

## Plea Bargaining

### Introduction

In this week's Torah portion, *Shoftim*, we read about the supreme importance of justice in Judaism:

לֹא־תִטֶּה מִשְׁפָּט לֹא תִכִּיר פָּנִים וְלֹא־תִקַּח שֹׁחַד כִּי הַשֹּׁחַד יְעוֹרֵר עֵינֵי חֲכָמִים וַיִּסְלַף דְּבָרֵי צְדִיקִים:  
צֶדֶק צֶדֶק תִּרְדֹּף לִמְעַן תִּחְיֶה

You shall not judge unfairly. You shall show no partiality. You shall not take bribes, for bribes blind the eyes of the discerning and upset the plea of the just. Justice, justice shall you pursue, that you may live... [Deut 16:19-20]

The Mishna says:

על שלשה דברים העולם עומד, על הדין ועל האמת ועל השלום

*Al shlosha devarim ha-olam omed: Al ha-din, veal ha-emet, veal ha-shalom* -- The world rests on three things: On justice, on truth, and on peace. [Avot 1:18]

Justice is listed first. It is the most important of the three. So justice is number one with us. It is so vital in Judaism that the full quote says "*Tzedek, tzedek tirdof lemaan tichyeh* -- Justice, justice shall you pursue that you may live". Indeed, we simply can't live without justice. That second part is often omitted from the quote. The Torah begins with, "*Bereshit bara Elokim* -- In the beginning, God", and the name for God that is used there, *Elokim*, traditionally reflects God's attribute of justice.

### You may not incriminate yourself

A cardinal principle in Jewish law is that you may not incriminate yourself. In that it goes well beyond the American Fifth Amendment. The latter says that you have the right to remain silent to avoid possibly incriminating yourself. But you don't *have* to avail yourself of that right. Jewish law says you *must*. You are not *allowed* to testify against yourself, or even *for* yourself, or plead guilty, or sign a confession. [Sanhedrin 9b–10a; Yevamot 25b]  
The judges listen to the charges from the plaintiffs, examine the evidence, interrogate the witnesses, discuss the matter among themselves, and then reach a verdict by majority vote. No lawyers and no jurors.

## Is this in the Torah?

The Torah states:

לֹא-יָוִמְתוּ אָבוֹת עַל-בְּנֵים וּבָנִים לֹא-יָוִמְתוּ עַל-אֲבוֹת אִישׁ בְּחֻטְאוֹ יוֹמְתוּ

Parents shall not be put to death for children, nor children be put to death for parents. A person shall be put to death only for his own crime. [Deuteronomy 24:16]

The Talmud [Sanhedrin 27b] argues: Why did the Torah not just say “a person shall be put to death only for his own crime”? The reference to parents and children seems unnecessary. This is to teach us that the verse really means: “Parents shall not be put to death *on the testimony* of their children, nor children be put to death *on the testimony* of their parents”. And, if so, all the more reason why *you* should not be punished based on your own testimony.

The Radbaz, from 16<sup>th</sup>-century Egypt, added that another reason is that your life is not your property but God's. (Also basis for ban on suicide.)

## Why can't you incriminate yourself?

-Rambam (11<sup>th</sup>-century Egypt): The defendant may become depressed, even suicidal, and “confess” just to get it over with. [Mishneh Torah, Sanhedrin 18:6]

-Yosef ibn Migash (12<sup>th</sup>-century Spain): A confession could influence the judges to the point that they may not take seriously evidence of innocence.

Exceptions: Judges may require self-incrimination in three cases: Major emergencies, major threats, and widespread disregard of the law. [Quint & Hecht, *Jewish Jurisprudence*, 1980, pp 139-213]

## Who else may not testify against you?

-Close relatives: Father, uncles, brothers, sons, nephews, stepfather, father-in-law, brothers-in-law, sons-in-law [Sanh. 3:4], and first cousins. [Yad, Edut 13:3; Shulchan Arukh, Choshen Mishpat 33:2]

-The husband of a female relative. [Yad, Edut 13:6; Shulchan Arukh, Choshen Mishpat 33:3] (Women don't *have* to testify because the rabbis don't want to take their time away from their duties at home, which they deem more important [Shevuot 30a; cf. Gittin 46a]. However, women may testify if there are no male

witnesses [Resp. Maharam of Rothenburg, ed. Prague, 920; Resp. Maharik 179]. Women have been able to testify in Israel since 1951.)

-The wicked, because the Torah says:

You shall not join hands with the wicked to act as a malicious witness. [Ex. 23:1] They include criminals, perjurers, informers, thieves, usurers, gamblers; those who reject social conventions (such as by working naked [Bava Kamma 86b].) Reason: They are more likely to lie.

## **Other witness requirements**

-At least two witnesses are required [Num. 35:30; Deut. 17:6; 19:15; cf. 1 Kings 21:10,13]. One witness alone cannot lead to a conviction. The Torah states:

One witness shall not rise up against a man for any iniquity ... By the mouth of [at least] two witnesses ... shall the matter be established. [Deut. 19:15]

-No punishment for failure to testify on behalf of defendant, except from God. The Talmud states:

Rabbi Yehoshua said: ... knowing evidence in favor of another and not testifying on his behalf [is an act] for which the offender is exempt from the judgments of Man but liable to the judgments of Heaven. [Bava Kamma 55b]

## **What is plea bargaining?**

A widespread feature in Western-style justice is plea bargaining. Forms:

-Plead guilty and you'll get a lesser punishment. If not, we'll throw the book at you.

-Plead guilty to a lesser crime. If not, we'll throw the book at you.

-Give us information about your bosses and testify against them, and we won't prosecute you at all (immunity).

Example: The police find large quantity of drugs near a woman (purse, car, house, etc.). She is arrested for possession with intent to distribute. Her lawyer tells her she will probably be found guilty if tried, be put in jail and her children sent to a foster home; but if she pleads guilty to possession *only*, she will receive only a short suspended jail sentence and probation.

She knows she is innocent (and probably framed by her ex-husband). But she accepts anyway.

## **Advantages of plea bargaining**

- From the state's point of view:
  - Lightens crowded dockets (may lead to skipping trial altogether or lead to a cheaper, faster, shorter trial).
  - A lesser crime is easier to prove.
- From the defense lawyer's point of view: Makes her job much easier.
  - Welcome point if she is paid little as public defender.
- From the prosecutor's point of view: Improves his convictions record.
- From society's point of view: Granting immunity in exchange for information and testimony against crime leaders benefits society.
- From the guilty defendant's point of view: Reduces his punishment.
- From the innocent defendant's point of view: Reduces risk of harsh punishment.

*But is this justice?*

## **The American plea bargaining experience**

What is the situation in the US? Many have argued that plea bargaining is unconstitutional because it removes the right to a trial by jury. Justice Hugo Black once noted:

[The defendant] has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process, the defendant has a fundamental right to remain silent, in effect challenging the State at every point to "Prove it!"

Nevertheless, the US Supreme Court ruled in 1970 that plea bargaining was constitutional (in *Brady v. United States*) but warned that if it results in too many innocents pleading guilty, it might become unconstitutional.

What is the record? In 2015:

- 97% of federal defendants took plea-bargains.
- Only 3% stood trial.
- 43.6% of defendants found innocent by court had pleaded guilty.

## Is plea bargaining allowed in Jewish law?

**No.** Here is why:

-You can't incriminate yourself, even for a reduced sentence.

-A witness may not testify if he benefits from his testimony [Bava Batra 43a; Yad, Edut 15:1,4; Shulchan Arukh, Choshen Mishpat 37:1]. In particular, a paid witness is invalid. [Bekhorot 4:6]

-However, the Rashba, 13<sup>th</sup>-century Spanish rabbi, allows paid "expert witnesses". They are not really witnesses to the crime but provide needed expertise.

-One might argue that, if offered immunity in exchange for information and testimony, you are not "testifying" in court against yourself. Would that make the deal more Jewishly acceptable, even though unfair to others who don't have such information to "sell"? One might say no, because the Torah says specifically that justice must be evenly applied:

You shall have only one standard of law, for you, for your countrymen, and for the stranger... [Lev. 24:22]

Still, one could argue that if lives can be saved based on the information and testimony, this point takes priority (*pikuach nefesh*).

-Because the temptation to plead guilty to a lesser charge, even if innocent, is great. Corroborated by studies and the record:

In 2013, two American professors ran an experiment with students to see whether innocent parties will "confess" under plea bargaining. The subjects were told the objective was to measure their ability to solve logic problems. Each was paid and paired with a confederate, with strict instructions not to help each other.

Half the confederates asked their partner for help and received it. The other half did not. Afterwards, all participants were accused of cheating (because of alleged low-probability similarities in their answers) and offered a plea bargain: Admit guilt and give up your payment; or we'll tell your faculty advisor, who will probably drag you before an ethics board.

Of the real “cheaters”, 89.2% confessed. But also 56.4% of the innocent “confessed”.

-Because a plea bargain can be used to be more lenient towards a defendant for whom one has sympathy.

## **Beating plea bargaining**

It has been noted that if *all* defendants refused plea bargains, they would all be better off. Only a few would go to trial. This a variation of “Prisoners’ Dilemma” in game theory, which shows that people generally don’t cooperate, even when it’s in their best interest to do so.

## **Conclusion**

Plea bargaining is not allowed in Jewish justice, although an exception can be made in the rare cases where it can be argued that it saves lives.