

# Encyclopedia of Law & Society: American and Global Perspectives

## Plea Bargaining

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Book Title: Encyclopedia of Law & Society: American and Global Perspectives

Chapter Title: "Plea Bargaining"

Pub. Date: 2007

Access Date: December 08, 2014

Publishing Company: Sage Publications, Inc.

City: Thousand Oaks

Print ISBN: 9780761923879

Online ISBN: 9781412952637

DOI: <http://dx.doi.org/10.4135/9781412952637.n517>

Print pages: 1111-1115

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<http://dx.doi.org/10.4135/9781412952637.n517>

Plea bargaining is a procedural mechanism through which the prosecution and defense in a criminal proceeding can reach an agreement for the disposition of a case, subject to the approval of the court. The agreement may take several forms, but usually requires the defendant to plead guilty to one or more offenses. In exchange, the prosecutor drops other charges, accepts that the defendant pleads guilty to a lesser offense, and requests a certain sentence for the defendant or does not oppose the defense's sentence request.

## Types and Use in the United States

In the United States, under the Federal Rules of Criminal Procedure, rule 11 requires that the court ensure that the plea agreement is intelligent and voluntary and determine that there is a factual basis for the plea. Nevertheless, the judge must not participate in plea negotiations. There are different kinds of plea agreements, but the two main types are *charge* bargains—in which the prosecutor drops one or more charges or charges the defendant with a less serious offense in exchange for a guilty plea—and *sentencing* bargains—in which the prosecution agrees to, recommends, or does not oppose a certain sentence or the consideration of certain sentencing factors. Prosecutors use plea agreements not only to save human and material resources by obtaining convictions without trial, but also as investigative tools. As part of a plea agreement, the defendant may have to provide information and testify at trial for the prosecution against his former confederates.

[p. 1111 ↓ ]

There have been extensive criticisms against plea bargaining that come from different perspectives. From a *crime-control* perspective, critics argue that the practice leads prosecutors and judges to be soft on defendants, which undermines the deterrence effect of punishment. From a *due-process* perspective, critics argue that it generates perverse incentives for prosecutors to overcharge and ask for harsher sentences as a way to obtain an advantage in plea negotiations. It also offers defendants pleas that are more convenient when the evidence is weak. Finally, defense attorneys and public defenders encourage their clients to accept agreements so that they save time

and reduce their caseload, while judges abdicate their adjudicative role in favor of prosecutors' decisions.

Some scholars consider plea bargaining to be in conflict with the federal constitutional rights to a trial by jury, confrontation, cross-examination, and proof beyond a reasonable doubt, among others, because it is prosecutors who, in fact, determine which defendants are convicted, and of which sentence, based on criteria not necessarily related to the merits of the case. Worse, those defendants who exercise these rights face potentially harsher punishments. This dilemma would be especially tough for innocent defendants who, in many cases, have to choose between a mild sentence offered by the prosecutor in plea negotiations and a much harsher sentence that could come after a conviction at trial. The same holds for defendants who are in pretrial detention and the courts would release if they accepted the plea agreement. Because plea bargaining generates these kinds of dilemmas, many consider it to be a coercive mechanism against defendants. In 1978, John Langbein even compared it to medieval torture.

Despite their differences, both crime-control and due-process critics agree that the main beneficiaries of plea bargaining are the professional actors of the criminal-justice system, rather than society, victims, or defendants. In addition, from both perspectives, plea bargaining may compromise the truth-determination function of criminal justice by resulting in guilty pleas even in cases where the defendant does not admit his guilt. It may also distort the facts of a case as part of an agreement, for instance, if the defendant pleads guilty to assault when he actually committed rape. Finally, Albert Alschuler argued that plea bargaining depreciates the value of human liberty and diminishes the purposes of criminal sanctions by treating these principles as commodities to be traded for economic savings.

## Reform Proposals

There are many proposed reforms to address these problems. Some of the more common include the following: (1) Increase the budget of the criminal-justice system so that more trials occur. (2) Give financial incentives to prosecutors to limit their discretion and make plea negotiations between prosecution and defense better balanced. (3)

Screen prosecutors more closely in the charging decision. (4) Restructure the economic relationship between attorneys and their clients so that the former have better capacities and incentives for zealous representation. (5) Require preplea disclosure to make negotiations more equal and a defendant's decision to plead guilty better informed. (6) Make judges take a more active role in plea negotiations so that prosecutors, in fact, do not determine sentences. (7) Enforce more strictly government concessions in plea agreements, which will protect defendants against defense-attorney errors in plea agreements and limit prosecutorial manipulation of broad mandatory-sentencing statutes. (8) Replace misdemeanor trials with the German system of penal orders. (9) Offer defendants incentives to choose bench trials. (10) Simplify the current trial by jury or replace the trial by jury with trial before mixed courts so that there are fewer incentives for plea agreements. (11) Abolish plea bargaining altogether.

Defenders of plea bargaining argue that the mechanism is a fair way of disposing of cases because the prosecutor takes into consideration the chances to win the trial when she makes her offer. In addition, the prosecutor is probably in a better position than jurors are to determine whether the defendant is guilty or innocent, because the prosecutor has access to information that may not be admissible or produced at trial. Pleabargaining defenders also claim that even if the practice presents serious problems, trials themselves often have problems and one should not idealize them. In addition, they claim that in plea agreements, both society and defendants benefit. Society secures convictions at a [p. 1112 ↓ ] lower cost, and thus can prosecute and punish more offenders. Moreover, plea bargains are a powerful tool that enables society to deal with organized crime. Defendants benefit by obtaining sentences that are lower than those they would have received had the judge or jury convicted them at trial; in addition, defendants avoid the anxieties and uncertainties of a trial. Finally, defenders maintain that a plea agreement contributes to a defendant's rehabilitation and victims avoid the rigors of testifying at trial and the possibility that the prosecution will not get a conviction. One of the assumptions of many plea-bargaining defenders is that both parties have, in most cases, equal bargaining power.

## Origin and Acceptance

Whatever the merits and demerits of plea bargaining, there is no question that it is a well-established practice of the American criminal-justice system. Although plea bargaining has been widely criticized, the U.S. Supreme Court upheld it as constitutional in *Brady v. United States* (397 U.S. 742, 1970) and stated in *Santobello v. New York* (404 U.S. 257, 260, 1971) that the practice was “an essential component of the administration of justice.” In addition, despite reforms intended to eliminate or limit the mechanism, about 90 percent of federal cases and 95 percent of state cases are disposed through guilty pleas, the vast majority of which occur through plea agreements.

Despite its entrenchment, the extensive use of plea bargaining in the United States is a relatively new phenomenon. There may have been some examples of this practice before the nineteenth century, but prosecutors did not begin to use plea bargaining widely until around 1900. Historians do not agree on what caused plea bargaining's rise and wide spread; explanations vary from jurisdiction to jurisdiction. They point to factors such as an increase in criminal dockets, at least partially caused by an expansion of substantive criminal law; an increase in civil dockets; the bureaucratization and professionalization of the police, prosecution, and defense functions; the increasing complexity of criminal trials; favoring the individualization of a sentence that would be more appropriate for the needs of the offender; political corruption; and the development of plea bargaining as a legal tool to promote and legitimize a certain social order.

## Other Common Law Countries

Even if plea bargaining is considered a distinctive feature of the American criminal-justice system, the practice is not unique to the United States. Other common law jurisdictions have also made use of this tool, though in some cases their practices present differences from the American system. For instance, in England fewer cases are disposed through guilty pleas (an average of 63 percent in crown court circuits in 1994) and the incidence of plea bargaining is less substantial than in the United States.

In addition, many English guilty pleas occur without explicit plea bargains between prosecution and defense such as those that prevail in the United States. Rather, they involve implicit plea bargaining, in which a defendant who pleads guilty gets a substantial discount in sentence as a matter of course, even if there is not a concrete ex ante promise by the prosecutor or the judge. Despite these differences, plea bargaining in England has received important criticisms similar to many of those already mentioned regarding American plea bargaining.

## Civil Law Countries

Until recently, comparatists considered civil law jurisdictions to be “lands without plea bargaining,” as Langbein put it in 1979. The very concept of the guilty plea did not exist in inquisitorial systems of civil law tradition. If defendants admitted their guilt, judges considered the acknowledgments confessions that may have been helpful in determining the truth at trial, but the admissions did not dispose of the cases. In addition, since in inquisitorial systems the prosecutorial role is one of an impartial official who has a duty to determine the truth, the act of negotiating with the defendant traditionally would be improper conduct by these officials. However, in the past three decades, and especially in the past decade, this situation has changed, and civil law jurisdictions have adopted consensual mechanisms to dispose of criminal cases in ways that are similar to [p. 1113 ↓ ] plea bargaining. For example, Germany incorporated the *Absprachen* during the 1970s, Italy adopted the *patteggiamento* in 1989, Argentina adopted the *procedimiento abreviado* or *juicio abreviado* in 1997, and France brought in the *composition pénale* in 1999 and the *comparution sur reconnaissance préalable de culpabilité* in 2004.

The reasons for the introduction of these reforms vary from jurisdiction to jurisdiction, but they include an increase in crime rates and court caseloads, the development of new legal tools to deal with complex criminal cases, and the influence of the American criminal-justice system on civil law jurisdictions.

Judges, practitioners, and commentators have resisted these mechanisms in many civil law jurisdictions, usually because they consider them an intolerable reduction of the sentencing powers of trial judges, a violation of due process, or out of fear of

Americanization. However, in most cases courts uphold these practices and use them widely. For instance, 22 percent of the cases before misdemeanor trial courts and 52 percent of the cases of crime trial courts in Buenos Aires (Argentina) are disposed through the *procedimiento abreviado*, and every fourth criminal trial in Germany is settled.

Even if American plea bargaining has inspired some of these consensual mechanisms, many present substantial differences from the American system. For instance, in Germany, unlike the United States, the trial judge has an active role in the negotiations. In Italy, in the *patteggiamento*, the defendant does not explicitly admit his guilt, and the Italian mechanism is more similar to an American *nolo contendere* than to plea bargaining. In Argentina, the *juicio abreviado* only permits sentencing bargains, not charge bargains. In France, the judge may only apply the *composition pénale* and the *comparution sur reconnaissance préalable de culpabilité* to offenses that carry a maximum potential punishment of five years imprisonment.

## International Courts

Plea bargaining has reached international criminal jurisdictions. Though initially excluded from the International Criminal Tribunal for the former Yugoslavia (ICTY), plea bargaining was later incorporated by the ICTY to its rules of procedure and evidence (rule 62 *ter*), and it is now widely practiced in that jurisdiction. Nancy Combs attributed the growing reliance on ICTY plea bargaining to trial complexity, but other factors, such as an increasing caseload, case complexity, and external pressures to process cases more swiftly, have all played roles that are at least as important. The International Criminal Tribunal for Rwanda also has accepted plea bargaining and expressly regulates it in rule 62 *bis* of its rules of procedure and evidence. Finally, the drafters of the Rome Statute of the International Criminal Court tried to exclude plea bargaining from the court's jurisdiction by establishing, in article 65.5, that any discussions between the prosecutor and the defense regarding modification of the charges, an admission of guilt, or the final penalty must not be binding on the court. It is still unclear, though, whether this entry will dissuade the use of plea bargaining in the International Criminal Court once it begins to prosecute and try actual cases.



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<http://dx.doi.org/10.4135/9781412952637.n517>

*See also*

- [Confessions and Interrogation](#)
- [Consensual Penal Resolution](#)
- [Defense Lawyers](#)
- [International Criminal Tribunals](#)
- [Penal Court Procedures, Doctrinal Issues in](#)
- [Plea Bargaining, Economics of](#)
- [Prosecutorial Discretion](#)
- [Prosecutors](#)
- [Victims' Rights](#)

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