CPI Wrongful Convictions Academy

Plea Agreements: Restoring Due Process and Fairness

Summary

Over 95% of criminal cases are adjudicated by means of a plea agreement. But the plea negotiation process involves the removal of several constitutionally-based due process protections, giving rise to a variety of abuses, and sometimes resulting in an innocent person pleading guilty. This module includes recommendations on how to reform the plea negotiation process and restore fundamental fairness.

Objectives

Upon completion of this module, the learner will be able to:

1. Discuss the Supreme Court cases that establish the legal parameters on plea agreements;
2. Explain how plea negotiations deprive defendants of key due process protections;
3. Discuss the roles and ethical duties of prosecutors, defense attorneys, and judges in the plea process;
4. Review the effects of plea bargaining abuses on unjust sentences and wrongful convictions;
5. Outline strategies to restore certain due process protections to the plea agreement process.

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Terms of Use

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Continuing Legal Education

1.0 CLE credits applied for.

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I. CASE STUDY

In 2002, Brian Banks was a sixteen-year-old high school football player in Long Beach, California. But, he was not just any football player, he was the star linebacker, who with his model performance had colleges such as the University of South Carolina lining up to offer him admission and a spot on their football team.

On his way to his school's office to talk to a counselor about college applications, he ran into classmate Wanetta Gibson, whom he had known since middle school. They were not in a relationship, but decided to 'make out' in a secluded alcove at the school.

Later that day, police officers arrived at the school and arrested Banks. Gibson accused Banks of raping her, and Banks was charged as an adult on two counts of forcible rape and one count of sodomy by force. He was arrested and placed in jail.

Gibson's story to the police and the evidence from the investigation did not add up. However, even though Gibson offered no witnesses or physical evidence to support her claim, Banks was charged with a heinous crime.

Before trial, the prosecution offered Banks a plea agreement: admit to the crime and go to prison for eighteen months, or bring the case to trial and risk going to jail for forty-one years. The prosecutor reportedly gave him ten minutes to make up his mind. His lawyer advised him, "[w]hen you go into that courtroom, the jury is going to see a big black teenager and you're automatically going to be assumed guilty."[1] Banks reluctantly accepted the plea.

However, Banks did not get the eighteen-month sentence that the prosecution offered. Instead, Banks was sentenced to six years in prison and five years of probation. Additionally, he was required to register as a sex offender, which would stay on his permanent record and forever tarnish his reputation and character.

In 2011, ten years after his conviction, Gibson sent Banks a Facebook message proposing that they let "bygones be bygones." She agreed to meet with a private investigator and in a videotaped interview, recanted her allegations.

On the basis of the woman's videotaped statements, Judge Mark C. Kim overturned Banks' conviction on May 24, 2012.

[1] *Bygones Be Bygones: The Unspeakable Injustice to Brian Banks* Community of the Wrongfully Accused (Apr. 4, 2013), http://www.cotwa.info/2012/06/bygones-be-bygones-unspeakable.html.

II. LEGAL FOUNDATIONS

> *"Any of us will plead guilty if the disparity between what we're threatened with if we go to trial and lose, and what we get if we don't is increased enough."* -- Professor John Langbien[2]

A. The Invisible Defendant

To the poor, the uneducated, the mentally challenged, and even to ordinary citizens, an arrest affords them a first-time view into the workings of the U.S. criminal justice system. Most of the time, the poor cannot secure their pre-trial freedom on bail. They are usually represented by a knowledgeable public defender. But due to an overwhelming case load the Public Defenders have insufficient time to devote to each case.

The accused looks forward to his day in court because he will then establish his innocence. After all, the Constitution does afford him the presumption of innocence and a jury trial. Much to his amazement, he is offered a deal by the prosecutor to settle his case for less time than he could receive if he went to trial. This is music to the ears of the guilty.

To the innocent, however, it presents a significant dilemma.

At this point in the proceedings, actual innocence or guilt becomes irrelevant. The accused has a choice: he either takes the deal, or be exposed to a jury trial where he could be convicted and receive a much harsher sentence.

In most cases, the accused will not take a chance by proceeding to trial. Innocence is just too risky. He accepts an offer, by entering a guilty or no-contest plea, and then finds himself with a criminal record if the court does not withhold adjudication.

Little does he realize the consequences of this fateful decision, future employment, social welfare benefits, and voting opportunities are severely limited. He/she may face the social stigma of a criminal conviction, and his family can become threatened with economic devastation.

He truly becomes one of the invisible people of the system.

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[2] *Interview: John H. Langbein*, PBS FRONTLINE (Jan. 16, 2004) *available at* http://www.pbs.org/wgbh/pages/frontline/shows/plea/interviews/langbein.html.

Until systematic reform occurs, the innocent will continue to experience injustice in the name of judicial efficiency.

B. Supreme Court Decisions

A plea bargain is a non-trial mode of procedure,[3] defined by Black's Law Dictionary as,

> an agreement in a criminal case between the prosecutor and defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. This may mean that the defendant will plead guilty to a less serious charge, or to one of several charges, in return for the dismissal of other charges; or it may mean that the defendant will plead guilty to the original criminal charge in return for a more lenient sentence.[4]

The overwhelming majority of criminal cases—ninety-seven percent of federal convictions and ninety-four percent of state convictions—are resolved by plea of guilty.[5]

The pivotal question remains: are plea agreements constitutional? In the seminal 1970 case, *Brady v. United States*, the Supreme Court ruled the following:

> we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.[6]

The Court also held that for a plea bargain to be valid, the plea must be voluntary and not induced by misrepresentation or threats.[7]

In *Lafler v Cooper*[8] and *Missouri v. Frye*,[9] the Supreme Court opined further on the constitutional issues surrounding plea agreements, holding in both cases that the accused still enjoys the constitutional guarantee of effective assistance of

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[3] *See* John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261 (1979), *available at* http://digitalcommons.law.yale.edu/fss_papers/544.
[4] *Black's Law Dictionary* 1173 (7th ed. 2000).
[5] *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); Langbein, *Torture and Plea Bargaining*, *supra* note 4, at
[6] *Brady v. United States*, 397 U.S. 742, 753 (1970).
[7] *Id.* at 755.
[8] *Lafler v. Cooper*, 132 S. Ct, 1376 (2012).
[9] *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

counsel at the pre-trial, plea negotiation, and final agreement phases of the criminal proceeding.

Writing in *Frye*, the Court acknowledged the central role of plea agreements in the criminal justice system, stating that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."[10]

In *Lafler*, the Court added credence to plea agreements by holding that if a defense counsel did not properly accept one, and the case was instead brought to trial, the lawyer would be found to be guilty of ineffective assistance of counsel.

The *Lafler* and *Frye* decisions stimulated a flurry of legal debate. One commentator described the *Lafler* and *Frye* decisions as "the single greatest revolution in the criminal justice process since *Gideon v. Wainwright*," (whereby the Court held that the Sixth Amendment right to counsel is binding upon states,[11]) and that the cases represented "the term's decisions with the greatest everyday impact on the criminal justice system."[12]

But when it comes to assuring the fundamental fairness of the process, the Supreme Court leaves many of the practical issues largely untouched.[13]

Additional Supreme Court cases, as well as pertinent law review articles and treatises, are presented in Appendix A.

C. Abrogation of Due Process Protections

Plea agreements owe their popularity to the fact that they afford benefits to each participant in the criminal justice system: the prosecution, defense teams, defendants, judges, and victims.[14] Along with increasing efficiency and expediency, plea bargaining also allows for "flexibility and creativity in a system that rarely fosters either."[15]

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[10] *Frye* at 1407; DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, TABLE 5.22.2009.
[11] *Gideon v. Wainwright* 372 U.S. 335 (1963).

[12] *See* Cynthia Alkon, *The U. S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L. Q., VOL. 561, 561 (2014); *see* Appendix.
[13] Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121 (2011).
[14] *See* Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L. J. 753, 765 (1998).
[15] *See* Alkon, *supra* note 12, at 591.

In recent decades, plea bargaining has come under growing criticism. The critiques are based on the fact that the defendant is consenting to waive a number of constitutionally-based due process rights:

1. Fifth Amendment right to remain silent and not incriminate oneself, as agreeing to a plea represents self-incrimination.
2. Sixth Amendment right to confront and cross-examine witnesses.
3. Sixth Amendment right to produce evidence and present a defense.
4. Seventh Amendment right to trial by jury (or a bench trial).

In addition, the defendant may also be required to waive the right to appeal, or to file a complaint on grounds of ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence.

Let us consider the four following scenarios:

1. A prosecutor makes an attractive settlement offer to the defendant early in the litigation process and before the completion of discovery. The prosecutor sets a two-hour deadline for acceptance, thus cutting short the defendant's right of discovery. *Can the defense attorney ethically accept the offer even though the case is not prepared for trial? What if later he learns that exculpatory evidence was withheld?*

2. The accused has been in jail for six months awaiting trial. The morning of trial jury selection, the prosecutor makes an offer that recognizes the jail time already served, so the defendant can walk free that day upon acceptance. *Has justice been served?*

3. A prosecutor charges multiple crimes from the same set of offenses in order to secure a tactical advantage in settlement negotiations. What happens if a prosecutor charges the highest level of the alleged offense, even though the facts of the case do not justify the charge? *Does the goal of achieving a speedy resolution of the case justify the means used to achieve that goal?*

4. The prosecutor makes a verbal settlement offer to the defense counsel. The prosecutor declines to put the offer in writing because he claims the offer is "completely straightforward." *Does the ambiguity inherent in a verbal offer place the defendant at an unfair advantage?*

The ethical and due process concerns raised by these four scenarios are explored further in this course.

D. Preeminent Role of Prosecutors

In criminal proceedings, the key players are the prosecutor, defense attorney, and judge. To understanding the workings--and shortcomings--of the plea agreement process, we need to understand the duties and roles of each of these three parties.

Prosecutors play a preeminent role throughout the adjudicatory process because they decide which offenses to charge, control what evidence will be disclosed, decide whether or not to make a plea offer, negotiate the terms of the plea, agree on the severity of the punishment, and present the terms of the agreement before the judge for approval.

One commentary noted:

> *[I]n place of a system which our constitutions have all devised . . . what we have now is a system in which one officer, and indeed a somewhat dangerous officer, the prosecutor, has complete power over the fate of the criminal accused.*[16]

In addition, the prosecutor may rely on certain hard-bargaining tactics to induce the defendant to plead guilty, such as:

- Imposing a short time limit on the offer, thus setting an unreasonably short time period by which the defendant must decide;
- Making an offer before all evidence has been shared,[17] or before the defense has had time to do adequate investigation;
- Placing the defendant in jail for an extended period, even for low-level crimes.

1. Ethical Duties and Responsibilities of Prosecutors

Based on the above, what are the ethical duties of prosecutors, and what checks should be enacted to prevent these types of abuses?

a. American Bar Association Rules

The ABA Model Rule of Professional Conduct Rule 3.8 specifically addresses prosecutors, but states only some of the most basic prosecutorial functions, such as making sure that the defendant knows he has a right to an attorney.[18]

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[16] *Interview*, *supra* note 2.
[17] *See U.S. v. Ruiz*, 536 U.S. 622 (2002).

While the ABA ethical code states, "[a] prosecutor should not knowingly make false statements or representations as to fact or law in the course of plea discussions with defense counsel or the accused,"[19] the rule is vague and difficult to enforce. Overall, the ABA rule provides little in the way of concrete guidance.

b. National District Attorneys Association National Standards

The National District Attorneys Association (NDAA) developed detailed National Prosecution Standards. The eighty-two-page document includes numerous ethical recommendations pertaining to plea negotiations and agreements. The recommendations are organized into five areas:

A. General considerations
B. Availability for plea negotiations
C. Factors for determining availability and acceptance of a guilty plea
D. Fulfillment of plea agreements
E. Record of plea agreements

The NDAA Standards are a thoughtful and reasonably comprehensive set of rules of conduct. But, with respect to Standard 5-1.3 of the standards document, Conditional Offer, the NDAA recommendations could be expanded so that the plea agreement offers do not have a scheduled time limit for acceptance. The prosecutor should be prohibited from making a conditional offer that requires the defense to abandon discovery or refrain from filing motions to suppress, to dismiss, or to limit the introduction of evidence or testimony prior to trial. All pleas should allow for the appeal of the judge's decision on these motions.

Additionally, while Standard 5-1.3 contains some important factors that should be addressed in the plea agreement, the prosecutor should refrain from asking for the defendant to waive pre-trial rights, such as, rights to discovery and appeal, in order to accept the agreement. On the other hand, the defendant's lawyer should not agree to a plea deal without engaging in fundamental discovery, and such action should be considered ineffective assistance of counsel.

When the prosecutor and defense agree to a plea deal, the prosecutor should take several additional steps. The prosecutor should include an affidavit with the finalized plea agreement that states the extent of parties' discovery and what *Brady* evidence he has provided to the defendant. The prosecutor should also

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[18] AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, RULE 3.8 SPECIAL DUTIES OF A PROSECUTOR.

[19] AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS, STANDARD 3-4.1(c). *See also* Standard 14.1-4; Standard 14-1.5; Standard 14-1.6.

reduce the plea agreement to writing and include this written contract in the court record.

With these additional precautions, both lawyers will be able to ensure that the defendant's rights are protected while a deal is reached.

E. Defense Counsel and Judges

1. Defense Counsel

Throughout plea agreements, the lawyer who represents the defendant has a duty to keep the client informed, to negotiate in the best interest of the client, and to be mindful of potential conflicts of interest.

Defense counsel should operate with "complete candor" so that the client is aware of all potential consequences if parties agree to a plea. Defense lawyers should also take the opportunity to negotiate seriously if a plea agreement could potentially benefit their client.

Frye expounded on the role of defense counsel:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.[20]

Our criminal justice system assigns a number of weighty bargaining chips to the prosecutor. But the defendant has only one chip, the option of going to trial. This uneven bargaining power impacts the fundamental fairness of the plea bargaining process.

The problem is worsened by a lack of clear standards for appropriate defense counsel conduct. As the Supreme Court acknowledged in *Frye*, *"*. . . [t]he plea bargain process is often in flux with no clear standards or timelessness and with no judicial supervision of the discussions between prosecutor and defense."[21]

Thus, the defendant who believes he has received inadequate legal defense has little recourse. The Supreme Court also decided in *Mickens v. Taylor* that a lawyer's violation of ethical norms does not make the legal assistance per se

[20] *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).
[21] *Id.*

ineffective.[22] In light of such guidance, how do we determine if the accused received effective assistance of counsel and a fair process during plea negotiations?

In *Strickland v. Washington*, the Court stated that a defendant must show that his lawyer's performance fell below an "objective standard of reasonableness," and that "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[23]

As a result, "ineffective assistance of counsel" has been notoriously defined narrowly, and in one instance, a defense counsel sleeping during trial was deemed not sufficient to meet such a test. Additionally, because plea agreement negotiations do not potentially harm the defendant until they have been entered, defendants may find it difficult to challenge their lawyers' actions during this period. Due to this limitation, it is necessary for defendants to safeguard themselves against ineffective representation.

2. Judges

Because of the 1971 Supreme Court holding in *Santobello v. New York*,[24] criminal courts have long been expected to ensure that there is a reasonable and factual basis for the plea accepted. In practice, however, such requirements do not regularly materialize. As one commentary noted, "the exercise of broad prosecutorial authority over sentencing within a system that severely limits the sentencing discretion of federal judges means that the power of prosecutors is not subject to the traditional checks and balances that help prevent abuse of that power."[25]

Generally, the plea negotiation process is conducted with little or no judicial supervision. At the time of the entry of the plea, once negotiated between the defendant and the State, the court's only function is to determine if:

a) The plea is voluntarily entered by the defendant;
b) Whether the defendant understands the constitutional rights he or she is giving up;
c) The true consequences of the plea especially as to one's immigration status; and

[22] *See Mickens v. Taylor*, 535 U. S. 162, 171 (2002).
[23] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[24] *Santobello v. New York*, 404 U.S. 257 (1971).
[25] KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 141 (1998).

d) Whether there exists a factual basis for the plea.

While the court does not have to accept the plea if the court feels like the punishment is too harsh or too lenient, the court seldom, if ever, inquires into the plea agreement process itself. For a variety of reasons stemming from overloaded dockets and the belief that plea agreements are like contracts that should not be subject to judicial review,[26] the plea bargaining process is largely left untouched.

Markus Dibber notes, "[s]ince American courts do not seriously scrutinize the voluntariness of guilty pleas, the Due Process Clause effectively does not apply to the vast majority of criminal proceedings in the United States."[27]

In *Brady*, the Supreme Court warned that plea negotiations are susceptible to error:

> this is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury.[28]

The concerns center around excessive sentences imposed on those who have committed relatively minor offenses and convictions extracted from innocent defendants.

F. Excessive Sentences and Wrongful Convictions

1. Trial Penalty

The charging options, mandatory minimum sentences, trial penalties, and broad discretion that prosecutor's hold concerning when and what types of plea bargains to offer come with implications for guilty and innocent defendants alike.

What makes charging powers and mandatory minimums so powerful is the part they play in the "trial penalty," which is (an increase in) punishment the defendant experiences if he chooses to exercise his constitutional right to a trial. An example of the trial penalty is, in 2003 a defendant was offered a plea deal of fifteen years,

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[26] *See* Justin Dion, *Prosecutorial Discretion or Contract Theory Restrictions? – The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. NEW ENG. L. REV. 149 160-61 (2000).

[27] Markus Dirk Dibber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 598 (1997).

[28] *See Brady v. United States*, 397 U.S. 742, 758–59 (1970).

refused to accept, and is now serving fifty-five years in prison. Similarly, in 2009 a defendant who refused a twenty-year sentence was convicted at trial and is now serving a sentence of life without parole.[29]

One should keep in mind, however, that the coerced plea may not be a bargain after all. Because prosecutors possess wide discretion in making a charging decision, the "bargain" that is reached may, in fact, far exceed the defendant's level of culpability.[30]Additionally, prosecutors may offer the strongest incentives for the weakest cases in order to secure a conviction, meaning the trial penalty or risk assessment may be even higher for innocent defendants.

There are practices related to the trial penalty. These three practices, outlined below, are additional forces that differentiate the trial setting from the plea agreement table:

1. Plea discounting: The two parties negotiate toward a bargain in the shadow of the expected trial outcome. Acting rationally, the prosecutor forecasts the sentencing outcomes of a conviction at trial, discounts it by the probability of an acquittal, and offers a proportional discount.[31] Plea discounting embodies the positive aspects of the practice.

2. Judicial decision-making: When considering a sentence, judges commonly consider whether a defendant has pled guilty. According to one study, "[eighty-seven] per cent of the judges who acknowledged that the plea was [a relevant factor in sentencing] indicated that a defendant pleading guilty to a crime was given a more lenient punishment than a defendant who pleaded not guilty."[32]

3. Superseding charges: The most common and most damaging way that the trial penalty occurs is through the addition by prosecutors of post-indictment charges. Here, the prosecutor threatens to add additional charges and sentencing enhancements if the defendant refuses to accept a plea.

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[29] AN OFFER YOU CAN'T REFUSE, HUMAN RIGHTS WATCH 1 (Dec. 5, 2013), *available at* http://www.hrw.org/reports/2013/12/05/offer-you-can-t-refuse-0.

[30] *See* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012).

[31] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARVARD L. REV. 2463, 6464 (2004).

[32] *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 206–07, 209 (1956).

2. Sentencing Guidelines

> *[Mandatory minimum sentences] are cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea*.[33]

In addition to trial penalties, the power of prosecutors is strengthened by sentencing guidelines. Sentencing laws and mandatory minimums provide the prosecutor a general guide to sentence length.

As stated by the U.S. Sentencing Commission, the "value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge."[34]

In the Supreme Court case of *United States v. Booker*, the Court held that the defendant's Sixth Amendment right to a jury trial was violated when a judge considered facts not admitted by the defendant and not decided to be true by a jury. Additionally, the case made sentencing guidelines no longer mandatory for judges to use. As explained by criminal law expert Erik Luna, this decision "opened up new possibilities for federal punishment – and if nothing else, it held out the hope that a district court could ensure that the sentence fits the offense and the offender consistent with the valid goals of punishment."[35]

With this decision, courts have therefore had more discretion to ensure that the punishment fits the crime, thereby reducing prosecutorial discretion. *Booker* was far from a magical panacea, however. While mandatory minimums still exist, judges still are forced to adopt certain sentences, even if the judges themselves, without such statutes, would impose a lesser punishment based on the facts.

Judges have their hands tied and prosecutors have been able to use the current sentencing structure to their advantage. They can effectively tell defendants that if the accused goes to trial he will face at the very least a minimum sentence included in a statute, and the prosecutor can point to the criminal code to show that he is not bluffing. The defendant is, as a result, strongly incentivized to take the plea.

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[33] John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J. L. ETHICS & PUB. POL'Y 311, 317 (2004).

[34] UNITED STATES SENTENCING COMMISSION (U.S.S.C.), SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991) 15, *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/special-report-congress.

[35] Erik Luna and Paul G. Cassell, *Mandatory Minimalism*, 31 CARDOZO L. REV. 1, 56 (2010).

Even after *Booker,* which no longer requires judges to use sentencing guidelines, it is clear that the courts still prevalently use them. To help ensure that the full effect of *Booker* is carried through, judges should take heed of the disadvantages that come with relying too extensively on these resources. Thus, while the court may no longer rely solely on sentencing guidelines, if a court does reference the guidelines for sentencing calculations, it should not presume that a sentence within the guidelines range is reasonable.[36]

3. Sentence Enhancements

Just as mandatory minimums provide prosecutors with bargaining leverage, sentencing enhancements provide district attorneys with another bargaining chip. Sentencing enhancements are increased sentences that prior federal drug offenders are eligible for at the discretion of the prosecutor.[37] If the prosecutor files a document under 21 U.S.C. § 851 listing the prior felony information, the court is required to impose the recidivist enhancement.[38]

Such a filing can dramatically increase the punishment that the defendant faces. If the prosecutor lists one prior drug conviction, the defendant's applicable mandatory minimum is doubled.[39] If the prosecutor lists two or more prior convictions, the defendant's mandatory minimum is increased to a life sentence if the original charge carried a ten-year mandatory minimum, and doubled for those with a five-year mandatory minimum.

The prior crimes need not be particularly serious; the prior crime need only be eligible for a sentence of one-year imprisonment. Nor is there a statutory time bar on the prior conviction, meaning that prior convictions dating back to the defendant's youth can be used to enhance the sentence.

Because of their potential to greatly increase sentences, these potential enhancements are used to coerce defendants into pleading guilty. In his opinion in *United States v. Lulzim Kupa,* Judge John Gleeson stated that the willingness of a defendant to plead guilty is the single most important factor in determining whether the prosecutor seeks a sentence enhancement.[40] Data compiled by the Human Rights Watch showed that, from a sample of 5,858 cases of drug defendants eligible for the enhancement, those who went to trial were 8.4 times more likely to receive the § 851 enhancement than those who pled out.

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[36] HUMAN RIGHTS WATCH, *supra* note 29, at 37.
[37] *See* HUMAN RIGHTS WATCH, *supra* note 29, at 7.
[38] 21 U.S.C. § 851.
[39] *See* HUMAN RIGHTS WATCH, *supra* note 29, at 7.
[40] *See United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013).

In addition to prior felony enhancements, the U.S. Code says that, "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" shall be sentenced to additional imprisonment. The first conviction carries a mandatory, consecutive five-year sentence, and the second carries a mandatory twenty-year sentence.[41] Data from the Human Rights Watch shows eligible defendants who are convicted at trial are 2.5 times more likely to receive the firearm enhancement than eligible defendants who accept a plea deal.[42]

4. Innocent Defendants Who Accept a Plea

Because of the court's trial penalty, the prosecutor's sentence enhancements, and the way that both use mandatory minimum sentences, current practices of judges and prosecutors inevitably lead to innocent individuals pleading guilty. No one knows how often innocent defendants accept a plea arising from fear of a wrongful trial conviction and an onerous sentence. While studies have been done in limited circumstances, they can only give us a glimpse into the number of wrongful convictions.

Out of the greater than 300 DNA cases in which the Innocence Project achieved an exoneration, approximately 10% of defendants pled guilty to a crime that they did not commit. The Innocence Project also estimates that between 2.3% and 5% of all prisoners in the United States are innocent,[43] which means that if 2% of all prisoners are innocent, then more that forty thousand innocent people are in prison. While it is impossible to know the true number, if the proportion of those exonerated who pled guilty is extrapolated, this means that at least 4,000 innocent people pled guilty and are currently incarcerated.

And while the stakes may not be as high for innocent defendants who accepted a plea that did not require incarceration, they are still subject to a number of harmful collateral consequences such as their impaired eligibility for child custody, student loans, and job opportunities.[44]

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[41] 18 U.S.C § 924(c)(1)(A).
[42] HUMAN RIGHTS WATCH, *supra* note 29, at 7.
[43] *FAQ: How many innocent people are there in prison?* THE INNOCENCE PROJECT http://www.innocenceproject.org/Content/How_many_innocent_people_are_there_in_prison.php.
[44] *See* John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* (2014). CORNELL LAW FACULTY WORKING PAPERS. Paper 113, at 24.

III. PRACTICE CONSIDERATIONS

A. Overview

Several types of plea agreements exist:

1. Charge bargaining: A defendant pleads guilty to a less serious crime than the original charge.
2. Count bargaining: The defendant pleads guilty to some of the original charges and the remaining charges are dropped.
3. Sentence bargaining: A defendant pleads guilty and agrees to a reduced sentence.
4. Fact bargaining: The defendant pleads guilty for the prosecutor to modify or omit certain facts that will affect how the defendant is treated under sentencing guidelines.

For federal cases, the Federal Rules of Criminal Procedure provide a procedural standard for plea bargaining *after* indictments. Rule 11(c) (1) provides prosecutors and defense attorneys the option of discussing a plea agreement and prohibits the court from participating in such discussions. If the defendant agrees to a plea bargain, the parties must disclose the agreement in open court, where the judge can accept it, reject it, or defer a decision.[45]

Many states use the Federal Rules of Criminal Procedure as a guide for plea bargaining procedures, though some states have language limiting or expanding the procedural rules.

B. Sentencing Guidelines

The sentencing guideline structure is a statutorily based, mathematical formula where various factors of both the crime and the defendant are assigned a number and then totaled to establish the punishment. The original intent of the guidelines was to create consistency in the sentencing process by removing judicial discretion. The guidelines were originally mandatory, but now they are discretionary and give the court a range of sentencing options from probation, house arrest, community service, and a small amount of jail time to a lengthier sentence depending on the severity of the crime. Some crimes still carry minimum mandatory sentences, but for the most part, the majority of crimes are subject to the discretionary demands of the sentencing guideline structure.

[45] Fed. R. Crim. P. 11.

In practice, the guidelines invest the prosecutor with a tactical advantage because the prosecutor has the ability and opportunity to settle the case at the lower end of the guidelines and threaten to recommend a severe sentence at the top end of the guideline number if the defendant chooses to go to trial and is convicted.

The large differences between the punishment suggested by the low end of the guidelines and that of the top end are significant. The reality of a conviction and spending considerably more time in jail if the defendant risks trial and loses, or taking the plea for the minimum amount of time, increases the acuteness of the dilemma an innocent person faces when offered a plea to settle the case.

The mathematical formula of the sentencing guidelines is too complicated to be discussed in this module. However, it is well to note that it gives the court and the prosecutor enormous discretion over a wide range of sentencing options depending on how certain factors in the formula are calculated. The prosecutor has numerous options over a wide range of possible punishments and uses this power to increase his or her bargaining position. But the accused has only one choice: to plead or go to trial.

C. Plea Negotiations in Practice

Plea negotiations often involve an iterative process among the prosecutor, defense counsel, and defendant. The negotiation may take place over the span of several hours or days.

The following table illustrates the three successive offers made by a federal prosecutor to a man who was charged with being part of a cocaine and marijuana distribution conspiracy. The charges carried a ten-year mandatory minimum and a maximum of life. At the conclusion of the plea negotiation process, the man pled guilty and was sentenced to sixty-three months.[46]

	1st Plea Offer	**2nd Plea Offer**	**3rd Plea Offer**
Actual Quantity of Drugs	5-15 kg cocaine	5-15 kg cocaine	5-15 kg cocaine
Statutory Sentence for Offense (Minimum and Maximum)	5-40 years	0-20 years	0-20 years
Calculation of Sentence Pursuant to Federal Sentencing Guidelines:			

[46] Plea agreement for Jose Ida, 1:11-cr-00345-08, E.D.N.Y. Available on PACER.

Base Offense Level	32	32	30
Adjustments			
Minor Participant	Not offered	Not offered	-2
Global Disposition*		-2	-2
Acceptance of Responsibility	-3	-3	-3
Offense Level After Reductions	28	27	23
Guidelines Sentence Range	97-121 months	87-108 months	57-71 months

*Global Disposition refers to the situation in which all defendants plead guilty.

D. Sample Policies and Checklists

The Judicial Council of California has published a seven-page form to assist with reducing such bargains into written plea agreements.[47] This form is presented in the Attachment.

The Center for Prosecutor Integrity commends this form as a basis for criminal defendant waivers, with two modifications:

1. Section 3, *Consequences of My Plea*, the prosecutor should include the specific legal consequences for the individual defendant. Because many defendants may not be aware of legal ramifications of a guilty plea, this would allow the defendant to be informed of the ways that his legal status would change.

2. Section 6, *Before the Plea* should be expanded to include specifics of the facts, elements of the case, constitutional and statutory rights, consequences of the plea, and anything else necessary for the defendant to know. With such additional information, the defendant will be able to make a more informed decision, and with an increased awareness of the proceedings and consequences, the defendant will less likely be pressured into a decision that could curtail his constitutional rights.

[47] *See* PLEA FORM WITH EXPLANATIONS AND WAIVER OF RIGHTS – FELONY, FORM CR-101, JUDICIAL COUNCIL OF CALIFORNIA, *available at* http://www.courts.ca.gov/documents/cr101.pdf.

E. Recommendations

The following practices are recommended to restore a measure of due process to plea bargaining:

1. Legislative reform should encourage judges to go below mandatory minimums in the interest of justice. This would help discourage prosecutors from inducing defendants to plead guilty under the threat of additional charges and enhancements.
2. To discourage prosecutors from filing post-indictment charges following a denied plea ("superseding charges"), the prosecutor should be required to submit an affidavit explaining what additional evidence has been found that justifies new charges.
3. To prevent defendants from having to take a plea without knowing the evidence against them, open-file discovery should be enacted, or at a minimum, the prosecutor should be required to turn over all Brady evidence before the plea agreement is finalized.
4. To discourage prosecutors from using timing techniques to pressure the defendant into accepting a plea, assure that defendants receive a reasonable time, at least twenty-four hours, to make a decision. This will also allow the defendant time to review evidence in light of the offer, discuss the plea offer with legal representation and family members, and if desired, draft a counter-offer.
5. Improve the transparency of the process by submitting records of plea offers and counter-offers to the court record.
6. Prior to the acceptance of a guilty or no contest plea by the court, the defense shall file with the court a sworn affidavit stating the likely consequences to the defendant. The affidavit should include the following: a complete discussion of the evidence; the steps taken by the attorney to prepare the case on behalf of the defendant; and the degree, amount, and number of consequences of the plea explained to the defendant. The California plea agreement form (Attachment) is a useful starting point.
7. The defendant shall file a written statement stating what discovery he received and what he was told by his or her attorney.
8. The court shall have the discretion to reduce the criminal charges of the defendant after an evidentiary hearing.
9. Due to the overuse of pretrial detentions, and due to the disparate impact such a practice has on poor defendants,[48] prosecutors should limit this

[48] Martin Schoenteich, *Overuse of Pretrial Detention Is an Overlooked Human Rights Crisis*, OPEN SOCIETY FOUNDATIONS (Sept. 12, 2014), http://www.opensocietyfoundations.org/voices/why-overuse-pretrial-detention-overlooked-human-rights-crisis.

practice to defendants who only truly pose a flight or societal harm risk, rather than as a method to simply secure the defendant.

10. Prosecutors should not levy the fairly opaque nature of the plea bargaining process in order to overcharge defendants with criminal charges that the prosecutor does not think are objectively justified.
11. Role of the judge: Judges should accept or deny plea agreements based on the sane standards by which they measure other judicial conduct.

This suggestion makes sense for several reasons. First, it is an easy argument to make that judges' approval or denial of the plea agreement is an exercise of their sentencing authority. And when judges have wide constitutional, statutory, and inherent authority, the ethical standards are one of the few bodies of law that provide meaningful oversight to judicial behavior.

APPENDIX A

A. Cases

These United State Supreme Court cases are foundational cases in criminal law and procedure that, through their opinions, form the rights, duties, and obligations of the players in the criminal justice system, as well as system itself.

1. *Boykin v. Alabama*, 395 U.S. 238 (1969). The Court held that a plea of guilty is more than a confession; it is itself a conviction. This requires the prosecution to place on the record the prerequisites to the waiver of constitutional rights.

2. *Hill v. Lockhart*, 474 U.S. 52 (1985). The Court applied the test of *Strickland v. Washington* to challenges to guilty pleas on the basis of ineffective assistance of counsel. The court held that the first part of the *Strickland* test was nothing more than the previous statement of attorney competency found in *Toillett v. Henderson* and *McMann v. Richardson*.

3. *Iowa v. Tovar*, 541 U.S. 77 (2004). The Court held that a guilty plea is a critical stage in the criminal proceedings, triggering the suspension of various constitutional rights enjoyed by the defendant.

4. *Kimmeiman v. Morrison*, 477 U.S. 365 (1986). The Court held that the right to counsel is a fundamental right of a criminal defendant; it assures the fairness, and the legitimacy, of our adversary process. *Gideon v. Wainwright*, 372 U. S. 335, 344 (1963).

5. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The Court decided whether counsel's failure to make an objection in a state criminal sentencing proceeding constituted 'prejudice' within the meaning of *Strickland v. Washington*. The court found the sentencing hearing was not fundamentally unfair due to the lack of objection to otherwise inadmissible evidence.

6. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The Court held that a failure to advise a defendant of the possibility of deportation on his immigrant status at the time the plea was accepted by the defendant constituted reversible error and ineffective assistance of counsel.

7. *Santobello v. New York*, 404 U.S. 257 (1971). The Court ruled that a plea agreement is a contract binding each party to the exact terms of the deal.

B. Law Review Articles and Professional Articles

These law review and professional articles further explore the theoretical and practical considerations discussed in the text above.

1. *Constitutional Law—The Plea Bargaining Process—Mr. Counsel, Please Bargain Effectively for Your Client's Sixth Amendment Rights, Otherwise the Trial Court Will Be Forced to Reoffer the Plea Deal and Then Exercise Discretion in Resentencing*, 82 MISS. L. J. 731 (2013). The four dissenters in the *Frye* case wondered if the Supreme Court had not overstepped its boundaries while providing an ambiguous answer to what constitutes ineffective assistance of counsel at the plea stage of a criminal proceeding.

2. *Effective Plea Bargaining Counsel*, 122 YALE L. J. 100 (2013). This article discusses the numerous professional standards that support the notion that defense counsel should act effectively during the plea negotiation process.

3. *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (2012). This article explores the salient features of the right to counsel at the plea negotiation phase of a criminal proceeding and the far-reaching impacts of the right for the day-to-day practice of criminal law.

4. *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012). This article, in part, explains why the author thinks prosecutors will attempt to solve the plea bargain problem under the dictates of *Frye* and why they have incentives to do so.

5. *Lafler and Frye: A New Constitutional Standard of Negotiation*, 14 CORDOZO J. CONFLICT RESOL. 309 (2013). This essay looks at some of the practical problems that can constitute ineffective assistance of counsel during the plea negotiation stages of a criminal proceeding: (1) poor preparation, (2) trading the interest of one client for another, (3) taking no or little time for proper plea bargain negotiations, (4) antagonizing the prosecutor, (5) refusing to bargain. The essay also offers suggestions for future scholarly work in the area of plea bargaining.

6. *Prosecutor's Discovery and Disclosure Requirements After Lafle v. Cooper*, 52 WASHBURN L. J. 97 (2012). This article sets out the existing statutory and constitutional disclosure duties of the prosecutor in relation to the plea bargain process.

7. *Prosecutor's Discovery and Disclosure Requirements After Lafler v. Cooper*, 52 WASHBURN L. J. 97 (2012). This article sets out the existing statutory and constitutional disclosure duties of the prosecutor in relation to the plea bargain process.

8. *Prosecutor's Discovery and Disclosure Requirements After Lafler v. Cooper*, 52 WASHBURN L. J. 97 (2012). This article sets out the existing statutory and constitutional disclosure duties of the prosecutor in relation to the plea bargain process.

9. *Turning the Sixth Amendment Upon Itself: The Supreme Court in Lafler v. Cooper Diminished the Right to Jury Trial with the Right to Counsel*, 12 CONN. PUB. INT. L. J. 101 (2012). This article reviews the legal precedents for ineffective assistance of counsel claims in many contexts.

10. *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L. J. 25 (2012). This article discusses the effect mandatory minimum sentencing statutes and sentencing guideline structures have had in the plea bargaining stage of the criminal proceeding. The article concludes that the mandatory sentencing of defendants gives the prosecutor a tremendous advantage in the plea bargaining stage of the criminal proceeding.

11. *Frye and Lafler: No Big Deal*, 122 YALE L. J. 39 (2012).

12. COMMENTARY ON LAFLER V. COOPER AND MISSOURI V. FRYE, FEDERAL SENTENCING REPORTER (Dec. 2012).

13. Lafler and Frye: Two Small Band-aids for a Festering Wound, Chicago Public Law and Legal Theory Working Paper Number 430, *available at* http/www.law.uchicago.edu/publiclaw/index.html.

C. Legal Treatises

American Law Reports offers several different constitutional and practical concerns for lawyers engaged in plea bargaining. This treatise is considered to be one of the most authoritative treatises for legal analysis and can supplement practice guides and other secondary sources that lawyers may use.

1. Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas, 10 A. L. R. 4th 8.

2. Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining, 8 A. L. R. 4th 660.

3. Construction and Application of Sixth Amendment Right to Counsel---Supreme Court Cases, 33 A. L. R. Fed. 2d 1.

4. Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 27. This annotation collects and analyzes representative state court decisions discussing the applicable rules of ineffective assistance of counsel claims.

APPENDIX B

National District Attorneys Association National Prosecution Standards

Propriety of Plea Negotiation and Plea Agreements

1. General

5-1.1 Propriety

The prosecutor is under no obligation to enter into a plea agreement that has the effect of disposing of criminal charges in lieu of trial. However, where it appears that it is in the public interest, the prosecution may engage in negotiations for the purpose of reaching an appropriate plea agreement. When agreement is reached, it should be reduced to writing, if practicable.

5-1.2 Types of Plea Negotiations

The prosecution, in reaching a plea agreement, may agree to a disposition of the case that includes, but is not limited to, one or more of the following commitments from the prosecution in exchange for a plea of guilty:

1. To make certain recommendations concerning the sentence which may be imposed by the court if the defendant enters a plea of guilty or *nolo contendere*;
2. To agree not to oppose sentencing requests made by the defense; or
3. To dismiss, seek dismissal, or not oppose dismissal of an offense or offenses charged if the defendant enters a plea of guilty or *nolo contendere* to another offense or other offenses supported by the defendant's conduct;
4. To dismiss, seek dismissal, or not oppose dismissal of the offense charged, or not to file potential charges, if the accused agrees not to pursue potential civil causes of action against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his staff or agents;
5. To agree to forego an ongoing investigation into other criminal activity of the defendant if the defendant enters a plea of guilty or *nolo contendere* to a presently charged offense or offenses; and/or
6. To agree that the defendant and prosecution will jointly recommend a particular sentence to the court and that the prosecution will support the defendant's motion to withdraw his plea of guilty if the court exceeds this agreed upon sentencing recommendation.

5-1.3 Conditional Offer

Prior to reaching a plea agreement and subject to the standards herein and the law of the jurisdiction, the prosecutor may set conditions on a plea agreement offer, such as:

1. The defendant's acceptance of the offer within a specified time period that would obviate the need for extensive trial preparation;
2. The defendant's waiver of certain pre-trial rights, such as the right to discovery;
3. The defendant's waiver of certain pre-trial motions such as a motion to suppress or dismiss; or
4. The defendant's waiver of certain trial or post-trial rights, such as the right to pursue an appeal.

5-1.4 Uniform Plea Opportunities

Similarly situated defendants should be afforded substantially equal plea agreement opportunities. In considering whether to offer a plea agreement to a defendant, the prosecutor should not take into account the defendant's race, religion, sex, sexual orientation, national origin, or political association or belief, unless legally relevant to the criminal conduct charged.

*2. **Availability for Plea Negotiation***

5-2.1 Willingness to Negotiate

The prosecutor should make known a policy of willingness to consult with the defense concerning disposition of charges by plea and should set aside times and places for plea negotiations, in addition to pre-trial hearings.

5-2.2 Presence of Defense Counsel

The prosecutor should not negotiate a plea agreement directly with a defendant who is represented by counsel in the matter, unless defense counsel is either present or has given his or her express permission for the prosecutor to negotiate directly with the defendant.

*3. **Factors to Consider***

5-3.1 Factors for Determining Availability and Acceptance of Guilty Plea

Prior to negotiating a plea agreement, the prosecution should consider the following factors:

1. The nature of the offense(s);
2. The degree of the offense(s) charged;
3. Any possible mitigating circumstances;
4. The age, background, and criminal history of the defendant;
5. The expressed remorse or contrition of the defendant, and his or her willingness
6. to accept responsibility for the crime;
7. Sufficiency of admissible evidence to support a verdict;
8. Undue hardship caused to the defendant;
9. Possible deterrent value of trial;

10. Aid to other prosecution goals through non-prosecution;
11. A history of non-enforcement of the statute violated;
12. The potential effect of legal rulings to be made in the case;
13. The probable sentence if the defendant is convicted;
14. Society's interest in having the case tried in a public forum;
15. The defendant's willingness to cooperate in the investigation and prosecution
16. of others;
17. The likelihood of prosecution in another jurisdiction;
18. The availability of civil avenues of relief for the victim, or restitution through criminal proceedings;
19. The willingness of the defendant to waive his or her right to appeal;
20. The willingness of the defendant to waive (release) his or her right to pursue potential civil causes of action arising from his or her arrest, against the victim, witnesses, law enforcement agencies or personnel, or the prosecutor or his or her staff or agents;
21. With respect to witnesses, the prosecution should consider the following:
    a. The availability and willingness of witnesses to testify;
    b. Any physical or mental impairment of witnesses;
    c. The certainty of their identification of the defendant;
    d. The credibility of the witness;
    e. The witness's relationship with the defendant;
    f. Any possible improper motive of the witness;
    g. The age of the witness;
    h. Any undue hardship to the witness caused by testifying.
22. With respect to victims, the prosecution should consider those factors identified above and the following:
23. The existence and extent of physical injury and emotional trauma suffered by the victim;
    a. Economic loss suffered by the victim;
    b. Any undue hardship to the victim caused by testifying.

5-3.2 Innocent Defendants

The prosecutor should always be vigilant for the case where the accused may be innocent of the offense charged. The prosecutor must satisfy himself or herself that there is a sound factual basis for all crimes to which the defendant will plead guilty under any proposed plea agreement.

5-3.3 Candor

The prosecutor should not knowingly make any false or misleading statements of law or fact to the defense during plea negotiations.

4. Fulfillment of Plea Agreements

5-4.1 Limits of Authority

The prosecutor should not make any guarantee concerning the sentence that will be imposed by the court or concerning a suspension of sentence. The prosecutor may advise the defense of the position the prosecutor will take concerning disposition of the case, including a sentence that the prosecutor is prepared to recommend to the court based upon present knowledge of the facts of the case and the offender, including his or her criminal history.

5-4.2 Implication of Authority

The prosecutor should not make any promise or commitment assuring a defendant that the court will impose a specific sentence or disposition in the case. The prosecutor should avoid implying a greater power to influence the disposition of a case than the prosecutor actually possesses.

5-4.3 Inability to Fulfill Agreement

The prosecutor should not fail to comply with a plea agreement that has been accepted and acted upon by the defendant to his or her detriment, unless the defendant fails to comply with any of his or her obligations under the same agreement or unless the prosecutor is authorized to do so by law. If the prosecutor is unable to fulfill an understanding previously agreed upon in plea negotiations, the prosecutor should give prompt notice to the defendant and cooperate in securing leave of court for the defendant to withdraw any plea and take such other steps as would be appropriate to restore the defendant and the prosecution to the position they were in before the understanding was reached or plea made.

5-4.4 Rights of Others to Address the Court

The prosecutor should not commit, as part of any plea agreement, to limit or curtail the legal right of any victim or other person authorized by law to address the court at the time of plea or sentencing. The prosecutor should honor the legal rights of victims and other persons authorized by law to address the court.

5-4.5 Notification of Media

Prior to the entry of a plea of guilty by the defendant in open court, the prosecutor should not make any extrajudicial comments to the media about either the possibility or existence of a plea agreement with the defendant, or of the nature or contents of any such agreement.

5. Record of Plea Agreement

5-5.1 Record of Agreement

Whenever the disposition of a charged criminal case is the result of a plea agreement, the prosecutor should make the existence and terms of the agreement part of the record. The prosecutor should also maintain the reasons for the disposition in the case file.

5-5.2 Reasons for Nolle Prosequi

Whenever felony criminal charges are dismissed by way of a *nolle prosequi* or its equivalent, the prosecutor should make a record of the reasons for his or her action.