

PLEA BARGAINING AND PLEA NEGOTIATION
IN THE JUDICIAL SYSTEM

Jerry C. Jolley
University of Utah

This paper analyzes plea bargaining and plea negotiation in the American judicial system. Plea bargaining refers to informal negotiations leading to an agreement under which the accused enters a plea of guilty in exchange for a reduced charge or favorable sentence recommendation by the prosecutor in criminal court cases. This type of plea negotiation is not recognized in the legal statutes and operates by a subsystem of "invisible" controls. Plea bargaining is a permanent fixture in our legal system to the extent that at present, the courts cannot operate without it.

Studies are analyzed which reveal that seventy-five percent and perhaps as many as ninety-five percent of all criminal cases do not go to a jury trial, and a substantial number of these cases involve a negotiated bargain.

Four types of bargaining or negotiation are discussed. These usually involve bargaining to reduce a sentence; to show leniency in sentencing; to settle for a lesser charge or one charge for a variety of offenses; or to drop charges entirely.

Contrary to popular belief, plea bargaining has become ingrained in our legal system because offenders and agencies such as police departments, prosecutor's offices, and the courts benefit from its use. It can be efficient, time saving and less risky to the parties involved. Specific benefits to the offender, prosecution, defense, and judges are mentioned. It is also noted, however, that the accused may fare better in a jury trial.

Arguments for and against plea bargaining are presented. Key elements of the President's Commission on Law Enforcement and Administration of Justice (Task Force Report: The Courts) relating to plea bargaining is reviewed. The conclusion drawn is that bargain justice has become a necessity in our present legal system. However, substantial change must occur within the near future to bring official recognition and control in plea bargaining and to protect the rights of those involved.

Introduction

Probably one of the least understood institutions in this country is the judicial system involving criminal cases. The general public continues to assume that the criminal offender proceeds through the court system in the typical Perry Mason fashion with the guilty meeting his fate at the hands of a competent jury. This, in fact, is not the case. For example, most offenders do not go through a

jury trial at all as we shall further illustrate.

One of the major reasons for judicial procedure differing from that generally expected by the public is the functioning of a subsystem of somewhat "invisible" controls. Plea bargaining and negotiation is one of these elements that has a vast influence on the system, and upon which the judicial system has come to rely. In the official statutes, however, plea bargaining is not recognized. It has gradually ingrained itself into court procedure, and now because of expediency, remains a permanent fixture.

In brief, plea bargaining refers to informal negotiations "looking toward an agreement under which the accused will enter a plea of guilty in exchange for a reduced charge or a favorable sentence recommendation by the prosecutor" (Task Force Report, 1967:9). This can be accomplished by a brief conversation in the hallway of the courthouse, or it can be "a series of elaborate conferences over the course of weeks in which facts are thoroughly discussed and alternatives carefully explored" (President's Commission, 1968:333). There are always at least two generalizations that can be made about these negotiations: 1) they are conducted informally and out of sight, and 2) that the issue in a plea negotiation always is how much leniency an offender will receive in return for a guilty plea (President's Commission, 1968:333).

Some persons have a less favorable name for plea bargaining--"copping out." This "cop-out," says Harold Garfinkel, is "a successful degradation ceremony which reasserts ultimate social values and strips the accused of his former status." Essentially, this is a process in which the individual

...is recast in a manner acceptable to all participants, including potentially the accused himself, the cop-out ceremony in which the accused publicly acknowledges his guilt and pleads guilty to a lesser charge results in many less valuable consequences. In part, the cop-out is a charade in which the accused projects a suitable degree of guilt, penitence, and remorse, meeting the suitable minimum standards for such responses expected by the prosecution, defense, and court, which ultimately decides the future life of the offender (Knudten, 1970: 445-446).

In the remaining sections of this paper, we shall deal with the following four aspects of plea bargaining: 1) How much plea bargaining takes place, 2) What are the forms and processes used, 3) Who benefits from plea negotiation, and 4) What are the arguments for and against the use of plea bargaining in the judicial system.

The Extent of Plea Bargaining

The most obvious outcome of research into the statistics surrounding plea bargaining is that it is common; and secondly, most offenders do not go through a court trial but avoid it by pleading guilty and receiving direct judgment from the judge.

Indications are that more than three-fourths of all criminal cases do not go to a jury trial. In fact, the true figures are most likely closer to ninety percent; and if misdemeanor offenses are included, the percentage is probably about ninety-five percent (Task Force, 1967:9; ABA Project). Of course, not all cases that involve a guilty plea are the result of some form of plea negotiation, but these statistics are overwhelming in light of the traditional view of how the courts function.

Below is a table summary of the findings of several studies concerned with the extent of guilty pleas.

Percent of Guilty Pleas in Various Studies

Study	Percent Pleading Guilty
Arthur S. Blumberg (Metropolitan Court, 1950-64)	91-95% ^a
Dominic R. Vetri (Federal courts, 1956-62)	79% ^b
Donald J. Newman (Wisconsin county court, 1956)	93.8% ^c
Jerome H. Skolnick (Federal Courts, 1960-63)	86% ^d
Abraham S. Blumberg (Large Metropolitan Court, 1962)	87% ^e
President's Commission on Law Enforcement and Administration of Justice (9 States and District of Columbia, 1964)	73.3-95.5% ^f
ABA Project on Minimum Standards for Criminal Justice, 1967	90-95% ^g

^aBlumberg, 1967:29-30.

^bVetri, 1964:865.

^cNewman, 1970:173.

^dSkolnick, 1966:13.

^eBlumberg, 1969:279.

^fTask Force Report.

^gABA Project.

While we cannot be certain how many of the above cases did involve plea bargaining, evidence would seem to show that a large percentage did in fact include some form of plea negotiation. A University of Pennsylvania Law Review study which surveyed 205 prosecutors' offices in forty-three states revealed an estimate of thirty to forty percent of the cases as having resulted from plea negotiations after the defendant pleaded guilty (Vetri, 1964:896-899). In Newman's sample, over half (56.7 percent) admitted to plea bargaining (Newman, 1970:179). The President's Commission Report did not even attempt to determine the percentage of cases that included bargaining. Which again serves to illustrate the difficulty of dealing with the "invisibility" of plea negotiations. Most sources, including the President's Commission, do concur that a "substantial"

number of cases do have the negotiation element present. These negotiations take a variety of forms.

The Process and Forms of Plea Bargaining

Because of the clandestine nature of the negotiated plea, the system usually operates in an informal and somewhat invisible fashion. Usually the parties involved know what is taking place; but there is no formal recognition that negotiation is in process, and in some cases, it may even be denied.

As a result there is no judicial review of the propriety of the bargain--no check on the amount of pressure put on the defendant to plead guilty. The judge, the public, and sometimes the defendant himself cannot know for certain who got what from whom in exchange for what (Task Force, 1967:9).

The cloak of secrecy is beneficial to some of the parties, however, as we shall discuss later in the paper.

Before and during the negotiation process, both the prosecutor and the defending attorney must keep in mind that the guilty plea must be voluntary and must be made with an understanding of the specified charge or charges. If this is not done, the guilty plea can be withdrawn at any time. Failure to comply with this rule has usually been held to be a violation of due process (Knudten, 1970:382).

Donald J. Newman has compiled some of the most revealing studies on plea bargaining. He suggests that there are four general types of considerations received by offenders in exchange for their guilty plea (1970:178-179).

The first type involves a plea of guilty being entered by the offender in exchange for a reduction in the charge brought against him in the complaint. This is usually done in cases where the statutes allow for varying degrees of severity related to the same offense, such as in homicide, assault, and sex offenses. Newman indicates that this form was mentioned as a major issue in twenty percent of the cases in his study.

The second form is bargaining concerning the sentence. Here the guilty plea is entered by the accused in exchange for a promise of leniency in the sentencing. Sometimes the result is probation for the offender, sometimes it is a less than maximum sentence in a penal institution. Oftentimes, the arrangement is proposed bluntly in this format: "If you plead guilty to this new lesser offense, you will get less time in prison than if you plead not guilty to the original, greater charge and lose the trial" (Sudnow, 1965:257). Newman found this form to be the most frequently used, occurring in almost half of the cases studied.

The third type of bargaining is the bargain for concurrent charges. This form was used most often by offenders who pleaded without counsel. This is common where numerous charges for the same or related offenses such as larceny or burglary are filed. The result may be a reduced sentence, but it also may merely mean serving one sentence for a variety of offenses rather than a more

lengthy procedure. This form was reported in about twenty percent of the cases.

The last generally used form is the negotiation for dropped charges. Included here was an agreement on the part of the prosecution to dismiss one or more charges against the accused if the offender would in turn plead guilty to one offense-- usually the major charge. For example, a charge of theft of a weapon used in armed robbery might be dropped to obtain a guilty plea to the armed robbery charge. About thirteen percent of the cases studied used this type of bargaining.

In addition to the above-mentioned plea negotiations, Newman stated that about thirty-seven percent pleaded guilty, they said, without any type of negotiation.

These processes and forms are used on a cooperative basis by the persons involved because the parties concerned and the system have benefitted in a variety of ways by their actions.

Who Benefits from Plea Negotiation?

Contrary to the popular public view of the judicial process, in practice, police agencies, prosecutors' offices, and the courts operate on the assumption that most cases will be rapidly disposed of by the use of the guilty plea. Not only is there an element of time saving and efficiency that is at stake, but also there is a "risk" factor involved. No matter how well prepared the attorneys are and how well the case is conducted in court, there is always the possibility that an unfavorable outcome might occur to some of the parties if the case goes to a jury.

Since the offender is supposed to be of primary concern, we shall start with him to see who benefits in plea bargaining, and then proceed to the defense, prosecution, police, and court personnel.

Being arrested and charged with an offense can be a very frustrating experience, especially for first offenders. In view of time, lodging, humiliation, and the possibility of being found guilty by a jury, there is great inducement to the accused to seek a bargain and speed by the process. First time offenders are probably more idealistic about the system and tend to plead initially not guilty more than repeaters (Newman, 1970:174). They are also most likely to be represented by counsel. This arrangement leaves them with more options in the bargaining process, and many will change their pleas to guilty later as a part of the negotiation procedure. Repeaters are most likely to plead guilty at first, but this does not mean that they do not seek a bargain. Because of their past record, threats of the prosecution, and fear of judges whom they may have seen before, repeaters need to be initially more repentant to please the parties involved, or they simply want to "get it over" more readily (Newman, 1970)174).

First-time offenders and repeaters often discover that even those representing them are not particularly interested in spending time hearing their stories and preparing detailed cases. Arthur S. Blumberg notes that many times "In his relations with his counsel, the accused begins to experience his first sense of 'betrayal'" (Blumberg, 1969:288). Not only is time short, but often the assumption of guilt is already present. This is not the normal worker-client relationship. David Sudnow's studies of the Public Defender indicate the same attitude (Sudnow, 1965: 255-276). The accused receives a short interview in which "The most important

feature of the P.D.'s questioning is the presupposition of guilt..." The attitude is frequently "You are guilty, now let's see what we can do to make the best of the situation." Some form of negotiation probably follows.

Blumberg's study reveals some of the common reasons by defendants who pleaded guilty to justify what they did (Knutten, 1970:446).

Defendant Responses As To Guilt or Innocence After Pleading (1962-4)			
Nature of Response		Number of Defendants	Percent
Innocent (Manipulated)	"The lawyer or judge, police or DA 'conned me'"	86	11.9
Innocent (Pragmatic)	"Wanted to get it over with" "You can't beat the system" "They have you over a barrel when you have a record"	147	20.3
Innocent (Advice of counsel)	"Followed my lawyer's advice"	92	12.7
Innocent (Defiant)	"Framed"-- Betrayed by "complainant," "police," "squealers," "lawyer," "friends," "wife," "girlfriend"	33	4.6
Innocent (Adverse social data)	Blames probation officer or psychiatrist for "bad report" in cases where there was prepleading investigation	15	2.1
Guilty	"But I should have gotten a better deal" Blames lawyer, DA, police, judge	74	10.2
Guilty	Won't say anything further	21	2.9
Fatalistic (Doesn't press his "innocence," won't admit guilt")	"I did it for convenience" "My lawyer told me it was the only thing I could do" "I did it because it was the best way out"	248	34.2
No response		<u>8</u>	<u>1.1</u>
Total		724	100.0

Many offenders no doubt fear the consequences of a jury trial, and perhaps this fear is heightened by attorneys in the case. In many cases, however, the accused might fare better, with concerned representation, if he did go to a jury trial. Evidence is scant on this point. The American Jury Study by Harry Kalvern, Jr. and Hans Zeisel is one source which indicates that the defendant fares better in a jury trial than a bench trial. They found the judge to be more lenient in three percent of the cases and the jury to be more lenient in nineteen percent

of the cases. "This means that in the cases which the defendant decides to bring before the jury, on balance, he fares better 16 percent of the time than he would have in a bench trial"(1969:372-373).

If the defendant were the only one to benefit from the plea bargain, the system would probably not be entrenched to the degree that it is--other related parties also benefit.

The prosecutor is a strategic force in the court system, and he calls many of the key plays concerning the offender. He decides what charges will be brought against the accused, when the case will appear on the calendar, recommends the amount of bail, what evidence will be used, and in many cases recommends the sentence (Blumberg, 1969:282; also, President's Commission, 1968:333-334). In some cases he may also recommend the judge who will hear the case. The prosecutor has an integral part in the plea negotiation and is benefitted by a favorable outcome. Blumberg states that the district attorney is "aggressively interested in obtaining a negotiated plea rather than a case culminating in a combative trial" (1969:282). One reason is that a case going to trial requires an elaborate procedure and extensive preparation. Most prosecutors' offices cannot bear the cost, time, or personnel to handle the majority of cases in this manner. Even more, the prosecutor wants to maintain control as much as possible over sentence and disposition. By being assured of a guilty plea beforehand, he can also be confident that his public image will be kept favorable and his "batting average" will remain high. Successful convictions, even if on a lesser charge, are essential to a prosecutor's career.

Judges are aware of the negotiated plea and also have something to gain by its use. The President's Commission report says that "Inevitably the judge plays a part in the negotiated guilty plea." Both this report and the ABA Project on Minimum Standards for Criminal Justice emphasize, however that the judge should not be an active participant in the discussions that lead to a plea agreement (Task Force, 1967:12). The judge's vested interest is well summarized by Abraham S. Blumberg.

He shares the prosecutor's earnest desire to avoid the time consuming, expensive, unpredictable snares and pitfalls of an adversary trial. He sees an impossible backlog of cases, with their mounting delays, as possible evidence of his "inefficiency" and failure. The defendant's plea of guilty enables the judge to engage in a social-psychological fantasy--the accused becomes an already repentant individual who has "learned his lesson" and deserves lenient treatment (1969:287).

There is some evidence to support the notion that some judges also hand out less severe sentences to defendants who have negotiated for a guilty plea than those who have been convicted by a jury trial for the same offense (Ohlin and Remington, 1958:495-507).

We have mentioned only a few of the key persons up to this point who might be beneficiaries when plea bargaining is utilized. There are others not so directly related. For example, we could mention police officers who like to see their

efforts pay off with a guilty plea and conviction. Probation officers, politicians, the victim, and others also have some interest. But what about the general public and the future status of the entire criminal system of justice?

Arguments For and Against Plea Bargaining

There is little doubt about our criminal courts' reliance on plea negotiation--the system operates on that assumption. Many, however, see this reliance as being a tremendous threat to the system at large, while others see it as a step that benefits the system and may even enhance it by wider use and official acceptance. Others perhaps accept it out of necessity because of limited resources and are not overly concerned.

Those who are against the use of the plea bargain see its acceptance as an indication of a general disregard for law and the judicial process. They might point out that it limits the range of punishment and limits the defendant's chance for his case to be fully heard by a jury. This form of "copping a plea" might also be taken advantage of by dangerous offenders who are able to manipulate prosecutors or the courts through plea bargaining (Knutten, 1970:440). There also may be an incentive for offenders to give false information in return for lenient consideration. Or, on the reverse side of the coin, the use of threats by the prosecutor or defending attorney may induce guilty pleas that are not justified or even on the innocent who are the victims of expediency. Judges too are not exempt from the corruption that accrues when they step beyond their legally prescribed duties to take part in plea negotiation (President's Commission, 1968:335). Perhaps they would be more subject to various types of political manipulation.

Arthur Rosett is one who is critical of the manner in which the system operates behind the scenes.

The system itself does not recognize the legitimacy of plea-negotiation, and usually the rules under which the game is played insist that the defendant state in court at the time the plea is entered that no promises have been made to induce the plea. Yet, everyone in the courtroom, including the judge, the prosecutor, and the defendant's lawyer, knows the negotiations have occurred, and the proceedings, therefore, take on the air of a solemn charade (1971:438).

Opponents of the present system are plenty, but there is little likelihood that the use of plea negotiation will be eliminated.

Supporters of negotiated pleas usually believe, or at least accept the fact, that it is not essential that most accused persons come before a jury to protect their constitutional rights. Why go through a long and often tedious court trial procedure when the accused offender is obviously guilty? The interests of both the state and the defendant are served.

The President's Commission Report gave support to those who want the continuation of the system, but it also emphasized that the system would have to be restructured to safeguard citizens. "Plea negotiations can be conducted fairly and openly, can be consistent with sound law enforcement policy, and can bring a worthwhile flexibility to the disposition of offenders"(1968:335). It serves practical functions and

saves investments of time, talents, and money; and to abolish it would be to place an overload on the courts to an extent that would not presently be feasible. Numerous recommendations were made that "...are intended to convert the practice of plea bargaining into a visible, forthright, and informed effort to reach sound dispositional decisions" (Task Force, 1967:12). Among the most important are the following:

Whenever the defendant faces a significant penalty, he should be represented by counsel, whether the offense is classified as a felony or a misdemeanor. The presence of counsel helps ensure that the plea is reliable, that the risks of litigation have been considered, and that no unfair advantage has been taken of the defendant.

Prosecutors who practice plea bargaining should make the opportunity to negotiate equally available to all defendants...the prosecutor should publish procedures and standards, making clear his availability to confer with counsel and listing the factors deemed relevant.

Discussions between prosecutor and defense counsel should deal explicitly with dispositional questions and the development of a correctional program for the offender.

The full and frank exchange of relevant information regarding the offender and the offense...is equally essential at this stage of the proceedings. When a precharge conference has been held, the data assembled by both parties may be used in the plea negotiations. In addition procedures should be adopted which would enable the parties to call upon the probation office or some other factfinding agency to obtain what is in effect a presentence investigation for use in the negotiation discussions.

The negotiations should be freed from their present irregular status so that the participants can frankly acknowledge the negotiations and their agreement can be reviewed by the judge and made a matter of record.

The judge's role is not that of one of the parties to the negotiation, but that of an independent examiner to verify that the defendant's plea is the result of an intelligent and knowing choice. The judge should make sure that the defendant understands the nature of the charge, his right to trial, the consequences of his plea, and the defenses available to him. The judge also should determine that there is a factual basis for the plea, by specific inquiry of the prosecutor, the defendant, his counsel, or witnesses, or by consideration of other evidence.

Only if the judge is satisfied that these criteria have been met should he indicate that the disposition is acceptable to him. Provisions must be made for situations in which the judge finds the agreement unacceptable and in which the case is set for trial (Task Force, 1967:12-13).

Summary

Bargain-justice has become a necessity in our present criminal court system. As a result, most criminal cases do not go to jury trial but end in a guilty plea and a bench trial. Plea bargaining is present in a substantial number of cases. A recent Federal Court of Appeals decision noted: "In a sense, it can be said that most guilty pleas are the result of a "bargain" with the prosecution" (Cortes vs. United States, 1964). Plea negotiation, however, has never gained an official recognition and continues to be cloaked with suspicion and hypocrisy.

Indications are that the bargaining aspect of criminal proceedings will continue to endure inspite of opponents who fear its existence will create a shambles of the justice system. It will continue because of a lack of funds, time, personnel, and interest. Moreover, it will endure because many if not all of the parties directly involved with the cases benefit in a variety of ways from the use of negotiation. The defendant, the defending attorney, the prosecutor, the judge, policemen--all have a vested interest in a guilty plea and expedient justice.

The future, then, most likely will see a change in the system and not a removal of plea bargaining. The recommendations of the President's Commission on Law Enforcement and the Administration of Justice are a healthy sign of the kind of changes that would make plea negotiation a more visible and forthright procedure. And as the Federal Court of Appeals further noted:

The important thing is not that there shall be no "deal" or "bargain," but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced (Cortes vs. United States, 1964).

References

- ABA Project on Minimum Standards for Criminal Justice, Pleas of Guilty.
1966 (Tent. Draft 1) Newman, conviction . . . (1966), at 3 n.l.
- Blumberg, Abraham S.
1967 Criminal Justice. Chicago: Quadrangle Books, Inc.
- 1969 "The criminal court as organization and communication system."
In Richard Quinney (ed.), Crime and Justice in Society. Boston:
Little, Brown and Company.
- Cortes vs. United States
1964 337 F.2d 699, 701 (9th Cir.).

Kalvern, Harry Jr. and Hans Zeisel

1969 "The pattern of disagreement between jury and judge." In Richard Quinney (ed.), *Crime and Justice in Society*. Boston: Little, Brown and Company.

Knudten, Richard D.

1970 *Crime in a Complex Society*. Illinois: The Dorsey Press.

Newman, Donald J.

1970 "Pleading guilty for considerations: A study of bargain justice." In Norman Hohnston, Leonard Savitz, and Marvin E. Wolfgang. New York: John Wiley & Sons, Inc.

Ohlin, Lloyd E. and Frank J. Remington

1958 "Sentencing structure: Its effects upon systems for the administration of criminal justice. *Law and Contemporary Problems* 23 (Summer).

President's Commission on Law Enforcement and the Administration of Justice

1968 *The Challenge of Crime in a Free Society: A Report*. New York: Avon Books.

Rosett, Arthur

1971 "The negotiated guilty plea: An evaluation." In Leon Radzinowicz and Marvin E. Wolfgang (eds.), *Crime and Justice, Vol. 2: The Criminal in the Arms of the Law*. New York: Basic Books, Inc.

Skolnick, Jerome H.

1966 *Justice without Trial*. New York: John Wiley & Sons.

Sudnow, David

1965 "Normal crimes: Sociological features on the penal code in a public defender office." *Social Problems* 12 (Winter).

Task Force Report

1967 *The Courts, President's Commission on Law Enforcement and Administration of Justice*. Washington, D.C.

Vetri, Dominic R.

1964 "Guilty plea bargaining: Compromise by prosecutors to secure guilty pleas. *University of Pennsylvania Law Review* 112 (April).