Plea Bargaining: A Necessary Evil

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COMMENTS

PLEA BARGAINING: A NECESSARY EVIL?

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Refusal by the Honorable G. Thomas Eisele, a federal district judge in Arkansas, to accept negotiated pleas in his court has raised an age-old question: How necessary is plea bargaining to our system.

1. In Memorandum and Order Denying Motion to Hear Plea Agreement, United States v. Griffin (Chambers & Yielding), No. LR-CR-77-9 (E.D. Ark., entered Dec. 29, 1978), Judge Eisele stated:
   Pending before the Court is the motion of the defendant Charles Yielding and the government to set a date certain to present to the Court the plea agreement which has been struck between the parties in this case. It is not now, nor has it been, the practice of this Court to consider such agreements, even though the Court is cognizant of the provisions of Rule 11(e), Rules of Criminal Procedure, which make such consideration optional.

2. The Griffin case to which Judge Eisele referred in the above memorandum began in July of 1977 when Charles Thomas Griffin and two other individuals, Charles E. Yielding and Joe Henry Chambers, were indicted for alleged violations of 18 U.S.C. §§ 371 and 1006. On September 15, 1978, Yielding filed a motion, under Rule 11(e) of the Federal Rules of Criminal Procedure, asking the district court to set a date and time certain for the disclosure and presentation of the negotiated plea between Yielding and the Government. On September 18, 1978, the Government filed a Response to this Motion, joining Yielding in the request that the district court enter a Memorandum and Order denying the Motion to Hear Plea Agreement, pointing out that this particular judge categorically refuses to hear plea agreements. On January 4, 1979, Yielding filed a Motion for Reconsideration, and on January 5, 1979, the district court held a hearing, again denying the request that the plea agreement be heard. On January 31, 1979, Yielding filed a Petition for a Writ of Mandamus in the United States Court of Appeals for the Eighth Circuit, seeking to invoke the court’s jurisdiction under 28 U.S.C. § 1651 (“All Writs Act”). _In re Yielding, No. 79-1093 (8th Cir., filed Jan. 24, 1979)._

3. A simple definition of plea bargaining has been given in the President’s Task Force Report:

   The plea agreement follows several patterns. In its best known form it is an arrangement between the prosecutor and the defendant or his lawyer whereby the accused pleads guilty to a charge less serious than could be proven at trial. ‘Less serious’ in this context usually means an offense which carries a lower maximum sentence. The defendant’s motivation is to confine the upper limits of the judge’s sentencing power. Similar results are obtained when the plea is entered in return for the prosecutor’s agreement to drop counts in a multicount indictment or not to charge the defendant as a habitual offender.


It should be noted that Judge Eisele specifically excluded from his ban the practice of “count” bargaining, giving as his reason that the court “has not found an appropriate way to prevent this practice.”
of justice? Most prosecutors and some defense counsel defend the plea bargaining process; many commentators and judges denounce it.\(^4\) Others simply recognize it as a practical necessity.\(^5\) An attorney with an apparently guilty client may be tempted to "beg, bargain, and barter"\(^6\) at the first opportunity, but he should ask himself whether this method of "trying" a case best serves the public interest, our legal system, or even the particular client.

Leon Jaworski has referred to the plea bargaining process as "a subject misunderstood by many . . . ."\(^8\) This lack of understanding is hard to comprehend when one realizes that plea negotiating originated in tribal society\(^9\) and has been a part of the adjudicative process since that time. The negative attitude of many individuals toward the plea bargaining process is probably due to the fact that most of its existence has been \textit{sub rosa}, with recognition and approval of the process surfacing only in recent years. The desire and drive to bring plea discussions into the open prompted the 1975

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4. Plea bargaining has had more than its share of critics through the years, including a Fifth Circuit judge who stated "Justice and liberty are not the subjects of bargaining and barter." Shelton \textit{v.} United States, 242 F.2d 101, 113 (5th Cir. 1957).

The practice, however, has finally been condoned by both the United States Supreme Court and the American Bar Association. The Supreme Court defended it in a 1971 case wherein the Court stated: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of Justice. Properly administered, it is to be encouraged." Santobello \textit{v.} New York, 404 U.S. 257, 260 (1971). The A.B.A. agreed in 1974, when it noted:

The process of plea discussion serves important social interests and . . . is one of the most important functions of both prosecution and defense counsel. . . . Properly conducted, plea discussion may well produce a result approximating closely, but informally and more swiftly, the result which ought to ensue from a trial, while avoiding most of the undesirable aspects of that ordeal.

ABA \textsc{Standard}s \textsc{Relating} \textsc{to} \textsc{the} \textsc{Administration} \textsc{of} \textsc{Criminal} \textsc{Justice}, Compilation 78-79 (1974).

5. It may have been this view that prompted the holding in Santobello \textit{v.} New York, 404 U.S. 257 (1971). The Supreme Court conceded therein that "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." \textit{Id.} at 260.


7. The relationship of the plea bargaining process to a trial of the case seems to be reflected in this statute:

Upon a plea of guilty or nolo contendere to an information or indictment, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty . . . .


amendments to Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 provides that if a plea agreement is reached by the parties the court shall require the disclosure of the agreement on the record in open court at the time the plea is offered. Construction of the word "shall" in that rule has resulted in controversy over whether a federal judge is required under Rule 11 to allow the presentation of plea agreements in his court for acceptance or rejection.

For every person who cites a benefit of the plea bargaining process, there is another who claims an abuse. Since the guilty plea accounts for approximately ninety-five percent of all criminal convictions in the United States, it is important to consider the positive and negative aspects of negotiating plea agreements and the impact such bargaining has on all of the parties involved in the process. The most obvious benefit is the savings in time and expense to the parties, the court, and the public. As criminal trials become more expensive and time-consuming and court dockets become more crowded, "back room" decisions which speed up the adjudicative process and reduce costs to all parties have become more appealing.

In numerous cases the defendant may benefit from the plea bargaining process. If the defendant is guilty of the offense with

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10. Fed. R. Crim. P. 11(e)(2). This section provides, however, that the agreement may be disclosed in camera on a showing of good cause.

11. As Judge Eisele's attorney summed up the controversy: "The one fact which rises undisputed from the record, the briefs of the parties and the authorities cited therein is this: reasonable men may disagree on the wisdom of plea bargaining." Brief for Respondent at 16, In re Yielding, No. 79-1093 (8th Cir. 1979).


13. Judge Eisele responded to this point by stating: "[T]here can be no significant delay in the disposition of criminal cases in the federal system based on clogged dockets. If the Constitution were not enough, we have the Speedy Trial Act." Memorandum and Order Denying Motion to Hear Plea Agreement at 7, United States v. Griffin, No. LR-CR-77-9 (E.D. Ark. 1978).


15. Id. at 572.

16. Since the guilty plea results in conviction, it is the defendant who must decide whether his case will be bargained or not. This is clearly stated in the Arkansas Rules of Criminal Procedure: "Defense counsel shall conclude a plea agreement only with the consent of the defendant and shall ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant." Ark. R. Crim. P. 25.2 (1977).

Federal courts also require that any plea entered by the defendant be made knowingly and voluntarily. These requirements are spelled out in the Federal Rules of Criminal Procedure 11(c) and (d). Specifically, 11(d) states: "The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d).
which he is charged and is confident that the prosecution has sufficient evidence to prove his guilt, there is the probability that he will receive a lighter sentence if he pleads guilty to a lesser offense. A reduction in charges also results in the appearance of a less serious criminal record than the defendant's conduct may have warranted. These are the considerations which persuade most criminal defendants to bargain.\textsuperscript{17}

There are the other benefits of perhaps lesser value to the defendant. By "copping a plea" the defendant and his family are spared the spotlight of a public trial and the emotional trauma that such a trial may inflict. Furthermore, the outcome of the defendant's case is settled in advance of trial and his fate is not subject to the uncertainties of a jury decision. If the bargain is not one with which the defendant is satisfied he may, of course, reject it and insist that he be tried.

The prosecutor may benefit as much or even more than the defendant from the plea bargaining process. The prosecutor is faced with the burden of proving the guilt of the defendant beyond a reasonable doubt. Due to constitutional restraints which are guaranteed the defendant, it may be impossible for the prosecutor to convict even the guiltiest defendant at trial.\textsuperscript{18} In such a situation the prosecutor is generally willing to bargain in order to obtain a certain conviction on a lesser offense. In further support of plea bargaining agreements, one district court has noted: "A defendant who enters a plea affords the government an opportunity to insure prompt and certain application of correctional measures while avoiding the costs and uncertainties of a trial."\textsuperscript{19}

\textsuperscript{17} Donald Newman explains that the most sought after concession is charge reduction, since:

\begin{quote}
In general, this is the best all-round bargain from the defendant's point of view because it results in a less serious record than is warranted by the defendant's conduct, the avoidance of any mandatory sentencing provisions applicable to the original charge, and whatever intrinsic sentencing benefit is brought by the guilty plea.
\end{quote}


\textsuperscript{18} It has been noted that:

\begin{quote}
[I]f the state has misused its power in the process of investigating or prosecuting the defendant, it is often denied a conviction because evidence obtained illegally is excluded from the trial. But since these exclusionary rules which control law enforcement agencies are effective only at trial, plea bargaining undermines their impact.
\end{quote}


Plea bargaining often results in the production of witnesses for the government:

[I]t has been established beyond peradventure that plea agreements, properly conducted, greatly help the cause of law enforcement. Defendants who have received a sentence concession of some sort testify regularly in criminal trials across the country. When a Court absolutely refuses to hear plea agreements, it often forces the prosecutor either to grant immunity to a suspect, or forego prosecution of conspiring defendants.20

The plea agreement may include a promise by the defendant to testify against a codefendant, to debrief in the presence of government agents, or to assist in undercover work for the purpose of aiding the government in the discovery of others engaged in criminal enterprises.21 The ability to deliver a reduction in charges in exchange for the cooperation of the defendant gives the prosecutor great leverage in the adjudicative process and boosts his conviction record as well.

An additional party that benefits from plea bargaining is the public.22 The public has a continuing interest in the courts' saving of time and expense. The public also benefits from plea bargaining in that a guilty plea immediately removes from the streets a potentially dangerous individual who is out of jail on bail. It is beyond dispute that the entire legal system benefits from the relief of court congestion. A New York judge noted that, "[I]n budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system, not just as to the courts but also the local detention facilities."23 This consideration, however,

20. Petitioner's Brief at 23, In re Yielding, No. 79-1093 (8th Cir. 1979).
21. D. Newman, supra note 17, at 95. These bargains are often made with minor narcotics sellers to "get to the man at the top" in a concession known as "trading the little ones for the big ones."

For a further discussion of the value of this cooperation with the government, see Adlerstein, Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems, 6 Hofstra L. Rev. 755 (1978). It is commonly believed that a defendant who can offer information against others is in a better bargaining position than those who acted alone. However, Mr. Adlerstein believes that "[T]he defendant who engages in crime with others may be in a difficult position: No attractive plea will be offered by the prosecutor unless the defendant turns in his fellow criminals." Id. at 782.

22. The Arkansas rules on "Plea Discussions and Plea Agreements" begin with this statement:

In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement.


may not be as conclusive in Arkansas as in New York. Judge Eisele has refuted the "congested docket" argument:

It has been said that without plea bargaining the wheels of justice would grind to a halt and that efficient administration of the courts require the use of plea agreements. This Court doubts the factual basis for this argument in the federal court context. It has been able to handle its criminal docket expeditiously, and has not found clear-cut evidence that there is any great disparity in the percentage of its criminal cases which proceed to trial, when compared to courts in other districts which do accept plea agreements.2

One especially concerned member of the public is the victim. The effect of the plea bargain on the victim has met with opposing arguments. One writer has stated unequivocally: "Most members of the public abhor it [plea bargaining] and regard it as bargaining away the interest of society in protection from crime. Particularly those who are victims of crime hold this view."25 A leading commentator on negotiated pleas sees it differently:

The victim of a crime is often as reluctant to be exposed to the publicity and trauma of a trial as is the perpetrator. The guilty plea is quick and relatively anonymous. Not only are the details of the crime largely kept from public view, but there is ordinarily minimal interference with the daily routines of complainant and witnesses.26

The committee that adopted Rule 11 of the Federal Rules of Criminal Procedure apparently agreed with this latter view. The committee declared: "A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination."27

24. Memorandum and Order Denying Motion to Hear Plea Agreement at 6, United States v. Griffin, No. LR-CR-77-9 (E.D. Ark. 1978). Judge Eisele's argument is sustained by the experience of the Maricopa County, Arizona, prosecutor's office. The prosecutor in that county eliminated plea bargaining for a number of felonies and found that "A ban on plea bargaining failed to cause the widely feared increase of trials in court." Berger, The Case Against Plea Bargaining, 62 A.B.A.J. 621, 623 (1976). In reporting the experiment, which began in 1971 with a ban on bargaining of narcotics charges and expanded into a full-scale ban on plea bargaining, the county attorney stated: "It was assumed that since there was no plea bargaining, these defendants would go to trial in most cases. This was not the case. In a majority of the cases the defendant pleaded guilty to the charges, and a trial was not necessary." Id. at 623.

25. Id. at 621.


Along with the benefits, however, there are abuses inherent in the plea bargaining process. Judge Eisele made his view of plea bargaining clear when he refused to hear the plea agreement in United States v. Griffin (the Yielding plea):28

It is the Court's opinion, probably a minority opinion, that the process of negotiating pleas has a tendency to demean all participants: the attorneys, the defendant, and even the Court. There are 'backroom' sinister implications (albeit unjustified) which simply cannot be removed. The result: public cynicism and lack of faith in the integrity of the judicial process.29

The defense attorney's role in plea bargaining has been examined by one writer30 who interviewed defense attorneys concerning their views on so-called "pleaders" or "cop-out lawyers."31 Responses from the attorneys included such scathing remarks as: "The practice of criminal law is just a little above shop-lifting in this city [Boston]" and (in Houston) "[A]t least half of all defense attorneys never take a case intending to prepare for trial."32 The author concluded that the plea bargaining system provides "extraordinary opportunities for dishonest lawyers" because it is conducted behind closed doors and is not subject to review "by the people who pay for it or anyone else."33 He seems to concur with Judge Eisele's opinion when he says that: "[A] system in which all or most cases went to trial would probably offer fewer opportunities for abuse."34

Most of the abuses inherent in the bargaining process have an adverse impact on the defendant. The process may result in waivers by defendants of their constitutional rights, involuntary pleas entered by defendants, unequal representation by counsel, the threat

28. Memorandum and Order Denying Motion to Hear Plea Agreement, United States v. Griffin, No. LR-CR-77-9 (E.D. Ark. 1978). United States v. Griffin was the first step in the series of events that led to the Yielding petition. See the outline of these motions supra note 2.


31. This phrase refers to those members of the bar who urge their clients to plead guilty regardless of the circumstances of the case. They are also referred to as "quick-buck artists" and "hangers-on of the criminal bar." Not all plea bargains are made by lawyers who fear trial, however. Judge Eisele listed this fear as one of the factors that encouraged plea negotiations, but made it clear that neither attorney in the Griffin case fell into the category of those who were afraid to go to trial.

32. Alschuler, supra note 30, at 1185.

33. Id. at 1198.

34. Id.
of unequal sentencing, and the possibility that the guilty pleas will be entered by innocent defendants. Consideration should be given to whether bringing pleas out of the back room and into the court room will prevent the proliferation of such abuses. There is no doubt that the amendments to Rule 11 of the Federal Rules of Criminal Procedure were designed to effect this goal.\(^3\)

When a defendant chooses to plead guilty rather than go to trial, he relinquishes several privileges guaranteed by the Constitution.\(^3\) Specifically, the defendant compromises his privilege against compulsory self-incrimination, his right to a trial by jury, and his right to confront his accusers.\(^3\) Furthermore, when a defendant enters a guilty plea the government is relieved from its burden of proving its case to a jury beyond a reasonable doubt. Due to the fundamental nature of the rights which the defendant waives when he enters a guilty plea, Rule 11(c) requires the court to advise the defendant of these rights before the plea is accepted. This is an attempt to make certain that the defendant's waivers are *knowingly* made.\(^3\)

In denying the *Yielding* plea bargain, Judge Eisele made the following observation: "We always get back to it: when is a plea voluntarily made? The plea 'taken to avoid the risk of being convicted of a more serious crime . . . is truly no more voluntary than is the choice of the rock to avoid the whirlpool.' "\(^3\) Often the right to reject a plea is more illusory than real. As stated by one commentator: "Fear of heavier sentence after trial and deference to advice of defense counsel might lead defendants to accept virtually all plea agreements, thereby impairing, at least in a pragmatic sense, the voluntariness of the guilty plea."\(^4\) The truth of this observation is evidenced by a United States Supreme Court holding that gave rise

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35. The committee admitted past defects in plea bargaining and its intention to cure them:

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. . . . There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated . . . .

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.


37. Id. at 243.


to the term "Alford plea." In *North Carolina v. Alford* the Court held that a plea of guilty accompanied by protestations of *innocence* is not so indicative of coercion and involuntariness as to invalidate the plea. The dictates of Rule 11 were intended to aid the court in making certain that a defendant's plea is truly voluntary.

It has been noted that "[t]he presence on the scene of a competent and aggressive defense counsel can decrease the likelihood of conviction. Some defense attorneys are of the opinion that prosecutors are more likely to reduce charges if a lawyer with a 'good trial reputation' is employed by a defendant." This may result in unequal representation for defendants who participate in the plea bargaining process. Defendants who can afford to hire an experienced defense attorney may receive better bargains and lesser sentences based solely on the skill and reputation of the attorney rather than the actual merits of the case.

It is the unsophisticated and less affluent defendant who is most seriously handicapped by inadequate representation. Such an individual may frequently defer to his attorney's advice without questioning the bargain. Often, he is represented by an overburdened public defender, by an appointed attorney who may be less than enthusiastic about his appointment, or perhaps by a "cop out" lawyer whose primary purpose in pleading his client is to avoid a jury trial. He also may be an indigent who is unable to raise bail and therefore faces lengthy incarceration while awaiting trial. The question arises whether these defendants are better off with plea bargaining or with trial. It has been suggested that a trial on the merits alleviates or at least lessens the impact of this disparity between prosecutor and defense counsel.

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42. Id. at 38.
43. FED. R. CRIM. P. 11(d). See also note 16 supra.
44. D. NEWMAN, supra note 17, at 74.
45. Throughout the *Yielding* briefs there is a dialogue on the impact of "unequal representation" on the plea bargaining process: Judge Eisele:

Inasmuch as plea bargaining provides leeway for a strong prosecutor to overwhelm a poorly prepared or timid defense counsel, or a strong defense counsel to take advantage of an inept or overworked prosecutor, there is a tendency to emphasize the disparity of counsel, which has less impact when a case is heard in open court, with all the attendant safeguards of a trial.


William R. Wilson, Jr., counsel for Charles Yielding:

It is true that 'disparity of counsel' tends to weaken the plea agreement procedure. . . . But it is also true that disparity of counsel undermines the entire judicial process, and this counsel doubts that there is any less impact when there is a trial on the merits.
There are always defendants who are reluctant to plead guilty to a lesser offense whether or not they actually committed the offense with which they were charged. If the trial judge becomes involved in the bargaining procedure, he may have a tendency to be more lenient in sentencing a defendant who is cooperative and treat more harshly one who refuses to enter a guilty plea. The following statement by a judge to a defendant demonstrates the coercion that can occur when the defendant seeks a trial:

As I see it, the likelihood of your being acquitted is not too good. Of course, if you want a trial, you will certainly get a fair trial. But you must remember this: If you are convicted as a second offender of robbery in the first degree, you will be entitled to no consideration of any kind from me.

... Or do you want to take a plea to robbery in the second degree and have some opportunity of receiving a shorter sentence? If I sentence you after a conviction of robbery in the first degree, you are going to be away until you are an old man.1

The threat to the defendant of sentence if he does not bargain is an acknowledged abuse of the plea bargaining process. The Second Circuit has held, however, that such a threat is not a denial of due process; it is merely "a fair description of the consequences attendant upon [a] prisoner's choice of plea ..."47


Judge Eisele:

[Disparity of counsel is a legitimate and reasonable factor to consider, I believe, in deciding against entertaining plea bargaining. I do believe disparity is really evened out, if a trial court is adequate to its duties, during the actual trial.]


William R. Wilson, Jr., counsel for Charles Yielding:

While the District Court is of the opinion that this disparity has less impact when the case is actually tried, Petitioner submits that the exact opposite is true. A properly conducted plea agreement procedure requires the Court to interject himself into the process, question the defendant at length, and then exercise his discretion in deciding whether to accept the proposed plea agreement. It is highly unlikely that a judge can fill in the gaps at a trial when counsel is ill-prepared — it is too late.

Petitioner’s Brief at 21, In re Yielding, No. 79-1093 (8th Cir. 1979).


47. United States ex rel. McGrath v. La Vallee, 319 F.2d 308, 314 (2d Cir. 1963). Federal
The imposition of a lighter sentence when the defendant enters a plea of guilty is so widespread that at least one court has taken judicial notice of the practice. It has been noted that the admission of guilt is a benefit to the defendant all its own: "This policy (of sentencing persons who plead guilty with more leniency) might be defended on the ground that a guilty plea indicates that the deterrent effect of the criminal law has begun to work upon a defendant and that rehabilitative incarceration is not necessary in such a case."

A final problem that haunts both proponents and opponents of plea bargaining is the fear that a defendant may be induced to plead guilty when he is in fact innocent. This fear has been expressed by many:

[T]here must be more than a lingering concern, when a negotiated plea is heard, that an innocent defendant has been prevailed upon, or has chosen to 'play the odds,' rather than to staunchly maintain his innocence. In fact, must it not be accepted by the proponents of plea bargaining that, statistically, a certain number of innocent people will suffer judicial penalties because of that system? . . . One can say that, in such situations, the defendant is simply exercising rational choices affecting his self-interest. That is true, and it may not be unreasonable for him to make such a choice. But should the federal criminal justice system give an innocent man that choice? This Court says, 'No.' [Judge Eisele]

[T]he plea negotiation system creates a significant danger to the innocent. Many of the rights it discourages are rights designed to prevent the conviction of innocent defendants. To the extent these rights are rendered non-operative by the plea negotiation system, innocent defendants are endangered. [Moise Berger, County Attorney, Maricopa County, Arizona]

While plea bargaining thus reduces the inaccuracies and costs of the traditional model, it also presents a danger that innocent defendants will be tempted to plead guilty. Courts have attempted to minimize this risk by inquiring into the factual basis for the guilty plea before accepting it. This remedy is insufficient, though,

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Rules of Criminal Procedure, Rule 11(e) outlines the plea agreement procedure to be used and specifically states that the court shall not participate in any such plea discussions.

because defense counsel might advise their clients to admit involvement in the crime in order not to jeopardize the bargain that has already been struck. [Harvard Law Student] 52

The prevalence of plea bargaining abuses in the federal courts may be curtailed by the amendments to Rule 11 which were designed to provide safeguards for defendants as parties to plea agreements. 53 Under Rule 11 the judge must develop on the record the factual basis for the plea and must assure himself that the plea is made knowingly and without coercion before he accepts it. 54

Recognizing that plea discussions have in the past occurred in a "largely invisible manner" and have been subject to almost no "effective judicial review of the propriety of the agreement," the Committee and the Court agreed that the most effective means of monitoring the bargaining process would be to require disclosure of all the plea agreement terms in open court. The judge could thus assure himself that a knowing and voluntary plea had been entered by the defendant before the plea was accepted. Abuses resulting in unwitting constitutional waivers by the defendant and coerced pleas could thus be largely removed from the bargaining process.

Most of the public cynicism concerning the plea bargaining process may be eliminated when the "back room" implications of plea bargaining are overcome by exposing the entire agreement to judicial scrutiny. The abuses that result from unequal representation will hopefully be removed as well. 55 Rule 11 may also eliminate a major headache for the federal courts: collateral attacks by a defendant who claims that the terms of his plea agreement were not honored and carried out by the prosecutor as agreed. The United

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   Rule 11(e) was designed to recognize the legal validity of bargained pleas, to regulate the plea bargaining process, and to eliminate at least some of the problems that have arisen and some of the abuses that have occurred in connection with the process.
   Id. at 1129.
55. FED. R. CRIM. P. 11 (Notes of Advisory Committee on Rules, 1974 Amendment).
56. See FED. R. CRIM. P. 11(c).
57. See FED. R. CRIM. P. 11(d).
58. This was the claim of the counsel for Charles Yielding in Petitioner's Brief at 21, In re Yielding, No. 79-1093 (8th Cir. 1979).
States Supreme Court has held that the terms of a plea bargain must be enforced as reflected in the agreement.\textsuperscript{59} The amendments to Rule 11 should aid in the implementation of plea agreements and the sentence agreed upon because the terms of the agreement will have been set forth in their entirety on the record before the court and the court may assist in their enforcement. In advocating the disclosure on the record of plea agreements, one court noted that: “Compliance with this procedure should avoid ostensible claims by defendants of unfairness in the guilty plea process and minimize the escalating number of cases complaining of aborted plea bargains, involuntary pleas, or frustrated plea expectations.”\textsuperscript{60}

\textit{The Judge’s Role Under Rule 11}

The issue raised by a court’s ban on the presentation of plea agreements is not whether such bargains should be accepted or rejected. Clearly, under Rule 11, there is no obligation on the part of a judge to accept any recommendation or bargain reached by the parties.\textsuperscript{61} The problem concerns the judge’s discretion as to whether he will even consider proposed plea agreements. Specifically at issue is the interpretation of the word “shall” in Rule 11(e)(2):

If a plea agreement has been reached by the parties the court \textit{shall}, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.\textsuperscript{62}

Counsel for the petitioner in the \textit{Yielding} case contended that Rule 11(e)(2) required the judge to \textit{hear} an agreed-upon plea. Judge Eiselle’s interpretation, however, is that it is entirely within the discretion of the judge as to whether the mere presentation of plea agreements will be allowed in his court. At war here are the “plain mean-


\textsuperscript{60} United States v. Dixon, 504 F.2d 69, 72 (3rd Cir. 1974). However, until the Supreme Court interprets Rule 11(e)(2), the slack in collateral attacks based on failure to implement plea agreements may be taken up by an increase in cases such as the \textit{Yielding} petition, based on a judge’s failure to \textit{hear} the plea agreement.

\textsuperscript{61} FED. R. CRIM. P. 11(e)(2). See also United States v. Dixon, 504 F.2d 69 (3rd Cir. 1974), where the court said: “The court, of course, is not obligated to accept any recommendation or bargain reached by the parties and it should so inform the defendant when any bargain is disclosed.” \textit{Id.} at 72.

\textsuperscript{62} FED. R. CRIM. P. 11(e)(2)(emphasis added).
ing” rule of statutory construction and the legislative history to Rule 11.

A statutory interpretation of Rule 11 favoring an obligatory hearing of all plea bargaining has been advanced by some defense counsel and prosecutors. To apply this plain meaning rule of statutory construction there must be no ambiguity in the statutory language in question. It has been argued that no such ambiguity exists in Rule 11(e)(2), which provides that the judge shall require the disclosure of a plea agreement when one has been reached between the parties.

The United States Supreme Court has waxed hot and cold in its application of the plain meaning rule. In Caminetti v. United States the Court stated the following:

[W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

The Court has declared later, however, that “when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however

63. Petitioner’s Brief, In re Yielding, No. 79-1093 (8th Cir. 1979).
64. “The Rule does not state, or imply, directly or indirectly, that this is the procedure a judge shall follow ‘if’ he permits presentation of plea agreements to him. Nowhere in the Rule does any ambiguity exist.” Motion for Reconsideration at 8, United States v. Griffin, No. LR-CR-77-9 (E.D. Ark. 1979).

Judge Eisele has refuted this contention:

[T]here is implicitly an ambiguity in Rule 11 if one states that, assuming that there is an obligation, a mandatory obligation, to permit counsel to bring before the Court a plea bargain, that the Court on the other hand has absolute authority to disregard it, out of hand, without any abuse of discretion, then the pertinency of the legislative history becomes obvious, and it would suggest that this useless exercise should, or could, be avoided or that judges should not be required to go through it unless they are required under certain circumstances to accept plea bargains.

If they are not required to accept them, if they can deny them and ignore them on grounds of principle as opposed to the particular facts and circumstances, then it is obvious to the Court that the ambiguity that requires reference to the legislative history is there.

65. 242 U.S. 470 (1917).
66. Id. at 490.
clear the words may appear on 'superficial examination'.”

There are those who claim the plain meaning rule is invoked by the courts to “consciously or unconsciously” frustrate the intention of the legislature. Others claim that neither the rule nor legislative history should be considered, but the “judicial application of the statute law should be governed rather by the personal conviction of the judge with respect to the worth of the competing interests involved in particular controversies.” Judge Learned Hand gave the plain meaning rule a short and decisive slap when he said: “There is no surer way to misread any document than to read it literally.”

If the plain meaning rule is not invoked and one looks to the legislative history of Rule 11, Judge Eisele’s policy rests on firmer ground. The following statements appear in the history of Rule 11:

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure . . . . The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it.

The language of the statute can arguably be said to reflect the intention of the Committee and the Committee apparently intended that judges have total discretion in receiving plea bargains. A judge’s right to refuse to hear plea agreements was discussed at length in both the committee hearings and in correspondence. Judge

68. Murphy, Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts, 75 COLUM. L. REV. 1299 (1975). However, the British courts follow the rule to such an extent that any resort to legislative history is forbidden. Id. at 1301.
70. Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944).
72. Id. In accord with this view of statutory interpretation is Murphy, Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts, 75 COLUM. L. REV. 1299 (1975), where it was stated:

If Congress can be said to have an intention at all in such a case it must be the intention of its Committees; thus the Committee report must mean that such evidence must always be accepted . . . . One can sympathize with the idea that it would have been better to have amended the bill in the first instance. But the workings of the legislative process are such that it frequently is not feasible to amend a bill so as to include every nuance of importance to its drafters.

Id. at 1314.
William H. Webster, for example, wrote a letter to Hon. Frank A. Kaufman in which he expressed the following:

I find that many judges throughout the country perceive the proposed rule as somehow requiring them to permit plea agreements in their courtrooms to the full extent authorized by the rule. This is simply not the case, and it's probably the fault of those of us who drafted the rule that the reservation of discretion in the trial judge is not more apparent. . . . We thought it was reasonably evident that a trial judge could make it clear to the prosecutor that he was not interested in receiving plea agreements . . . if that were in fact the case . . . . It was our conclusion that the trial judge was thus accorded complete discretion to preclude plea bargaining in his court, to accept certain types of plea bargaining or to permit the entire range of plea bargaining, depending upon the state of his docket, the reliability of the prosecutor and the trial judge's own sense of propriety.

Courts are not required to accept any plea agreements. At least one writer, however, has adopted the view that "Now, under Rule 11, the trial judge, while not required to accept any plea agreement, must at least consider it." Judge Eisele obviously interpreted the Committee's intention to be in accord with his ruling since he answered the request for presentation of the Yielding plea with this response: "[T]he Advisory Committee of Criminal Rules of the Judicial Conference of the United States stressed that the Rule does not require a court to permit any form of plea agreement to be presented to it."

73. Then of the United States Court of Appeals, Eighth Circuit.
74. United States District Judge, Baltimore, Maryland.
77. Memorandum and Order Denying Motion to Hear Plea Agreement at 3, United States v. Griffin, No. LR-CR-77-9 (E.D. Ark. 1978). In Case No. 79-1093, filed May 21, 1979, the United States Court of Appeals for the Eighth Circuit refused to order Judge Eisele to consider the plea bargaining agreement in the Yielding case. The Eighth Circuit concluded that since Rule 11(e)(2) gives the court the right to accept or reject the plea bargain, "it would be a useless act to require a district judge to listen to the agreement when he has already decided to exercise his right of rejection under Rule 11(e)(2)."

The Fourth Circuit agreed with this interpretation when a circuit judge in the Western District of North Carolina imposed a ban similar to Judge Eisele's. In United States v. Stamey, 569 F.2d 805 (4th Cir. 1978), the defendant was charged on three counts of bank robbery and reached an agreement with the government that led to his pleading guilty to one indictment in return for a dismissal of the other two. Concerned that plea bargaining in that district had gone too far, the district court announced prior to trial that plea bargaining agreements no longer would be recognized. Because of this ban no disclosure of the full
The controversy generated by the refusal to hear plea agreements may be reduced to one essential question: Is plea bargaining a necessary process? While recognizing its flaws, the United States Supreme Court has regarded plea bargaining with approval:

Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.\textsuperscript{78}

Other courts have agreed that plea bargaining serves a valid purpose in the adjudicative process and that plea agreements should not be entirely excluded in the federal district courts. In \textit{Bryan v. United States}\textsuperscript{79} the Fifth Circuit articulated its view that plea agreements should be considered, even if ultimately rejected:

Thirty days after the date of this opinion all district courts in this circuit shall put into effect the following supplementary practices at the time of taking pleas of guilty or nolo contendere. The court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered. Specific inquiry shall be made as to the existence of such an agreement before a plea is accepted.\textsuperscript{81}

Judge Eisele is among those critics who feel that plea bargaining is \textit{not} necessary.\textsuperscript{82} Commentators have expressed the idea that "Plea bargaining runs counter to the system (of justice) devised by our forefathers."\textsuperscript{83} In accord is the following view:

"Stuff and nonsense" was Alice in Wonderland's response to the idea that the sentence should come first and the verdict and trial later. Plea bargaining carries the logic of the Queen of Hearts

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\textsuperscript{79} 492 F.2d 775 (5th Cir. 1974).

\textsuperscript{80} Id. at 781.

\textsuperscript{81} Memorandum and Order Denying Motion to Hear Plea Agreement, United States v. Griffin, No. LR-CR-77-9 (E.D. Ark. 1978).

one step farther. It is sentence first, and never mind about the trial and verdict. They are eliminated from the system.83

Various proposals for reform of the plea bargaining system have been made. These include a plea screening hearing before an investigatory magistrate prior to the plea bargaining session;84 greater participation by the defendant in the plea discussions;85 lower fees for the attorney when the case does not go to trial;86 and the insistence that a possible bargain never be offered in exchange for a plea when the same results would obtain without the plea.87

Two issues should be dealt with by a court before it implements a policy resulting in an absolute ban on the presentation, consideration and acceptance of plea agreements. First, it is important that sentences be tailored to each individual defendant and yet remain equal for similarly situated defendants. Those determining the sentence must be free to consider the circumstances of the crime and the degree of deterrence or rehabilitation that is necessary, among various other factors. The court should consider whether this can best be done by trial or by bargain.

Second, serious consideration must be given to whether rejection of all plea bargains would have the ultimate effect of driving the plea bargain back underground. It was this fear that prompted

83. Id. The statement was made by the executive director of the American Civil Liberties Union.
85. This step has since been taken by the U.S. Attorney’s office that was involved in the plea in the Yielding case. In each case the prosecutor will sit down with the defendant and defense counsel and go over all the points in the prospective plea agreement to make certain the defendant understands the decision that is reached. See Exhibit A.
86. Alschuler, supra note 30, at 1199. This would put the squeeze on the “cop-out lawyers,” but would also mean an attorney might have to go through the fee-collection process in two steps if he did go to trial.
87. For example, the Memorandum to the Legal Staff of the District Attorney’s Office, August 14, 1974, put out by Richard H. Kuh, District Attorney, New York County, New York, states:

Frequently defendants will be arrested and charged with felonies, ... but the gravity of the cases will not require that they be treated as felons. Sometimes in the past this type of charge has been reduced to misdemeanor status in the Criminal Court only if the defendants express their willingness to plead guilty to misdemeanors promptly as a condition of such reductions.

Insofar as that has been the practice, it tends to deprive defendants of their right to trial in cases in which—hypothetically—equitably the misdemeanor charge, not a felony charge, is appropriate.

If a case is worthy of misdemeanor treatment only, it is ordinarily to be accorded such even though the defendant has not expressed his willingness to plead guilty.
the amendments to Rule 11. 88 Proper attention to the dictates of Rule 11 should eliminate most of the abuses that have co-existed with "behind the scenes" plea bargaining. As expressed by the Advisory Committee: "Failure to recognize it (plea bargaining) tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record . . . and publicly disclosed." 89 This admonition should be considered carefully by the Bench and the Bar.

88. FED. R. CRIM. P. 11 (Notes of Advisory Committee on Rules, 1974 Amendment).
89. Id. This same fear is expressed in Comment, New Federal Rule of Criminal Procedure 11(e): Dangers in Restricting the Judicial Role in Sentencing Agreements, 14 AM. CRIM. L. REV. 305 (1976), where the author warns: "[If] this rule fosters secret negotiations between prosecutors and defense attorneys and their clients seeking to avoid its strictures, the laudable legislative goals of the new procedure will be frustrated." Id. at 318 (footnotes omitted).
Exhibit A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

UNITED STATES OF AMERICA

v.

NO. _______

RULE 11 PLEA NEGOTIATION AGREEMENT

Pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure, the attorney for the government and ____________, attorney for the defendant ____________, have engaged in discussions and have reached an agreement which contemplates the entry of a plea of guilty by this defendant to ________ ________ of the above-captioned indictment.

1. Upon acceptance of such plea of guilty, the attorney for the government agrees to ____________________________

2. The defendant states that he understands that his plea agreement and a recommendation for sentence to be made by the government is not binding on the Court, but if the Court rejects the plea agreement, the defendant will be offered an opportunity by the Court to withdraw his plea of guilty and go to trial. In the event that the defendant does not wish to withdraw his guilty plea and persists in that plea, the Court may impose any sentence allowable under the laws of the United States including a sentence less favorable to the defendant than that contemplated by the plea agreement.

3. The defendant also states that he understands that he has an absolute right to plead not guilty and persist in that plea, that he has a right to be tried by a jury and at that trial he has a right to the assistance of counsel.
4. At any trial of the case, he has a right to require the government to prove the entire case against him beyond a reasonable doubt, that he has the right not to testify against himself or not to be compelled to incriminate himself. Further, at any trial, the defendant would have the right to confront and cross-examine the witnesses against him and to present witnesses in his own behalf. Furthermore, the defendant understands that by pleading guilty he waives the right to a trial, that no trial will in fact occur and that the only thing remaining to be done in the case is the imposition of sentence.

5. The defendant and his attorney both state that this agreement constitutes the entire agreement between the defendant and the government and that no promises or inducements have been made, directly or indirectly, by an agent of the United States, including any Assistant United States Attorney, concerning any plea to be entered in this case. In addition, the defendant states that no person has, directly or indirectly, threatened or coerced the defendant to do or refrain from doing anything in connection with any aspect of this case, including entering a plea of guilty.

6. Counsel for the defendant states that he has read this statement, been given a copy of it for his file, explained it to his client, and states that to the best of his knowledge and belief the defendant understands it. Furthermore, if any statements are made by the Assistant United States Attorney or any other government agent at any time in the future which are at variance with the contents of this statement, counsel will notify the United States Attorney in writing of the details thereof within two days after the statement is made.

7. The defendant states that he has read this statement—has had this statement read to him—has discussed it with his lawyer and understands it.

______________________________
(Defendant)

______________________________
(Attorney for Defendant)

By
Assistant United States Attorney

DATE: __________________________