

# Plea Bargaining in Anglo-American Law

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## Legal Studies Program

**Office Hours: W 2-3:30 and F 2-3:30 p.m. (Pacific Time)**

**Temporary Office: Room 212, [2240 Piedmont Avenue](#)**

**Course Number: LEGALST 190 (SEM-009)**

Recently two U. S. Supreme Court cases, *Missouri v Frye* and *Lafler v Cooper*, held that a defendant must be apprised fully of opportunities to plea bargain as part of their right to a fair trial. Is the plea bargain, now, not just tolerated but incorporated into the heart of American criminal procedure? Is it Constitutionally protected?

While our image of justice is a jury trial where one is presumed innocent until convicted by a jury of peers, a very different practice pervades American courts. It is the widespread practice of plea bargaining. Why would a country possessed of strong jurisprudence, sound laws and respected legal institutions turn away from jury trials and judicial decisions to embrace a negotiated, indeed “bargained,” approach to justice? And why turn to a practice that rewards precisely those claiming to be guilty? Despite the prevalence of plea bargaining, relatively little is known about its causes and consequences.

This course explores the nature of plea bargaining, varieties in its form across diverse legal systems, its causes, forces shaping its practice, and its consequences. Our primary emphasis is on American and English bargaining. We examine an American case study of how the many dynamics of plea bargaining have come together in the handling of drug cases in American federal courts in recent decades. A rich portrait of bargaining in Birmingham Crown Court in the UK is also studied. We situate plea bargaining within the logic of the common law, its jurisprudence and case law, the philosophical basis of prosecutorial practice, and an understanding of crime, justice and purposes of punishment. The relation of plea bargaining to legitimation and the basis of political authority is considered. Its contribution to the rise of mass incarceration is probed.

We consider how to measure plea bargaining, which so often has not been recorded explicitly, to establish trends and outcomes for study. Methodological approaches for studying the rise and current prominence of the practice are compared and critically analysed. The role of the US Supreme Court through its landmark decisions in shaping the constitutional status of the practice is explored. Emphasis here is on voluntariness

and coercion, fairness, efficiency, the nature of fair trial, and equity along lines of race, class and gender. We ask if a “trial penalty” operates so that a defendant is penalized for exercising their right to trial and, if so, what is its impact.

Why has this practice arisen? Together we explore competing portraits of the emergence of plea bargaining in the United States highlighting exchange and workplace culture; professionalization, bureaucratization, and complexity; and socio-historical economic and political dynamics. Accounts of its roots in America are compared with findings of new research on origins and contours of plea bargaining in England. Although the English still tend to deny bargaining exists, a growing body of laws and appellate decisions proves otherwise. Special attention is given to the English effort to avert a “trial penalty.” Dynamics of contemporary plea negotiation in some Commonwealth countries including Canada, Australia, South Africa and Nigeria are considered in comparative perspective. We then contrast briefly to the practice of plea bargaining in just a few Roman-Dutch, or Civil, law-based jurisdictions such as France, Germany, China, Italy and Colombia as well as the ICC and international tribunals. Paradigms of elite social control, political corruption, and “localization” of human rights are probed.

Finally, we consider pros and cons of plea bargaining; its potential implications for legitimation of governance and normativity of law; and possible impacts on the use of evidence, charging decisions, and trial practice. Proposals for reform and ethical quandaries are examined. New alternative discretionary practices including deferred disposition and deferred sentencing as well as varied approaches to the classification and handling of misdemeanours are queried. We conclude by asking if there has, in the “normalization” of guilt, a turn to retribution, advance of mandatory and other harsh sentencing practices, and punitiveness generally, been a “misreading” of the very logic of the common law in modernity and, if so, what part plea bargaining has played.

The course creates an opportunity for students to delve into a crucial topic that has become a hotbed of research and to apply theory and knowledge to a practical policy and research problem relating to the working of law in practice. It presents an excellent opportunity to begin to explore areas for further research.

## Educational Aims and Learning Outcomes of the Course

Educational aims are to:

- 1) Provide students with knowledge of the workings of the criminal law in practice.
- 2) Explore conceptual and theoretical frameworks drawn from philosophy, sociology, psychology, law and political science to enable students to critically examine the workings of law and the courts -- particularly through the practice of plea bargaining -- in prosecutorial process, provision of normative guidance and pursuit of justice.

3) Facilitate a critical evaluation of research evidence, including the historical and comparative, on the development and transformation of various sorts of institutional and customary arrangements constituting the criminal process.

4) Examine patterns in how law and its cultural and institutional regimes of regulation and control vary in their treatment of social difference and a range of explanations.

5) Foster a critical comparative understanding of the ways in which various societies approach and attempt to resolve the apparent tension between the principles of law rule and pressures for crime control inherent in democracy.

#### Learning outcomes

At the end of the course students will be enabled more fully to demonstrate:

- a) a *systematic understanding* of the legal, philosophical, political and social bases of the role of law and its implementation in society.
- b) a *critical awareness* of the nature of law; the problems of legitimacy it raises; and the importance of the practices through which it functions.
- c) skills to *accurately and creatively analyse and interpret* theoretical and empirical academic literature in the field as well as relevant case-law, statutory and other documents coupled with richer skills to conduct original library-based research.
- d) greater ability to *identify and research* relevant legal or socio-legal problems and to produce a systematic, creative and original application of theoretical ideas and legal principles to reasonably complex factual situations
- e) enhanced capacity to *form* reasoned arguments and judgments
- f) fuller capacity to *communicate* conclusions clearly to academics, practitioners and lawyers working in the field as well as non-specialist audiences due to experience gained in class discussions, presentations and written work.
- g) burnished *self-direction and originality* in identifying and solving problems as well as autonomy in planning and implementing work
- h) heightened *initiative and personal responsibility* which are the building blocks of independent learning that is required for continuing lifelong personal and professional development.

#### Course Programme

1. Plea Bargaining – Widespread Practice, Subversion of Justice or an Actual Right?  
Week 1  
*20 January*
2. Historic Reversal on Guilty Pleas: Common Law, Episodic Leniency and Challenge to the Privilege Against Self-Incrimination  
Week 2  
*27 January*
3. American Plea Bargaining: Process, Dynamics and the Trial Penalty  
Week 3  
*3 February*
4. Plea Bargaining in England: Longstanding Denial of Its Existence  
Week 4  
*10 February*
5. Actors in the Bargaining Process: Prosecutor, Defense Counsel, Judge and Defendant  
Week 5  
*17 February*
6. Is Plea Bargaining Coercive?: Voluntariness, Fairness and the Problem of False Conviction  
Week 6  
*24 February*
7. Impact of Equity in Sentencing and Administrative Efficiency  
Week 7  
*3 March*
8. Bargaining: Its Relation to Court Caseload, Mushrooming Misdemeanors and Growth of Mass Incarceration  
Week 8  
*10 March*
9. How Legal Rules, Procedure and Court Structure Shape Bargaining  
Week 9  
*17 March*
- Spring Break**  
*24 March*
10. Early Arguments as to the Causes of Plea Bargaining  
Week 10

*31 March*

11. Historical Arguments as to the Origins of Plea Bargaining  
Week 11  
*7 April*
12. Comparing Plea Bargaining Across the Common Law Countries of the Commonwealth: Australia, Canada, South Africa and Nigeria  
Week 12  
*14 April*
13. Contrasting Common Law with Civil Law Countries: Germany, France and China  
Week 13  
*21 April*
14. Reform, Expansion or Abolition?: Misreading of Common Law in Modernity  
Week 14  
*28 April*
15. Harvesting the Fruits of Our Work: Short Talks on Student Projects  
Week 15  
*5 May*

## Seminar Meetings

The course will be taught as a fourteen-week series of three-hour meetings. In the fifteenth week, Reading Week, our focus will be on study and there will be no new material. We will have what hopefully will be a festive in-person last meeting for the course with short student presentations on your final papers. Everyone will have a chance to offer her or his views on plea bargaining and to provide a plan for its reform, expansion or abolition.

As the material is new, I will present some material at each class. Active learning and a workshop atmosphere, however, are hallmarks of this class. No question is too small to ask. If you wonder, others surely do too. For this reason, it is essential that all seminar members come prepared having read and reflected on the material for the week and ready to participate in discussion.

Remember that the class is to a large extent what you put into it. So, everyone is encouraged to remember that your views matter and we really want to hear your voice. We will have class discussions, small group activities, a plea bargaining game, and tasks where we'll break into small teams and report back to the group—these are aimed to be stimulating and to help you meet other students in the class. We will also have some guest speakers, short films and, if possible, hold a discussion online with students at a university

in England or the Commonwealth on possible reforms.

As you will have heard, the first two weeks of the course are currently planned to take place virtually on Zoom. It is our great hope that by third week, COVID Omicron will have subsided and we can return to in-person meetings in class. Remote learning presents obstacles. It makes it harder to have the interactions with faculty and other students that make university life so rewarding. Please know that we will do everything possible to join with you in making the experience doable and enjoyable.

Once we resume in-person meetings, our seminars are currently scheduled to take place on Thursday from 5-8 pm (PST) in Room Social Science Building 155. Please watch for announcements on that point.

Please address any enquiries or problems related to the course to me, Dr. Mary Vogel ([mary.vogel@berkeley.edu](mailto:mary.vogel@berkeley.edu)).

Our Zoom link for this class is:

<https://berkeley.zoom.us/j/92904586747?pwd=ZXlzMVUdZcTjXRFNlcU9pRWMrC2tNUTo9>  
(Links to an external site.)

Meeting ID: 929 0458 6747

Passcode: LS190009

## Course Materials

Materials for the course will be available through CANVAS, known locally at Berkeley as bcourses. Our website is up and you will be finding a module for each week of the course with a link to each of the assigned readings. Effort has been made to keep readings around 75 pages per week. Several recommended works are listed for each week as resources for anyone thinking of midterm or final work in that area.

A welcome video has been posted and, if you have not yet made time to see it, I encourage you to do so. We have also posted a short survey to help us get your input for the course, to see what kinds of work you enjoy doing, and to see where things stand technology-wise. For anyone who does not have a camera for their computer, the University has a lending program. We have sent an announcement with a link for you to contact them and arrange to pick up a camera. You will, of course, have to return the camera at the end of our course.

There are three books recommended for purchase and each has been ordered through the University bookstore. They are: Carissa Hessick, *Punishment Without Trial*; Vanessa Edkins and Allison Redlich, *A System of Pleas*; and Mona Lynch, *Hard Bargains*. I

encourage you to work on building your library by purchasing at least one or two of these. The Moffitt Library has also been asked to make copies of those books available.

## Assessment of Student Work

Work for the course is designed to help you build some specialized knowledge on topics that really interest you. We hope this will give you something special to take with you to your subsequent studies and, later, to the workplace.

Requirements for the course are as follows:

- Participation in class (10%) [written options will be offered as often as possible]
- Short response papers (5) on weekly readings (20%)
- Midterm take-home exam (30%)
- Final paper project (40%)

The thematic focus for the midterm exam will be announced well in advance. The specific question for the midterm will be provided one week before your work is due. The final project will be a paper and is designed to build on your analysis for the midterm.