

**THE USE OF PLEA BARGAINING IN THE  
UNITED STATES' CRIMINAL JUSTICE SYSTEM**

By

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B.A. Law & Society  
B.A. Psychology  
University of California, Santa Barbara 2007

PROJECT  
SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF CRIMINOLOGY

In the School  
of  
Criminology

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SIMON FRASER UNIVERSITY

Fall 2008

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## ABSTRACT

This paper examines the use of plea bargaining in the United States' criminal justice system. With only 10% of criminal cases being resolved through trial, bargaining is widely used as a means of obtaining quicker convictions. Since plea bargaining received constitutional recognition in *Brady v. U.S.* (1970), guidelines have been formed to regulate the use of pleas. These guidelines are included in the *Federal Rules for Criminal Procedure*, American Bar Association, and local court rules.

Although plea bargaining has been well established in the United States' criminal justice system, issues concerning its use still arise: these include victim participation, effectiveness, and ethics of negotiations. This paper will examine the issues and critiques of the process, while also discussing possible resolutions to such problems. Overall, a synopsis is provided of the use of plea bargaining as a means to resolve criminal cases.

**Keywords:** plea bargaining, sentencing guidelines, United States' Criminal Justice System

**Subject Terms:** Orange County Alternate Defender, sentencing (criminal procedure United States)

## **ACKNOWLEDGMENTS**

I offer my enduring gratitude to Neil Madu, Simon Verdun-Jones, and William Glackman who have encouraged and supported me in my intellectual endeavors and this work, in particular. This project could not have been completed without your constant kind words and assistance.

A special thanks are owed to my parents who have not only provided me the resources to complete my education, but have also provided their undivided support to follow my dreams. Words cannot express how truly thankful I am.

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# **CHAPTER ONE: BACKGROUND OF PLEA BARGAINING**

## **Introduction:**

While the United States' criminal justice system consists of an adversarial process, through the years, consistently fewer cases make it to trial (Champion, 1987). As trials take up a vast amount of time for both the prosecution and the defense, lawyers have turned to other methods of resolving cases. One dominating method is the use of plea bargaining. Although statistics vary from district to district, it has been said around 90% of cases result in guilty or no-contest pleas (Herman, 1997). Plea bargaining has become a necessary part of the United States' criminal justice system. It is argued that the proper use of negotiated and structured pleas benefits all actors within the criminal justice system – the defendant, the prosecution, and the government (Champion, 1987). Thus, instead of engaging in a lengthy trial, with no assurance of the outcome, defendants and prosecution come together to negotiate a sentence which is acceptable to both parties.

The term plea bargaining can be defined as “a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial” (Herman, 1997, p. 1). While the plea is negotiated between the prosecution and defense, the court is prohibited from any involvement in the negotiations (Miller, McDonald & Cramer, 1978). Within plea bargaining, there are three types of negotiations: charge bargaining, sentence bargaining, and fact bargaining. Charge bargaining involves the negotiation of the particular charge,

including the dropping of one or more charges, or a reduction in the severity of the charge. Sentence bargaining is similar to charge bargaining; however instead of a reduction of the charge, negotiation revolves around the particular sentence the individual will receive. Fact bargaining, on the other hand, involves the omitting/ or altering of certain facts of the case, usually resulting in a less harsh charge or sentence (Roberts, J.V. and Grossman, M.G., 2008). However, while the plea involves an agreement between prosecution and defense, the judge maintains the ability to reject the settlement – having the final veto power over the case.

Along with the type of plea bargaining which may be engaged in, the process/ style of the bargain also varies. Two types of bargaining practice are explicit bargaining, and implicit or tacit bargaining. Explicit bargaining is obtained through overt negotiations between two or more people, which are then followed by an agreement on terms. Conversely, implicit bargaining involves the understanding of the defendants that they could receive a more severe sentence through the process of a trial (Miller, McDonald, & Cramer, 1978). Therefore, depending on the severity, and type of case involved, the actors involved in the process have the choice of both which type of bargaining to engage in and the style of the bargain to be presented.

While plea bargaining is highly prevalent within the United States court system, the issues arising from its controversial status still remain. Although the constitutionality of plea bargaining has been upheld (Herman, 1997), plea bargaining is often criticized as being too lenient on the offender, and leading to inaccurate or unjust convictions (Bond, 1982). In contrast, supporters of plea bargaining believe in plea bargaining's swift and efficient nature, with a decrease in the amount of time needed to settle a case (Fisher,



2003). However, while people's opinions of plea bargaining may vary, the procedure remains one of the most heavily used processes in the United States' court system.

Throughout this paper, the issue of plea bargaining will be investigated in a variety of ways. The paper will examine the history and theoretical basis of plea bargaining, explore the process of bargaining, and then further evaluate the standards and ethics concerning the issue. Next, the concerns relating to plea bargaining's effectiveness and cost analysis will be examined to better understand the issues surrounding the status of such negotiations in a criminal court. Finally, the reality of plea bargaining will be investigated by looking at its use in the Superior Courts of Orange County, California by the Law Offices of the Alternate Defender. Overall, this paper will address the major issues encompassing the use of plea bargaining in the United States.

## **History:**

In order to fully understand plea bargaining, one must first examine its history. While plea bargaining remains highly controversial today, the process has deep roots in American culture. Although plea bargaining has occupied a consistent place within the United States criminal justice system, the practice's historical origins prove to be diverse within the literature. With plea bargaining often seen as a secretive and not widely agreed upon process within the court system, early records of court activity omitted references to such uses of guilty pleas – leading to a lack of concrete evidence concerning plea bargaining's early existence.

As with much of the United States' legal system, plea bargaining has been shown to have first appeared in British law as early as the 1400's (Alschuler, 1979). However, legal officials did not look at early uses of guilty pleas fondly. Thus the use of guilty pleas was limited in the judicial system. On the other hand, additional literature believes plea bargaining is largely a United States innovation (Vogel, 1999). Although the origins of plea bargaining are still debated, today plea bargaining remains as one of the most widespread practices within the United States legal system.

The 19<sup>th</sup> century has often been looked at as the time of origin for plea bargaining within the United States. With concerns of increased crime and rioting, courts were believed to be the only entity with the ability to take control over the situation (Vogel, 1999). Thus changes were made within the court system in hopes of reclaiming the order of social standards. The 1840's were a time which saw an increase in guilty pleas. Plea bargaining's "emergence was casually shaped by changes in social structure, events, and culture beyond the courtroom" (Vogel, 1999, p. 168). With the increase in criminal activity, the court also found an increase in cases. Thus by "1860, plea bargaining had been solidly established and institutionalized" (174). The use of guilty pleas provided a strong sense of social control in a crime-ridden era. "Under plea bargaining, the guilty plea, which closed a case with finality, protected order, and, with it, property by drawing conflicts into court and working both to render law known to citizens and to inculcate a sense of consequences that might deter the robber or thief" (226). Accordingly, plea bargaining existed to provide efficient processing of cases, while declaring the legal standards of the community in hopes of deterrence.

The first widespread case incidence of plea bargaining in the United States concerned “whiskey cases” in the 1920’s (Alschuler, 1979). Such cases usually involved the sale or possession of alcohol during the Prohibition era. With large caseloads of similar charges, prosecutors sought a quicker method of resolving cases. Also, the faster the cases were finished, the more money prosecutors were able to make. “No matter how many criminal cases a district attorney handled, he could make more money if he handled them with dispatch” (Fischer, 2003, p. 43). Thus plea bargaining offered a means of obtaining swift, certain, and relatively simple convictions (48). Because the United States remains a comparatively capitalistic society, more money with less work was considered a desirable outcome for prosecutors.

Another reason why liquor cases lead to the increased use of plea bargaining was the fact that such cases involved rigid sentencing. “Only in liquor cases did the statutory penalty scheme so tightly bind the judge’s hands in sentencing, enabling prosecutors to dictate sentences by manipulating charges” (Fischer, 2003, p. 49). Through these cases, prosecutors were themselves able to guarantee sentences – without the judge’s input. On the other hand, the exclusion of judges in the process was not openly accepted. “Plea bargaining in the early and mid-nineteenth century therefore encountered at least three obstacles to judicial acceptance: It served judges’ needs less well than those of the prosecutors; it confronted judges’ principled aversion to discharging their awesome duty to sentence without full information; and it wounded some judges’ pride of power” (Fischer, 2003, p. 58). Through it all, such “whiskey cases” established plea bargaining as a common procedure within the United States’ criminal justice system.

After the dramatic increase of guilty pleas in the 1920's, rates of plea bargaining remained relatively stable – even with the end of prohibition. However, with the baby boom of the 1960's, courts began to see increased caseloads once again. With judicial resources staying relatively the same, the court system was forced to seek more efficient methods of obtaining convictions (Alschuler, 1979). Thus, “in 1967, both the American Bar Association Project on Minimum Standards for Criminal Justice (1967) and the President's Commission on Law Enforcement and Administration of Justice proclaimed that, properly administered, plea bargaining was a practice of considerable value” (Alschuler, 1979, p. 237). However, the following years continued to see government speculation on the use of plea bargaining within the courts. Finally, in the case of *Brady v. United States* (1970), the Supreme Court established that “plea bargaining was inherent in criminal law and its administration” (Alschuler, 1979, p. 239). It was at this time that the first steps were taken to make plea bargaining a fully recognized practice in the United States (240).

### **Constitutional Status:**

Although plea bargaining may not have begun with widespread support from United States' courts, the constitutional status of pleas has been upheld. The main debate about the constitutionality of plea bargains arose around the issue of whether the leniency of the plea would allow for innocent individuals to condemn themselves out of fear of the negative consequences of a trial (Adelstein, 2001). In principle, the United States' criminal justice system does not approve of the accidental conviction of an innocent

person (Adelstein & Miceli, 2001). Thus, “prior to the 1970’s, the legitimacy of plea bargaining was in question” (Sigman, 1997). Although mentioned in court, the process was often thought of as being too secretive and “perverting justice.” It was not until *Brady v. United States* (1970) and *Santobello v. New York* (1971) that the Supreme Court of the United States officially recognized the practice and constitutionality of plea bargaining. Furthermore, in *Bordenkircher v. Hayes* (1978), plea bargaining was found to be “acceptable as long as the accused is free to take or leave the prosecutor’s offer” (Glenn, 1997, p. 173). However, the constitutional status of guilty pleas came after recognition from a broad range of other sources.

While plea bargaining had been consistently used since the 1920’s, when a large increase in guilty pleas was noted, legal organizations were hesitant about its approval because they feared potential abuse of this process by prosecutors (Alschuler, 1979). The President’s Crime Commission was the first official body to address the use of bargaining. In 1967, the President’s Crime Commission issued a report that conditionally approved the use of plea bargaining within the courts. Following the report, the American Bar Association issued standards for guilty pleas. Included in these standards were rules outlining the process of plea negotiating and the proper guidelines for acceptable pleas (ABA online). Finally, in 1974, Chief Justice Burger proposed amendments to the *Federal Rules of Criminal Procedure* (Miller, McDonald, & Cramer, 1978), further recognizing plea bargaining as “an essential component of the administration of justice” (*Santobello v. New York* (1971)). In light of the recognition of the constitutionality of the plea bargaining process in the United States, guilty pleas can be better controlled with officials being held accountable for the actions throughout the process.

## CHAPTER TWO: STANDARDS

With the constitutionality of plea bargaining being upheld in the United States' courts of law, many standards and guidelines have been enacted to ensure proper practice. Because plea bargaining has been subject to increased scrutiny, with the general public and media often criticizing the practice, the legal acknowledgement of guilty pleas allows for rules outlining the process of submitting a plea to the court (Chilton, 1991). The main rules/ guidelines for plea bargains in the federal courts are located in Rule 11 of the *Federal Rules of Criminal Procedure*, the 1980's United States Department of Justice Prosecutorial Guidelines, and the American Bar Association guidelines for lawyers (Reinganum, 2000).

### **Federal Rules:**

In 1975, rule 11 of the *Federal Rules of Criminal Procedure* was amended in order to further recognize the use of plea bargains in court by making their use more visible and to provide guidelines for their use (T.L.M., 1980). "Rule 11 of the Federal Rules of Criminal Procedure permits prosecutors and defendants to enter into several types of plea agreements. It states that in exchange for a plea of guilty or *nolo contendere* the prosecutor will" engage in one of three pleas (Sigman, 1997, p. 1317). Of these types of pleas there are:

- (A) Dismissal of another charge; or
- (B) Recommendation for a specific sentence while also acknowledging that such a request is not binding on the court; or
- (C) Agree upon an appropriate sentence for the outcome of the case (1317)

Although the plea bargains are agreed between the prosecution and the defense, the court has the right to either accept or reject the plea – other than a type B plea, which is non-binding. Thus, through Rule 11, plea bargains were recognized as a contract to be upheld once made and approved by the court.

Along with the types of pleas to be made as laid out, Rule 11 also states certain conditions which must be met in order for a plea to be entered. These conditions include: informing the defendant of their right to trial, making sure that the plea is voluntary, the court must make sure there is factual basis for the plea, the defendant must be informed of the maximum and minimum penalties, the prosecutor must discuss the consequences of a guilty plea with the accused, and the defendant must be aware that they are waiving their rights (Cornell Law School, 2002). If such conditions are not met in the process of plea bargaining, the plea may be appealed in a court of law.

### ***The Alford Plea***

Rule 11 of the *Federal Rules for Criminal Procedure* specifically outlaws the use of a plea known as an “Alford plea” (9-16.015). The “Alford plea” arose from the court case of *North Carolina v. Alford* (1970). Prior to this case, North Carolina law stated that “a penalty of life imprisonment would attach to a plea of guilty for a capital offense, but the death penalty would attach following a jury verdict of guilty (unless the jury

recommended life imprisonment” (Plea Bargaining, 2008, p.3). Since Alford was charged with first-degree murder, he had the possibility of facing the death penalty. Prior to his trial, Alford pled guilty to second-degree murder, although he asserted his innocence on all charges. Unhappy with his 30-year imprisonment sentence, Alford appealed his case “claiming that his plea was involuntary because it was principally motivated by fear of the death penalty. His conviction was reversed on appeal” (Plea Bargaining, 2008, p.3). However, once the case was heard in the U.S. Supreme Court, the court did not believe that a defendant was “compelled” to submit a plea out of the threat of receiving the death penalty. Thus, the U.S. Supreme Court further reversed the appeal and reinstated Alford’s prison sentence and conviction. Therefore, the term, “Alford plea”, is used “when a defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty” (Cornell Law School, 2002, 9-16.015). Thus attorneys should not proceed with submitting a guilty plea if the defendant maintains their innocence in the case. However, if the defendant enters a plea of guilt but denies involvement, it is up to the attorney for the Government to provide proof through facts known to the Government of the defendant’s guilt in the matter. The use of any sort of “Alford plea” is frowned upon except in the most unusual of cases (Plea Bargaining, 2008, p. 3).

### **Department of Justice Rules:**

While Rule 11 laid out initial guidelines for the plea bargaining process, the U.S. Department of Justice Prosecutorial Guidelines provided more rules for the use of guilty pleas in court. The 1980 United States Department of Justice Prosecutorial Guidelines



went on to state that a plea agreement must be recorded in writing. Also, once the sentencing process has finished, the written plea agreement must be sent to the Sentencing Commission. The use of written pleas allows for the terms of the plea to be laid out clearly so there are no misunderstandings within the process (Ashcroft, 2004). If the plea is on paper, it leaves little room for questions as to the agreement and terms. Once the defendant signs the plea and initials the specific terms, the individual is bound to the agreement.

As the plea must be in writing, the department policy concerning bargaining also states the need for an honest sentence: “Any sentencing recommendation made by the United States in a particular case must honestly reflect the totality and seriousness of the defendant’s conduct and must be fully consistent with the Guidelines and applicable statutes and with the readily provable facts about the defendants history and conduct” (Ashcroft, 2004, p. 5) Thus, prosecutors cannot overcharge a defendant in order for a plea to seem more desirable. For example, “no attorney for the government may seek out, or threaten to seek, the death penalty solely for the purpose of obtaining a more desirable negotiating position for a plea arrangement (United States Attorneys Manual, Ch. 9). Nonetheless, just because such rules are provided, this does not mean overcharging has ceased to be practiced.

Other rules outlined within the *Guidelines* include the right to charge bargain – as long as it lies within the previous rules, downward departures should not be requested by prosecutors, and prosecutors may only enter a plea that is within the specified guideline range (Ashcroft, 2004). Overall, the rules outlined in the Department of Justice Prosecutorial Guidelines are designed to ensure that all prosecutors are using plea

bargaining in the same approved manner – allowing for proper steps to be taken in order for legal guilty pleas to be made.

### **American Bar Association Standards:**

Finally, the American Bar Association outlines standards for lawyers to use while engaging in the plea bargaining process. The American Bar Association (ABA) exists to provide guidelines for lawyer's actions and to bestow ethical standards for the legal association. In 1997, the ABA outlined "black letter" standards for criminal justice which addressed the issue of guilty pleas. These guidelines included the categories of: receiving and accepting a plea, withdrawals of pleas, how to go about negotiations, and lastly, alternative solutions to plea agreements ("Plea Bargaining," ABA).

The category of receiving and accepting a plea set standards for how a defendant should be advised, the proper procedures required for use of aid as counsel, how to determine if a plea is voluntary, and proper methods for keeping record of a plea. Thus such guidelines laid out specific procedures for lawyers to adhere to. By following these standards, lawyers have the ability to present a proper plea to the court. The category of setting the standards for withdrawals of pleas contained how to properly perform a plea withdrawal and when to know if such discussions would be inadmissible in a court of law ("Plea Bargaining," ABA online).

The final categories of the ABA standards concerned the actual plea discussions and alternative resolution. Laid out in the standards for discussions are the responsibilities of the prosecuting attorney, defense counsel, and judge - along with

guidelines regarding inadmissible pleas. Finally, the ABA provided standards on the use of diversion in sentencing, while also encouraging non-criminal resolution when appropriate (“Plea Bargaining,” ABA online). Through the standards outlined in Rule 11, the United States Department of Justice Prosecutorial Guidelines, and the ABA standards, lawyers are provided with the tools necessary to participate in the plea bargaining process.

### **Superior Court of Orange County, California Guidelines:**

The Superior Court of Orange County, California is one of the fifty-eight trial courts in California. Such trial courts provide an opportunity for resolution of criminal cases under local and state laws (CA Courts Overview, 2008). With the large amount of crimes happening every day, each county in California has the need for its own trial court – which is laid out in the California Constitution. As of 2003, the Superior Courts of California contained 1,498 judges, and 431 commissioners and referees. Thus the large caseload of the Superior Court of Orange County makes it necessary to have their own set of rules governing the legal process in general and plea bargaining in particular.

While pleas in a felony case are guided specifically by the *Federal Rules of Criminal Procedure*, the *Local Rules – Superior Court of California, County of Orange* outlines specific rules for the acceptance of misdemeanor pleas in court. Rule 852 of *Local Rules – Superior Court of California, County of Orange* contains the rules for plea bargaining in a criminal trial. Such rules include:

- A defendant who absents himself from a misdemeanor proceeding wherein a plea is entered through counsel and the pronouncement of immediate judgment is requested,

must do so with full knowledge of the pendency of criminal proceedings. Further, the court must be confident that the waiver of all rights, including the right to be present, is made knowingly and intelligently, and that acts of counsel are authorized by the defendant.

- To implement the foregoing policy, a guilty plea form shall have been executed by the defendant and his attorney, and shall be filed at the time of entry of the plea and prior to pronouncement of judgment. Said guilty plea form shall contain:
  - An express waiver of the defendant's presence for the entry of the plea if guilty or *nolo contendere*; and
  - An acknowledgment that the defendant has read and considered, and the attorney has explained to the defendant, each and every legal and constitutional right which the defendant is waiving. Further, an acknowledgment that the defendant understands each of the rights being waived. (*Local Rules – Superior Court of California, County of Orange, 8-7*)
- Defense counsel shall submit a written stipulation for a continuance of the pretrial hearing, with a time waiver, signed by defense counsel and, if applicable, a deputy district attorney, setting the date for the entry of plea.
- The clerk shall deliver the "Tahl" form and sentence recommendation form to the attorney for the defendant. After delivery to defense counsel no changes or alterations shall be made to these forms.
- Defense counsel shall return to the court at the next subsequent pretrial hearing and shall then submit the notarized "Tahl" form and sentence recommendation form containing the terms and conditions of probation, each containing the signatures of the defendant, defendant's attorney of record and, if applicable, a deputy district attorney. The defendant's signature on the sentence recommendation form shall include, immediately above the signature, the following language: "I understand and accept all of the conditions of probation." (*Local Rules – Superior Court of California, County of Orange, 8-8*)

Thus, these rules of the Superior Court of California, County of Orange specify the procedure for accepting a plea in court. These guidelines are specific to this particular court – ensuring that each plea goes through the same procedure before it is accepted in open court as the final judgment between the prosecution and defense.

While the Federal rules for plea bargaining are the overarching regulations for the process, individual states and counties maintain the ability to further regulate the

submission of guilty pleas. Also, individual lawyers and law firms may also maintain their own particular methods for submitting a plea. However, the *Federal Rules of Criminal Procedure* and the American Bar Association standards for lawyers constitute the final concerning the guidelines for plea bargaining (Reinganum, 2000).

### **CHAPTER THREE: VICTIM PARTICIPATION AND RIGHTS**

The 1970's are often talked about as the time of the origin of the victims' rights movement (Tobolowsky, 1999). This period saw an increase in the recognition of victims within the court system, which led to a demand for more victims' rights within the legal process. The legal system is often looked at as an entity designed to serve the public, rather than the private interest. However, most cases arise around the harm done to a victim – thus the victim is an integral part of a wide variety of cases. While the victim used to be completely left out of the trial, changes have been made most around victim inclusion in the sentencing phase with the use of Victim Impact Statements (O'Hear, 2007). Nonetheless, as it has been shown that more than 90% of cases are resolved through the use of plea bargaining, victim's participation in the negotiations have become questioned.

One of the first official recognitions of victims came after President Ronald Reagan's establishment of the President's Task Force on Victims of Crime in 1982. This task force provided the victim with greater access to the criminal justice system. Included in the Final Report were over sixty recommendations about the involvement of victims in the legal process. One significant recommendation was "that prosecutors consult with

victims and inform the court of the views of victims of violent crime regarding bail, pleas, sentencing and restitution” (Tobolowsky, 1999, p. 30). Furthermore, after the case of *People v. Stringham* (1988), the victim can include the person who was immediately harmed by the crime, but also the individual’s family members and caregivers – allowing next of kin to also contest the plea bargain (Roberts, J.V. and Grossman, M.G., 2008).

Following the release of the President’s Task Force on Victims of Crime, twenty-nine states have made constitutional amendments regarding victims’ rights. Also, all fifty states have some form of victims’ rights legislation (Verdun-Jones, Tijerino, 2002).

While such standards vary from state to state, most states have adopted a hybrid approach to the situation – having certain rights for some crimes, and broader rights for others.

Nonetheless, Federal law requires victims to be notified of their rights in the criminal justice system (Tobolowsky, 1999). However, because of the large number of individuals coming through the criminal justice system, some people worry about the overwhelming burden it would be to contact and track all victims of crimes (Glenn, 1997). While being notified about their rights is one thing, actual participation in the trial process is another. Victims may not want to be actors in the process out of fear of retaliation or having to relive the crime. Victim participation in plea bargaining was often not considered because such negotiations happened in private – not through the articulated information provided in court.

Many criminologists believe victims have a certain place within the criminal justice system, yet the actual structure of the victim’s role seems to be highly debated. The possible forms of victim participation include: a veto power over any proposed plea agreement, allowing the victim to express their views involving possible plea bargains,

and finally solely requiring prosecutors to consult with the victim prior to the negotiation stage (O’Hear, 2007): the final option is the most favored. “Approximately forty states currently require prosecutors to consult with victims regarding plea negotiations in their case” (Tobolowsky, 1999, p. 64). Thus, through speaking with the victim, the prosecutor has the chance to take note of the victim’s wishes concerning the case – being able to have those wishes taken into account in the plea. Of these states, Arizona has the strongest victims’ rights legislation by allowing victims to personally express their views at the plea negotiation hearing. Rather than playing a passive role in the criminal justice system, the Arizona model allows the victim to actively participate in the process. Through these Victim Impact Statements, valuable information is provided with a view to adequately address the degree of harm inflicted. However, no state has granted victims the right to completely veto the agreement – mainly out of fear of what this could lead to. On the other hand, it may be unconstitutional to provide the victim such power in the trial (Verdun-Jones, 2008). Nonetheless, the inclusion of victim participation in the plea bargaining process has shown to be effective to both the case, and the victim’s satisfaction with the criminal justice system (Tobolowsky, 1999).

Although federal rules are put in place for victim participation in the plea bargaining process, some criminologists still push for stronger victim inclusions guided by a constitutional amendment. While there were rules provided for how victims are to be treated during the legal process, without a constitutional amendment, there is no “legal readdress when someone in an official position does not acknowledge a victim’s rights” (Glenn, 1997, p. 23). Thus a constitutional amendment would guarantee victims of crimes have the opportunity to be involved in the criminal proceedings. This idea was further

perpetuated by the 1986 creation of the Victim Constitutional Amendment Network (VCAN), which mobilized support for amending the constitution in favor of victims' rights. Nonetheless, proponents of a victims' rights amendment seek to balance defendants' rights with those of victims – not to overpower defendant's rights (28). Instead of crime victims in some states having broader rights provided to them, an amendment would supersede state lines and provide victims' rights as equal to defendants' rights. "Just as Americans are familiar with the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments and rights they provide for defendants, so should they be familiar with rights for victims instead of having to find an attorney to scan the law books to determine what their rights are" (Glenn, 1997, p. 28). Finally, without a constitutional amendment, the rights a victim is afforded today have the ability to change with legislators' discretion.

### **Senate Bill 2329:**

Although the Federal law of the United States has proposed a greater inclusion of victims in the criminal justice process following the establishment of the President's Task Force on Victim's of Crime, some researchers believe there is still more room for protecting crime victims' rights. The Senate Bill 2329, also called the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lyn Crime Victims' Rights Act, was established to address the issue of victims' rights. This Act proposed a Constitutional amendment to enact new standards for victims' participation in the legal process (Fontana, 2004). However, it was further proposed to change the approach from



passing a Constitutional amendment to a more legislative route. This action was taken because of the difficulty in amending the Constitution as compared to adopting new legislation (Hulse, 2004).

The bill initially proposed an amendment to Part II of title 18 of the *United States Code* by the inclusion of a crime victims' rights chapter. According to Senate Bill 2329 (2004), "the term 'crime victim' means a person directly and approximately harmed as a result of the commission of a federal offense" (5). Such additions to the *United States Code* concerning the rights of crime victims included:

- The right to be reasonably heard at any public proceeding involving release, plea, or sentencing.
- The right to reasonable, accurate, and timely notice of any public proceeding involving the crime or of any release or escape of the accused.
- The right to full and timely restitution as provided in law
- The right to be treated with fairness and with respect for the victim's dignity and privacy. (Senate Bill 2329, p. 2-3)

Further provisions contained in the *Crime Victims' Rights Act* were:

- The establishment of an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim
- Disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims
- Provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant (Senate Bill 2329, 2004, p. 6)

The final changes to the *United States Code* included an increase in grants and funding for victim restitution (7 – 12). The *Crime Victims' Rights Act* proposed more than \$100 million over the following five years after its supposed inaction to further establish victims' rights within the criminal justice system (Hulse, 2004). Thus, Senate Bill 2329

represented a concerted effort to address the problem of victims' rights. However, although there was vast support for the *Crime Victims' Rights Act* (Hulse, 2004), the Bill encountered more difficulties than previously thought.

*Crime Victims' Rights Act*, Senate Bill 2329, was introduced in the 108<sup>th</sup> Congress on April 21, 2004. Sponsored by Senator Jon Kyl, the bill overwhelmingly passed through the Senate with a vote of 96 – 1 on April 22, 2004 (GovTrack, 2004, online). “Senator Ernest F. Hollings, Democrat of South Carolina, provided the sole vote against the legislation; aides said he believed it would be too burdensome for prosecutors” (Hulse, 2004, p. 1). Under the bill's arrangements, prosecutors would be more strictly required to take into account the victim's wishes in the trial procedure. Overall, the bill passed with strong advocacy from all sides. “Democratic and Republican senators said the measure was a long overdue recognition of what has been a steady erosion of the ability of crime victims to play a central role in the legal moves against the accused” (Hulse, 2004, p.1). However, although there was wide support for the *Crime Victims' Rights Act* in the Senate, the bill failed to become a law. Once passed through the Senate, the bill was never voted on in the House, or further signed by the President. Since the bill was passed in the previous Senate session, it was further cleared from the books with all other previously proposed bills and resolutions.

However, while the *Crime Victims' Rights Act* failed to achieve passage beyond the Senate, Sponsor James Sensenbrenner included the act in the larger proposed H.R. 5107: *The Justice for All Act* of 2004. Introduced September 21, 2004 the bill passed through the House on October 6, 2004 and further succeeded in the Senate on October 9,

2004. The *Justice for All Act* of 2004 finally became law on October 30, 2004 when signed by the President (GovTrack, 2004, online).

Through the combination of the *Crime Victims' Rights Act* along with other provisions included in the *Justice for All Act* of 2004, increased protection in the United States legal system has been provided to various entities involved in the criminal justice system – specifically victims of crimes (GovTrack, 2004). Thus, the passage of the *Justice for All Act* of 2004 provided sanctions to ensure that prosecutors are holding to obligations listed in the present guidelines. Along with methods of victims' protection supplied in writing, the addition of the *Crime Victims Rights' Act* in the larger *Justice for All Act* further provided checks on whether such guidelines are being followed through in reality – allowing the victims' role to be enforceable, while controlling prosecutors' actions. Furthermore, the use of plea bargaining will continue but there are now clear instructions for the proper treatment of victims in the process, and additional assurances that the legislation is being fully executed in the United States court system.

## **CHAPTER FOUR: AN ATTORNEY'S DECISION TO USE PLEA BARGAINING IN A CASE**

While interning at the Alternate Defenders Office, County of Orange, I was exposed to a variety of criminal attorneys. The Alternate Defenders Office is a branch of the larger Public Defenders Office, County of Orange. Since each client is afforded the right to have a fair trial, the Alternate Defenders Office handles cases that are declared a conflict by the main Public Defenders Office. Rather than the county paying a private attorney to handle conflict cases, the Alternate Defenders Office saves the county money

by providing government paid conflict attorneys. These are usually cases involving multiple defendants, cases in which a witness has been a prior client of the Public Defenders, or cases in which the victim was a prior client of the Public Defenders. Thus, although the main Public Defenders Office governs the Alternate Defenders Office, the Alternate Defenders operates as a separate law office – with its own attorneys, investigators, and secretarial staff. By operating separately, each client is assured a fair trial and investigation without conflicts between offices.

During my internship I had the ability to both speak to lawyers in the office about plea bargaining, and also observe them in court during plea negotiations. While each attorney had different ideas about plea bargaining and their opinions on the process, overall each attorney felt plea bargaining is extremely necessary to keep cases being resolved in a reasonable amount of time. Without “plea’ing” certain cases, attorneys in the Alternate Defenders Office felt that there would be no possible way to try each and every case that came to them – their case load is far too heavy. Thus their use of pleas allowed them to spend more time on clients who they felt had a better chance of achieving a more desirable outcome by going to court, rather than clients who would be better off accepting a plea and starting their sentence sooner. However, when it truly comes down to it, the client has the ultimate decision power in deciding whether to accept a plea bargain or proceed to trial – separate from what the attorney may believe is the best option.

## **Initial Steps in Plea Bargaining Process:**

Once an attorney receives a case, there are many options they may take in order to obtain the most desirable outcome. The first aspect to examine in a case is what kinds of pleas are available. The main types of pleas are: guilty, not guilty, and *nolo contendere*. *Nolo contendere* requires consent from the court and is used most commonly in situations where there is a pending civil suit and you do not want your client's plea used against him or her if a victim is suing the client in civil court. This type of plea can be used when the client is more comfortable not contesting the charges rather than saying guilty. Therefore, the client is not required to state that they are guilty of the crime before accepting the plea. While guilty, not guilty, and *nolo contendere* pleas are the most common, another plea may be used called a "slow plea." Although slow pleas are not provided for in the *California Penal Code*, it consists of a submission on the police report with a jury waiver - a waiver of the right to confront and cross examine witnesses. This is used when the charge is unfounded but the DDA (Deputy District Attorney) will not dismiss it because he/she fears the repercussions of such action. This is used where there is no factual dispute and one can "win on the law." It is also used when a client who is seeking to obtain a plea bargain nevertheless wants to preserve the right to appeal and cannot plead guilty or *nolo*: however, the court must agree prior to this arrangement. Thus, once a defense attorney receives a case, he or she must explore all of the possible strategies which may be adopted in that case – including how to best defend the client against their crime with which he or she has been charged.

While an attorney may make the decision on his or her own concerning how best to defend a client in court, at other times he or she may seek the help of other attorneys

and investigators in the office. At the Alternate Defenders Office, this was done through a trial preparation meeting. During such a meeting, any attorneys, investigators, and interns who are available come together to discuss defense possibilities in a case. The attorney involved in the case will usually provide the initial facts gathered and explain his or her thinking process in the matter. Through this brainstorming, the attorney is often able to see a multitude of different pathways which a case may take during the trial. If it becomes clear that the case is not very favorable to the defense, the attorney may choose to look towards plea bargaining as a means of resolution rather than risking the outcome of a trial. However, leaning towards a plea early in the process may allow the prosecution to believe they have a strong case – making it more likely that they will not offer a favorable plea.

### **How to Obtain a Desirable Plea:**

As the saying goes, “a case is only worth what you can get for it.” It is up to the defendant’s attorney to try to provide the best possible defense for their client – even if this means negotiating a desirable plea bargain before going to trial. However, there are certain tactics lawyers use to obtain a desirable plea. With the adversarial nature of the United States’ Legal System, case resolution can seem like a game – with each side trying to call the other side’s bluff. Whether or not it is a desired effect, with both sides arguing a different story, the truth is often pushed away.

Whether one ultimately wishes to proceed to trial or not, the most effective means of obtaining a deal is to be a good trial lawyer. If from the beginning the attorney only seems after a deal, the DDA and Judges will assume that the attorney believes that

he or she does not have a good case and the deal will not be as favorable to the client. If the defense attorney is not confident of winning the case, how can the District Attorney believe that offering a deal prior to trial will be a good decision? Although some deals once offered will not be offered again, it is ultimately the client's choice as to whether or not to accept any bargain – no matter how frustrating it may be for the defense attorney.

The second key attribute to obtaining a good deal is that timing is everything. Attorneys have the chance to “shop” for a Judge, arraignment, pre-trial, etc. – through scheduling and court rotations. It is up to the attorney to know which Judge is likely to be most sympathetic towards them and to know what legal arguments often work for that particular judge. Such arguments can include: a sympathetic client, the client's appearance, self-help actions the client has taken prior to the case, the client attending Alcoholic Anonymous meetings or programs prior to disposition, or the defendants involvement in school and the detrimental effects a criminal sentence may have on such an individual's academic future. While each judge has their own particular likes and personality, it is the key to figuring out their “soft spots.” Although “shopping” around, or using a judge's “soft spots,” may seem questionable, it is not outlawed in any regulations regarding attorney practices. All of the attorneys know how to play their part in the system and should know what strategies work best for him or her.

Calendar management is also a key factor in obtaining an attractive plea. It is important to not ask for too many favors in one day because a judge may be unlikely to grant them all. Since most pleas happen in the Judge's chambers, it is best to wait for the chambers to be cleared of other attorneys if the defense attorney is seeking special consideration since the Judge is more likely to offer a favor without the presence of a

wide audience – chambers is about “schmoozing” the court. The opposite is also true, if while waiting in chambers the attorney observes several good deals, it may be best to wait for another day to ask the Judge for a favor rather counting on the Judge to continue doling out favors throughout the day. Thus, while all the steps may be taken for a plea to be accepted, the timing of a request for a deal may lead to its rejection. It is also important to always keep in mind what the client wants and will accept. A deal is only good if it has the possibility of being accepted on both sides. There is no point in soliciting an offer that the client will absolutely not take. Offering a plea may seem desirable to a particular attorney: however, if the client wants nothing to do with it, this rejection can hurt the lawyer’s credibility and also weaken the overall case at hand. Furthermore, an attorney must always be ethical and maintain credibility. It is important for a lawyer to pick their battles and remember the ultimate goal – obtaining the best outcome for their client, no matter how difficult that may seem.

Next, it is critical to begin investigative work before looking for offers in a case. Investigation can be the key to either getting a case dismissed, or obtaining a desirable plea bargain. Without checking all the facts and background to a case before starting negotiations, the attorney may end up doing a lot more work than is really necessary. For example, in one case, a client was charged with felony possession of a controlled substance. The client was arrested after an officer stated he observed the client run a stop sign at a street intersection. Also, the officer alleged that the individual “took off” once sirens were activated. Upon pulling the suspect over, the officer found a small amount of a controlled substance in the vehicle and the suspect was subsequently arrested. However, prior to the preliminary hearing, the defense attorney asked his investigators to visit the



scene of the incident and take pictures of the intersection in order to prepare an initial defense against allegations that the client fled the scene. Once investigators arrived at the scene, the whole defense changed – there was no stop sign at the alleged intersection, and there were no stop signs between the area in which the officer allegedly “observed the individual fail to stop at a stop sign” and the final stopping point of the vehicle. When the defense attorney brought these facts up during the preliminary hearing, the case was subsequently dismissed. Thus, without the initial investigation work, the client could have ended up pleading to a charge that should not have been filed in the first place.

Finally, and most importantly, it is critical to maintain client control in any case. If an attorney wants the client to listen to him or her, then the attorney also has to listen to the client. This means returning their telephone calls, asking them what happened, talking to them about their case, telling them what the attorney is trying to achieve – often in a variety of ways – and how the attorney will set about reaching his or her goals for the case. With the Alternate Defenders Office providing legal representation for people who are unable to afford private attorneys, clients often have some mental disabilities. This makes plea negotiations more difficult in the sense that, while explaining each deal, the client may need to have the explanation repeated multiple times and in greater detail in order to grasp the full ramifications of plea bargaining. This may also require visiting them in jail before a hearing, or having someone else in the office speak to them. Nonetheless, if the attorney respects and cooperates with his or her client, the individual will most likely end up respecting and cooperating with them.

However, not all pleas proceed as planned. Some clients believe they should go to trial – even with a vast amount of evidence telling them otherwise – and it is his or her

attorney's job to do as the client pleases. Still, if the attorney receives an offer that they believe their client should take, and the client remains unwilling to accept it, the attorney has the option of requesting the Judge or the Deputy District Attorney to keep the offer open – making sure they mark this in the file. This process allows the attorney more time to speak to the client and better explain the reality of the situation than is possible in court. Conversely, if the client wants to accept a plea that they attorney believes they should not, the attorney retains the power to tell the court that they do not concur with their clients decision to accept the plea bargain. When defense attorneys state that they are not in agreement with their clients in relation to a plea, they are protecting themselves in the event that an appeal questions they voluntariness of a plea. However frustrating it may be, the decision as to what to do lies in the defendants' hands and they are the ones who will be most directly affected – no matter what may be their attorneys' emotions concerning the cases in question.

### **Once a Plea is Obtained:**

Once the defendant decides that he or she would like to go forward with the plea bargaining process, the defense attorney's job does not stop there. In the Superior Court of California, County of Orange, the form a client and attorney fill in, outlining the consequences of a plea, and what they are pleading to, is called a "Tahl" form after the case of *William A.A. Tahl v. Joseph O'Connor, Sheriff of San Diego County* (1971). This case involved William Tahl, who was sentenced to death after his pleas of "guilty to murder in the first degree, attempted armed robbery, rape, and grand theft auto" (1). The petitioner asserted that he was not provided effective counsel because his counsel failed

to raise the insanity defense. He further applied for a “writ of *habeas corpus*, seeking to overturn his conviction” (1). However, the court denied his petition for writ of habeas corpus finding that the petitioner’s claims were ill-founded. Thus a “Tahl” form outlines the direct consequences of submitting a guilty plea.

While the “Tahl” form outlines the effects of submitting a guilty plea, it is up to the attorney to advise the client of fines that must be paid, mandatory assessment fees regarding the crime committed, the costs of house arrest, diversion fees, costs of formal probation, and what to do if their client cannot pay fines. Each attorney representing a client who is submitting a guilty plea must further advise his or her client of the consequences in order to assure a proper plea has been provided to the court. This might include talks concerning: the withdrawal of driving privileges, immigration consequences, maximum sentence, maximum period of probation, offender registration, and the effects on professional licenses. Without making an attempt to advise their client about the direct consequences of submitting a guilty plea in a case, the attorney’s professional license is possibly at stake for unethical attorney practices.

Although there are specific federal, American Bar Association, and local court rules, individual lawyers and law offices have varied opinions about how to go about negotiations – both with the court and client. While following their client’s wishes, every attorney is ethically bound to provide the best defense possible for their client – whether they may be guilty or innocent. However it is how a lawyer conducts such defense that varies from individual to individual, and also from case to case. Ultimately, it is up to either a judge or a jury to make the final determination of guilt or innocence – not the attorney.

## CHAPTER FIVE: ISSUES WITHIN PLEA BARGAINING

Although plea bargaining is widely used across the United States, many issues concerning its use in the criminal justice system are still present – causing plea bargaining to remain controversial. These issues include: plea bargaining’s effectiveness, the economics of accepting a plea rather than going to trial, and the ethics of bargaining. While there will always be critics in every situation, plea bargain remains inherent to the criminal justice system.

### **Effectiveness:**

One of the main issues concerning the widespread use of plea bargaining within the legal system involves the cost effectiveness of a plea versus a full trial. The economics of the cost of going to trial for each case, contrasted with the minimized time spent in court during plea negotiations, provides evidence for the cost effectiveness of such use. Clearly, the District Attorney does not have enough resources to engage in a full-blown trial for each crime committed. Thus, by moving toward guilty pleas as much as possible, the District Attorney is able to ration their expenses for the most valuable trials at stake. Rather than splitting the money between all cases charged, the District Attorney only needs to obtain money for 10% of the cases – with 90% of the cases being resolved through plea bargains (Adelstein, 2001). Therefore, one of the main arguments

as to why plea bargaining should continue to exist involves the money saved to the criminal justice system (Adelstein & Miceli, 2001).

Along with the money that is saved, plea bargaining allows for efficiency, in the sense that many cases can be processed simultaneously or in a short period. “Plea bargaining is the grease which makes the criminal justice system work” (Riley, Rodriguez, & Ridgeway, 2000, p. 14). With prosecutors intent on maximizing the amount of cases resolved, plea bargaining allows for swift convictions of multiple offenders. For, plea negotiations are obtained much more rapidly than if a case were to go to trial. By offering a plea at the beginning of the trial process, the government saves money, the defendant generally receives a more lenient sentence, and the prosecutor obtains a quick conviction – a situation pleasing to many parties (Adelstein, 2001).

However, not all plea bargains are obtained at the beginning of the process. For example, the first plea offered by the District Attorney may not be favorable to the client. If both the client and defense attorney are not pleased by the offer, they may push towards trial in order to obtain a better outcome – however risky it may be. Thus the process toward trial will begin and valuable resources will be committed by both the District Attorney and the defense attorney. Because trial preparation can end up taking years, a plea bargain can also be offered at a later occasion. If the trial preparation is near completion when the plea bargain is put on the table, the client’s acceptance of the bargain will only result in a marginal saving of resources. Therefore, the earlier both parties accept a plea bargain, the more resources are saved overall.

It has also been stated that plea bargaining maintains the adversarial process and “traditional sentencing theory” of usual criminal trials (McConville, 1998). Thus,

although sentencing is not obtained through the openness of a trial, the process does not differ drastically from the normal procedures.

Whilst retaining the trial as the badge of adversariness, the system could justify giving a sentence reduction to defendants who were truly remorseful and who thereby gave up their right to trial by pleading guilty because, in doing so, they had taken the first step towards rehabilitation and had thus already gone some way towards meeting the objectives which any sentence would otherwise have to secure alone. (McConville, 1998, p. 563)

Thus, if an individual chooses to plead guilty, they have already taken the first step to recovery by recognizing their responsibility for the crime(s) charged and should accordingly be afforded a more lenient sentence. The plea bargaining process has been shown to not only reduce the amount of acquittals, but also, to further reduce the amount of crime by decreasing the number of cases dismissed (Rhodes, 1980). With plea bargaining, the District Attorney is assured of a conviction.

While plea bargaining is an efficient means to resolve high case loads, the process simultaneously acknowledges guilt and prevents undue harm (Miller, McDonald & Cramer, 1978). Thus, the prosecution maintains high rates of convictions, while the defense is able to provide their client with a more lenient sentence. Also, with the use of plea bargaining, a victim is prevented from secondary victimization by not having to testify and disrupt their personal and professional life any further (Piccinato, 2005): in the course of a trial, a victim may have to relive the events in painful detail. Not only will the victim be expected to explain their side of the case but also, by testifying, he or she will be exposed to cross examination – an often stressful process. Thus every

variation in the victim's story will be questioned, along with their overall credibility. If a plea bargain is accepted, the victim can fully begin the healing process, while the defendant is held to answer to their actions (Gerard & Nelson, 1998, 8-9). However, because the effects of conviction largely determine the ultimate disposition where there are sentencing guidelines in place, submitting a guilty plea provides the defendant with the opportunity to determine the sentence in his or her case (Mather, 1978). Then again, whether the defendant should be allowed such power in the trial process is an issue to be questioned.

### **Critiques of Plea Bargaining:**

A major critique of the plea bargaining process concerns the issue of whether a defendant has the ability to truly choose a plea freely. If the contrast between the perceived costs of going to trial as compared with the benefits of accepting a plea bargain is too large, the defendant's ability to make a rational choice is hampered (Bar-Gill & Ben-Shahar, 2007). With such a large difference between charges on the table, defendants often choose to plead guilty out of fear of the "gamble" of a trial. On the other hand, prosecutors may pressure the individual to plea for a multitude of reasons: these include time constraints on the preparation for trial, cost-benefits analysis, and the prosecutor believing the trial may result in a successful outcome (Lynch, 2003). Plea bargaining "creates a situation in which defense counsel may be tempted to give precedence to his own interests rather than to the best interests of the accused" (Piccinato, 2005). Thus, if a defendant chooses to take a plea out of false pretenses for a desirable

outcome provided by their attorney, the voluntariness of the plea is put in question – a highly important factor in the process. It has also been shown that defendants who entered a guilty plea in order to minimize the suffering of having to complete a trial were more likely to believe that the process had not been fair. Thus, the satisfaction of the defendant in the case was inversely related to the pressure they felt in making a plea (Bordens & Bassett, 1985). Furthermore, others believe that this specific use of pleas is made through threat, rather than free will (Maich, 2007).

Another critique of the plea bargaining process concerns the “subversion” of many values inherent to the criminal justice system (Piccinato, 2005). For example, the United States legal system prides itself on the fair and equal treatment of each offender, and the right of individuals to a trial. Yet, through the use of plea bargaining, most of the process is done in private – between the prosecution and the defense. The conversations are often not made public, and are done in a “hushed” and quick process (Piccinato, 2005). Also, when an individual chooses to participate in the negotiations, they are forced to give up their rights to be heard in a trial – an action that contravenes the *Bill of Rights*. “Typically, plea bargains are not the result of sustained and normal negotiation procedures,” rather they come through hurried discussion (Adelstein, 2001, p. 502). As Justice Hugo Black stated, each defendant has the right for the state to conduct an investigation of his or her case, and participate in the process of preparing for trial (Lynch, 2003). Plea bargaining removes the right of an individual to have a trial. The question of whether innocent individuals may choose to submit a plea out of fear of going to trial causes some concern. If prosecutors make it seem that there is a large enough difference in outcomes between submitting a plea and going to trial, rational individuals



may choose to take a plea in order to “get it over with” – even if they are innocent. For example, if a client is unable to obtain the money which is necessary for him or her to be bailed out of jail, the client often ends up waiting months for a trial. Once the individual has sat in jail for a long period, he or she may choose to accept a plea to leave jail as early as possible – rather than wait in jail longer for their trial to begin. Although the individual may still believe that he or she is innocent, the fear of waiting in jail for a lengthened amount of time in order for their trial to be heard may cause that individual to plead guilty to crimes they possibly did not commit. Thus the process of plea bargaining can lead to inaccurate and unjust convictions (Bond, 1982) – with the guilty getting off too easily, and the innocent too harshly. Furthermore, District Attorneys realizing that the longer an individual sits in jail, the more likely they are to accept a plea, may purposely postpone hearings in the expectation that the defendant will ultimately choose to plead guilty rather than risk conviction through a full trial. Although cases are being resolved quickly with plea bargaining, if the outcome is not accurate, the method of plea bargaining is unable to provide justice – a central component of the United States’ legal system.

### *Alaska’s Ban*

While one of the main arguments for accepting the process of plea bargaining revolves around the issue of its effectiveness, some literature questions whether this argument is valid (Rubinstein & White, 1979). A frequently expressed rationale for plea bargaining is that the court system would be overloaded if the majority of cases were not resolved through pleas. Guilty pleas allow cases to be heard in a quick manner. Thus, without plea bargaining, the court system would be unable to provide accused persons

with the right to a “speedy trial” (Bond, 1978). However, other literature questions whether a ban on plea bargaining would in fact overload the courts (Rubinstein & White, 1979).

Alaska’s 1975 ban on plea bargaining has often been used as an argument against many criminologists’ theory that plea bargaining reduces the workload for the courts. The Attorney General enlisted the plea bargaining ban in Alaska in order to emphasize the “proper role of courts” in sentencing (Rubinstein & White, 1979, p. 368). After the ban, prosecutors were unable to offer reduced charges as a *quid pro quo* for guilty pleas, and could therefore only recite the facts of the trial. Thus the discretion of the prosecutor and defense was limited.

Another reason for the implementation of the ban was the perception of socioeconomic disparities within the legal system. Prior to the ban on plea bargaining, middle-class defendants were affected most negatively. For, such individuals were unable to afford high priced lawyers and did not qualify for public defenders (Rubenstein & White, 1979, p. 371). Thus, these individuals were unable to make pleas which were as beneficial as those made by others with a higher income. However, the ban on plea bargaining failed to eliminate the socioeconomic disparities – defendants’ income remained a significant factor in legal counseling (382). Nonetheless, the ban did not prove to be unsuccessful for all actors. While prosecutors believed they were doing more work, judges obtained more discretion in the sentencing process (372) - a major goal of the ban’s implementation.

Along with the increased discretion held by judges, the years following Alaska’s ban on plea bargaining saw a decrease in the disposition time (Rubinstein & White, 1979,

p. 374). A fact that contradicts what many researchers believed would happen without plea bargaining (Adelstein & Miceli, 2001). Alternatively, researchers were unable to attribute the decrease in disposition time directly to Alaska's ban. Another result of the ban was a trend towards more severe punishments in burglary, larceny, and property crimes – this same effect was not found in violent crimes. Nonetheless, the increase in sentencing mainly affected first-time offenders (378). Plea bargains are often offered to first-time offenders with the idea of giving an individual a chance for an unlucky “mess-up.”

Thus, with Alaska's ban on plea bargaining showing no significant change in the rate of guilty pleas (Rubinstein & White, 1979), the main argument revolving around plea bargaining's effectiveness comes into question. Although researchers were unable to definitively attribute the decrease in disposition time directly to the ban on plea bargaining, the fact that no significant change in the rate of guilty pleas was revealed calls into question the validity of the argument that plea bargaining is the only effective method of dealing with large numbers of criminal cases. With plea bargaining's long history in American culture, states have been hesitant to change their practices – especially with such a drastic change in how cases are resolved. However, if the current structure is shown to not be as effective as previously believed, the issue of plea bargaining's use should be investigated further.

### *Ethics*

An additional critique of plea bargaining involves the ethics of such a practice. While some commentators believe that plea bargaining is an effective method of processing criminal cases (Adelstein & Miceli, 2001), others nevertheless question

whether negotiating plea bargains is an ethical practice (Cassidy, 2006). While the guidelines provided for plea bargaining in the *Federal Rules for Criminal Procedure* articulate the proper steps to take during the process of submitting a guilty plea, they do not take into account the individual characteristics of attorneys. Thus, while guidelines are provided, they do not address ethical concerns that may arise in individual cases.

There are two kinds of views on ethics: the deontological view and the consequentialist view. The deontological view of ethics states that one must look towards prior practices in order to determine the moral course of action (Cassidy, 2006). Thus, if the practice of plea bargaining has been used throughout the years, it is ethical by precedent. Consequentialist views, on the other hand, assert that an action is moral if it increases the happiness for humans and improper if it increases suffering (Cassidy, 2006). Accordingly, plea bargaining would then be ethical if it always increases an individual's happiness and furthermore decreases suffering. From this point of view, it is questionable whether plea bargaining is ethical. If an innocent individual chooses to make a guilty plea out of the fear of going to trial, plea bargaining necessarily results in an increase in his or her suffering since such person should not have to suffer at all for a crime they did not commit. Conversely, plea bargaining has deep historical roots in the United States' legal system, passing the test for being deontologically ethical. However, it does not pass the consequentialist view on ethics and should, therefore, be considered an unethical practice according to this particular point of view. For, the United States' legal system does not condone the conviction of innocent people – a possibility with the use of plea bargaining.

## CHAPTER SIX: ALTERNATIVES TO PLEA BARGAINING

In light of the many critiques of plea bargaining, the critical question becomes what is an alternative process to engage in other than the use of guilty pleas? Plea bargaining seems to allow for an efficient method to resolve high caseloads (Adelstein & Miceli, 2001). Therefore, it would be reasonable to believe that, without plea bargaining, courts may become overloaded by the amount of cases which would come before them. However, alternatives have been suggested to the use of plea bargains. These alternatives include: the use of judge trials, a general reduction of punishment, and the abolition of victimless crimes (Bond, 1982).

The use of a trial by a judge would cut down the amount of time needed during the process because no jury would be required. Rather, the individual would plead their cases solely in front of the judge in order for a resolution to be reached (Bond, 1982). However, the trial would still require significant time and energy to be spent by both sides. The prosecution and defense would have to go through the motions of trial preparation in order for the strength of their cases to be evaluated by the judge for the final decision. This method would also grant the judge a large degree of discretion in the sentencing of defendants. Rather than a “jury of peers” deciding the outcome of a trial, the judge would maintain full discretion in the outcome of the case.

With the effectiveness of plea bargaining depending upon the efficient resolution of cases, a general reduction in sentencing would allow for individuals to pass through the criminal justice system at a quicker pace (Bond, 1982). Although the process of going to trial would require an increase in the amount of time spent on cases, more individuals

would be able to cycle through the legal system at an expedited pace with decreased sentences. “Under plea bargaining, the guilty plea, which closed a case with finality, protected order, and with it, property by drawing conflicts into court and working both to render law known to citizens and to inculcate a sense of consequences that might deter the robber or thief” (Vogel, 1999, p. 226). However, with the current political structure and the “tough on crime” approach to justice, society may question whether letting defendants off more easily is the correct action to take for efficiency in the criminal justice system. However, there needs to be some give in an overcrowded criminal justice system as the one we see today.

The last alternative given against the use of plea bargaining is the abolition of victimless crimes. Such crimes would include white-collar crimes and drug offenses (Bond, 1982). It has been shown that the majority of sentences of individuals involve drug cases (Petersilia, 2003). Thus, if drug offenses were not classified as crimes, there would be a diminished amount of cases being sent through the criminal justice system. With a decrease in the amount of cases to be processed, the District Attorney has the ability to spend more time and resources on other types of crimes – including the more violent offenses. Since the perpetrators of victimless crimes are seen as not being a direct safety concern to the general public, it can be argued that their problems should not be addressed through the criminal justice system. However, drug crimes can often be indistinguishable from other types of crime – going hand in hand (Petersilia, 2003). For example, a person may rob a store to get money to buy drugs, or solely because they are high on drugs and not thinking clearly. Therefore, the outward appearance of the situation is the person is a thief, while upon further review, their drug problem is the main issue at

hand. Thus, while plea bargaining has been established as one of the most used methods of resolution in the criminal justice system, there are alternatives to its use which still allow for courtroom efficiency.

### **Another Country's use of Plea Bargaining: A Canadian Perspective:**

With Canada being one of United States' neighbors, one may expect their legal systems to be similar. However, this is not the reality of the present structure. Although Canada has differing criminal justice practices, the reliance on guilty pleas in approximately 90% of their cases is similar to the practice in the U.S. (Verdun-Jones & Tijerino, 2002). However, one of the main differences between Canada's plea negotiations as compared to the United States is that Canada has less extensive regulations on the process.

With the implementation of the *Justice for All Act* of 2004, United States obtained legislation to not only regulate the practice, but also had sanctions in place for prosecutors who failed to comply with plea bargaining guidelines (GovTrack, online). While each Canadian province and territory has some form of legislation regarding victims' rights, the use of plea negotiations has not been formally recognized in legislation. Without such recognition, officials cannot be held fully accountable for their actions (Verdun-Jones & Tijerino, 2002). Although guilty pleas resolve around 90% of cases in the Canadian criminal justice system, the practice remains relatively uncontrolled. For example, "there is no direct judicial scrutiny of the contents of a plea agreement, nor is the agreement supervised by the court" (Reynolds, 2006, p. 7). With the

lack of transparency in the system along with no formal regulations, there is no assurance that the rights of victims will be protected (Verdun-Jones & Tijerino, 2002). Also, whereas in the United States, defendants are allowed to withdraw their pleas at most stages in the criminal justice process, such attempts in Canadian criminal proceedings are rare (Reynolds, 2006). Thus, although the reliance on guilty pleas in both the United States and Canada is similar, the lack of formal regulations in Canadian plea negotiations causes some concern.

If the practice of plea negotiations is so widely used, there need to be guidelines set in place in order to ensure that pleas are actually being submitted in a correct manner. “From the point of view of the accused, the lack of a formal procedure requiring the disclosure of a plea bargain by counsel means that there is currently no independent review of whether they have entered into such an agreement voluntarily and with full knowledge of the potential ramifications” (Verdun-Jones & Tijerino, 2002, section 3.3). Thus individuals could be submitting pleas under false pretenses from the Crown. In order to rectify this situation, formal regulations need to be adopted to ensure the protection of the accused – along with the rights of victims in the criminal justice process. The Canadian criminal justice system would then have the ability to hold officials accountable for their involvement in plea negotiations – further regulating legal proceedings.



## CHAPTER SEVEN: DISCUSSION AND CONCLUSION

Plea bargaining has had a diverse history within the United States of America. Although previously frowned upon, the acceptance of guilty pleas is presently the most common method in the resolution of criminal justice cases – and probably will be in the future (Herman, 1997). After the case of *Santobello v. New York* (1971), the use of pleas was officially recognized as a beneficial process in the legal system (Miller, McDonald & Cramer, 1978). Through plea bargaining's recognition as an integral part of the United States' criminal justice system, formal regulations have been put in place to ensure its proper use. Such regulations include: the type of plea allowed to be made, ensuring the plea is voluntary, and the inclusion of the victim in the process (Adelstein, 1978). Thus, while this method of resolving court cases is widely used, the implementation of strict guidelines helps to ensure that prosecutors are correctly submitting pleas.

Although the use of plea bargaining has been constitutionally upheld, many critiques concerning the use of guilty pleas still remain. One of the downsides of plea bargaining given is that, through the submission of a guilty plea, defendants are forced to give up their right to a trial by their peers – a constitutional right as a citizen of the United States of America. Since the jury is meant to be a check against the abuse of power, through the use of plea bargaining, the power of the prosecutor and defense to determine the disposition of a case goes relatively unchecked (Maich, 2007). Thus the attorneys, and ultimately the judge, end up determining the guilt or innocence of an individual, not a jury of their peers. Also, as Alschuler (1979) proposed, plea bargaining fails to consistently distinguish the innocent accused from the guilty, since all parties are faced

with the similar pressure of submitting a guilty plea. Since some individuals may choose to accept a plea simply out of fear of the consequences of going to trial, plea bargaining does not ensure that the guilty are punished and the innocent acquitted. Thus innocent individuals may be forced to pay the consequences of a crime they did not commit – no matter what they are pleading to and accepting the responsibility for in front of the judge. On the other hand, researchers state that, with the recent increase in the amount of criminalized offenses, courts need to resolve cases in an efficient manner – which plea bargaining is said to do. Rather than engaging in a lengthy and costly trial with no certainty as to the outcome, plea bargaining frequently results in a more lenient sentence to the defendant with the assurance of a conviction for the prosecution (Bond, 1982). Thus the use of guilty pleas is satisfying to both parties –granting both sides some degree of power over the situation.

However, as with the entire United States’ legal system, there is often room for improvement. For example, Chilton (1991) believes in the open-ended regulation of plea bargaining. This would be done through the use of increased screening and reviewing in order to require more probable cause and regulate prosecutorial overcharging. Although current guidelines exist for the process of submitting a plea, open-ended regulation allows more flexibility. More judicial screening in the process would take into account socially acceptable ethical considerations (Chilton, 1991). With the future of the United States’ legal system relying heavily on the use of plea bargaining, all considerations of change should be accounted for in order to assure justice is being provided through the large use of guilty pleas.

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