison*, 5 U.S. 137 (1803).

26. I expand on this thought in *Abstraction and Authority*, 59 U. CHI. L. REV. 349 (1992), and *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

27. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and my essay *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1 (2004).