Plea Bargaining.

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Despite the high value American constitutional law and tradition assign to the formal procedures of a criminal trial, most criminal cases are not resolved by a jury trial, or by a trial of any kind. Instead, in about 90 percent of criminal cases, the defendant waives trial and pleads guilty. Some defendants, wishing to take responsibility for their criminal conduct, plead guilty without any prompting from judges or prosecutors. Most guilty pleas in serious cases, however, result from the practice of plea bargaining, in which the accused exchanges his plea for some explicit or tacit consideration from the prosecutor, the court, or both. Usually the consideration consists of mitigation of the punishment imposed after conviction, or reduction of the charges, or more lenient treatment while charges are pending (for example, pretrial release on bail or on the defendant's own recognizance), or some combination of all of these.

Plea bargaining is not the only way in which the letter of the criminal law is tempered by official discretion. Informal processes dominate the entire criminal justice system. Police officers decide whether to arrest, prosecutors decide whether to file charges, and what charges to file, judges decide whether to sentence a convicted defendant to incarceration, and if so, for how long, parole boards decide whether to release a prisoner early, and parole and probation officers decide whether to seek revocation of a defendant's release.

Plea bargaining is especially controversial because it substitutes a discretionary process largely hidden from public view for the formal, highly visible process of adjudication by jury trial, with all its familiar and respected protections for the accused. Moreover, the importance of plea bargaining has increased in recent years, as other opportunities for discretion in the criminal justice system have been limited, notably by the proliferation of mandatory sentences and the drastic curtailment of parole.

Forms of Plea Bargaining.

Plea bargaining occurs in every American criminal trial court, both at the federal and state levels. But the practice takes different forms. Some plea bargaining consists of an open exchange between the defendant on the one hand and the prosecutors (and sometimes the judge) on the other. Judges may not participate too actively or too directly in plea negotiations, but they are permitted, and in some cases required, to approve the final agreement. But overt agreements are not always necessary. Often there is an unspoken understanding between judges and lawyers that criminal defendants who insist on going to trial will be treated more harshly. An incentive structure is built into the practices of the courthouse and buttressed by the long sentences increasingly mandated by statute: with a possible prison term frequently exceeding the length of a defendant's vigorous adulthood, the costs of failing to cooperate need not be made explicit.

Sometimes prosecutors and defendants agree that after a guilty plea a particular sentence will be imposed. The judge may formally approve the bargain before the defendant pleads guilty, ensuring that the agreed-upon sentence will in fact be imposed, or the prosecutor may simply promise to recommend a particular sentence. In theory, the judge is free to reject the prosecutor's recommendation and impose a higher sentence, but in practice this rarely happens.

Not all explicit plea bargains promise the defendant a particular or recommended sentence. Often prosecutors agree only to reduce the charges against a defendant, either by moving for dismissal of certain charges or by refraining from filing them in the first place. By pleading guilty to reduced charges, a defendant hopes to obtain a lighter sentence, either because the maximum sentence the judge can impose is thus reduced or simply because the reduced charges send a signal to the judge that the offense is less serious.

Most explicit plea bargaining in state courts is like a retail transaction: prosecutors in a given jurisdiction regularly make a standard offer to a broad category of defendants, and individual defendants can take it or leave it. There may be a going price, for example, to resolve a charge of aggravated assault by a defendant with no prior convictions. Often, no formal offer may be necessary, because the going price is well known to local defense attorneys.

Some federal defendants, particularly those accused of white-collar fraud or participation in major narcotics operations, encounter a different kind of plea bargaining, in which the terms are open for negotiation. Agreements with these defendants differ from standard plea bargains, not only because they are individually negotiated, but also because the defendant's side of the bargain often includes both a guilty plea and a promise to cooperate with prosecutors and investigators and to testify truthfully in the trials of any accomplices.

Concerns about Plea Bargaining.

The Supreme Court has repeatedly made it clear that plea bargaining is fully constitutional. The Court has required that a guilty plea be accompanied by an admission of guilt in open court, after the judge has advised the defendant of his rights and explained the possible consequences of waiving them. Often, though, these requirements result in little more than a perfunctory exchange between the judge and the defendant, providing little assurance that the defendant is truly making an informed and intelligent choice. Moreover, the Supreme Court has permitted guilty pleas even from defendants who continue to assert their innocence; the judge only has to have grounds for believing the defendant is guilty. Although the constitutionality of plea bargaining is thus settled, concerns about the process are widespread. Four concerns are paramount.

First, many observers worry that guilty pleas produced by plea bargaining are not truly voluntary and that the process may extract guilty pleas from some defendants who are innocent. When going to trial entails the risk of a decades-long sentence—and in some cases the risk of execution—many defendants may feel they have no choice but to plead guilty, even if they have legitimate defenses. This kind of pressure can make the right to trial sound hollow, and is

particularly troubling when it leads an accused to plead guilty despite a belief in his own innocence.

As the potential punishment becomes more severe, the price that will be paid for the defendant's insistence on the full assertion of his rights intensifies. The ironic result is that a potentially severe punishment motivates a defendant both to plead guilty and to avoid the most dire consequences of conviction. Instead of operating as an ameliorating reward for the cooperative defendant who does not resist the system, the plea becomes a way to avoid the unacceptable risk of an excessively severe system. Security and risk avoidance have a higher value for the prosecutor as well as the defendant. The prosecutor faces greater risks for losing cases as their severity increases, and so is inclined to reduce the risks by negotiating a plea bargain.

Second, plea bargaining is often criticized not for forcing guilty pleas from defendants who may be innocent, but rather for letting guilty criminals get off lightly. Prosecutors with heavy caseloads may be too eager to cut deals in order to avoid trials, and standard plea bargains may thus confer unwarranted leniency on offenders who deserve stiffer sentences.

Third, plea bargaining creates certain inequities. Because plea bargaining is an inherently discretionary process, defendants of comparable culpability often receive starkly different treatment—either because they are charged in different jurisdictions, or because they face different prosecutors, or because the prosecutor simply feels differently about them. The discretion that is at the heart of the system also leaves it more vulnerable to racial discrimination and other forms of bias.

Fourth, plea bargaining is largely hidden from public view. The prevalence of plea bargaining reduces the frequency of direct confrontation between constitutional doctrine and everyday law-enforcement practices, particularly since prosecutors are more likely to settle cases in which the legality of police behavior may be challenged by means of motions to suppress evidence. Plea bargaining also obviates the public's ability to observe the difficulties inherent in the exercise of assessing criminal liability in a full trial.

The Future.

Despite these serious concerns about plea bargaining, the practice continues unabated, largely because the practicalities of criminal litigation require it. Some have suggested that with additional resources and streamlined trial procedures, plea bargaining could and should be abolished. But at present, the American criminal justice system relies heavily on the practice. Prosecutors and judges have grown accustomed to disposing of cases without trial in the vast majority of cases. Prosecutors also have come to rely on the testimony they obtain from accomplices in exchange for favorable plea bargains. Whether or not taxpayers realize it, they too have grown to depend on plea bargaining: there are very few communities in which local budgets are adequate to bring most criminal cases to trial. This is in part because plea bargaining has allowed American courts to operate with trial rules that might prove unworkable if applied in all criminal cases; with fewer criminal trials, it has become less important that they proceed efficiently.

See also Criminal Law Practice; Criminal Punishments

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