PBS Interview Albert Aschuler, Jan. 16, 2004.

Albert Alschuler is a professor of law and criminology at the University of Chicago.

What's good about plea bargaining?

I think nothing is good about plea bargaining. I mean, sometimes it can have a good effect. It can get you out from under some horrible mandatory minimum sentences and from some bad federal sentencing guidelines. But I could go on for the entire interview talking about what's wrong with plea bargaining.

We could start with the sentences that it leads to. The mark of a good legal system is that it minimizes the effect of tactical choices on its outcomes. What sentence a guy gets should depend on what he did, or maybe on who he is, but not on whether or not he's exercised a tactical decision to exercise a right or not to exercise a right. You have two people who've committed the same crime. They have the same background, and one is going to get twice as severe a sentence as the other because he's exercised the right to trial. I think it's a perfectly designed system to produce conviction of the innocent.

There's two kinds of plea bargaining. There's cost bargaining and odds bargaining. Costs bargaining is where the prosecutor bargains to avoid the economic costs of a trial. Odds bargaining is where the prosecutor bargains because he thinks he might lose the trial, and he figures half a loaf is better than none. Every prosecutor will avow that he does both kinds of bargaining.

So you have somebody who is facing 10 years at trial, but there's only a 50 percent chance he'll be convicted. So the prosecutor who is in engaged in odds bargaining offers five years in exchange for a plea of guilty. Well, that's not going to work, because the prosecutor doesn't want there to be a trial. This is an offer that leaves the defendant indifferent between pleading guilty and standing trial. So the prosecutor starts with the odds bargaining, then adds something of the cost bargaining. He calculates his offer not to balance, but to overbalance the defendant's chances of acquittal.

Meaning?

Meaning that it is to every defendant's advantage whether guilty or innocent to accept the plea.

What about truth? And justice?

Well, it's a system that's designed to keep the truth from coming out. We don't care enough in the American criminal justice system to listen to the defendant's story. We do

everything possible to avoid having an impartial party sit there and hear both sides and decide who's telling the truth.

We have a system that makes the defendant half guilty. There's a 50 percent chance that he'll be convicted at trial. Let's give him 50 percent of the sentence he would have if he were really guilty, so it's half guilty.

That's what I think the public doesn't like about plea bargaining. Most people think that either he did the crime or he didn't, and if he did the crime, you should give him the sentence that an honest-to-God criminal should receive. And if he didn't, he shouldn't be punished at all. Or even if he did it but you can't prove it beyond a reasonable doubt, he shouldn't be punished at all. …

[The plea bargaining system is] inconsistent with the law that we apply to waivers of other rights. What do you suppose would happen if a prosecutor said to a defendant, "Well, you can exercise your right to be represented by a lawyer. But if you're convicted with a lawyer representing you, we'll give you 10 years, and if you represent yourself, we'll give you five."

If the guy waives his right to a lawyer, would you consider that a voluntary waiver? What if they offer him a lighter sentence if he agrees not to challenge the racial composition of the jury or agrees not to cross-examine the witnesses against him? Nobody would regard a waiver of those rights as voluntary, and yet somehow we put on blinders and permit a bargaining for a guilty plea that waives all of those rights and more.

Is it coercive?

It's extraordinarily coercive. As I say, you'd certainly regard it as coercive if the prosecutor offered concession to waive another right, the right to an attorney or the right to challenge the racial composition of the jury. We just depart from our usual standards of coercion when we're talking about the most pervasive waiver, the most complete waiver that our criminal justice system permits.

Do you have to lie in order to plea?

I think the courts are divided on that. The United States Supreme Court said in a case called *Alford v. North Carolina* that it's perfectly constitutional to accept a plea of "Guilty but not guilty." That is, the defendant can say, "I didn't do it, but I want to take the deal," and the judge can say, "OK," which means that it's not necessary for an innocent person to lie to take the deal. He can say he's innocent and still take the deal.

What do you make of that?

I think it's hard to imagine a clearer denial of due process than sending someone to prison who hasn't been tried and who hasn't admitted his guilt. But the Supreme Court of the United States says that's OK. …

[However,] a great many judges do not accept these Alford pleas, and do insist on a confession from the defendant. … But it's usually a hypocritical show. It's a coerced confession. The defense lawyer goes out and confers with his client and gets his lines right. They go back in and they put on a better show for the judge, and the judge accepts the plea. … You can sort of satisfy your conscience with this salve of "I made him say he did it." And he's saying, "Well, OK, you son of a bitch, if I've got to say I did it to take the deal, I'll say it. Do you feel better now?"

What's the biggest downside to plea bargaining?

The downsides are innumerable. We're producing unjust sentences. We don't know the truth. We're putting pressure on the innocent to plead guilty. We're violating our usual standards of waiver. It's a hypocritical system that produces all kinds of evil.

In terms of defendants' perceptions of the system, it encourages the view that the system is all a matter of networks and connections and who do you know and what kind of deal you make. That isn't the image offenders should have of the criminal justice system; that's probably the view of the world that got a lot of them into trouble in the first place.

What do you say to those who argue that plea bargaining is necessary?

The bottom line argument for lots of people is, "OK, it may be unfair, but it's necessary. We'd have to have a courtroom for every filling station if we tried to implement the right to trial [for every defendant.]" I think that's a kind of a shocking idea. Our president thinks we can send a manned mission to Mars at a cost of $500 billion, and yet we have a justice system that doesn't think it can afford to give defendants the most basic of their rights -- the right to be heard in court? Something is wrong with that picture. Most nations of the world poorer than ours manage to implement the right to trial. There has to be a way for us to do it too.

How can the judge know whether to accept a plea bargain?

As I say, some judges won't take one of these pleas of guilty but not guilty, and will insist that the defendant make a full confession and make a show of rejecting the confession occasionally -- very occasionally -- if the judge is not convinced. … The judge rarely, in fact, forces the case to trial. When the judge does force the case to trial, the defendant may be convicted and may receive the tough sentence that's reserved for trial.

What makes the system go is the fact that sentences after trials are much more severe than sentences following pleas of guilty. So you're talking about a situation in which the defendant says, "I want the light sentence," the prosecutor says, "There's no reason in the public interest not to accept the light sentence," and the judge, to prove his independence, forces the defendant to stand trial and possibly get socked.

Whom does the system benefit?

I once talked to a congressional staffer and said, "Maybe you should think about legislation to get rid of plea bargaining." He said, "Oh, that's impossible. We'd have the prosecutors against us, we'd have the defendants' lawyers against us, we'd have the judges against us." I said, "Yes, and who else?" It's a system that's wonderful for prosecutors, defense attorneys, and judges. It's not good for victims of crimes, it's not good for criminal defendants, and it's not good for the public.

What about people who refuse to plead guilty?

I was peripherally involved in a case in Illinois where the defendant had been on death row for 12 years. His conviction was reversed. At this point, the prosecutor had no evidence against him, so the prosecutor went to him in the Cook County jail and said, "If you will plead guilty to murder -- you've already served 12 years on death row -- we will sentence you to the time you have already served, and you can be home for Christmas." The defendant, who was later proven innocent through DNA evidence, said, "I didn't do it, and I'm not going to plead guilty to it." He sat in the worst part of the Cook County jail through the holidays and eventually was exonerated. He was a courageous fellow. Could I tell him to do that? No. …

I think it has to be somebody's decision when they're confronted with one of these coercive offers, even if they have to lie, even if it's a judge who will not let somebody plead guilty who says that they're innocent. If somebody puts a gun at your head and says, "Confess or I'll shoot you," I think you're entitled to say, "I did it," even if you didn't. Similarly, if somebody threatens to give you an extra 30 years in prison unless you lie, I think you're morally entitled to lie. But I think it's more courageous morally to insist

on the truth, even if you pay a terrible price.

Would you do that?

I don't know. I rather doubt it. …

What is the difference between court-appointed lawyers and paid lawyers, in terms of incentives and conflicts?

The plea bargain system is rife with conflicts of interest for both private lawyers and appointed lawyers. The usual way of collecting a fee in a criminal case is to be paid a lump sump in advance. Your client may not be around later to pay you, so you can't just send him a bill for the number of hours you have spent. Once the lawyer has pocketed his fee, it's obviously to his economic advantage to plead the defendant guilty, to find a way to get the defendant to enter a plea agreement. There are lawyers throughout America who virtually never try a case, who get rich by handling a large volume of cases for low fees, and the way to do that is not to try cases, but to plead defendants guilty.

Court-appointed attorneys in the state of Texas face a similar dilemma. There's a cap on the fee they're going to get from the state. These are poorly paid assignments, and these are lawyers who have other cases of their own that are lucrative cases. They want to spend more time on the lucrative cases, so they, too, have an interest in encouraging defendants to plead guilty. …

What is the argument in favor of the plea bargain system?

Well, they make several defenses of the system. I think the most prominent one now is, "Everybody consents." The prosecutor is representing the public interest, and he thinks this bargain will serve the public interest; the defendant has decided the bargain will serve his interest, and who's left? As long as the prosecutor and defendant think it's a good deal, it's got to be a good deal for both of them.

You also hear the argument that, "Oh, gee, the defendant deserves credit for saving the state money," or "Maybe the defendant is remorseful, and so therefore he should have a lighter sentence." The bottom line argument really is necessity. Even though we're one of the richest nations in the world, we cannot afford to give our criminal defendants their day in court.

Often defendants who plea will be given probation. Is this really a break?

No, it's a serious penal sentence. There will be various restrictions on your liberty. There will be an obligation to report. There will be conditions: You may not associate with these people; you may not go to places where alcohol is served. Lots of restrictions, and you can be sent to prison if you mess up on any of these conditions. …

[Probation] was designed to provide corrections in the community for some offenders, and that's not a bad idea. It was designed to be a sentence, just like a penitentiary sentence. This was part of the progressive movement early in the 20th century. The talk was all of rehabilitation. This would be a better way to rehabilitate people.

It's changed. One of the important functions of probation was to prepare a pre-sentence investigation report, so that the judge would know something about the person she was sentencing. Well, they still prepare a pre-sentence investigation report, but only after the case has been effectively resolved through plea bargaining, so that it's essentially a fifth wheel. It doesn't have much effect.

How does plea bargaining connect to justice?

Plea bargaining has nothing to do with justice. It has to do with convenience, expediency, making the life of prosecutors and defense attorneys easier and more profitable. It's designed to avoid finding out the truth. It's designed to avoid hearing the defendant's story. I mean, what's a more basic component of justice than if you're going to lock somebody up, you ought to hear whatever he has to say in his defense first? Isn't that the most basic element of procedural justice? If you have something to say, if you have a story to tell, we want to hear it. We don't want to punish you unless we're convinced that you've done something wrong. …

So plea bargaining makes the system opaque.

Sure. The justice is administered in America in courthouse corridors and behind the closed doors of prosecutors' offices. That's where it all happens. I mean, the Supreme Court insists that the press has the right to attend criminal trials, because knowledge of how our justice system works is so important for the public. But in fact, when 95 percent of the convictions are by guilty plea, the public is excluded from seeing how the sausage is made. …

Do defendants understand how the sentences work?

If they have good lawyers they do, but many don't have good lawyers. It all goes by very, very quickly. In a New York City court, a judge may make an offer and give the defendant 15 seconds to decide whether to accept it. If the defendant doesn't look happy, the judge will say, "Hmm, the defendant doesn't look happy. Tell him, Mr. Lawyer, it's going to go up next time. He's going to get two-to-four [years] if he's smart, and four-to-eight [years] if he's dumb." And you make a hurry-up decision that has enormous consequences.

The sentencing system can be confusing. Good lawyers and judges do explain it. … But one of the problems with plea bargaining is it depends so much on the quality of the lawyer you have. We have a justice system that makes justice more dependent on the quality of a defense lawyer and on how much money he has than any other legal system in the world. We have no way of reviewing a lawyer's performance in the back rooms, where plea bargaining occurs, and in conferences with his client. So we insulate the attorney from effective review at the same time that we make him the most important figure in the system.

It's a wonderful system for lawyers and defense lawyers and prosecutors. It's so much easier to sit in an overstuffed chair drinking coffee than it is to stand in the courtroom trying cases, and a guilty plea is a quick buck for a defense attorney. The conflicts of interest are just enormous. One prominent Texas defense attorney told me, "There are two ways to get rich in the practice of criminal law. You can develop a great trial reputation like Johnnie Cochran and then get the occasional defendant like O.J. Simpson who has a lot of money to spend on criminal defense, or you can handle lots of cases for lower fees," and the way to handle lots of cases is not to try them, but to plea them. The prominent Texas defense lawyer told me the best way to operate is to combine the two cases -- you should take one highly publicized case to trial every year. He says you don't make much money on the cases you try, but they help to bring in the cases you can settle.

How can we fix the system?

There are three ways to do it. Plan A is just spend the money. We're one of the richest nations on the planet, and we've decided we can't afford to give criminal defendants their day in court. There's got to be something wrong with that picture, but the problem is that our trials are so over-proceduralized that maybe we can't afford to do that. …

So Plan B would be to simplify our trial procedures, and thereby make trials more available to defendants who want them. We don't need these prolonged jury selection procedures. We don't need the complicated rules of evidence; there are lots of other ways

we could simplify criminal trials.

Plan C is to substitute a different kind of bargaining for plea bargaining. In Philadelphia for many years, the usual way of trying cases was a jury-waived trial -- a trial before the judge alone. Why did that happen? Well, because in Philadelphia, as everywhere else, a defendant who asks for a jury and was convicted got a very tough sentence. But if a defendant asks for a trial before the bench, his sentence was not likely to be tougher than a guilty plea sentence. So guilty pleas were very low.

The defendant was tried before a court in a relatively expeditious proceeding, typically taking only a half an hour for an ordinary street crime. That's a troublesome practice for some of the same reasons that plea bargaining is troublesome. I mean, you've got a right in the constitution to a jury trial. … But at the same time, this is a system where the defendant does have his say before an impartial third party, and he does not give up his chances of acquittal. …

What's the relationship between the sentencing guidelines and the plea bargaining system? Do some of the draconian sentences for drug crimes, for example, induce more plea bargaining?

… Guilty pleas have increased in recent years partly because sentences have become so draconian. We now have mandatory minimum sentences. We have sentencing guidelines that are very tough, and it's like a good cop/bad cop strategy for police interrogation. The sentencing commission is the bad cop. We're going to be really tough, and the prosecutor then becomes the good cop, "Hey, I can protect you from that bad old sentencing commission, but only if you cooperate with me." So you get tremendous leverage.

We've imposed these guidelines because we don't trust judges. We don't think the judges will exercise discretion properly. But all we've done is transfer the discretion from the judge to the prosecutor. Judges don't sentence defendants in America today. One offender says, "You know, the judge is just put up there. He's supposed to be the head of the show, but he ain't nothing. The head of the show is the prosecutor." Another defendant says, "You know, the prosecutor is the man who gives you the time," and that's the truth in American criminal justice system. And the tougher the sentences that are threatened after trial, the more leverage the prosecutor has to induce a plea of guilty.

Which comes first, the tough sentences, or are the sentences designed with the plea bargaining system in mind? I think that the sentences are probably designed with the plea bargaining system in mind. I don't know that it's a conscious, calculated process. But the overwhelming majority of defenders plead guilty. You don't want to give inadequate sentences to the vast majority of offenders. So I think that the sentences given to defendants who plead guilty are probably about what they would be in a system without any plea bargaining at all. The sentences given to people who stand trial are harsher, but

there's no way to prove that.

Do you think that's true even in state cases?

Yes. The federal system is worse, because the federal guidelines are so rigid and so severe. But certainly we have mandatory minimum sentences and so forth in the state systems, too, and sentences have been getting tougher in both state and federal courts. …

Why do people think our justice system is the best in the world?

I don't know if Americans think that it's the best system in the world. Maybe they did before the O.J. Simpson trial. But we have juries. Most places don't have juries. We have the most complicated and cumbersome elaborate trial system that humankind has ever devised, and maybe people don't know that it's become so expensive that we've decided we can't use it for more than a tiny minority of cases.

I've sometimes wondered if our justice system isn't close to the worst criminal justice system in the world. It's probably not as bad as the systems where they cut off hands for minor offenses, but, I don't know, maybe it's about on a par with the systems where judges take bribes. I think the systems where judges take bribes are less expensive and may result in justice just about as often.

Are you a maverick?

I think I'm probably considered a maverick, yes. I think most people in the legal profession think plea bargaining is just fine. It's in the interest of prosecutors and defense lawyers and judges, and they've devised elaborate rationales for this process. I don't think any of the rationales make sense, and I think that makes me a maverick.

PBS Interview John Langbein, Jan. 16, 2004.

John Langbein is a professor of law and legal history at Yale Law School.

What is wrong with the plea bargain system in our courts today?

Plea bargaining is a system that is best described as one of condemnation without adjudication. It is a system that replaces trial, which is what our constitution intended, with deals.

Second, those deals are coerced. The prosecutor is basically forcing people to waive their rights to jury trial by threatening them with ever greater sanctions if they refuse to plead and instead demand the right to jury trial.

But every defendant has a right to go to trial; it's a choice they make to plead guilty.

The problem with choice arguments is that they neglect the main dynamic of plea bargaining which is the pressure that the prosecutor puts on you to do it his way.

Plea bargain works by threat. What the prosecutor says to a criminal defendant in plea bargaining is, "Surrender your right to jury trial, or if you go to trial and are convicted of an offense, we will see to it that you are punished twice. Once for the offense, and once for having had the temerity to exercise your right to jury trial." That is a coercive system.

And the prosecutor has many devices which increase the level of coercion: multiplying the counts, threatening to recommend the most severe end of the sentence range, keeping you locked up in pretrial detention if you're poor -- most people who are in the criminal justice system are poor -- prosecuting your wife as well as yourself, and things of this sort. The prosecutor can pile it on if you don't play it his way. It is therefore a deeply coercive system. Yes, you have a choice, but your choice is constrained by coercion.

What is the role of the defense lawyer?

Sometimes defense counsel does a very good job for people in the plea bargaining process, and gets you a good deal. But there are many other outcomes.

In the public defender system the defense counsel is representing a hundred

other people; the defense counsel can not take every case to trial, the caseload pressures force the defense counsel to decide which of the cases he's going to take to trial and which not. Defense counsel in some circumstances is not very competent and is delighted simply to take his money and run, so to speak. Some of the compensation arrangements for defense counsel are quite perverse. They're paid by the case and therefore, it's in their interest to take as many customers as they can, represent to them that they're getting them a great deal and in fact not do very much for them. So there's no particular reason to think that defense counsel is any serious answer to the intrinsically coercive nature of plea bargaining.

To the extent that defense counsel does in fact negotiate a better deal than one could get in the ordinary outcome of trial, that's also something which disserves the public interest, in the sense that the defendant gets to walk. I'm not in favor of all defendants walking around on the street free. I think most people who are prosecuted of serious crimes are guilty of at least what they're charged with and ought to have serious criminal sanctions attached. But the problem is, "most" isn't the way we do business in a free society that cares about individual rights and individual liberty. We're concerned about each person, and the trouble with plea bargaining is it places tremendous pressure on every defendant to waive the right to adjudication.

Whom does the system benefit?

The main winner in the plea bargaining process is the prosecutor. I describe plea bargaining as a system of prosecutorial tyranny. What has happened is that a single officer, the prosecutor, now is in charge of investigating, charging -- that is, bringing formal charges -- deciding whether to prosecute, evaluating that evidence, [deciding] whether or not in his or her judgment you're guilty or not, and then basically sentencing you. So that in place of a system which our constitutions have all devised, which is one in which the power, the awful power, to inflict criminal sanctions on an accused, is dispersed across prosecutor, witnesses, a judge, jury, sentencing professionals -- instead of all that, what we have now is a system in which one officer, and indeed a somewhat dangerous officer, the prosecutor, has complete power over the fate of the criminal accused.

You let the defense attorney off lightly.

I think defense counsel is to some extent at the mercy of a bad system. There's not a lot you can do when the other guy has all the chips. And the prosecutor has an awesome pile of chips in our plea bargaining system, because the prosecutor can threaten ever larger sanctions if you don't do what he wants. So I believe that by far the worst failure in the plea bargaining system is the prosecutor, and I think that's in part because the prosecutor is not always as noble as he would like you to believe he is.

You have to understand the perverse incentives that operate on prosecutors. Many of them are noble, high-minded people, but they have very serious caseload problems of their own. They also are subject to the ordinary human frailties. Some of them are lazy. It's hard work to try a case. It's much easier to threaten some poor devil until he consents. ... It's a lot easier to coerce somebody into waiving all his defenses than to actually investigate the case thoroughly, take the proofs to trial and see to it that there's a genuine adjudication.

But, again, the trial is there for anyone who chooses that option.

It is true that one always has the right to go to trial, but the prosecutor can make that right so costly that only a fool will exercise the right. ... Any of us will plead guilty if the disparity between what we're threatened with if we go to trial and lose, and what we get if we don't is increased enough. ...

Part of the reason why we in this country have criminal sentences that are so much more severe than in the rest of the civilized world, is the need that prosecutors have to threaten people with these huge sentences in order to get them to waive the right to jury trial. So there is a linkage between the notorious severity of our criminal law and the plea bargaining system. We have to have these perverse sentences as a threat in order to get people to waive the right to jury trial and take something less. ...

Prosecutorial power in the plea bargaining process often turns on pretrial detention. That is to say most people [in the system] are too poor to afford bail, and these people are particularly likely to yield to the demand that they confess whatever it is they're being charged with rather than wait for some kind of trial, because they'll be sitting in jail for months and months and months, and therefore there is a very evil interaction of prosecutorial power with poverty, with indigence.

The simple truth is there are not a lot of Rockefellers in jail for sticking up 7-Eleven stores or drug busts or whatever. Most of the people caught up in a criminal justice system, for all sorts of sad reasons, are people who are poor. And when you combine pretrial detention with the prosecutor's power to threaten much worse sanctions if you don't confess and bear false witness against yourself -- many people caught in that trap basically have no choice but to bear false witness against themselves, and confess to things they didn't do. ...

It is very sad that the Supreme Court, which has been so anxious to protect various rights of persons who go to trial, has been so cowardly about seeing

the evils of the plea bargaining process. ... The Supreme Court has been ... indifferent to the pressures on accused in the plea bargaining process, as exemplified by the famous *Alford* case, where the fellow actually stood up and said, "I'm innocent, but I'm pleading because the disparity of outcome that they're threatening me with is too great." It's terribly sad.

What's the moral foundation of that?

It is a very hard question why the Supreme Court is so sensitive to creating trial rights which make trial ever more complicated and therefore unworkable on the one hand, and on the other hand so insensitive to the resulting evasion which dominates the system, which is that the prosecutor is allowed to coerce people out of trial.

It's very important to understand that prosecutors have a number of incentives that are not necessarily in the public interest. Prosecutors are sometimes affected by sheer laziness; prosecutors are sometimes people who are very exposed to political and media pressure. ... Our prosecutors are very often elected in the state system or they're politically appointed, and they are people who are on the make in the federal system, and as a result they have an interest in headline hunting, in notching victories, in winning, and that shows up in their pressures to bring unjust cases. My favorite example is Giuliani's prosecution of Michael Milken, and his use of abusive plea bargaining tactics to do so. It's very important to understand that prosecutors are themselves a mixed bag.

But it wouldn't work without the collusion of everybody else -- judges, defense attorneys.

It is certainly true that all of the professionals, the insiders in the criminal justice system, are in a sense winners from subverting the right to trial in favor of plea bargaining.

What happens is that prosecutors don't have to prove their cases; they're simply allowed to coerce people into waiving their rights. Judges are spared the difficulty of conducting trials and the danger of being found to have erred; they can't be appealed from as a practical matter in plea bargaining. Defense counsel is enabled to have a mass practice in which he represents a lot of different people, pleads them all and has a high volume business ringing the cash register. And the result is all of these people have interests which are contrary to those of the trial system and those of a genuine ventilation of guilt or innocence at trial.

The result is we have a system in which our constitution says beyond reasonable doubt, you're presumed innocent until you're proven guilty. And what actually happens is you're coerced into confessing yourself guilty, whether you are or not.

Do people know that?

One of the saddest things about plea bargaining is that it is not widely understood. Most people have the television model of Perry Mason or

somebody similar contesting for a verdict of a jury. Moreover, when plea bargaining actually happens, it's always out of sight. And as a result, not only does plea bargaining replace the constitutional requirement of trial with a deal, but plea bargaining attacks another feature of the constitutional design. What the Bill of Rights, the Sixth Amendment calls for is public jury trial, and plea bargaining is not public. It's secret. The evidence does not come out in public. It's not ventilated in public. And the public doesn't really know what happened. That causes very great disquiet in some cases; the most famous I think is the prosecution of James Earl Ray, the purported slayer of Dr. Martin Luther King. The plea bargain in that case resulted in no public ventilation of the evidence, and there has been a lingering suspicion for decades that the case involved a wider plot than what was acknowledged, but the evidence doesn't come out.

So part of what we lose in the plea bargaining process is not only the rights of the innocent accused, but we're also losing the very important benefit of publicity associated with a trial tradition. ...

The single defining characteristic of the criminal law in the theoretical, philosophical understanding is the condemnatory force of the criminal sanction. It's not simply that we lock you up. We lock up people who have tuberculosis. The important difference is we lock you up in circumstances in which we condemn you. The judge says you have wronged society.

Plea bargaining devastates the condemnatory force of the criminal sanction because those sanctions are now applied without adjudication. That judge has not examined the question of whether you are guilty or innocent. What has happened is that you have been threatened enough that you waive your right to have that adjudication. ...

What is the judge's role in the plea bargaining process?

There are a variety of different forms of plea bargaining. There are versions in which the judge has a relatively passive role, and in which most of the pressures are brought by the prosecutor, and that is typically what we call "charge bargaining," where the prosecutor threatens to bring a large number of charges or to intensify the charges in various ways and to recommend the high end of the sentencing range, in areas where there is such a range.

There are other forms of plea bargaining, typically called "sentence bargaining," in which the judge may have a larger role and in which the real driving force can be the judge. We've had a tendency in recent years for a variety of reasons to have charge bargaining prevail over sentence bargaining. ...

Defendants pleading guilty often indicate remorse for the crime.

That's one of the standard excuses that are given by apologists for the system. Plea bargaining is sometimes justified on the ground that we are giving a lighter sentence to someone who is showing contrition or remorse for the offense. But that's a pack of lies. What is in fact happening is that the accused is being told by the prosecutor, "You accept guilt and confess and

bear false witness against yourself and we will then see to it that it gets characterized as contrition or remorse." The point is that the coercion, which eliminates trial, eliminates our ability to know you were in fact beyond reasonable doubt, guilty or not. And therefore it makes the remorse talk just window dressing by apologists who want to keep this existing system which is convenient for them.

Many times defendants ask for a plea offer.

It is true that most people would rather not be subjected to the publicity of trial.

Or the risk of trial.

And it is also true that most people are very concerned about the risk of trial. It is true therefore that in a sense, the plea bargaining deal can look as though it is a blessing. You are spared all this. But what we are unable to determine is the difference between those cases where it really is benign, and those cases where it is malevolent because I'm being coerced out of my right to trial and circumstances in which I have a legitimate defense. The only way to protect against the latter is to insist that we try all cases of serious crime, that we not plea bargain any of them.

But the system would collapse.

It is certainly true that plea bargaining is not a topic unto itself. It is connected to the failures of the trial system.

If you go back two centuries, there was no plea bargaining in Anglo-American law. We didn't have it. Today we have plea bargaining running rampant. What's happened is that across those two centuries, jury trial changed character. It's something different from what the framers were constitutionalizing. Jury trial today has been captured by the lawyers; it's what we call "adversary jury trial." There were almost no lawyers involved in jury trial two centuries ago. The result is that we have an elaborate body of law that is designed to control this lawyerly combat, which is called the law of evidence and certain other rules, and the result is that jury trial has become ever more time-consuming and impractical.

The ability of the lawyers in the O.J. case, for example, to spin out the case forever and ever, their ability to dominate the jury selection in ways that was unheard of two centuries ago, all of that is the background to plea bargaining. As the jury trial becomes more and more time-consuming, more and more complex under the weight of the lawyers' capture of the trial, we find that it becomes ever more costly to give people that which the Constitution says they must have.

Do you have a solution?

I think the solution is very complex. I think it requires facing the underlying failure of this adversary criminal justice system. The idea that having one pack of lawyers and investigators saying, "You did it," and another pack saying,

"We didn't," and nobody actually looking for what actually happened, nobody having an interest in investigating the truth, is a big mistake.
No other civilization does it. All other legal systems except those that are based on English law like our own have a more truth-centered system in which the prosecutor is basically a judge and is conducting a public investigation... and in the result, trials become more rapid and less combative.
You cannot have an O.J. Simpson trial for every accused. And we don't have it. We just give those full dress trials to rich guys.

Many say we have the best justice system in the world.
No knowledgeable student of comparative criminal justice is likely to fall victim to the notion that ours is an admirable system.
It is an appalling system. We have ten times as large a percent of our population locked up in jail by comparison with the European countries. We have sentences which are draconian. We've just had a 12 year-old put in jail for life in Florida. Things of this sort are unheard of in the rest of the world.
There are many causes, but the failure of our adversary system is central, and the political nature of our prosecutorial system is also central.

PBS Interview Stephen Bright, Jan. 29, 2004

Stephen Bright is a defense attorney, professor of law at Yale and Harvard Universities and director of the Southern Center for Human Rights.

… In many courts in this country we have a system of assembly-line justice, where people meet their court appointed lawyer often in court, sometimes even in the front of the courtroom, talk to them for five minutes, plead guilty, are sentenced, and that's their entire exposure to the criminal justice system.

What kind of justice is that?

Well, it's not real justice and of course it also means that the prosecutor has all the power, not only for determining what charge the person pleads guilty to, but also the sentence, because in most places the plea bargain includes, "You plead guilty, you get this particular sentence." So the defense lawyer doesn't really do anything except communicate that to the client, and the judge doesn't do anything except accept the recommendation by the prosecutor.

Describe the defense attorney's job.

The job of the defense attorney is to first of all investigate the case, to know what it is that happened in a particular incident, but also to investigate the background of the client, because even for people who may be guilty of an offense, the question of do they go to jail, do they get probation, do they go on some sort of program, if they go to jail, how long do they go to jail for -- those are all questions that depend upon individual circumstances of the client.

How can they do all that if they meet the client the same day that the client is sentenced?

Well, they can't, and we see lawyers who meet their client the day before, or lawyers that meet their client in the courtroom and not only meet their client and only spend five minutes with them, but often meet client after client after client. I was in a courtroom where one lawyer had 94 clients in one day. So obviously the lawyer can't know anything about those people, not even to put the name

with the face, if they have 94 cases.

We're seeing court systems that are run about like a fast food restaurant. A fast food restaurant may be a little bit better, because at least there's some choices and a menu there for the customers. But people are processed through court not understanding what's happening to them, with no investigation by the lawyer, no understanding of who they are, when they're sentenced. They're just processed through the system.

Judges say they're sure defendants are guilty when they accept the pleas.

The way in which judges accept guilty pleas is done in a way that almost insures that people are going to plead guilty. They're asked leading, conclusory questions, where the answer is obvious.
The other thing is, if you're in a court that's taking pleas all day, all the defendants who are there sitting in the audience see other people pleading guilty. It's just a ritual that everyone goes through. Everyone knows the answers to the questions and everyone knows that if you answer the questions incorrectly, the whole thing will blow up and the judge will yell at you and you might not get the bargain that you're going to get. So everyone answers, "Yes, yes, yes" to all the questions and the judge says, "Well, I find that this is a knowing, intelligent, voluntary plea." The fact is, the client probably didn't even understand the process they just went through. …
One of the reasons that so many people plead guilty is because they really don't have legal representation. Because when a lawyer meets somebody in court, talks to them for five minutes, they plead guilty and are sentenced, that's not legal representation. A high school student could do that. You don't need a lawyer for that. That's just a clerical function that the lawyers are providing. But our courts have such a large volume of cases and so little resources has been devoted to providing representation to people accused of crimes, that this sort of fast food justice is what we've ended up with. …
It's not unusual for lawyers who handle a high volume of cases to not know their clients' names or know anything about them. I go to courtrooms all the time where you see the defense lawyers coming and they'll stand up in the front of the courtroom and call the names of their clients because they don't know who the clients are and ask them to raise their hand. They're just dealing with such a high volume of cases, they don't even keep files on the cases, because they're only going to be dealing with this person for five or 10, 15 minutes, and then the case is over. …

Is it a question of money?
It's a question of several things. It's a question of money because there have to be adequate resources so that lawyers have few enough cases that they know their client's name, just as a starting point. But beyond that, that they can actually represent their clients.

Secondly, it's a matter of structure. There really need to be public defender offices in every jurisdiction. A lot of people don't realize that that's not the case in many places. It may just be a lawyer who contracts with the court and they just handle all the cases for a flat amount of money. And of course those lawyers have a built-in conflict of interest, because they're making money on their private practice, so they don't want to spend any time on their court-appointed cases. I mean, some do, because they're very conscientious, but most are going to try to spend as little time on those cases as they can.
They're also going to lack the expertise in dealing with the issues that come up, the scientific evidence that comes up, and dealing with clients that have special needs, like mentally retarded or mentally ill people. They're just going to be not equipped to handle cases that come into the court system.

It's different if the defendant has money?
For people that have money, it's a completely different system. You often see that in court, where you'll see all these people herded through the system represented by a court-appointed lawyer just plea after plea after plea. And then the case comes along where somebody's represented by a lawyer who's paid and their case is completely different. The minister's there, the employer is there, the parents are there. The person is dressed up with a coat and tie on. A presentation is made about why this person ought to get a particular sentence, why the case ought to be reduced to a lower crime than what's accused. It's a completely different kind of justice. …

A lot defendants who plead guilty end up on probation.
One reason that a lot of people plead guilty is because they're told they can go home that day because they'll get probation. What they usually don't take into account is that they're being set up to fail. They're going to be told to report every month to a probation officer, or maybe every two weeks. They probably aren't told that that's going to cost them $40, or some fee depending on where they are, every time they come. They may be told they have to go to classes. They're not going to be told, probably, that they have to pay for those classes every time they go. They'll be fined, and more likely than not the fine will be more than they can afford.
So before long they're going to be behind in their payments and then they probably won't go to see the probation officer because they don't have the money that they're supposed to pay and then a warrant is issued for their arrest and then they're sent to prison for violating their probation. So in the short term it looks great to the person; what they haven't realized is that now there are all these responsibilities that they have, which, because of their poverty and their financial inability to pay, they really don't have any serious hope of meeting.

Why do they have to pay?
It's a relatively recent phenomenon, charging people to be on probation. At one time probation officers worked for the state and their goal was to help deal with whatever problem got this person into the criminal justice system. Now in lots of places we have private probation companies, which basically are just for-profit businesses, which are collecting fees from people every time they come by and meet a probation

officer, and then maybe conducting classes and charging for those classes, or renting out ankle bracelets that monitor the person's movements and so forth. All of that is generating income for this company, but it probably is not dealing with whatever behavior brought the person into the court.

Who pays for that?
Unfortunately, too often it's paid for by the defendants, and illegally, because the Supreme Court of the United States has said you can't lock people up just simply because they can't afford to pay, but the courts never inquire into that.
At the time people are put on probation, there's no inquiry into how much money they make, what they can afford to pay. At the time they come back in because they haven't paid, in most courts there's no hearing to find out that the baby had to go to the hospital and somebody lost their job, that some other emergency in the family kept them from making the payment. It's just a question of, "You owed this much money and you didn't pay it." And slam, off you go to jail. The hope a lot of times is that the family will somehow mortgage the house, sell the car, do something to come up with the money so that the person can get back out on the streets again. But we're really running debtor's prisons as a result of this because a lot of families can't come up with the money.

Is it really all about money?
I think it's very much about money. And I think one of the corrupting influences in our courts is that many localities depend upon the courts as a major source of revenue. … When the courts are in pursuit of profit, that's in conflict with being in the pursuit of justice. …

Why do so many cases end up in plea bargains?
… I think what has happened is that the volume of cases has grown. We've criminalized so many things in this country. Sure, there's some serious crimes, but the vast majority of cases coming through the courts are the quality of life crimes, somebody who's arrested for vending without a license -- that means a homeless person who's shining shoes without having a license. Somebody who tries to get on the bus without paying their fare. Somebody who's hanging out in a place where they're not supposed to be and they're suspected of selling drugs, but they don't have any drugs on them. Those kinds of cases are coming into the court system all the time and the volume of those cases has just meant that people are not getting individual attention from their lawyers and they're not getting individual attention from the judges. They're just being herded through the system in sort of assembly line manner. …
One of the first things I want my students to do is to go down and watch court when people are pleading guilty. In the Southern states where I practice, you go to the courthouse and it looks like a slave ship has docked outside the courthouse. All these African-American men in orange jumpsuits, very degrading, are brought into the courtroom handcuffed together, fill up the jury box, fill up the first few rows of where the people sit, and then one after another guilty plea, guilty plea. Sometimes they'll bring them up in groups and they'll all plead guilty in a group of five or 10

and then they'll be moved along and the next group. And 100 people will be dealt with like that. The reality is not Law and Order; the reality is people being processed like that.

But that's not the public perception.
Yes, the perception is just so different. The perception is that people have lawyers who are really contesting the police case. Often the lawyers are depicted on television as not only working on the case, but also being very devious in many ways and trying to get the guilty people off and all that.
The truth of the matter is the lawyer may only spend five minutes with the client in the case. The truth of the matter is during the investigative stage, while the police and the prosecution may be doing an investigation, the person may be languishing in jail without a lawyer at all. We see people go months without ever having a lawyer even appointed to their case, and by the time you finally get a lawyer -- three, four months after you've been arrested -- it's really too late to investigate in many cases. The trail is pretty cold at that point. In addition, you're in jail, whereas a person who gets a lawyer appointed the next day might be out on bond, which greatly influences how your case is going to be handled later on. A person who's out on bond is much more likely to get probation as a sentence than a person who's in jail when their case finally comes up for a plea.

Who is plea bargain good for? Who is it bad for?
I think some people would say that it's good for the system. I think that's wrong, because I think it's really undermines the credibility of the system. It's good for the prosecution. The prosecution completely controls what happens: what crime that the person pleads guilty to is, what the sentence is.
A lot of judges like it because it means that their dockets move very quickly. Judges don't like to work any more than they have to, like many people in society, and if you've got a lot of cases and you're going to take time with each case, that's going to be a fairly time-consuming process. … We would have to have a lot more judges and more prosecutors and more defense lawyers if so many cases weren't disposed of with guilty pleas.

Can't we have more?
Well, I think we can. For my whole career at the bar I have been told that there's not enough money -- not enough money for defense, not enough money for judges, not enough money for enough courtrooms and all that. And then I turn on the television and here the president of the United States talking about going to Mars. I just don't understand it, because it seems to me that one of the most fundamental things in our society, besides education, is justice and we ought to have a justice system that people have faith in and that has credibility. The Supreme Court building says "Equal justice under law." That's not true. The criminal courts of this land are like stockyards in which people are just processed through like cattle on their way to slaughter. That's not equal justice. It's not individualized justice. It's not really justice at all.

Why do we accept it?
Because we're not willing to spend the money on having justice. If we wanted to have more individualized justice, we would have to pay more money for judges, for prosecutors. We'd have to have more courtrooms. Right now we're disposing of a huge number of cases in a very small amount of time per case and at a very low cost per case. Some of these lawyers who represent people and spend five, 10 minutes with them and do 20, 30, 40, 50 cases in a day, they're doing those cases for $20 a case. Obviously if people got real legal representation, it would cost a lot more than that. …

Do people pleading guilty understand the grave consequences of agreeing to probation?
No, I don't think people understand at the time they plead how many conditions are going to be placed on the probation… Many don't realize that they're giving up their protection against searches and seizures, that any time a probation officer can come and search them, search their house, which is fairly disruptive. They don't realize they're going to be on probation for 10 years, which means that basically for 10 years any possible deviation, or anything that makes the power structure unhappy in that community can mean they're going to prison. …
They can't drive. They can't vote. There may be other consequences. For some people there are immigration consequences, which they don't understand. They may be deported as a result. If they're in public housing not only will they be thrown out of public housing, but sometimes if it's a son or a daughter, the mother may be thrown out of public housing because of zero tolerance. They'll lose public benefits. Many people plead guilty in traffic matters … and lose their driver's license. In many places in this country where there's no public transportation, losing your driver's license is losing your job. You're not going to have a job because you're not going to be able to get to work.
The irony of this is that often people who will be getting first offender treatment or be getting some non-sentence in exchange for being put on probation, the reason they're getting that is because these are the people that are seen as the less culpable people, the people that really don't deserve an extremely long sentence. But then when they don't live up to all those conditions, which may be impossible, then they end up with some draconian sentence, not for the crime they committed, but for their inability to live up to the conditions of probation. That doesn't make any sense.

What's the point of it?
I think the point of the legislature, and I suppose the governors and judges, in having those laws is the thought that by having this huge draconian sentence hanging over somebody's head it's going to pressure them year after year into meeting the conditions of probation.
It's unrealistic on several different levels. One, at the time people plead guilty and accept the probation, they're really not thinking far enough ahead to think about what the consequences are. Secondly, it just doesn't take into account the people that are often getting these sentences. Most of the people in the criminal justice system are poor, very poor. They're people struggling to survive. Their life is difficult

enough as it is just simply trying to find food and find work and find shelter every day. So when we add a whole lot of things to that, there's not a strong likelihood that they're going to be able to meet those things. …
I think many people [on probation] feel that it's sort of like being in debt to the company store; you can't get out of it, it goes on year after year, you get behind in the payments and they refinance it. The courts are sort of like finance companies now, they're trying to collect all this money from people and of course the people don't have any. This is like trying to get blood out of a turnip. … They can't pay, so the probation officer renegotiates with them and sometimes they even go back to court and extend the probation and so they're always paying. It really is very much like a high-interest loan. It's like you can never get it paid off, particularly if you're poor. So it just goes on and on. …

What would you advise a client who was innocent who was offered a plea bargain?
Ultimately the decision, of course, is up to the client, but I think most lawyers would advise somebody in that situation -- particularly if you're going to spend a lot of time in prison -- you should take this offer because it's going to get you your freedom. … But some people absolutely won't do it and are very insistent, "I didn't do the crime, I'm not going to plead guilty, I don't want a conviction on my record for it." Of course, if they're convicted anyway, they're going to have the conviction on their record, but at least they're not going to have an admission that they did it.

Can you understand that?
Why somebody would do that? Sure. I think that for somebody who is innocent, to plead guilty is going to torment them for the rest of their life. They're always going to think, "I shouldn't have done that. I've been branded now as a murderer, I had nothing to do with the murder." But it's really a Hobson's choice, because spending the rest of your life in prison is not very good either. …

What is the judge's role in plea bargain negotiations?
Judges aren't supposed to participate in the plea negotiations at all. Pleas are supposed to be negotiated between the prosecution and the defense. The judge always has the power to reject the plea offer, and many judges will, if they don't think the sentence is severe enough, or for whatever reason. But in terms of being engaged in the day to day negotiations of the plea, that's really not something a judge should be doing. The judge is supposed to be a neutral impartial arbitrator in the case.
In different jurisdictions … judges are more involved in some places than others, and certainly everybody knows that in lots of places the judge brings everybody back into his office and sits down and basically twists arms until the cases get worked out, particularly judges who want to get cases off their trial calendar.

Is this legal?
I don't know that it's illegal. I think there are questions if the plea is not ultimately negotiated as to whether the judge can really stay on that case.

Is it ethical?
I don't know the answer to that question. First of all, the canons of judicial ethics vary from jurisdiction to jurisdiction. I think that there are places where you'd say that is unethical. I think there are probably places where they would say it's not. I'm not sure that there's a clear-cut yes/no answer to that, because it is a fairly widespread practice. …

PBS Interview with Stephen Schulhofer, professor of law at New York University School of Law, Jan. 14, 2004. Web 15 Oct. 2013.

People say the United States has the best criminal justice system in the world.

When people think that we have the best system of justice in the world, they're thinking about our trial system. They're thinking about the very elaborate safeguards that we have.

Of course, the reality is that those are available in only a very, very small percentage of cases, and the very fact that those safeguards are so elaborate is part of what creates the pressure to plead guilty and to force cases out of the trial system into a guilty plea before trial.

The guilty plea is the primary system.

I don't think you can say that the system is one or the other; they are both parts of the system. I think that you could exaggerate the irrelevancy of trials. It would be easy to lose sight of their importance by just looking at the infrequency of trials. Because everything that happens in a trial filters back into the framework for plea bargaining, so if we have a trial system that typically acquits a certain kind of person or typically doesn't take seriously a certain type of crime, that means that the bargaining in those situations is going to reflect that. Conversely, if you have certain types of offenses that jurors punish very severely, then that strengthens the prosecutor's hand for plea bargaining, so I think you have to think about bargaining in the shadow of the trial system, and how its effects can permeate plea bargaining.

What is good about plea bargaining?

Well, personally I think there's very little, if anything, that's good about it. I think plea bargaining is a disastrous system from every perspective: from the public's perspective, from the perspective of effective law enforcement, from the perspective of crime control and from the perspective of the defense's rights.

Talk about defense rights.

The major problem with plea bargaining is that it forces the party into a situation where they have to take a guess about what the evidence is, about how strong the case might be, and they have to make that guess against the background of enormously severe penalties if you guess wrong. So defendants, even if they have strong defenses, and even if they are innocent, in fact face enormous pressure to play the odds and to accept a plea. And the more likely they are to be innocent, and the more strong their defenses are, the bigger discount and the bigger benefits the prosecutor will offer them. Eventually at some point it becomes so tempting that it might be irresistible, especially when the consequences of guessing wrong are disastrous.

So the result is that the system as a whole doesn't do what we count on it to do, which is to sort

out the guilty people from the innocent people. It doesn't do that because the guilty people and the innocent people are all faced with the same pressure to plead guilty.

The system in its details puts the defendant under even more pressure because very often in less serious cases -- by that I mean still felonies, but they could be relatively routine felonies like a robbery without a firearm or a burglary -- the defendant is in jail awaiting trial. He may have to wait months or close to a year for a trial, and his defense attorney comes in and says, "Well, if you're innocent and you want to go to trial, you stay here for a year. If you're guilty and you want to plead guilty you can go home right now," so what does a person do in that situation? It's a terribly hard choice. Even if you're convinced you're innocent and even if you're convinced that the evidence will show that you're innocent, the pressure that the system creates is so strong that it forces people to say that they're guilty and to accept a record of conviction. So that's just a disaster in terms of effective protection of the innocent.

One way to think about the guilty plea system is that it obliterates most forms of visibility and accountability, and one thing that we rely on the justice system for is visibility and accountability. We take it for granted that trials are public trials; the very few instances when the Bush administration has attempted to close proceedings in 9/11 cases it's been enormously controversial and troubling to people, because it creates a veil of secrecy in terms of what's happening. But that's plea bargaining. That's plea bargaining's middle name: you have a complete veil of secrecy and a lack of transparency to anything that happens.

When a prosecutor makes a deal, the assumption that defenders make is that the prosecutor is irrevocably committed to the public's interest and effective crime control. He's making a judgment about the odds of conviction and he's tailoring the sentence to reflect that. If that's what's happening, it's fine. But when things happen behind closed doors, there's no assurance, and the prosecutor is a human being with many interests, many concerns, many conflicting pulls both in terms of office politics, his personal life, the advancement of his own career, and all of those things, any one of which can lead him to accept a much more lenient sentence than the facts actually warrant. So you have a situation where there's no way to know whether we're getting the right people convicted for the right crimes and the right sentences. …

What rights does a defendant give up when he pleads guilty?

Everything. When a defendant pleads guilty he waives his right to a jury, he waives his right to confront the witnesses in open court, he waives his right to a public trial, he waives his right to cross examine the witnesses, and in a real sense, he really waives a good part of his right to the effective assistance of counsel. That's something that many people don't realize. Of course he has to be represented by counsel in a guilty plea, but a lawyer who goes to trial has a strong duty to investigate the case, to interview witnesses, to look for defenses, to prepare for cross examination.

A lawyer who plans to plead guilty can make a tactical judgment that it's not worth his time. If a lawyer says, "I want to grab that deal, and I didn't want to take a chance on waiting three or four days to interview witnesses," the courts consistently hold that that's a legitimate tactical judgment, so in effect the defendant not only waives his right to trial and all that that entails, he also in practice is waiving his right to legal research and thorough factual investigation by his own lawyer.

What kind of pressure is the defendant under to plead guilty?

Part of the pressure is the sentence that the defendant faces. A large part of the pressure is the time pressure on the lawyer himself or herself. We have many different forms of representation: we have retained counsel, we have counsel appointed by the court, we have public defender organizations, so the dynamics play out a little differently for each of these people, but the bottom line is the same: every one of them is under enormous pressure to settle the case as quickly as possible in the great majority of cases.

And so the lawyer's under pressure to see the case as a guilty plea case. These are good professionals for the most part, but they're also human beings, and when a lawyer knows that taking a case to trial means that he's going to spend the next three weeks of his life working for free, that has to color his judgment. … The prosecutor has time pressure, the judge has time pressure, the defendant has sentence pressure, everybody is faced with this type of pressure because of the way the system operates.

So it's really bad, for everyone?

It's a disaster. In my opinion, plea bargaining is a disaster for every one of the parties concerned. But what makes it even more of a disaster is that it's avoidable. …

But proponents of plea bargaining say that without it, the system would collapse.

That general wisdom is so misleading. Like much of conventional wisdom, there's a kernel of truth in it. If every single case went to a jury trial, had the most complete defense and lasted for two weeks or three weeks, then of course the system couldn't handle that without a very large infusion of resources. Even then, the system could handle it if we made the judgment that this was important to us, but we know we're in a society that doesn't allocate enough money for education, it doesn't allocate enough money for homeland security; the reality is that it's difficult to make people aware of the importance of this.

So that's true, as far as jury trials are concerned. But plea bargaining means you're not only waiving a jury, you're waiving your right to any public hearing at all. And one of the areas in which I focus my research was to look at trials without juries. The reality is that the big bottleneck in our system is not the trial, it's the jury trial. You can try cases very quickly and

very expeditiously before a judge. Now that means the defendant is still waiving something, but when we think about a guilty plea, the defendant is waiving his right to a jury and his right to confront the witnesses, and his right to cross-examine the witnesses and his right to have a lawyer research the facts and law of the case. He's waiving all of those rights.

In a bench trial, the defendant is waiving only one right and he's retaining the core of the adversary system. A defendant who goes to a trial before a single judge still has the right to confront his witnesses in open court, he has the right to cross-examine them, he has the right to have his lawyer do a thorough, factual investigation of the case, he has the right to raise any legal issues about the interpretation of the statute, he has a right to insist that the record in open court establish guilt beyond a reasonable doubt.

In my judgment, all those things are huge, and those things go 99 percent of the way to guaranteeing the integrity of our system. He also has the right to a fair and appropriate sentence based on an investigation and a judgment of the judge and the probation service, rather than a deal that's cut by the prosecutor and the defense attorney. So all of these things guarantee the public interest and the defendant's interest, just a hair shy of perfection. And for that you can do that with very minimal addition to the total cost of our justice system.

But it's not as efficient.

It's not as fast, but fast doesn't mean efficient when you're running the risk of convicting innocent people, when you're running the risk of overly lenient sentences for guilty people, when you're running not only the risk but the reality of haphazard procedures on the defense side and on the prosecution side. … By giving up the jury, or discouraging the jury trials is I think a better way to think about it, you're retaining 99 percent of the benefits of the adversary system, with only 1 percent of the cost of a full fledged jury trial. …

People believe that we have no alternative, and that's the conventional wisdom that I think is even hardest to accept in all of this, because there are alternatives. The alternatives are not as easy for people because many lawyers find it easier to accept a guilty plea than to go to trial. Trial is more work. Nonetheless, many lawyers love trials. And people don't go to law school so that they can negotiate guilty pleas. People go to law school because they're fascinated with trials.

So once you put in place a system where people get used to this, they would see that it's perfectly possible, it can function with no significant problems, and they actually come away from it with more self-respect and with more professional gratification than they can possibly get in this system of flying by the seat of your pants, guilty plea haggling that goes on in so many places. People have convinced themselves that they have no alternative, but the reality is, it can work very easily if people are willing to put the commitment to actually deciding cases on the merits.

But people will argue, "Well, if the defendant said he was guilty, why bother with a trial?"

What people don't understand is first of all, the person pled guilty because they were given an offer they cannot refuse. We know from *The Godfather*, you sign a contract because somebody makes you an offer you can't refuse, and that's what the guilty plea system is for the most part.

Now for some defendants, it's a fantastic deal; some defendants are guilty and they get away with murder. That's why the system is bad for the public interest just as much as it's bad for defendants who are innocent or defendants who are overcharged -- defendants who have done something wrong, but it's much less serious than what the prosecutor is claiming. So, number one, the public doesn't understand that.

Number two, the public believes that every criminal defendant has a right to counsel. That is another piece of the conventional wisdom that is just so far out of touch with reality, it's hard to even begin describing it. Any person who had the misfortune of being charged with a serious offense and didn't have the funds to hire a dream team of defense attorneys would discover very quickly what the right to counsel means, and it's a very pale shadow of what anyone would ever accept if they had the means to avoid it. So again, when people plead guilty it's because they know that they don't have the chance of having a really vigorous defense, and they also are being advised by a lawyer who is himself under incredible pressure, a lawyer who is not free, even if he's a dedicated professional, to devote the time to the case that it really requires.

[These are] … problems for an indigent defendant who is forced into the system where he's represented by a public defender who is under enormous time pressure, or an appointed counsel who is being compensated at very, very low rates. But even people who aren't indigent face the same kinds of problems unless they're enormously wealthy; they're scraping together a few thousand dollars for retainer, a flat fee that you have to pay in advance. Practically no criminal defense attorney would ever take a case on the idea that they'd send you a bill later. Every criminal defense attorney, unless we're talking about an extraordinarily wealthy person as a defendant, will insist on payment up front.

Once he's been paid up front, his compensation is identical if he pleads the case out in two days or if he investigates it for six months and then goes to a three week trial. It's exactly the same compensation. So again, the pressure on the retained counsel for the non-indigent, the so-called person of means, who thinks he's going first class because he's gotten the money to hire his own lawyer -- that person is thrown into the same problem and will very quickly find that the pressure to plead guilty is enormous. …

Are defendants punished for going to trial?

Whether you're being punished for going to trial is a question of terminology. People will say that you're only getting the sentence that you deserve; that's the view of people who support plea bargaining. Those who oppose it will tell you that that increment, the difference between

the three year sentence that you get if you plead guilty and the 20 year sentence that you get for going to trial, that most of that increment is a consequence of the need to create incentives for people to plead guilty to make sure that people won't go to trial. So whether you call it a punishment or not is a question of semantics.

The reality is that the person who goes to trial and loses that bet, they may be guilty or they may be innocent, but the person who loses that bet is going to get one heavy sentence for the crime they were convicted of, and another heavy sentence for their tactical mistake.

What do you call it? Is it punishment?

I'd prefer not to get into a semantic quibble about whether it's punishment or not, because somebody can tell you that they deserve 20 years in prison for that offense. The fact is, we would not routinely give that sentence to everybody who is guilty of that offense. As a society, we wouldn't need to, we couldn't possibly afford it. … The rate of imprisonment today is four times higher than it was just 10 or 15 years ago. … If society is willing to spend billions more dollars, we could double our prison population. But to eliminate plea bargaining without lowering the sentences that we have would mean a tenfold or a twentyfold increase in our prison population. Nobody would want that or tolerate that.

So to me that just makes very clear that the sentences are being imposed not because of the intrinsic culpability of the person and not because of the need to incapacitate them that long. They're being imposed to grease the wheels and make sure that people don't ask for a trial.

How would you change the system?

The simple solution is to discourage plea bargaining; in fact you can prohibit any concessions for pleading guilty and also discourage jury trials by giving defendants an incentive to give up the jury only and take their case to a trial before a judge. And in fact, this is not just an imaginary academic idea, this is largely the way that trial system works in Philadelphia, and it's worked this way for decades and all the lawyers find that it works better. It guarantees better results for the public, and it's better for them in reality because they get to be lawyers. What happens basically is that well over 50 percent of the cases are tried before a single judge. About 5 percent of the cases go to a jury trial.

And again, defendants know and lawyers know from experience that juries tend to react in certain ways to certain cases, and that affects how judges will decide cases without a jury. A judge knows that a jury wouldn't convict in a certain type of case, he has to take that into account, or no defendant would accept a trial before that judge. At the same time the system can give slightly lower sentences -- the gap obviously doesn't have to be as great because the defendant isn't giving up as much. This system has worked in practice very effectively for many, many years, so it's not an imaginary idea, and it essentially solves 99 or 100 percent of the problems we've been discussing.