Echoes of a Muted Trumpet

*By Ralph Adam Fine**

Forty years ago, the United State Supreme Court ruled that the Constitution gives every person charged with a felony the right to a lawyer, irrespective of whether the defendant can afford the fee. The case, of course, was *Gideon v. Wainwright*, 372 U.S. 335 (1963), made famous for non-lawyers by Anthony Lewis's best-selling "Gideon's Trumpet." *Gideon* recognized that the legal system's mazes and arcana were simply too daunting to be navigated or understood by persons not trained in the law. Sadly, the fairness that everyone thought the decision heralded has largely been lost in the fog of expediency.

Contrary to television-driven myth, most prosecutors and defense lawyers do not want to try cases. Many judges, too, would rather be doing other things — "moving" cases off their dockets, and, for some, an afternoon of golf or tennis. Even those who take their jobs seriously feel overwhelmed by the crushing load and paucity of resources. Thus, the resort to plea bargaining. Some ninety percent of all felony cases never reach trial; the defendants are convicted on their plea.

Although much of the time plea bargaining gives defendants great deals, letting them escape just punishment for many or most of their crimes, there is another side to plea bargaining that is less well-known — extortion. Most non-lawyers would be surprised if they knew that prosecutors can lawfully extort guilty pleas from defendants by threatening to pile on additional charges unless the defendants gave up their constitutional right to a trial. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), a five-to-four majority of the Supreme Court said that prosecutors could do exactly that.

When Paul Lewis Hayes was charged by the state of Kentucky with uttering a forged check for $88.30, he had two convictions on his record. In 1961, when he was seventeen, he pled guilty to "detaining a female," which was a lesser-included offense of rape. He served five years in the state reformatory. In 1970, he was convicted of robbery and was, in effect, placed on probation. The prosecutor in Hayes's bad-check case had a deal for Hayes: either plead guilty and accept a five-year sentence or face life in prison as a three-time loser. This is how the prosecutor described it at a later hearing:

> Isn't it a fact that I told you at that time [the initial bargaining session] if you did not intend to plead guilty to five years for this charge and ... save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

Despite the threat, Hayes exercised his constitutional right to a trial. The prosecutor charged him as a repeater. Hayes was convicted and sentenced to the mandatory life term. The Supreme Court, although recognizing that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort," nevertheless upheld Hayes's conviction, ruling that the prosecutor's actions were constitutionally permissible as part of the "give-and-take" of the plea-bargaining process. Significantly, the only reason given by the five-to-four majority in *Hayes* for permitting prosecutors to extort guilty pleas from defendants is that expediency demands it:

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable" ¯ and permissible ¯ "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

(Internal citation omitted; brackets by *Hayes*.)

Four years after *Hayes*, the Supreme Court acknowledged in *United States v. Goodwin*, 457 U.S. 368 (1982), that the decision had been "mandated" by the "Court's acceptance" of plea bargaining "as a legitimate process." It explained that, in its view, the "fact that the prosecutor threatened" Hayes "did not establish that the additional charges were brought solely to 'penalize'" him. That is sophistry. If Hayes had not demanded a trial, as was his right, he would not have been charged as a "repeater." Under Kentucky law at the time, he would have then been exposed to a maximum penalty of ten years in prison and a realistic punishment of substantially less. Hayes was "punished" the moment he demanded what the constitution said was his — the right to plead not guilty and have a jury decide his guilt or innocence.

The "choice" Hayes faced was illusory and was similar to that offered by the innkeeper Tobias Hobson, who gave his guests the selection of any horse in his stable, as long as it was the one closest to the door. In reality, Hayes, like Hobson's lodgers, had no choice at all: both of the prosecutor's offers were unreasonable, especially if Hayes was innocent. Indeed, since for a guilty person the "choice"

was between a certain five years or a certain life-sentence, only an innocent person would have dared reject the prosecutor's deal.

Hayes's dilemma was foreshadowed in a 1967 report issued by the President's Commission on Law Enforcement, *The Challenge of Crime in a Free Society*:

> There are real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial.

In 1973, the National Advisory Commission of Criminal Justice Standards and Goals also warned:

> Underlying many plea negotiations is the understanding — or threat — that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case had he pleaded guilty. An innocent defendant might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence.

Of course, *no* defendant is required to prove his or her innocence; the *prosecutor* has that burden and must prove guilt beyond a reasonable doubt. The National Advisory Commission's perception that plea bargaining results in a *de facto* shift of the burden, however, highlights that the plea-bargaining system not only sets upon society dangerous criminals who should be locked up where they can do no harm, but that plea bargaining is also at war with our most precious tradition: the presumption of innocence.

Sadly, all across this country, in both federal and state courts, the *Hayes* decision has been used by prosecutors as a tool with which to extort guilty pleas from defendants. An experienced trial judge in Wisconsin recently reflected on the record in open court that prosecutors in Milwaukee County used to give deals to dissuade defendants from going to trial but that now they were upping the ante by "amending up." Some of the defendants facing amended-up charges because they insist on their right to a trial may be innocent. No matter. In *Alford v. North Carolina*, 400 U.S. 25 (1970), the Supreme Court said that it was OK for defendants who believe themselves to be innocent to plead guilty — all as part of the plea-bargaining process!

Henry C. Alford was charged with the capital crime of first-degree murder. The case was plea bargained. Although he said that he did not kill anyone, Alford pled guilty to second-degree murder, a charge for which the death penalty was not authorized. He later explained why:

> I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said that if I didn't they would gas me for it, and that is all.

The trial judge accepted Alford's guilty plea and sentenced him to a thirty-year prison term.

After stewing about it for a number of years, Alford tried to get out. He complained that his guilty plea had been forced by the death-penalty threat, and that he never did admit his guilt. A number of lower-court judges believed that it was unseemly for a civilized society to send self-proclaimed innocent persons to prison without a trial. The Supreme Court, however, disagreed.

Hayes and *Alford* make up a potent one-two punch that permits lazy prosecutors to avoid having to prove their cases in court. The decisions help grease the system's wheels with the oil of expediency. We should remember, however, what the Supreme Court recognized in *Stanley v. Illinois*, 405 U.S. 645 (1972), albeit in another context:

> But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Although prosecutors and public defenders get paid whether they try the cases or not, most privately retained defense lawyers can only make money if they plead their clients guilty. Thus, there is a huge financial incentive for criminal-defense lawyers to run their clients through the system's case-processing, docket-clearing shredder. Researchers from the National Institute of Justice studying the effects of Alaska's plea-bargaining ban instituted in 1975 by the state's courageous chief law-enforcement officer, Avrum Gross, were told by one defense lawyer: "Criminal law is not a profit making proposition for the private practitioner unless you have plea bargaining." As University of Chicago law professor, Albert W. Alschuler, who has intensively studied plea bargaining wrote in one of his many law-review articles on the practice:

> There are two basic ways to achieve financial success in the practice of criminal law. One is to develop, over an extended period of time, a reputation as an outstanding trial lawyer. In that way, one can attract as clients, the occasional wealthy people

> who become enmeshed in the criminal law. If, however, one lacks the ability or the energy to succeed in this way or if one is in a greater hurry, there is a second path to personal wealth — handling a large volume of cases for less than spectacular fees. The way to handle a large number of cases is, of course, not to try them but to plead them.

During my nine years as a trial judge, I had several defendants who wanted to plead guilty even though when I then asked them to tell me what they did, responded with stories of innocence. When I asked them *why* they were trying to plead guilty, they all told me that they had been threatened with harsher penalties if they insisted on going to trial. In rejecting their pleas, I told them that we had enough guilty persons to convict, and that we did not need to dip into the pool of the innocent.

In each of the instances, we went to trial and the defendants were acquitted. After one of the not-guilty verdicts, the defense lawyer, whom I had dragooned into defending his client by rejecting the proffered plea, bitterly accused me of "wasting" his time. By that, of course, he meant that he lost money on the case because he had to take it to trial.

The lawyer's comment after his client's acquittal is writ large by our criminal justice system, which has elevated expediency above all the nice words that "guarantee" that no person can be punished for crime in this country unless the government proves guilt to a jury of fellow citizens beyond a reasonable doubt. In a real sense, by permitting plea bargaining to flourish, we have traded "justice" for tax dollars that plea bargaining allegedly saves. But this is an argument constructed from meringue. We spend tax money on all sorts of things with marginal benefit to society and our people. Moreover, Professor Alschuler estimated that giving a three-day jury trial to *every* felony defendant in the country would cost less than the annual expenditures that were funneled through President Richard Nixon's Law Enforcement Assistance Administration. But, of course, politicians get praise for giving money to local police departments, and for dispensing other pork in their districts. The kudos would be muted indeed for money spent to see that justice was done in *every* case. There would also be loud howls from prosecutors, defense lawyers, and judges fearing that they may have to do their jobs — the trying of cases.

Fears that there would be a glut of trials if plea bargaining were abolished, however, are unfounded. Experience shows that guilty pleas would come in at essentially the same rate as they do now. Most defendants who are guilty plead guilty, whether they are given a "deal" or not. I never accepted plea bargains and defendants pled guilty before me even though they knew they would not get a break for doing so. The experience in Alaska was similar. The National Institute of Justice, which, as noted, studied the Alaskan experience concluded:

> Supporters and detractors of plea bargaining have both shared the assumption that, regardless of the merits of the practice, it is probably necessary to the efficient administration of justice. The findings of this study suggest that, at least in Alaska, both sides were wrong.

Indeed, the disposition times for felonies in Anchorage fell from 192 days before the state-wide ban to under ninety days after. In Fairbanks, the drop was from 164 days to 120, and in Juneau, from 105 to eighty five.

The right to take a case to trial when a defendant disputes guilt is guaranteed in every state and in the federal system. To punish those who exercise that right is unworthy, to say the least. As former federal prosecutor and federal judge Herbert J. Stern has written, plea bargaining is a "fish market" that should be "hosed down."

* Ralph Adam Fine has been a judge on the Wisconsin Court of Appeals since 1988. He was a trial judge in Milwaukee for nine years before that, and presided over more than 350 jury trials. He is the author of six books, including *Escape of the Guilty*, from which this article is adapted. In addition to his court work, Judge Fine teaches trial advocacy throughout the country, and has written *The How-To-Win Trial Manual* and *The How-To-Win Appeal Manual*, both published by Juris. His trial-advocacy web site is: www.win-your-trial.com. He has appeared on CBS's *60 Minutes*, ABC's *Nightline*, PBS's *McNeil/Lehrer NewsHour*, and CNN's *Larry King Live*, among other national television shows. For several years, he was the host of *A Fine Point* on Milwaukee's CBS television affiliate, with such guests as Nobel laureates Elie Weisel and Milton Friedman.