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THE DOUBLE STANDARD OF JUSTICE IN PLEA BARGAINING

With the increased burden on our criminal justice system, the practice of plea bargaining is being accepted. While our overcrowded courts make plea bargaining necessary, it is a dangerous practice which imposes a double standard of justice upon defendants. The guilty defendant is allowed to use his guilty plea to "bribe" prosecutors into recommending lighter sentences while the innocent defendant, who does not have a guilty plea, is robbed of his basic constitutional rights.

If our people are to obey and respect the law, they must have a court system which treats all criminal defendants equally and fairly - a court system which does not reward the guilty and punish the innocent for the sake of administrative expediency. We must expand the capacity of our court system so that all criminal defendants can have a jury trial.

In order to better understand the process of plea bargaining, let us look at a hypothetical case to see what is involved. Let us suppose that the State

has a good case against defendant Brown who is charged with murder in the first degree. Let us suppose also that some thirty criminal cases are docketed for trial on the day of Mr. Brown's trial and that one assistant solicitor is responsible for prosecuting all thirty cases. Many of the thirty defendants have retained lawyers, who have spent a great deal of time in preparing a defense for their clients. The assistant solictor, on the other hand, has only a very limited time to prepare his case against each defendant. Suppose that the defense lawyer for Mr. Brown offers to plead guilty to the lesser and included offense of manslaughter.

What will the assistant solicitor take into consideration when deciding whether to accept Mr. Brown's plea of guilty to manslaughter? He realizes that he has only a very limited time to prepare his case while the lawyer for Mr. Brown has a great deal of time to prepare his defense. He realizes that Brown's attorney could employ various dilatory tactics to lessen the effectiveness of the prosecutor's case.

For example, the chance of loss of memory and

death of witnesses become greater the longer the trial is delayed. The prosecutor also realizes that if he spends too much time with Mr. Brown's case, he will not have enough time to effectively prosecute the other cases.

After taking all these factors into consideration, the prosecutor decides that a conviction for manslaughter is better than the chance of no conviction at all and accepts defendant Brown's plea of guilty to manslaughter. The prosecutor gets his guilty plea and the defendant gets a greatly reduced prison sentence. This process is called plea bargaining, and the factors taken into consideration in this process are largely extraneous to the defendant's guilt or innocence. The prosecutor should not be blamed for his decision to allow a guilty defendant to escape the full punishment for the crime which he committed - punishment which was prescribed by the people of North Carolina through its General Assembly. The prosecutor made an honest effort to do the best job he could with the limited resources he had available. He made the most of a bad situation.

Our criminal justice system as it is today depends, for its very existence, on the guilty plea. A

presidential commission has estimated that in some jurisdictions as many as 90% of all criminal convictions are obtained through quilty pleas which are often obtained through plea bargaining. This is truly a dangerous situation when we consider that a reduction from 90% to 80% in guilty pleas requires the assignment of twice the judicial manpower and facilities - judges, court reporters, sheriffs, clerks, jurors, courtrooms, etc.

The United States Supreme Court in Brady v U. S. 367US recognized that plea bargaining is essential to effective utilization of "scarce judicial and prosecutorial resources." Of the 1404 felony cases prosecuted in New York from January 1, 1970 to April 29, 1970, 45 were disposed by jury trial, 8 by trial before a judge and 1351 (96.2%) were disposed by guilty pleas.

While North Carolina's criminal justice system is not in such a deplorable condition, our courts are crowded; and they are getting more so each day. We should learn a valuable lesson from the more populous states and not make the same mistakes they have. Let us prepare now for the ever-increasing burden on our criminal courts. Our citizens deserve more from government than a watered-down

system of justice administered by a court system choked in its own inadequacy.

Necessary, though it may now be, the practice of plea bargaining is dangerous to the safeguards in our constitution designed to protect our people from over-zealous law enforcement authorities.

Guilty pleaders are apt to be excessively rewarded and persons demanding trial severely penalized. Where the sentencing discrepancy is so great that powerful pressure is placed on the defendant to forego trial, then the State is limiting or denying the right to trial and the right not to plead guilty.

A plea induced by a bargain, though perhaps voluntary in that no blatant coercion has been employed and in that defendant has full knowledge and understanding of his action, still subverts the defendant's ability and will to defend himself; for the state has structured his alternatives and encouraged him to plead guilty to the lesser of the two evils.

The practice of plea bargaining punishes defendants who go to trial in order to induce them to waive their

trial rights. By offering leniency on the basis of a plea of guilty, the state discriminates between those who plead guilty and those who stand trial. The pressure on the defendant to plead guilty undermines such basic constitutional rights as the right to public trial, the right against self-incrimination, the sixth amendment right to confront one's accusers, the right to have compulsory process for obtaining favorable witnesses, and the right to stand trial by jury. By inducing waivers of constitutional trial rights, plea bargaining systematically undermines these protections, substituting administrative determination of guilt for the decisions of a judge and jury.

The primary purpose of plea bargaining is to assure that the jury trial system established by the Constitution is seldom utilized. The interposition of the jury between the state and the accused helps prevent arbitrary prosecution. Plea bargaining undermines their impact. The function of judge and jury cannot be eliminated without risking serious, and also invisible,abuse by police and prosecutors.

Another danger of plea bargaining is its inaccuracy. Innocent persons may plead guilty for the same reasons guilty persons plead guilty: the likelihood of conviction and the harsher penalties which accompany conviction by

trial. With many prosecutors, their personal evaluation of the defendant is an important determination of sentence recommendations. This subjective evaluation naturally introduces into the plea bargaining process an additional element of uncertainty and opportunity for arbitrariness. The prosecutor's unrestrained discretion may also take advantage of the relatively ineffective bargaining position of defendants unable to make bail. This practice plays a significant part in perpetrating inequality between the rich and the poor in the criminal process.

The practice of plea bargaining also causes disrespect for the courts. If a defendant perceives that his ability to strike a favorable plea bargain depends on his lawyer's effective manipulation of the system or on a particular trial prosecutor's attitude, his natural attitude will be that of cynicism and disrespect for the law and our courts. A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people.

It is established that prosecutors must accept bargained-for pleas, but by properly circumscribing the manner in which guilty pleas may be offered and accepted, we can strike a balance between the ligitimate needs of law enforcement and the threat to society of an overly powerful police apparatus.

The problem of overcrowded courts is only a part of our total problem in our criminal justice system. If our system could provide a swift determination of guilt and increased emphasis on rehabilitation, the problem with overcrowded courts would be eased. The imbalance in our system of criminal justice must be corrected so that we give at least as much attention to the defendant after he has been found guilty as before, so that our high rate of recidivism will decrease, thus reducing the burden on our courts.

Our courts would be able to handle more jury trials if the time required for each trial were shortened. There are several things we could do immediately to shorten the trial process. These things would cost little or nothing and they could be implemented

without sacrificing the constitutional rights of the defendant.

Our grand jury is outmoded - it could be revised and streamlined to save valuable court time. Our court reporters should update their method of work. It is now possible for the court reporter to sit in the court-room, hit the keys; and in another room a computer will translate electronic impulse into a printed transcript that is available for use immediately. By use of such equipment, appeal time could be greatly reduced. The judge should have a background report on defendant at trial to eliminate delay between verdict and sentence. A shorter time for jury selection should be required.

Edward Bennett Williams, one of our nation's most esteemed criminal defense attorneys, has written that he has never taken more than a day for jury selection and that he has never lost a case because he did not have time for jury selection. A lesson could be learned from our hospitals who hire professional hospital administrators to see that the hospital activities are run smoothly and without delay. A corresponding position could be created in our courts to provide for a more

efficient use of our court facilities. They could insure that witnesses and jurors are available when needed and thus eliminate the waste of time now associated with many of our courts. This increased efficiency in our courtrooms would enable our courts to provide more jury trials and ease the pressure on prosecutors to accept bargained for guilty pleas.

We should take a hard look at some of our "victimless crimes" such as drunkenness, loitering, and vagrancy, and see if we cannot get them out of our courts. If we could find a way to dispose of some of them outside of our courts, more court time could be devoted to accused criminals.

We should also look at traffic violations to see if the courts could not handle them in a more efficient manner. Some states have initiated a system of traffic "infractions" designed to ease the burden on our courts.

Finally, it need hardly be said that we need more judges, prosecutors, clerks, and administrative staff to handle the heavy criminal case load and insure a jury trial for all criminal defendants who want one. Our forefathers paid dearly for the right to trial by a jury of one's peers. We must not lose this right by default.