# Ad Hoc Bargaining

### Generic

#### Ad hoc bargaining is illegitimate – it can only be stopped by a legal prohibition. Colquitt 2k

Joseph A. Colquitt " Ad Hoc Plea Bargaining 75 Tulane Law Review 2000-2001 ." Heinonline.org. N. p., 2018. Web. 5 Mar. 2018. Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, Sixth Judicial Circuit, State of Alabama. //nhs-VA

Plea bargaining is a widely accepted practice, but some plea bargaining practices are simply unacceptable. While plea bargaining is a necessary and legitimate method of case disposition,6 many of the bargains struck are inappropriate, unethical, or even illegal. Judges and prosecutors have used the bargaining process to impose penalties including banishments,7 coerced charitable contributions,8 deprivation of rights unrelated to the crime at issue,9 forced military service, ° "scarlet letter" punishments,11 surrender of profits,12 and compelled waivers of appeal." They also have required pleas to nonexistent, inapplicable, or time-barred crimes. 14 On the other hand, they have awarded benefits, such as agreeing to seal conviction records,"5 in return for pleas of guilty. This Article argues that the system needs extensive cleansing to extirpate the ill-advised, unauthorized, and thus illegal bargains which permeate plea bargaining. There should be no punishment unless law establishes that punishment 6 and no benefit if law prohibits that benefit. When society prohibits certain actions, punishment reinforces the message that such conduct will not be tolerated. The criminal justice system must choose wisely its response to offending conduct in order to encourage conforming behavior. 7 Ad hoc bargaining 8 occurs when the parties suggest unsanctioned punishments or benefits in settling criminal cases. 9 When the parties reach ad hoc settlements, they act outside the law. Prosecutors and defense attorneys should not be allowed to assume the legislative functions of defining crimes and establishing the types and ranges of punishments. Giving them the option to settle criminal cases through the use of ad hoc alternatives to legal punishments does precisely that. They establish the law of the locale rather than apply the laws of the state. Moreover, the "punishments" they negotiate most often fail to address penological goals. Ad hoc justice commonly leaves much to be desired.

#### Types of ad hoc bargaining. Colquitt 2k

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Ad hoc bargaining, however, may involve neither a plea nor a sentence. For example, if a defendant charged with public intoxication seeks to avoid a statutorily mandated minimum sentence often days in the county jail, the prosecutor might agree to dismiss the charges if the defendant agrees to make a monetary contribution to a local driver's education program. An ad hoc settlement may also result in the case being dismissed before or after a plea. Even if a plea is forthcoming, a nonsanctioned alternative to the statutorily established punishment may be imposed by the court. For example, if the public intoxication defendant enters a plea to the charge, the court may continue the case for sentencing to permit the defendant to make the monetary contribution in installments. At or before the sentencing hearing, the prosecutor might move to dismiss the charges once the accused has made the contribution in full. Thus, in ad hoc bargaining, the defendant may or may not receive a conviction or a legally established sentence. The ad hoc bargain may require the accused to perform an act, complete a program, or surrender a right. Rights that the defendants may surrender include the right of appeal,94 the right to bring civil claims against parties,9 or the right to book royalties.9 6 Such requirements may be in connection with or in lieu of a conviction or sentence. Ad hoc bargains exist in at least five forms: (1) the court may impose an extraordinary condition of probation following a guilty plea, 97 (2) the defendant may offer or be required to perform some act as a quid pro quo for a dismissal or more lenient sentence, 98 (3) the court may impose an unauthorized form of punishment as a substitute for a statutorily established method of punishment99 (4) the State may offer some unauthorized benefit in return for a plea of guilty,' or (5) the defendant may be permitted to plead guilty to an unauthorized offense, such as a "hypothetical" or nonexistent charge, a nonapplicable lesser-included offense, or a nonrelated charge.

#### Ad hoc bargaining is driven by personal motives of attorneys and judges. Colquitt 2k

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\*Brackets in original

Ad hoc bargaining may be driven in great part by actual or perceived institutional needs, but it also arises to a significant degree from collateral wants or needs of the parties or court. This is perhaps one of the most troubling aspects of ad hoc bargains: The personal motivations of the participants may underlie and even drive the bargaining or the approval of the bargain."°2 The prosecutor may be motivated by personal considerations; that is, the prosecutor may be overworked, underpaid, understaffed, unprepared, lazy, or some combination of any or all of the foregoing factors. 3 Less personal in nature, the prosecutor may have sought, and lost, a continuance of the case. With a trial imminent, the prosecutor may have a missing or unavailable witness or overdue reports of physical evidence tests by experts, facts that the prosecutor may not want to disclose to the court and, thereby, to the defense. Such case-related developments may leave the prosecutor unable to adequately present the case either for the instant trial or some later trial date. Moreover, the prosecutor may simply disagree with the legislatively provided sentencing alternatives and choose to fashion an ad hoc remedy. A more ominous motivation might be to avoid the exposure of inappropriate or embarrassing conduct of law enforcement, prosecutorial, judicial, or other governmental officials or agencies.' 4 None of these motivations address penological goals such as deterrence, just deserts, 105 rehabilitation, or retribution.0 6 The defense attorney also may be motivated by personal considerations (e.g., the defense attorney may be overworked, underpaid, understaffed, unprepared, or even lazy). Additionally, the defense attorney may be faced with caps on appointed-counsel fees, competing, possibly lucrative civil or criminal cases, or a disagreeable or unpopular client. And, of course, the defense too may have missing or overdue witnesses and may be even more likely than the government to lack adequate expert evaluation of physical evidence. In addition, defense attorneys may also find themselves at odds with the sentencing alternatives available to the bargainers. Similar to the attorneys involved, the defendant may also have some personal motivations to engage in ad hoc bargaining. The defendant may not want to spend money or time defending the charge, particularly if the defendant is a person of limited means or if a conviction on the charge does not carry significant adverse consequences. In many cases, the defendant may have no real choice; considering the alternatives, the offer may be the better option. Whatever the considerations being weighed, a defendant may be left with no genuine choice when given options such as a possible tax deduction,"0 7 the addition of goodwill, a diversion instead of a conviction, the removal of the potential stigma that accompanies some criminal convictions, or less or even no supervision. The message may be, "Accept the plea or suffer the consequences." The benefits of the bargain may simply be too attractive, or the consequences of a trial may be so uncertain or Draconian in comparison to the bargain offered, that the defendant may have no real alternative. Judges, too, may be motivated by personal concerns in suggesting, participating in, or approving settlements. One almost unbelievable example resulted in dismissal of a case. The case involved a woman who was ordered to participate in a drug court diversion program as a result of several misdemeanor drug violations.' Subsequently, the probation officer asked the judge to remove her from the program for an alleged failure on her part to comply with the rules of the program."0 9 A hearing was held during which the defendant "who was wearing a low-cut sweater, bent over several times to remove documents from her purse. Thereafter the judge dismissed all criminal charges against her. When his clerk asked why the charges had been dropped, [the judge] replied, 'she showed me her boobs."' 110 The judge was charged, among other things, with issuing an order for "improper personal reasons." ' He answered that he was only joking and that the basis for his decision was actually that the defendant had successfully completed the drug program, as shown by the documents she retrieved from her purse."1 The California Commission on Judicial Performance recommended that the judge be removed from the bench after a hearing on this and other charges.' On appeal, the California Supreme Court noted that the judge's comments were "in very poor taste," but concluded that the evidence was not clear and convincing that he acted for improper personal reasons."' Nevertheless, the court concluded that, based on other charges, the judge should be removed from the bench. 15 Plea bargaining should not be driven by personal or other improper motivations. Courts should seek to protect the public and to do so in a fair, just, and equitable manner. Objections to plea bargaining for personal or improper reasons obviously exist. However, plea bargaining is a part of the system, and the remedy lies in eradicating plea bargaining for personal and improper motivations, rather than eliminating plea bargaining altogether.

### **Police Officers**

#### Police involvement has formally become part and parcel of plea bargaining. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

The poster child for formal systems of police influence is Charlotte, North Carolina. Prosecutors in Charlotte hold a roundtable discussion in every homicide case to decide on what plea, if any, to offer.[61](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref61) Roughly five years ago, the district attorney’s office started inviting detectives to participate in the discussions.[62](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref62) The detectives, accompanied by members of the police chain of command, weigh in on what they think the case is worth. It is a formal opportunity to participate in plea bargaining, and it is a model for the active role officers could play in the negotiation process. In Charlotte, the inclusion of the police in plea deliberations was designed to address a recurring conflict between prosecutors and police, a conflict that had grown acute under a prior district attorney’s regime. Previously, prosecutors and police were at each other’s throats, publicly blaming each other for settling too many cases too cheaply.[63](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref63)Police blamed prosecutors for pleading out murder cases that could have received stiffer penalties at trial, and claimed these lenient plea agreements were making it harder to enforce the law on the street.[64](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref64) Prosecutors replied that the cases could not go to trial because the police had performed such shoddy investigative work.[65](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref65) Both sides agreed that the plea-bargaining process was out of control, but each saw the other as the cause. When a new district attorney was elected, the inclusion of the police in the plea discussions was one of the reforms aimed at healing the wounds within the prosecution team. The new system of consulting officers on homicide pleas eased officers’ concerns by giving them a greater sense of control over the fate of their cases, while simultaneously showing them the reasoning prosecutors were using to decide on the plea offer.[66](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref66) “The reason we decided to invite police,” explained William Stetzer, the prosecutor in charge of the roundtable, “was just sort of a natural tendency of the relationship between prosecutors and police. We realized that they didn’t have a lot of idea[s] about [the] decision to make a plea offer.”[67](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref67) Stetzer thought police “consider[ed] plea offers generally bad,” but his experience at the roundtable has shown him their willingness to settle even the most serious cases.[68](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref68) For their part, police praise the roundtable model. Prior to the roundtable, officers “were not aware what had happened in our case until we got a letter saying the case had been dismissed,” explained retired police Major Andy Leonard.[69](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref69) The only time detectives were involved in negotiations, he said, was when prosecutors needed bodyguards to protect them from victims’ family members, who were likely to be upset upon hearing from prosecutors about the proposed plea. “Now that we’ve been involved in the process,” Leonard said, “we’re really not sitting down with the families anymore as security [for the attorneys]. We’re sitting down with the family as advocates for the district attorney—as advocates for the concessions they’re making.”[70](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref70)Major Cam Selvey emphasized a new feeling of empowerment among officers because of their role in plea negotiations. In the past, “[w]e turned it over to the DA. They did whatever. We would just shrug our shoulders and say, ‘Oh well, we tried.’ . . . [W]hen we would mouth off too much, they would come back and say, ‘You handed us a crap case.’”[71](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref71) Now, police officers have a forum to talk constructively to prosecutors about pleas.[72](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref72) Other jurisdictions, too, have employed formal methods for soliciting police input.[73](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref73)In Miami, prosecutors ask officers to indicate on the arrest paperwork whether defendants should be sentenced according to the guidelines or whether a non-guidelines punishment is appropriate.[74](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref74) Cristina Escobar, a former prosecutor in Miami, said, “The officer’s position on a plea bargain . . . , at least in Miami-Dade County, is always taken into account.”[75](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref75) Where the officer has spent a lot of time investigating a case, “you’ve got to take their opinions more seriously,” Escobar said.[76](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref76)Similarly, in Hillsborough County, Florida, the prosecutor’s office has a policy of consulting with the police about plea bargaining in any case in which the officer has expressed a “sincere interest” about the outcome.[77](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref77)Laurie Woodham, an attorney for the Tampa Police Department, explained how the policy is sometimes more honored in the breach, as when prosecutors have attempted to hide a plea they knew the police opposed.[78](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref78) Such was the case, Woodham said, when a city employee was caught using a city van to trawl for foster kids to molest: “[The prosecutor] didn’t contact us until after the plea because they knew we would object.”[79](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref79) From Nevada to Virginia, police officers described prosecutorial policies for consulting officers about pleas. “The former district attorney had a rule that you didn’t plea out a case unless the cop said it was okay,” said Chris Collins, a Las Vegas police officer, who recently served as executive director of the Las Vegas Police Protective Association.[80](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref80)Similarly, the policy in Virginia’s Henrico County is for prosecutors to check with officers in all cases before offering a plea. “Usually when I do the agreement,” prosecutor Elsa Seidel said, “I’ll tell the defense attorney, ‘I’ll check with the officer and I’m pretty sure he won’t have a problem with it, but I do need to check with him first.’”[81](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref81) Fellow Henrico County prosecutor Mike Feinmel said he would “never make a deal without talking to a police officer first. ‘Hey, I want your input. Tell me what you think.’ One hundred percent of the time they’ll say, ‘I trust your judgment,’” Feinmel noted.[82](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref82) “They don’t have a veto, it’s ultimately my decision, but I will always engage in a dialogue with the officer.”[83](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref83) Likewise, Virginia Beach prosecutors have employed a policy that requires them “to discuss any plea with the primary case officer before entering into an agreement with defense counsel,” wrote Lyla M. Zeidan, a former prosecutor who now teaches at the Northern Virginia Criminal Justice Training Academy.[84](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref84) “It was not required that we got their approval, but we had to discuss it with them and inform them of the plea and give the officer the opportunity to share his/her comments [with] us.”[85](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref85) Nor are prosecutors the only prosecution-team members to promote formal systems of police influence. Some police departments actively encourage their officers to get involved in plea bargaining. For example, the Fairmont Police Department in Minnesota lists “plea bargain agreement consultation with prosecutor” among the duties of the detective.[86](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref86) In Massachusetts, the Dennis Police Department posts an officer at the courthouse to alert the police chief when a case is pled out too cheaply. “It was the only way to keep an eye out on things,” explained Mike Whalen, the retired police chief.[87](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref87) “[Be]cause they see every case that comes through, they know who the frequent flyers are . . . . They may go to the prosecutor and say, ‘I’d rather not see this case plea bargain[ed].’”[88](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref88) If the case is important enough, Whalen said, the police chief is notified and he may complain directly to the head of the prosecutor’s office.[89](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref89) In Peoria County, Illinois, a police officer is stationed at the prosecutor’s office, rather than the courthouse, to act as a liaison between prosecutors and police.[90](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref90)In other jurisdictions, prosecutors are stationed at police headquarters to serve as liaisons between the two halves of the prosecution team. The goal of these liaisons is to address prosecution-team frictions, including those arising from plea bargaining.[91](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref91)“I’m able to call the chief [prosecutor] and say, ‘Your baby DA [is messing up],’” said Damon Mosler, a prosecutor assigned to the San Diego County Sheriff’s Department.[92](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref92) Mosler explained that the detectives can become very upset about bad plea decisions, and he tries to address their concerns through back channels.[93](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref93) Sometimes police officers enlist the help of third parties, such as judges or state attorneys general, to give them formal influence over plea bargaining. In 1978, the police union in Detroit, Michigan, pressed local judges to adopt a policy of not accepting plea deals unless the police had been consulted.[94](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref94) In the 1980s, a police union in Toledo, Ohio, filed a complaint with the attorney general demanding that Ohio prosecutors be prevented from agreeing to any plea without first getting the sign-off of the arresting officer. “In some jurisdictions plea bargains cannot be submitted to the judge unless the police have been at least consulted about,” if not asked to approve, the terms of the plea, according to a 1982 national study of police-prosecutor relations.[95](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref95) These attempts to force prosecutors to consult with police suggest the depth of police interest in influencing the process.

#### Put away the court clog DA – the offices that consult police have very low caseloads that overwhelm the link. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

\*Brackets in original

Office Size and Logistics. Where there are numerous cases and large prosecutors’ offices and police departments with satellite branches, the logistics of consulting with police officers can be overwhelming.[121](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref121) Where caseloads are low and the number of prosecution-team members small, the opportunity for officers to influence plea bargaining is at its height. The apex of influence, officers and prosecutors suggested, is in suburban or rural jurisdictions, especially those policed by elected sheriffs. Officers in such jurisdictions have the greatest opportunity and motivation to get involved. “When you get into the rural areas, the sheriff and the p[olice] d[epartment] and all of them—they work so closely together with the DA’s office,” said Mike Rickman.[122](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref122)“They have to work so closely together because they cover so much ground.”[123](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref123) As one author wrote, small-town police chiefs feel responsible for knowing what happened to all the town’s serious cases because, “to the small town’s citizens[,] [the crime] will be viewed more seriously, and they will hold their chief responsible for knowing the outcome and being able to explain it.”[124](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref124) In part, this may also be because less densely populated, rural jurisdictions lack probation services to help with pre-sentence reports. A 1978 study quoted a prosecutor who “explained that in those sections the local sheriffs have a major influence in selecting an appropriate plea bargain. They have this influence because they are virtually the sole source of information. They know what the defendant did and are usually familiar with the defendant’s background.”[125](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref125)

#### There is significant informal influence on plea bargains by police officers.

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

In many jurisdictions—likely, the majority—there are no formal rules about when prosecutors should consult with officers about pleas. Instead, the jurisdictions employ ad hoc arrangements whereby a prosecutor may occasionally check with an officer about a plea or an officer may initiate a conversation with the prosecutor. What causes consultation in some cases and not others appears to be a function of many factors related to the case, the personalities of the prosecutor and officer, and the local customs of the prosecution team. This Section discusses some of the factors mentioned by officers and prosecutors in interviews and then turns to particular types of cases where police consultation is especially likely, including those where the victim or defendant is an officer or a cooperating witness. 1. Factors Leading to Police Involvement in Plea Bargaining Prosecutors and police officers are awash in criminal cases. For officers who are not routinely involved in plea bargaining, it takes something special about a case to trigger the officer’s involvement. And there are many potential triggers. The examples below touch on some of the most commonly articulated triggers. Needless to say, the list is far from exhaustive. Personal Rapport Between Prosecutor and Officer. According to interviews conducted for this Essay, personal relationships between prosecutors and police officers matter immensely in considering whether plea consultations will occur. “[P]lea bargain[ing], no matter what the structure is, is really about what the relationship is,” said Greg Seidel, former chief of detectives at the Petersburg Police Department in Virginia.[99](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref99)“[H]ow the prosecutor views the competency of the officers and whether or not they are willing to listen . . . . [The] plea bargain is a very human thing, it’s not easily broken down into a decision tree.”[100](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref100)William J. Johnson, the executive director of the National Association of Police Organizations (NAPO), noted that the rapport between officer and prosecutor is hard to predict, given the variety of personality types that become prosecutors. Some prosecutors naturally gravitate toward the company of officers, Johnson said, “go[ing] on ride-alongs on [their] day off,” for example, while others are decidedly wary of their police colleagues, subscribing to the notion that, “‘I took this job because I really don’t trust the police and my job is to police the police.’”[101](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref101) Prosecutors who align with either of these archetypes would have different levels of willingness to seek police input on a case. Severity of Crime. The seriousness of the crime also factors into whether plea consultations will occur, with more serious and complicated cases being more likely to see consultation between the police and prosecutors. “Normally, as far as plea bargaining goes, they may tell us they’re going to make an offer but generally speaking, unless it’s an egregious type of offense, they won’t discuss anything about the plea other than that they’re going to do it,” said Mike Rickman, general counsel for a law enforcement association in Texas.[102](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref102) Los Angeles prosecutor Shannon Presby said that, in run-of-the-mill cases, “the police have almost no input,”[103](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref103) but consultation will likely take place “on the other extreme, [in] complex either homicide cases—very, very serious case[s]—or sexual assault cases or very complex fraud cases in which the police officers have [done] a whole lot of investigation and often times know the case much better than the prosecutor.”[104](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref104)“Sex crimes and homicides, I would say, are the two where I think there is the most communication that goes back and forth,” said Bill Amato, a former prosecutor who now works as an attorney for the Tempe Police Department in Arizona.[105](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref105)Gary Ingemunson, a police officer turned union attorney, put it this way: “Let’s say I’m working burglaries and I arrest someone for [a] more or less routine burglary . . . . If I didn’t ask, I would probably never hear what happened to that case unless it’s going to go to a jury trial.”[106](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref106)“[N]ot every case is the case of the century,” said Rod Kusch, a captain in the homicide division of the Los Angeles Police Department.[107](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref107) “I would fully expect a conversation, at least some meeting of the minds [on a murder case], but low-level case[s] that happen every day in Los Angeles County, people don’t always say, ‘Let me stop [in and talk about it].’”[108](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref108) Cases less serious than murder and rape can also spur police consultation, however, when they become personal. Charlotte Police Major Cam Selvey gave two examples: domestic violence “where I knew there was a history—that was something I would not want to back off on,” and cases where “someone laid their hands on me . . . ’[W]e fought out in the middle of the street for twenty minutes. I’m not willing to let this one go.’”[109](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref109) Personal Interest in the Job. Some officers just care more about their cases. “[There are] some guys that seek a doctorate and some guys that just are satisfied with a bachelor’s,” said Mike Rickman, the Texas law enforcement association attorney. “Some officers take a lot more interest in their cases.”[110](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref110) Johnson, of the National Association of Police Organizations, compared officers’ varying levels of interest to those of artists and tradesmen:“There are some paintings that you put more effort into. If you’re a plumber there is a job you put more effort into,” Johnson said.[111](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref111) Prosecutor Elsa Seidel agreed about the diversity of interest among officers. “Some officers’ position is, ‘I make my case and I arrest them and after that it’s completely up to you,’” she said.[112](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref112)“Some officers really do want to be involved in the process. Some of them only care if the person was particularly difficult or particularly nice.”[113](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref113) Damon Mosler, a prosecutor who serves as a liaison to the San Diego Sheriff’s Department, estimated in “over half the cases, I think most cases . . . [the] cop could care less what happens.”[114](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref114)Added Charles Huth, a police captain in Kansas City: “Empirically, there [are] varying degrees of interest. . . . [S]ome officers are extremely involved even to the point they get emotionally involved.”[115](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref115) Officers’ Job Classification and Seniority. Detectives have more influence than patrol officers, and veteran officers have more influence than junior ones, at least according to the intuitions of those interviewed for this Essay.[116](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref116) Patrol officers see a higher volume of cases and have shallower interactions with each one. As a result, they are less likely to care about the outcomes of their cases than detectives, who may have spent months investigating a crime and getting to know the victims. Veteran officers have increased influence compared to junior ones. This may be a function of the older officers’ more developed network of relationships, more imposing reputation, or more nuanced understanding of how the justice system works. “At the beginning, you’re kind of naïve to the process,” said Kusch, a detective with more than three decades on the job.[117](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref117) “Once you understand the process, if you’re going to take ownership of the case, you’ve got to take ownership. If I really feel passionate about a particular case, I need to get that word to the DA.”[118](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref118) However, some thought seniority cut against police involvement. “I think as they progress through their career they understand the disappointments that are inherent in our criminal justice system,” added Johnson.[119](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref119)“[T]hey reach the point not that they don’t care, but they get cynical, almost like self-protection: ‘Don’t get too involved, because you don’t know what the DA is going to do, and you never know what the jury is going to do.’”[120](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref120)

#### Police unions push for plea bargains in cases where an officer is being tried. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

2. Special Cases Where Police Plea Involvement Is Heightened Beyond the general factors discussed above, there are special cases in which it is particularly likely officers will get involved in plea bargaining. Officers as Victims. From battery on an officer to first degree murder, officers are constantly at risk of becoming victims. When an officer is a victim, prosecutors will likely consult with the officer, her family, the police union, and the police department before any plea is offered.[126](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref126) This is partially an extension of the victims’ rights movement, which advocates that victims and their families be informed about the status of the prosecution’s case and be given an opportunity to address the court at sentencing.[127](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref127) What makes officer-victims different from other victims is that prosecutors feel inclined to take into account not only the officers’ interests, but also those of the officers’ employers and unions.[128](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref128) Police departments and unions have deep interests in preventing their members from becoming victims. Naturally, these organizations will want to have a say in the punishment of anyone who has victimized an officer. In San Diego, for example, police unions made an election stir when the prosecutor failed to consult them in an officer-as-victim case.[129](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref129) Even in relatively minor cases, police unions may push prosecutors to carefully consider the officers’ interests before settling the case. Cristina Escobar, an attorney for the Dade County Police Benevolent Association, sends letters to prosecutors in police-victim cases warning them not to make plea offers without first consulting her or the officers she represents: “[I] put it on the record, [the officer] want[s] to plead them to the guidelines and, anything below that, they need to [let the officer know].”[130](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref130) Officers as Defendants. The officer-defendant case is the flip side of the officer-victim case. When officers are defendants, prosecutors are also likely to consult police departments and unions about the appropriate plea. Officer misbehavior tarnishes the reputation of the department, so police chiefs may want a severe punishment for the officer-defendant in order to deter future misconduct and assure the public that no special treatment is given to misbehaving police. Or, the department may want leniency, under the theory that officers’ jobs entitle them to “professional courtesy.”[131](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref131)Either way, the police department would want to have a say. Meanwhile, police unions may also want to weigh in on the plea bargain, if they see it as their duty to push for as low a punishment as possible for the officers they represent. Of course, there may be areas where unions are willing to give and take with prosecutors in the plea negotiations. Financially, much rides on the specific charge to which the officer pleads guilty, because guilty pleas to some crimes can strip the officer of her law enforcement credentials and retirement benefits, while guilty pleas to other crimes do not.[132](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref132) In this respect, the officer might be willing to accept a more serious punishment if it is structured in such a way as to preserve [their] ~~her~~ ability to work in law enforcement. For these reasons, police departments and unions have a vested interest in the plea bargain and are likely to be consulted. Cooperators and Informants. Plea negotiations concerning cooperators and confidential informants are another area of great interest to the police. Officers use the prospect of a favorable plea, or the threat of an unfavorable one, to win cooperation from witnesses. In such cases, officers may have very strong opinions about what types of pleas are required to get the witness to cooperate, and officers may press prosecutors to deliver pleas on those terms. That is the good-cop approach. The bad-cop approach would be to threaten to scuttle a plea offer that is already on the table, if the potential witness refuses to cooperate.[133](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref133) There is no guarantee that the prosecutor will agree to the plea requested by the police officer, but if the prosecutor refuses to go along, he can be sure to face pressure from his law enforcement colleagues.[134](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref134)

#### Police departments go over the heads of prosecutors when facing resistance. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

C. Police Influence in the Face of Prosecutorial Resistance Even when prosecutors refuse to consult, or agree to consult but refuse to take police input to heart, officers still have ways to influence plea offers. This Section explores the mechanisms officers can use to pressure prosecutors. 1. Police Brass and Police Unions Upset with the prosecutor’s proposed plea? Officers can raise their concerns with police management or with their union representatives in the hopes that the higher-ups in these organizations can change the prosecutor’s decision.[135](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref135) Police departments and district attorneys’ offices necessarily work together on many thousands of cases each year, and the chain of command on each side of the prosecution team has a lot at stake in maintaining good working relations with their prosecution-team colleagues. A high-ranking police official can call a supervisor in the prosecutor’s office to ask for help overturning a line-level prosecutor’s plea decision, assuming the police official is willing to spend the capital. “If you were in a detectives squad, it would be your bosses in the detectives squad speaking with the district attorney’s office why someone was getting a plea deal rather than going to trial,” said Michael Paladino, a police union official and a detective in the NYPD.[136](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref136) Even if the line officer does not want to involve his supervisors, the police bureaucracy might get involved if the organization has a particular interest in the outcome of the case, an interest that could include protecting the police department’s public image.[137](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref137) Because police unions are important players in local politics, they are also able to pressure district attorneys’ offices about bad pleas. “[I]f the union president has a good working relationship both with his or her police chief . . . as well as with the prosecutor, it’s often times better for everyone involved,” said Johnson. “Most of the participants involved, they understand that there are going to be cases where I have to publicly disagree with something you did, but next week I’m still going to call you about something [to ask for a favor or work out an issue].”[138](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref138) Although union officials mostly focus on cases involving officers as victims or defendants,[139](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref139) unions sometimes see it as their duty to speak up when their members are upset about the way prosecutors are handling cases. Sean Smoot, an Illinois union official, gave the example of a group of sex-crime investigators who complained to the union about a prosecutor who was always pleading cases out to the less serious charge of simple battery. “When that issue was raised with the state’s attorney, they reviewed some cases and wound up letting the assistant state’s attorney go,” Smoot said.[140](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref140)Similarly, a group of officers in Gulfport, Mississippi, banded together to pressure a prosecutor they believed was not doing her job. The prosecutor was fired after her supervisor received “outraged complaints from a number of police officers that [the prosecutor] was negotiating plea bargains and dismissing cases without their input.”[141](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref141) Police management and police unions can sometimes work in tandem to influence a plea, with the police chief using the threat of union pressure as cover to raise his own concerns with the district attorney. “I give the chief the excuse to go over and talk to the state’s attorney and he can tell the state’s attorney, ‘I wasn’t going to say anything, but now the union’s involved and they’re asking questions, and just as a professional courtesy I’m telling you,’” Smoot said.[142](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref142) Indeed, the union may have even more freedom than police brass to meddle with prosecutors’ plea decisions, because the police union is not part of the prosecution team—it does not have to abide by whatever plea bargaining etiquette reigns within the jurisdiction. However, the union’s position outside the prosecution team also adds controversy to its involvement in the plea process. “I never dealt with unions, and I don’t think that’s the appropriate place” for them to get involved, said Andy Leonard, a retired major with the Charlotte-Mecklenburg police. And some union officials say they would never get involved in plea bargaining. “I can’t say that that has happened,” said Paladino, the NYPD detective and union official. “I never had to ask the union to get involved in any of that . . . . It’s not a union issue when a member of the public [is involved].”[143](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref143)

#### Police departments use media to pressure prosecutors into obtaining higher charges when prosecutors resist. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

Newspapers and local television news are routinely part of police efforts to influence plea bargaining. Officers can derail a plea by leaking word that the prosecutor is considering a lenient offer and did not consult with police first. If the plea offer has already been made, officers may go on the record to voice their dissatisfaction with the plea and make clear that they were not consulted.[144](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref144) These disparaging comments can help galvanize public opposition to the plea and put pressure on the sentencing judge to reject the plea agreement as not being in the interests of justice. Even after the judge accepts the plea, officers may publicly denounce the plea to put pressure on prosecutors to be more punitive in the future.[145](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref145) In one such example, police stormed out of the sentencing hearing for a defendant accused of murdering a cop. The officers made clear to the press that they “were not consulted on the plea bargain, and when they learned of it and objected, their objections were overlooked.”[146](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref146) Interestingly, even though there is no requirement that prosecutors consult police officers about plea bargaining, media accounts often portray the lack of consultation as a failure on the part of the prosecutor,[147](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref147) perhaps suggesting that the public expects officers and prosecutors to act in concert on plea bargaining.[148](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref148) Going to the media is not uncommon, but neither is it routine. In interviews for this Essay, prosecutors and police officers expressed their concerns about the effect on the prosecution team of involving the media in the team’s internal conflicts. “On a case-by-case basis, I think that has the potential to undermine the reliability of the justice system,” said prosecutor Mike Feinmel.[149](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref149) “They’re certainly free to say at election time, ‘Hey, we need a district attorney that is going to protect the public.’ That’s fair game, that is a little different than in a case-by-case basis undermining the public perception of the justice system.”[150](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref150) Attorney Gary Ingemunson, a former police officer himself, pointed to a recent Los Angeles case where an officer who was unhappy with the way police were handling a child molestation case complained to the Los Angeles Times. The police department leadership disciplined him for this breach of prosecution-team etiquette.[151](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref151) “It makes a certain amount of sense for the state’s attorneys to at least touch base [with the police], especially when you’re talking about cases [with] really significant crimes,” said Smoot.[152](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref152) “From a political standpoint, if you’re going to do a plea agreement and you don’t want somebody out in the newspaper the next [day] calling you out on it, then it’s probably a good idea to talk to the officers.”[153](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref153) This discussion about the use of media coverage would not be complete without a coda of skepticism. It may be that the police complain to the media, even when they believe a plea is appropriate, because it benefits them to criticize a plea bargain in the press. By publicly distancing themselves from the plea, the police can get all the benefits of a guilty plea—including certainty of a conviction[154](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref154) and limited expenditure of resources on further investigation[155](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref155)—without appearing soft on crime. By giving the impression that the police want to take every case to trial, the department can promote its own reputation for assiduousness without having to do additional work.

\*Sean Smoot is an Illinois union official.

#### Judges don’t solve – officers go to judges to combat prosecutorial resistance. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

For an officer who has a burning desire to influence a plea deal, there is the nuclear option: tell it to the judge. Officers have gone this route by writing letters to judges or showing up at sentencing hearings to condemn the prosecutor’s plea offer.[156](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref156) This technique is extremely controversial within the prosecution team, not only because it airs the team’s internal conflicts, but also because it raises the question of who is bound by the prosecutor’s plea bargain: the prosecutor only, or the prosecutor and the police? If the plea deal promises that the state will not make a recommendation at sentencing or that the state will ask for the minimum guideline sentence, does this promise prevent the police officer from asking the court for a severe punishment? And what is the remedy if the officer is found to have breached the agreement?

#### No conclusive court decision on officer involvement. Abel 17

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\*Brackets in original

Courts have waded into these questions when defendants have attempted to withdraw pleas or asked for specific performance to be ordered on the grounds that the police violated the terms of the plea agreement by weighing in on the punishment.[157](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref157) At the point that a defendant seeks to withdraw his or her plea, the court must determine whether the terms of the agreement were violated by the officer’s actions, which in turn requires the court to decide whether the prosecutor’s promise to the defendant binds the police as well.[158](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref158) Not surprisingly, given the contentiousness of the issue and the lack of rules about the prosecution team’s internal dynamics, courts are evenly split about whether the officer is bound by the prosecutor’s plea offer. Courts that hold that the police are bound by the prosecutor’s promise, and thus that the defendant should be allowed to withdraw his plea, believe that the officer’s recommendation to the judge is “an improper attempt to influence the sentencing by breaching the state’s promise.”[159](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref159) The Florida Supreme Court even extends this doctrine to cover statements made by officers in pre-sentence reports. “[B]asic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state’s [plea] recommendation,” the Florida court held.[160](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref160)Meanwhile, courts that do not allow the defendant to withdraw her guilty plea rely on the assumption that officers play no role in plea bargaining. Because officers play no role, the courts reason, no defendant should have assumed that the prosecutor’s plea offer would limit what the police could say, and therefore the officer’s statement to the judge does not deprive the defendant of the benefit of any bargain. The Arizona Supreme Court explained: “The police participate in neither negotiations nor the agreement and have no voice in dictating what terms should be considered, bargained for or included.”[161](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref161) It added that “[t]he provision requiring the State to stand mute on sentencing here obviously refers to and binds only the county prosecutor and was not intended to prohibit police officers from airing their opinions when specifically asked to do so by probation officers.”[162](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref162)

#### Blanket bans and regulations fail, but ending ad hoc methods of bargaining creates a cultural shift and policies that enforce better dialogue between the police and the prosecutors. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

Going forward, in thinking about what role police should play in plea bargaining, what is needed is some combination of honesty and optimism. The honesty part first: those who would attempt to build a wall between prosecutors and police officers on plea bargaining are setting themselves up for disappointment. Police officers have a deep, vested interest in being able to influence plea outcomes, even if they choose to invoke this power in a scattershot manner. Blanket rules preventing officers from getting involved in plea negotiations are doomed to fail, just as blanket bans on prosecutors’ ability to plea bargain were easily circumvented.[202](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref202) If officers want to influence a case, they are too deeply enmeshed in the prosecution team to be kept from doing so. Now, for the optimistic part: Instead of fighting an unwinnable battle against police involvement in plea bargaining, society could embrace this involvement with the hope that bringing officers into the plea-bargaining fold will reorient them to the adjudicative process with all of its attendant procedural protections. This would take a cultural shift, to be sure; it would have to begin with the way departments evaluate their officers and then percolate down to promotions, training, and the police academy. Of course, this gamble might fail, and police and prosecutorial abuses could become even more pernicious if officers had more influence over plea bargaining. Some experimentation by the nation’s thousands of prosecutorial and police agencies would surely be welcome in answering these questions.

Even without such a culture shift, however, there are some changes that can be put in place immediately. At a minimum, what is needed is transparency and intentionality about the police decision to get involved in some plea negotiations but not others. In some jurisdictions, there are formal guidelines dictating this involvement, but in the majority of jurisdictions, police involvement is entirely ad hoc. Wherever a decision is left completely to the unguided discretion of the officer or prosecutor, there is an opportunity for racism and other prejudices to affect the criminal justice system. Do crimes involving female victims particularly spur officers to care about case outcomes? Are crimes involving African-American victims less likely to motivate a police officer to push for a particular plea? It would be worrisome if this discriminatory pattern, seen in the charging decisions in death-penalty cases, were motivating police involvement in plea bargaining. Prosecutors, police agencies, and courts that see this pattern unfolding should be very concerned about the police influence on plea bargaining. Official department policies guiding officers’ decisions on when to contact prosecutors about pleas and what types of things to say would help limit the capriciousness that may exist. Likewise, data on how often these consultations occur would be helpful in understanding the dynamic.

One measure of how much work remains to be done in this area is the absence of a conceptual account of who should be allowed to influence plea decisions in the first place. Victims have been given influence over the plea-bargaining process by a wave of victims’ rights statutes that entitle victims to be informed about the progress of the criminal case against the accused and to have a formal say at sentencing proceedings. However, the fact that it required legislative action for victims to have a say is some indication that they may not otherwise have been powerful players in the criminal justice system. Police officers, on the other hand, are sufficiently powerful within the criminal justice apparatus to use their position to influence plea decisions—and influence they do. But what right do they really have to weigh in on these cases? They are not victims or otherwise aggrieved parties, yet there is a sense in which their sweat equity in working on the cases entitles them to a say in the cases’ outcomes. But is this sweat-equity theory enough to distinguish officers from city council members or state senators who might want to press prosecutors to ask for a particular punishment in a case? Politicians’ influence on cases would be unseemly, but it is not abundantly clear why officers who are not victims have more legitimate stakes in influencing decisions over guilt and punishment. This is one of the many aspects of this topic where additional theoretical work is needed.

#### Police misconduct drives police involvement in plea bargaining. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

In a world where police officers are involved in plea bargaining, the plea process would differ from one in which prosecutors have exclusive control over pleas. The more involved officers are, the less of an independent check the prosecutor can provide against improper police action. Bad arrests would be more likely to become bad convictions. Also, as officer involvement increased, there would be situations where the interests of the officers in settling a case would systematically diverge from the interests of the prosecutor in settling the case. The more influence the officers have, the more likely they are to get their way in such situations. These diverging interests include cases in which the police want to avoid the discovery process because it would reveal instances of police misconduct and cases in which departments may not want their officers cross-examined, for fear of what the cross-examination would bring to light. These cases of diverging interests might also include times when the police want to lock down a guilty plea, rather than take their chance at trial, because the guilty plea would prevent the defendant from bringing a civil rights suit later on.

More broadly, police influence on plea bargaining might change the market price for a plea to a particular crime. Officers’ views of what a case is worth may differ from prosecutors’ views because of their differing backgrounds, moral and legal sensibilities, and resource constraints. To the extent officers have more of a say, their influence would change the ultimate terms of the plea agreement. In short, police involvement in plea bargaining could upend the delicate equilibrium of plea negotiations in a number of ways because it imports a new set of institutional interests into the equation: the police’s interests.

#### Bad arrests become bad pleas. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

Prosecutors who advocate the separation of powers in plea bargaining often do so because they think prosecutors have a duty to act as checks against police overreach. In this separation-of-powers model, the police may make an arrest for improper motives or based on faulty evidence, but before anyone can be punished as a result of these allegations, there is an opportunity for independent review by a prosecutor not involved in the police misconduct. Where the prosecutor finds the police action was inappropriate, she can prevent it from sending the defendant to prison by dismissing the charges or offering a plea with a reduced punishment more in line with the crime.

The prosecutor’s ability to oversee, restrain, and correct police misconduct would be greatly diminished, however, if the police gained power in the plea-bargaining process. Or so the argument goes. If police officers are able to exert their influence on the plea decision, there is a greater risk that they will use this influence to convert an improper arrest into an improper conviction. In the process, the prosecutor’s independent review would shrink to nothing. In this way, greater police influence has the potential to transform the problems associated with bad arrests and investigations into problems that afflict adjudication, as well.

#### Threat of disclosure of misconduct drives police involvement in plea bargaining, which hampers civil rights litigation. Abel 17

Abel, Jonathan. “Cops and Pleas: Police Officers' Influence on Plea Bargaining.” The Yale Law Journal, vol. 126, no. 6, ser. 2016-2017, Apr. 2017. 2016-2017, www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining. Fellow, Stanford Constitutional Law Center. //nhs-VA

But there may also be times when the police are more inclined than the prosecutor to settle a case. Where going to trial would lead police misconduct to be disclosed through discovery, pretrial motions practice, Brady and Giglio disclosures, or cross-examination, police officers may want to settle the criminal case to prevent embarrassing information about the police agency from coming out.[163](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref163) If an officer does not have to testify at a trial, there is no need to provide information that would impeach his credibility, such as information about his history of misconduct. Likewise, if an arrest was effected through an illegal surveillance program or with excessive force, settling the case by guilty plea would spare the police agency from having its practices publicly exposed at trial.[164](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref164) Were the prosecutor the only one whose interests mattered, the threat of police embarrassment might not register. But if police have more influence over the negotiations, there would be a greater potential for pleas that help the police department to save face, even if the pleas otherwise do little for the prosecutor.

A variation on this face-saving interest can be found in the conditions the prosecutors set for the guilty plea. Where there is potential that the criminal defendant will sue the police department later on for civil rights violations, the police might have a particular interest in obtaining a guilty plea—even to reduced charges—if the plea contains a promise that the defendant will not bring any future lawsuit resulting from the case. The U.S. Supreme Court has signed off on the constitutionality of incorporating an agreement not to sue into the guilty plea.[165](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref165) This civil litigation context is another example where the police would have an interest in settling the case that the prosecutor would not otherwise have had on his own.

Similarly, the police may want a guilty plea because the conviction itself protects against some civil rights litigation.[166](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref166) Bill Amato, an attorney for the Tempe Police Department in Arizona, referred to the U.S. Supreme Court’s decision in Heck v. Humphrey for the rule that a federal civil rights claim for damages cannot prevail if the suit’s success would imply that a criminal conviction is invalid.[167](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref167) “[T]hat’s not something that prosecutors necessarily know,” Amato said, so “[I] went to my city prosecutor’s office one day without any case pending” and told the prosecutor about this doctrine: “‘Don’t plead it to the trespass, plead it out to the aggravated assault.”[168](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref168)In this way, the decision about what charge to plead a defendant to has implications for the police department’s civil liability—implications that the prosecutor likely would not know, or care, about if the police were not involved in the negotiation process. Another example where police may push for a particular plea offer is in cases involving officers as defendants. As noted earlier, certain guilty pleas will strip officers of their law enforcement credentials and pensions, while others will not.[169](https://www.yalelawjournal.org/essay/cops-and-pleas-police-officers-influence-on-plea-bargaining" \l "_ftnref169)

#### SCOTUS has explicitly ruled this type of plea bargaining constitutional. Louison 2k

Louison, Bradford N. “Release-Dismissal Agreements in Criminal Cases.” Merrick LC, Louison, Costello, Condon & Pfaff, LLP, 2000, www.merricklc.com/news/articles/release-dismissal-agreements-in-criminal-cases.html. Principal Attorney. //nhs-VA

\*Bracketed for gendered language

Unfortunately, judges are loath to dismiss cases as a result of previously signed releases due to an ingrained belief of a right of access to the courts. More importantly is the issue of voluntariness i.e., whether there was undue pressure placed on the defendant to sign a release in exchange for a favorable plea agreement in a criminal case, or in other words, whether it is fair to require a defendant to sign a release in exchange for avoiding a jail sentence. In fact prior to the 1987 U.S. Supreme Court decision in the Town of Newton, New Hampshire v. Rumery case, the Federal Court in Boston would not accept any releases to drop civil suits in exchange for the dismissal of criminal charges.

The United States Supreme Court in the case of Town of Newton (New Hampshire) v. Rumery, 480 U.S. 386, 389, 107 S. Ct. 1187, 94 L. Ed. 2d 405 (1987) Justice Powell, held that "a court properly may enforce an agreement in which a criminal defendant releases [their] ~~his~~ right to file a section 1983 action in return for a prosecutor's dismissal of pending criminal charges." In *Rumery*, the plaintiff and his attorney had discussed and signed such an agreement which in *Rumery* dealt with the dismissal of witness tampering charges, a felony, leveled against the plaintiff. The release-dismissal agreement provided that plaintiff would not sue the defendant town or any of its officials for his arrest.

Reversing the First Circuit, which had adopted a per se rule invalidating such release-dismissal agreements, the Court applied "traditional common law principles" to what it characterized as a question of federal law. It rejected the argument that release-dismissal agreements were inherently coercive. In its view, such agreements could further legitimate prosecutorial and public interests.

#### Plea deals for police prevent police misconduct from surfacing. Mock 17

Mock, Brentin. “How Chicago Let Police Off the Hook.” CityLab, 24 Jan. 2017, www.citylab.com/equity/2017/01/chicago-police-accountability/513791/. Brentin Mock is a staff writer at CityLab. He was previously the justice editor at Grist. //nhs-VA

For investigations where evidence of police misconduct does surface, the city allows police officers to plea down to lesser charges to avoid punishment.

So, let’s say a person filing a complaint does meet with an investigator, signs the sworn affidavits, and the action is serious enough that neither the IPRA nor the police department can simply ignore further examination per the methods outlined above. There’s a good chance that the complaint still won’t be investigated because of an over-utilized tool called “mediation” that allows the accused police offer to walk off with no meaningful punishment—even if the victim feels their grievance is not settled.

Under mediation, an accused police officer can simply agree to a less-serious charge related to the complaint in exchange for avoiding the most serious penalty—it’s essentially a plea bargain. According to the DOJ report, there has never been a mediation that was initiated after an investigation into the complaint was completed, and the person who filed the complaint is “generally excluded” from the mediation process.

As a result, approximately 65 percent of all complaints between 2013 and 2015 were waived off via mediation—50 percent of those mediated were for domestic violence or excessive force claims. One of those cases is described in the DOJ report:

We reviewed one complaint where an officer fractured his girlfriend’s nose during a domestic dispute. In this case, investigators recognized the seriousness of the allegations and requested an affidavit override after they could not secure the victim’s agreement to participate in the investigation because the victim feared retaliation from the officer and his friends within CPD. It is laudable that the investigators recognized the seriousness of the offense and pursued the investigation without the victim’s agreement to participate in the investigation. Yet, in the end, the investigators still sent the case to mediation, and the officer received only a five-day suspension.

#### Plea deals for police, commonly used in mediations, prevent police misconduct from surfacing. DoJ 17

United States Department of Justice Civil Rights Division. “Investigation of the Chicago Police Department.” Justice.gov, 13 Jan. 2017, www.justice.gov/opa/file/925846/download. Working with the United States Attorney’s Office Northern District of Illinois. //nhs-VA

Attempts to expedite investigations through so-called “mediation” allow officers to circumvent punishment for serious misconduct. Many serious misconduct complaints that avoid the investigative barriers described above are not fully investigated but instead are resolved through what IPRA calls “mediation.” However, this program is not true police-complaint mediation where parties meet to arrive at a mutually agreeable resolution of their dispute and, often, gain a better understanding of each other’s perspective along the way. Such programs, like the one that has been implemented in conjunction with our consent decree regarding the New Orleans Police Department, provide an opportunity for dialogue and understanding between victims of police misconduct and the officers who are the subject of their complaints in the presence of a neutral third party. “Mediation” at CPD, however, is a euphemism for a plea bargain, and is used in a way that often inappropriately, albeit quickly, disposes of serious misconduct claims in exchange for modest discipline, while misleading the public into thinking that accountability has been achieved. “Mediation” is used by IPRA to resolve an allegation of misconduct, usually by having the officer agree to a sustained finding in exchange for reduced punishment. Mediation is always used before investigations are complete, including before the accused officer is ever interviewed. This premature use of mediation deprives investigators of important information they could use to better determine the severity and breadth of the misconduct. The complainant is generally excluded from the process altogether, further separating the “mediation” process used by Chicago from the typical mediation used in other departments. Persons who complain of police misconduct are afforded no opportunity to meet with the officers who are the subject of their grievances or provide input into the resolution of their complaints if disciplinary action is taken. At the end of this process, complainants receive a letter that even IPRA leadership admits can be misleading, because it advises that the complaint was sustained but never discloses the precise charge that was sustained or the discipline imposed. These flaws are particularly concerning given how often IPRA uses mediation. From 2013 through 2015, mediations accounted for approximately 65% of all sustained cases. The investigators we spoke to stated that by December 2012, a year after the pilot program began, they were told to attempt mediation in every case. So instead of using mediation only in a limited number of appropriate circumstances, such as allegations where the facts are undisputed and there is no victim, IPRA mediates a wide range of complaints despite the seriousness of the allegations. This includes cases that are facially inappropriate for mediation, such as allegations of excessive force and domestic violence by officers.19 Approximately 50% of the mediations from 2013-2015 were for domestic violence or a full range of excessive force claims. Moreover, because IPRA is intentionally lenient in exchange for an officer agreeing to mediation, the discipline imposed for misconduct violations resolved through mediation is often far lighter than the allegation facts merit. We reviewed one complaint where an officer fractured his girlfriend’s nose during a domestic dispute. In this case, investigators recognized the seriousness of the allegations and requested an affidavit override after they could not secure the victim’s agreement to participate in the investigation because the victim feared retaliation from the officer and his friends within CPD. It is laudable that the investigators recognized the seriousness of the offense and pursued the investigation without the victim’s agreement to participate in the investigation. Yet, in the end, the investigators still sent the case to mediation, and the officer received only a five-day suspension. Another officer received a one-day suspension for admitting that he had shoved his baton into a victim’s side. And in over half of these excessive force and domestic violence cases, there was no real discipline at all, but simply a “violation noted” in the officer’s record, such as the case in which a CPD officer who participated in mediation received only a “violation noted” after being accused of verbally and physically abusing his wife in public, where there were witnesses to the event. In addition to mediation often leading to lesser disciplinary penalties, agreeing to mediate a misconduct complaint also allows officers to accept a sustained finding on a less serious charge in exchange for the IPRA investigator dropping more serious charges from the complaint file. For example, one investigative summary publicly available on IPRA’s website describes an officer who was accused of verbally abusing her mother and brother, striking her brother in the head, scratching his face and neck, stealing her mother’s Social Security check, and charging unauthorized items on her mother’s credit card. The accused officer was ultimately arrested for domestic battery. Yet, IPRA allowed the complaint to proceed to mediation, and after admitting to the lesser violation of scratching her brother’s face and neck, this officer was given only a two-day suspension. During the course of our investigation, the City and current IPRA leadership recognized that mediation is currently misused. IPRA officials also admitted that mediation is used to reduce caseloads and preserve resources. While this practice may have saved resources, IPRA staff admitted, and we confirmed, that mediation, as it is currently used, is both inappropriate and a significant impediment to true accountability. Some, but not enough, of the problems described above were addressed in the new ordinance creating COPA. The ordinance prohibits COPA from using mediation for “complaints alleging the use of excessive force that result in death or serious bodily injury and cases of domestic violence involving physical abuse or threats of physical abuse.” The ordinance, however, does not provide sufficient guidance on other circumstances where mediation should not be used as a means to negotiate a plea bargain.

#### Here’s a solvency advocate. DoJ 17

United States Department of Justice Civil Rights Division. “Investigation of the Chicago Police Department.” Justice.gov, 13 Jan. 2017, www.justice.gov/opa/file/925846/download. Working with the United States Attorney’s Office Northern District of Illinois. //nhs-VA

A well-functioning accountability system (in combination with effective supervision) is the keystone to lawful policing. The City and CPD must create impartial, transparent, and effective internal and external oversight systems that will hold officers accountable in a timely manner for violations of law, CPD policy, or CPD training. To that end, the City and CPD must: 1. Improve the City and CPD’s accountability mechanisms for increased and more effective police oversight. a. Work with police unions to modify practices and procedures for accepting complaints to make it easier for individuals to register formal complaints about police conduct; b. Adopt practices to ensure the full and impartial investigation of all complaints, and assessment of patterns and trends related to those complaints; c. Revise IPRA/COPA mediation policies and procedures to: 1) require complainant notification of and participation in mediation; 2) incorporate principles of restorative justice; 3) create clear, objective standards for referring cases to mediation; and 4) prohibit mediation for resolving certain categories of complaints, including use of force and domestic violence complaints

#### And the plan is a reform that ensures neutral prosecution. Jawando and Parsons 14 Wakanda

Jawando, Michele L., and Chelsea Parsons. “4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations.” Center for American Progress, 18 Dec. 2014, www.americanprogress.org/issues/courts/reports/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/. Michele Jawando is an attorney and social justice advocate working at the intersection of policy, political strategy, and media. Chelsea Parsons is the vice president of Gun Violence Prevention at American Progress. //nhs-VA

Some states have established permanent special prosecutors’ offices. Maryland handles a variety of cases, from violations of election law to police misconduct, through an independent special prosecutor. In 1972, the state of New York created a special prosecutor’s office to explore police corruption in New York City. According to the *New York Law Journal*, the special prosecutor’s office in New York “established a remarkable track record in fairly, objectively and successfully investigating and prosecuting police officers and others in the criminal justice system suspected of criminality.” In 1990, the office was disbanded, but recently, there have been calls to reinstate the office to investigate and potentially prosecute alleged police brutality cases that result in the death of an unarmed subject. There are several approaches employed in states across the country that could serve as a model for reform. States could provide state attorney generals additional prosecutorial authority over fatalities involving police and create permanent “special prosecutors” that are housed within the state office of the attorney general to provide a level of insulation from local law enforcement. As suggested by Joshua Deahl, an appellate attorney with the District of Columbia’ Public Defender Service, the special prosecutor’s responsibilities could “be limited to the oversight, investigation and prosecution of police or public official misconduct, keeping them independent from other policing functions.” Alternatively, states such as Wisconsin have “officer-involved-death” statutes. In Wisconsin, this requires that at least two independent investigators examine cases. Finally, automatic referral outside the jurisdiction in fatal cases involving police is a possibility. In that instance, a prosecutor from outside the jurisdiction in question would lead the investigation. The requirement of an independent, outside party could address perceived conflict of interest issues with local officials. Whether by state statute requiring an out-of-jurisdiction investigator or state executive action automatically assigning fatalities cases involving police to attorney generals or special prosecutors, all states should adopt practices to ensure that all investigations of homicides involving police are conducted by a neutral prosecutor other than the office that typically works with the police department that is the subject of the investigation.

#### Prosecutorial bias favoring police prevents justice. USA Today 14

The Editorial Board. “Reform Prosecuting Police Misconduct: Our View.” USA Today, Gannett Satellite Information Network, 10 Dec. 2014, www.usatoday.com/story/opinion/2014/12/10/eric-garner-staten-island-police-district-attorney-editorials-debates/20216333/. //nhs-VA

Three years after that election and one year before the next one, it was Donovan's job to lead a grand jury investigation into whether a white police officer, Daniel Pantaleo, should be indicted in the death of Eric Garner, an unarmed black man. The grand jury voted not to indict despite a video, seen by much of America, that showed Pantaleo using a banned chokehold on Garner and ignoring, along with other officers, Garner's pleas of "I can't breathe." That decision not to indict, and many others like it, suggest that the system for investigating police misconduct is broken, and that elected district attorneys are poorly positioned to fix it. Local prosecutors, more than 80% of whom are elected, not only work closely with police, but also often depend on police union endorsements to win and keep their jobs. These endorsements are particularly helpful in low-turnout, off-year elections such as the ones in Staten Island. Police unions are quick to anger over even the slightest criticism. After New York Mayor Bill de Blasio made some mildly critical comments about the Garner case, Lynch — the union chief who endorsed Donovan — promptly blasted the mayor for throwing police "[under the bus](http://newyork.cbslocal.com/2014/12/04/pba-president-police-officers-thrown-under-the-bus-by-de-blasio-in-wake-of-eric-garner-grand-jury-decision/)." In racially fraught situations involving allegations of police misconduct, even the appearance of conflict is damaging. When grand juries, which are largely controlled by district attorneys, fail to indict, many people, particularly African Americans, regard the system as rigged. While fatal shootings of suspects are on the rise, newspaper investigations in numerous communities have found that [few police officers face charges](https://www.usatoday.com/story/news/nation/2014/11/25/ferguson-grand-jury/70098616/) when they shoot an unarmed person.

#### Criminal enforcement of the police misconduct provision is within the jurisdiction of the DOJ. Gore n.d.

Gore, John M. “Addressing Police Misconduct Laws Enforced By The Department Of Justice.” The United States Department of Justice, www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice. Acting Assistant Attorney General. //nhs-VA

Federal Criminal Enforcement It is a crime for one or more persons acting under color of law willfully to deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States. (18 U.S.C. §§ 241, 242). "Color of law" simply means that the person doing the act is using power given to him or her by a governmental agency (local, State, or Federal). A law enforcement officer acts "under color of law" even if he or she is exceeding his or her rightful power. The types of law enforcement misconduct covered by these laws include excessive force, sexual assault, intentional false arrests, or the intentional fabrication of evidence resulting in a loss of liberty to another. Enforcement of these provisions does not require that any racial, religious, or other discriminatory motive existed. What remedies are available under these laws? Violations of these laws are punishable by fine and/or imprisonment. There is no private right of action under these statutes; in other words, these are not the legal provisions under which you would file a lawsuit on your own. Federal Civil Enforcement "Police Misconduct Provision" This law makes it unlawful for State or local law enforcement officers to engage in a pattern or practice of conduct that deprives persons of rights protected by the Constitution or laws of the United States. (42 U.S.C. § 14141). The types of conduct covered by this law can include, among other things, excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests. In order to be covered by this law, the misconduct must constitute a "pattern or practice" -- it may not simply be an isolated incident. The DOJ must be able to show in court that the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct. However, unlike the other civil laws discussed below, DOJ does not have to show that discrimination has occurred in order to prove a pattern or practice of misconduct. What remedies are available under this law? The remedies available under this law do not provide for individual monetary relief for the victims of the misconduct. Rather, they provide for injunctive relief, such as orders to end the misconduct and changes in the agency's policies and procedures that resulted in or allowed the misconduct. There is no private right of action under this law; only DOJ may file suit for violations of the Police Misconduct Provision.

### **Coercion**

#### Ad hoc bargaining results in forfeiture of defendants’ property. Colquitt 2k

Joseph A. Colquitt " Ad Hoc Plea Bargaining 75 Tulane Law Review 2000-2001 ." Heinonline.org. N. p., 2018. Web. 5 Mar. 2018. Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, Sixth Judicial Circuit, State of Alabama. //nhs-VA

During bargaining, one of the parties may suggest a contribution to a charity or a fund in lieu of a fine or a jail term, or in return for a dismissal of charges. Contributions may constitute attractive alternatives to statutorily established punishments for several reasons. First, the defendant may not view the contribution as a punishment; alternatively, the defendant may believe that the public will not view it as such. Second, the statutory range of fines available may not meet the wishes of the parties. The minimum fines may be too high in the view of the defendant or the judge; the maximum fine may be too low in the eyes of the prosecutor or judge. Because the contribution is not governed by law, 16 the parties can fix any amount that they deem acceptable and that the court will approve. Third, the defendant may consider the possibility of receiving a benefit or even a potential tax deduction from the contribution to be an additional advantage.1 17 Contributions may also provide the prosecutor with a means of evading restrictions on punishing a defendant absent a conviction. If the case is to be dismissed, it may be impermissible to impose a fine or costs in conjunction with the dismissal,"8 yet the prosecutor may be able to exact some price for the dismissal through a contribution. These attractive aspects of contributions-as-sanctions notwithstanding, the charitable or governmental contribution generally is an unauthorized and ill-advised substitute for properly established punishments. Despite the issues of legality, advisability, and appropriateness, courts have approved contributions to charitable and governmental agencies and funds of the defendant's choice"9 or charities designated by the court.2 The beneficiaries have included a county prosecutor's fund,121 a county sheriff's fund, 22 a court library fund, 123 a hospital,1 24 a fund for volunteer attomeys,1 s a job training program, 26 a police street-crimes unit fund,12 7 a university foundation, 28 and various other charities and funds.129 Additionally, courts have upheld bargains that included forfeitures of defendants' property, even absent statutory authority.130 In times past, courts frequently dismissed or nolle prossed' 31 criminal cases upon payment of court costs. This practice was eventually condemned in at least some jurisdictions because, generally, without a conviction a court may not impose punishment.1 32 Yet a substitute for the practice survives today. As the previous text indicates, a prosecutor, or perhaps a judge, may offer to dismiss pending charges if the defendant either contributes a certain sum of money to a charitable or governmental organization or agrees not to contest the forfeiture of property. 3'3 Alternatively, as mentioned earlier, a contribution to a charitable or governmental organization might replace the statutory fine available for use upon a conviction for a particular offense. For example, a municipal court judge in North Las Vegas, Nevada, prepared a list of charities which he then provided to defendants appearing before him and suggested that the defendants make contributions to a charity on the list in lieu of paying a fine to the city."' Likewise, a Missouri judge approved a practice devised by the local prosecutor to allow criminal defendants to contribute funds to the underfunded court's "library fund."135 The moneys were then used for court and law library maintenance as well as to purchase furnishings for the court. 36

### Corporations

#### Corporations take ad hoc bargains. Colquitt 2k

Joseph A. Colquitt " Ad Hoc Plea Bargaining 75 Tulane Law Review 2000-2001 ." Heinonline.org. N. p., 2018. Web. 5 Mar. 2018. Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, Sixth Judicial Circuit, State of Alabama. //nhs-VA

A somewhat unique and rather complex case involving DuPont Chemical Company serves as another good example of the contribution quid pro quo.137 Although the DuPont case was not a criminal case in which a defendant sought to settle a charge, the issue of immediate interest in that civil case was criminal in nature, namely an investigation of DuPont for possible criminal contempt.' During the litigation, which involved alleged crop damage from the use of Benlate 50, a DuPont product, DuPont was alleged to have fraudulently withheld and possibly destroyed evidence.'39 The federal district court in which the civil case was pending strongly encouraged the U.S. Attorney's office to conduct a criminal investigation of DuPont's conduct. 4 ' Shortly thereafter, however, the matter was resolved when DuPont agreed to contribute about $11 million to Georgia's four law schools and a law-related project. 4' Under the proposal and the resulting consent order, each school would receive $2.5 million to establish and fund a professional chair on professionalism and legal ethics. 42 The remaining $1 million would fund an annual symposium on legal professionalism and ethics.'43 The symposium would rotate among the four law schools.'"

### Rights – Chemical Castration

#### Barring an explicit statue prohibiting forfeiture of rights, defendants can be pushed to accept things like chemical castration. Colquitt 2k

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If the law gives a right or privilege to a citizen, and that right or privilege can be taken, given away, or lost, then even a well-intentioned prosecutor or judge may see that right or privilege as a possible bargaining chip. Quite a number of items exist for barter. For example, the price sought for a lesser penalty, an alternative punishment, or probation could include surrender of the right: (1) to assemble or protest,156 (2) to attend or to forego attending the church of one's choice,'57 (3) to contest the forfeiture of property, (4) to engage in certain occupations,159 (5) to file complaints or lawsuits,16 (6) to procreate,161 or (7) to raise one's own children. 62 Similarly, the price might be the surrender of a privilege such as operating a vehicle as a licensed driver. 63 All of these rights potentially can be bargained away without any legislative authorization. Alternatively, a defendant may elect to accept even a Draconian offer if a desirable benefit is extended in exchange. For example, the defendant might agree to plead guilty and accept a period of incarceration if he is accorded the right to conjugal visits." Even though we have the right to procreate, eight states already have chemical castration statutes. 65 Moreover, at least one state recently considered whether to allow chemical castration of child molesters, but the proposed legislation failed.166 More states are likely to follow if they are not constructing even newer ways to lead. The fact remains, though, that at this time many states do not have chemical castration statutes. In those jurisdictions without chemical castration statutes, or in those cases to which such statutes are inapplicable, chemical or physical castration may be viewed by some parties as a matter for negotiation. 67 The prosecution may seek it or the defendant may offer it. If they strike a bargain and the trial court approves it, the agreement may never be reviewed. Moreover, women have not gone unnoticed. Some women have been ordered not to become pregnant 6" while others have been required to submit to a Norplant implant.169

### Scarlet-Letter Punishments

#### “Scarlet-letter” plea bargains are used to embarrass the defendant for committing a crime but prevent them from moving past it. Colquitt 2k

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In times past, prosecutors have bargained for, or courts have imposed, scarlet letter punishments. 7' The name, of course, derives from Nathaniel Hawthorne's classic book by the same name.' Scarlet letter punishments seek to shame or disgrace the individual by exposing the offender's wrong to public scrutiny.172 Recently, this practice has been condemned by many, but not all, courts." Some courts uphold various forms of scarlet letter punishments." Types of scarlet letter punishments vary widely. Perhaps the most popular varieties today include bumper stickers and placards for automobiles,"5 newspaper advertisements, 7'6 and yard signs' 7 that publicize the offenders' crimes or apologize for them. Other versions have included printed T-shirts' and bracelets 79 announcing the offenders' crimes. Courts that permit scarlet letter punishments usually limit them to offenders who they believe pose a risk of future harm to the public, such as convicted sex offenders or intoxicated drivers. Even though these measures might infringe on an offender's rights or constitute an unauthorized punishment, the imposing courts justify them as remedial measures that protect the public. 8' These courts view the perceived benefit to society as outweighing any detriment to the offender. 8 ' A New York case provides an excellent example of a court-imposed scarlet letter punishment."' The trial court required, as a condition of probation, that a defendant convicted of driving while intoxicated attach to his automobile license plate fluorescent lettering that stated "CONVICTED DWI.'183 When the defendant appealed the probation condition, the Court of Appeals of New York held that this condition was intended to humiliate the defendant and did not serve any other purpose.184 Additionally, the court noted that the probation condition was not authorized by New York law and therefore was an impermissible punishment." The appellate court's ruling thus limits the use of scarlet letter punishments in New York courts. 86 Perhaps the most pervasive labeling today is the registration of sex offenders or child abusers under Megan's Law-type statutes."8 7 These statutes require convicted sex offenders or child abusers to register their addresses with local law enforcement. 8 Depending on the classification of the offender,189 some statutes authorize the disclosure of this information to the public.' While the registration aspect of these statutes is generally upheld as a justified attempt to track dangerous predators and prevent future crimes,' 9' some courts have found the disclosure aspect to be an invalid punishment of the offender. 92 Offenders who challenge the disclosure provisions often argue that publicly announcing their crimes makes them possible targets of vigilantes, decreases their career opportunities, and inhibits their ability to form stable relationships. 93 When scarlet letter conditions are included in plea agreements, they might violate either the law or constitutional principles. By enforcing a plea that includes such a condition in a jurisdiction that has not authorized the particular scarlet letter punishment, the judiciary impermissibly assumes the legislative role of establishing punishments for crimes. Even in a jurisdiction that has enacted a scarlet letter statute, a plea agreement might inappropriately apply such a condition to the offender. For example, a statute might provide for the registration of child sex offenders, yet a plea agreement might require the registration of a DWI offender. DWI obviously is not included within the statutory classification; thus, the bargain raises separation of powers concerns which are addressed later in this Article!" Another possible problem arises when parties agree to a scarlet letter condition modeled after a statutory provision that a court has struck down. For example, the Kansas Supreme Court found that enforcing the disclosure provision of the Kansas Sex Offender Registration Act against a previously convicted defendant constituted an impermissible ex post facto application of the law. 95 Yet parties may agree on a plea package that requires offenders to register and disclose to the public their previous convictions, thus potentially waiving any right to protest a de facto ex post facto application of a statutory disclosure provision. Such examples demonstrate the potential problems of including scarlet letter sanctions in ad hoc plea bargains.

### Sterilization

#### Defendants are forced to accept sterilization. Associated Press 2015

Associated Press. “Tennessee Sterilisations in Plea Deals for Women Evoke Dark Time in America.” The Guardian, Guardian News and Media, 28 Mar. 2015, www.theguardian.com/us-news/2015/mar/28/tennessee-forced-sterilizations-plea-deals-women. //nhs-VA

Nashville prosecutors have made sterilization of women part of plea negotiations at least four times in the past five years, and the district attorney has banned his staff from using the invasive surgery as a bargaining chip after the latest case. In the most recent case, first reported by The Tennessean, a woman with a 20-year history of mental illness had been charged with neglect after her five-day-old baby mysteriously died. Her defense attorney says the prosecutor assigned to the case wouldn’t go forward with a plea deal to keep the woman out of prison unless she had the surgery. Defense attorneys say there have been at least three similar cases in the past five years, suggesting the practice may not be as rare as people think and may happen more often outside the public view and without the blessing of a court. Sterilization coerced by the legal system evokes a dark time in America, when minorities, the poor and those deemed mentally unfit or “deficient” were forced to undergo medical procedures that prevented them from having children. “The history of sterilization in this country is that it is applied to the most despised people – criminals and the people we’re most afraid of, the mentally ill – and the one thing that that these two groups usually share is that they are the most poor. That is what we’ve done in the past, and that’s a good reason not to do it now,” said Paul Lombardo, a law professor and historian who teaches at Georgia State University. Davidson County District Attorney Glenn Funk agrees. A former defense attorney who took over the office in September, he recently ordered lawyers in his office not to seek sterilization by defendants. He said he hadn’t heard of it happening before but didn’t ask. ‘Government can’t be ordering a sterilization’ but it does. Funk said people could be ordered to stay away from children, and the state wouldn’t have to resort to such invasive measures. “The bottom line is the government can’t be ordering a forced sterilization,” Funk said. However, such deals do happen. In West Virginia, a 21-year-old unmarried mother of three agreed to have her tubes tied in 2009 as part of her probation after she pleaded guilty to possession with intent to distribute marijuana. And last year, a Virginia man who fathered children with several women agreed to undergo a vasectomy in exchange for less prison time in a child endangerment case. Forced sterilization came up in a different way in California last year, when Governor Jerry Brown signed a bill that banned state prisons from forcing female inmates to be sterilized. The law was pushed through after the Center for Investigative Reporting found that nearly 150 female prisoners had been sterilized between 2006 and 2010. An audit found that the state failed to make sure the inmate’s consent was lawfully obtained in every case. The most recent Nashville case involved Jasmine Randers, 36, who had been under court supervision for mental illness when she left her home state of Minnesota. She gave birth in West Memphis, Arkansas, then fled a homeless shelter to come to Nashville, said her attorney, assistant public defender Mary-Kathryn Harcombe. Court records show Randers reported awakening in a motel, where she’d slept in a bed with the baby, only to find the child unresponsive. She reportedly called a taxi two hours later and took the child to a local hospital, where the infant was pronounced dead. Advertisement There was no sign of injury, and the cause of death was undetermined. Police later learned that in 2004, Randers stabbed herself in the stomach while pregnant, though the fetus was not harmed. She told investigators that it happened when she fell down the stairs while cutting fruit. The assistant district attorney who worked the case, Brian Holmgren, is a child prosecutor who speaks around the country, was once a senior attorney with the National Center for Prosecution of Child Abuse and serves on the international advisory board of the National Center for Shaken Baby Syndrome. He has been both praised and fiercely criticized for his aggressive courtroom tactics on behalf of children. Harcombe said he previously asked that another client agree to be sterilized in order to get a plea deal. She refused and it didn’t become part of the plea deal reached in that case. Holmgren did not respond to several messages seeking comment. Nashville defense attorney Carrie Searcy said Holmgren asked that two of her clients who gave birth to children who tested positive for drugs undergo sterilization. Neither did, Searcy said, because both women had already undergone the procedure. Assistant public defender Joan Lawson, who also supervises other attorneys, said she also had been involved in cases in which a prosecutor had put sterilization on the table. Lawson said it was typically not an explicit demand, was not an everyday occurrence and was made off the record. Lawson said she refused the idea and resolved her cases without sterilization. “It’s always been more of ‘If your client is willing to do this, then I might be inclined to talk about probation,’” Lawson said. This time, when Holmgren insisted Randers ungero sterilization to avoid prison, Harcombe complained to his boss. The district attorney took over the case, and Randers was not sterilized. The prosecutor agreed Randers was mentally ill, and she was institutionalized after being found not guilty by reason of insanity. “Any time a woman is given a choice between prison and this surgery, that is inherently coercive, even in cases where there is no mental illness,” Harcombe said.

#### Predictable – banning types of ad-hoc bargaining is in the lit OR District Attorney is normal means. Reutter 16

Reutter, David. "Tennessee District Attorney Ends Sterilization In Plea Bargains; Prosecutor Fired | Prison Legal News" Dec. 8, 2016. Prisonlegalnews.org. N. p., 2018. Web. 20 Mar. 2018.

The District Attorney for Davidson County, Tennessee has banned the practice of seeking sterilization as part of plea bargains in criminal cases. The policy was implemented after an assistant prosecutor refused to discuss a plea unless a mentally ill defendant agreed to be sterilized. When Glenn Funk, who had worked as a criminal defense attorney for 25 years, was elected as District Attorney in September 2014, there were concerns as to how well he would perform his duties. His involvement in the case of Jasmine Randers in early 2015 fulfilled his campaign promise to take a direct and active role in prosecutions. Randers, 36, had suffered from mental health issues since the age of 15 and was hospitalized numerous times. “Treatment” for her condition mainly took place in America’s most populous de facto mental health facilities: jails. When a dirty, disheveled and pregnant Randers arrived at the Nashville International Airport on October 9, 2012, she was on the run from a Minnesota commitment order. She spent the next 30 days at a Nashville mental health facility before her mother came to pick her up. Hours after they arrived home, Randers hopped on a Greyhound. She traveled to Nevada, Utah, Idaho and Oregon. Her water broke on a Greyhound bus in Arkansas, and she was taken to a hospital where she gave birth to Isabelle on December 17, 2012. Randers showed no signs of mental illness at the time, and was released to a homeless shelter. A day later she arrived in Nashville. The next morning, having spent the night in a hotel bed with her newborn, Randers discovered four-day-old Isabelle was dead. A few hours later she took the baby to a medical center. Although the cause of death could not be determined, Randers was charged with child neglect and faced 15 to 25 years in prison. Assistant Public Defender Mary Kathryn Harcombe said Assistant District Attorney Brian Holmgren, who was nationally renowned for his work in child abuse and neglect cases, refused to discuss a plea deal unless Randers agreed to have her tubes tied, preventing her from having more children. “Any time a woman is given a choice between prison and this surgery, that is inherently coercive, even in cases where there is no mental illness,” Harcombe stated. She called DA Funk, who took over the case himself. He found that doctors had unanimously said Randers was so mentally ill that her condition could be raised as part of her defense, and agreed that she should be found not guilty by reason of insanity. Randers was subsequently committed to a mental health facility. In March 2015, Funk enacted a policy prohibiting sterilization as part of plea deals. “I have let my office know that that is not an appropriate condition of a plea,” he said, adding, “It is now policy that sterilization will never be a condition of deal-making in the district attorney’s office.” Just a few weeks later, on April 1, 2015, Holmgren confirmed that he had been fired. While he would not disclose the reason, the Associated Press reported that sterilization had been part of plea bargain discussions in at least four child neglect and abuse cases during the previous five years in Davidson County.

### Closed Proceedings and Sealed Records

#### Prosecutors can bargain away the right to an open court proceeding or can seal records. Colquitt 2k

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Courts are open governmental agencies.196 As such, the public generally has had access to plea agreements and proceedings. 197 However, parties frequently bargain the closure of court proceedings or the sealing of court records during the settlement process 9 Naturally, statutes may provide for the closure of certain proceedings or the sealing of particular types of records. 199 Those statutes and the cases governed by them fall outside the focus of this subpart. Here, we focus primarily on the closure of proceedings or the sealing of records without, or in spite of, the guidance or authority of governing rules or statutes. Many of the bargained closures or sealing of records violate statutes that require open proceedings and records." 0 Normally three factors should be present to justify a court's closing criminal proceedings or sealing records: (1) the closure or sealing must serve a compelling interest; (2) absent the closure or sealing, it is probable that the compelling interest would be frustrated; and (3) no reasonable alternatives to the closure or sealing would sufficiently protect the compelling interest.2 ' Moreover, certain prerequisites should be met. For example, those who are to be excluded from the proceedings should be afforded a reasonable opportunity to assert any objections, and the court should state the basis for the closure in its findings and order. 2 Similarly, any motion to seal the records of a guilty plea should become a part of the case record and the hearing on the motion presumptively should be held in open court. Despite such safeguards, plea negotiators may choose to add closure of the proceedings or sealing of the records to their menu of bargaining options. Consider, for example, the plea agreement in State v. Campbell.°3 At an unscheduled hearing closed to the public, the parties informed the court that they had reached a settlement. 4 The defendant's attorney moved that the agreement, sentence, and record of the proceeding be sealed permanently in an effort to curtail publicity about the dentist-defendant's case.2"5 The prosecutor did not oppose the motion, which was granted in an oral ruling by the trial court.2"6 Subsequently, three newspaper publishing firms, representing five newspapers, successfully sought a vacatur of the order.207 The trial court granted their motion to intervene, vacated the order sealing the plea agreement, sentence, and court record, and ordered that the record immediately be made accessible to the public and the media.208 Had the newspapers not pursued the matter, the proceedings likely would have remained a secret. As it developed, the plea became public and the defendant lost an anticipated benefit.

### Banishment

#### Banishment is an ad hoc punishment. Colquitt 2k

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Nevertheless, banishment possibly remains a viable bargaining chip in some jurisdictions. For example, in Phillips v. State, the parties negotiated a settlement in 1990 that included a banishment condition. 247 In 1998, the defendant filed a motion to strike various provisions of the 1990 settlement and an intervening settlement." The trial court denied the motion and the appellate court affirmed, despite the fact that banishment beyond the state's borders is proscribed by the Georgia State Constitution.249 The court reasoned in part that, because the conditions were a part of a negotiated plea, the defendant had waived any right to challenge the conditions.25 ° Thus, even though the law prohibits an order of exile, the defendant may be deemed to have waived the law or any review of the agreement by accepting the negotiated terms.2 1 Although appellate courts condemned banishment in the 1970s, it still existed in the 1990s, and it is only reasonable to believe that it remains a bargaining chip today. Admittedly, it would be rather difficult to determine just how many cases are withdrawn and filed252 or dismissed on the agreement of an offender to relocate to another locale. Alternatively, parties might agree to an unsupervised probation on the condition that the accused leave the state.253

### Military Service

#### Defendants are forced to serve in the military – any “disqualifying aspects” are bargained away. Colquitt 2k

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In times past, particularly in times of military conflict, one potent bargaining chip was the agreement by a defendant to enter military service in return for a dismissal of charges or some other nondisqualifying settlement of the charges. 4 In recent years, though, the peacetime, voluntary-enlistment military forces have become more selective.255 They will not often accept as enlistees persons who have criminal records. If the charges are serious and the defendant remains subject to prosecution or punishment, that status might pose a complete bar to enlistment.25 6 Thus, for example, in State v. Hamrick, the defendant was unable to enlist in any of the military services because he had attended a "batterers' education program" as a condition of his negotiated settlement."7 Additionally, the military services will not accept "forced volunteers," namely those who enlist due to "a choice by civilian authorities between going to a civilian jail or joining the .Army.'ass For these reasons, prosecutors and defendants who envision military service as a possibility have to carefully craft settlements that do not disqualify the defendants from military enlistment. A plea of guilty to a serious crime, active probation, a definite choice ofjail-orservice, or collusion on the part of a military recruiter could bar the enlistment and thus spoil the parties' agreement. But it is likely that military enlistment agreements continue to be forged, albeit not quite as easily as in the past. Moreover, it is likely that disqualifying aspects of punishment are bargained away. Thus, an impediment such as a "batterers' education program" requirement may disappear during bargaining so that the defendant may enlist in the military.

### Waivers of Appeal

#### Defendants waiver their right to a conditional plea. Colquitt 2k

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Ever more frequently, prosecutors are insisting that defendants waive their right to appeal as part of the plea package." 9 Historically, in some jurisdictions the plea had effectively precluded the assertion of certain errors on any appeal. Yet offenders sought to preserve their right to appeal issues collateral to the plea agreement. Thus, the system gave birth to the conditional plea." 6 A conditional plea permits the defendant to both plead guilty and appeal certain pretrial issues or rulings. Suppose, for example, that a defendant believes the police illegally searched for and seized incriminating evidence or inappropriately interrogated the defendant and thereby obtained a confession. Yet the defendant feels that it is advantageous to accept the prosecutor's offer and settle the case if in fact the search or the interrogation is legal. In some jurisdictions, defendants in such cases are, or have been, allowed to plead guilty while reserving the right to appeal in order to seek appellate review of issues not related to the plea itself.261 The conditional plea allows defendants who lose motions to suppress alleged improperly obtained confessions or fruits of a search and seizure to take advantage of settlement offers, but still obtain appellate review of adverse trial court rulings on pretrial motions. To counter the conditional plea, many prosecutors require the surrender of all appeal rights as part of a plea bargain.262 In fact, waiver of appeal rights arguably is connected with the purposes of the plea; the waiver helps bring closure. The public, the government, or the victim (or perhaps all three) may desire and seek finality. Permitting the defendant to plead, then appeal, does not provide that finality. Many defendants agree to waive their right to appeal as a condition of their plea agreement.263 While the waiver of appeal rights may provide the desired finality, it also takes many aspects of the bargained case out of the reach of appellate courts. Consequently, appellate courts do not review many of the bargains struck between state attorneys and defendants.

### AT: Judges CP

#### Involving judges kills neutrality and undermines the legal system. Colquitt 2k

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Although judges must exercise control over the business of the courts, and therefore are likely to encourage the settlement of cases pending before them, they must not become too involved in plea bargaining. The appearance of propriety is as important as the absence of impropriety. Litigants and spectators alike should conclude that the court's proceedings are even-handed, just, and proper. If the judge becomes directly involved in the plea bargaining process, even in an otherwise appropriate way, it is likely that the appearance of neutrality, if not neutrality itself, will be lost. Some code provisions, rules of criminal procedure, and appellate decisions specifically prohibit judicial involvement in the bargaining process.28 Plea bargaining is left to the parties. Either the prosecution or the defense can start the process, but the judge cannot become a party to it. Excluding the judge from the negotiation process reduces "the risk that the defendant will be judicially coerced into pleading guilty, ... preserves the impartiality of the court, and ... avoids any appearance of impropriety. '282 Equally important, is the fact that a nonparticipating judge is better positioned to assess the proposed agreement. If the judge participates in the bargaining, the product of the effort belongs at least in part to the judge. Thus, a judge who helped forge the deal is not well positioned to serve as an independent evaluator of the agreement

### **Separation of Powers**

#### Ad hoc bargaining kills SOP. Colquitt 2k

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When a prosecutor and defense attorney agree upon a plea to a hypothetical charge or to a nonestablished punishment, they legislate. Neither the prosecutor, a member of the executive branch of government, nor the defense attorney, a citizen, have the prerogative to create from whole cloth new crimes or innovative punishments. Moreover, the judge, as a member of the judicial branch of government, similarly lacks the authority to create crimes or fashion innovative punishments for criminal acts. The separation of powers doctrine trumps executive and judicial authority and discretion in this regard.327 As discussed later in this subpart, even when given some leeway through authorization to enter special conditions of probation, ad hoc terms are frequently deemed impermissible. Several reasons can be advanced for the proposition that legislative powers should not be usurped by prosecutors or judges. Consider, for example, the case of fines and costs. It is the legislature, not the courts, that establishes and maintains governmental programs. Some governmental agencies or programs are funded, at least in part, through fines and court costs. The legislature decides which programs will be funded, as well as the degree of support that will be forthcoming. As the representative branch of government, the legislature should make these decisions which clearly fall within its powers. A bargain that diverts such funds to another program impermissibly intrudes on the legislative process.328 Thus, for example, a bargained cash contribution by a criminal defendant to a county government to offset the costs of the criminal investigation clashes with the legislature's power to direct which agencies of government will benefit from collected fines and costs.329 Prosecutors and trial judges are poor substitutes for the legislative process when such choices are to be made.33 Rather, trial judges and prosecutors are charged with the duty of interpreting and enforcing the laws set forth by the elected bodies of the states. Their function does not include creating law.33' Innovative programs that siphon away funds otherwise destined to help support various agencies clash with the legislature's choice of which programs to fund and to what extent those programs will be funded. If they choose to do so, prosecutors and judges can create alternatives to any statutorily established criminal sanction. Some prosecutors establish "standing offers" for use in certain types of cases.332 Standing offers may be conventional or ad hoc. These offers may be available only to certain types of defendants333 or may be limited to certain types of crimes.334 Although anyone eligible may accept such an offer once it is extended, generally no defendant has a right to compel the prosecutor to extend the offer.335 If standing offers are ad hoc and widely offered, they may become the norm and greatly impact legislative programs. Judges also can establish extra-legal alternatives by communicating to attorneys that potential alternatives exist. It is difficult, though, for a judge to offer an extra-legal alternative without the concurrence of the prosecutor. If the prosecutor disagrees with the extra-legal alternative offered by the judge, the prosecutor may be able to appeal the court's action or to mandamus the judge to withdraw the offer or set aside the plea.336 Case-specific bargains can also arise during the bargaining or pleading process.337 The alternative may be advanced initially by the prosecutor, the defense attorney, the judge, or even the defendant. Case-specific bargains are not standing offers. They arise in a particular case if someone suggests an alternative and the parties reach an agreement. Whether such a settlement will be available in a different case depends significantly on whether some party in the particular case suggests the alternative. Although case-specific ad hoc bargains may have less potential to disrupt legislative programs, this ad hoc practice inevitably leads to disparity in treatment. Pleas structured to resemble Son-of-Sam statutes may also threaten separation of powers. First, in a jurisdiction that has not enacted such a statute, a plea incorporating a surrender-of-profits provision would not be based on legitimate sanctions. In such a case, the parties and the judge are assuming the legislative role of determining and establishing the punishments for crimes. Second, even if the jurisdiction has enacted a Son-of-Sam-type law, the plea agreement may exceed the authorized parameters of the punishment. For example, if a court awards the profits from the sale of a criminal's story to a party other than the victim or a restitution fund, the court probably violates the statute because such statutes normally limit payment of proceeds to such parties or entities. Furthermore, in Simon & Schuster, the Supreme Court declared that Son-of-Sam statutes must be narrowly tailored to meet states' compelling interests of denying criminals profits from their crimes and of compensating victims." Courts should not accept pleas that are structured to carry out the purpose of Son-of-Sam statutes but that disregard the constitutional limits imposed on those statutes. On the other hand, the parties might attempt to bargain away the impact of a Son-of-Sam statute. As mentioned earlier, such statutes may authorize distribution of a defendant's royalties or fees to victims of the defendant's offending conduct, with otherwise undistributed funds escheated to the state. The parties might seek to lessen the statute's impact by agreeing that the state's share will be returned to the defendant. Or they may agree that a portion of the funds will go to a mutually agreed-upon fund or agency. Once again, the parties impermissibly legislate. Similarly, plea agreements that impose scarlet-letter punishments339 on offenders might violate separation of powers. Courts and parties may structure plea agreements that include scarlet-letter conditions that have no statutory basis. For example, a court may approve a plea agreement requiring a driving-while-intoxicated offender to place an advertisement in a newspaper to publicize the crime and apologize to the community, even though no statute provides for that type of punishment.3' 4 Even when a jurisdiction has enacted a scarlet-letter statute, a plea agreement may exceed the statute's intended application. For example, a statute may require all convicted child sex offenders to register with local law enforcement. Yet, as a condition of a plea, the parties in a particular case may expand the reach of the statute by agreeing that an adult woman's rapist will register with law enforcement. The plea agreement in that case exceeds the scope of the statute. Absent statutory authorization, local law enforcement may refuse to register the rapist and consequently prevent the offender from meeting the conditions of the plea. In either of these scarlet-letter punishment examples, the courts and the parties are assuming the legislative function of defining the punishment for crimes.

### AT: Illegal

#### Probation practices that are deemed illegal are permissible through plea bargains. Colquitt 2k

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Other appellate courts also have invalidated special conditions of probation. For example, conditions of probation that require defendants to make contributions to organizations which are not sanctioned by the statutes defining the crime repeatedly have been ruled illegal.3" In other cases, trial courts have banished defendants from their state35 2 or attempted to require alien defendants to serve their probation outside of the United States.353 These forms of "sundown probation," if reviewed by appellate courts, usually are deemed impermissible, and special conditions of this nature routinely are set aside. Of course, not all banishment conditions are reviewed. Moreover, even if the condition is brought to the attention of an appellate court, the court may refuse to vacate the condition if it was part of a plea bargain. Because probation statutes authorize the imposition of special conditions of probation,354 even perhaps to the extent of inviting innovation,355 appellate courts recognize that trial courts exercise "wide" discretion356 or "great latitude 357 in fashioning conditions of probation. Moreover, because trial judges sometimes do experiment with extraordinary conditions, limits must exist beyond which innovation or experimentation may not proceed.

Colquitt continues.

Far too frequently, though, no such standards of review regulate plea bargaining. Plea bargaining agreements ordinarily should be held to the same standards imposed on conditions of probation. The agreements should not venture beyond the framework established by the state legislatures. If a court is not permitted to sentence beyond a statutory limit or impose conditions that are unrelated to the offense, why should prosecutors (and, ultimately, judges) be able to do so through the plea bargaining system? Courts are not allowed to ignore the governing statutes when fixing the terms of probation. Likewise, they should not be permitted to accept pleas that brush aside the strictures of the governing criminal statutes and rules of ethics when accepting the terms of a negotiated plea bargain.

### Contracts

#### The courts can reject ad hoc bargains based on contract doctrine. Colquitt 2k

Joseph A. Colquitt " Ad Hoc Plea Bargaining 75 Tulane Law Review 2000-2001 ." Heinonline.org. N. p., 2018. Web. 5 Mar. 2018. Jere L. Beasley Professor of Law, University of Alabama School of Law; retired circuit judge, Sixth Judicial Circuit, State of Alabama. //nhs-VA

Strong policy concerns underlie the desired procedure that courts invalidate unethical or illegal plea bargains. A contract which has as its basis an illegal object or service normally is not enforceable in a court of law.423 In the case of plea bargaining, a plea agreement implicitly incorporates the applicable sentencing statute and the prosecutor's authority.424 When a prosecutor goes beyond legally established, well-defined, and appropriate standards, the authority of the prosecutor is neither grounded in statute nor derived from the prosecutor's implied discretionary power. 425 Just as gamblers frequently cannot expect a court to enforce bad gambling debts against a playing partner,426 neither the prosecutor nor the defendant should expect the court to enforce an unethical or illegal plea bargain. A final, but as yet unestablished approach to analyzing plea bargains under contract theory is to consider the effects of an unethical plea bargain on the implicit third-party beneficiary of any action by the prosecuting authority, the public welfare.4 27 The public, as third-party beneficiary to all actions by the prosecuting authority, is entitled to have laws faithfully enforced by the prosecutor. No prosecutor has free reign to arbitrarily enforce laws with unfettered discretion.4 21 The crux of the separation of powers ideology charges the executive branch, through its prosecutors, with the duty to enforce the laws of the land for the general safety and welfare of the citizenry. The courts frequently utilize contract law when determining whether or not to accept, enforce, or uphold bargained pleas. But they also should use contract law to reject ad hoc bargains. Ad hoc settlements offend penological goals and violate law and perhaps ethical restraints. Courts generally do not enforce illegal contracts. They should not suggest, accept, enforce, or uphold illegal or unethical ad hoc bargains. Moreover, because constitutional concerns, laws, ethical rules, justice, and equity are all at play in plea bargaining, the courts cannot simply limit themselves to contract doctrine when addressing bargained settlements.429 They owe more than that to society and the parties.

### Solvency

#### Regulation fails – only total abolition solves; it’s empirically proven. Colquitt 2k

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Procedural rules are necessary if plea bargaining is to be controlled, but procedural rules alone do not provide a complete answer. Even though the process may be regulated by procedural rules, parties may still strike inadvisable, unethical, or illegal bargains. Therefore, the results of the bargaining process, as well as the process itself, must be controlled. Laws, rules, and court decisions already provide controls, but these restraints sometimes are overlooked, ignored, or inadequate. Proper governance of plea bargaining requires that the bargains must be legal, reasonably related to the charge and penological goals, proportional to the charge, and just. Substantive controls are necessary. This subpart identifies and discusses existing substantive controls and also suggests and discusses new types of controls. 1. All Bargains Should Be Limited to Those Authorized by Statute In mainstream plea bargaining, the defendant may plead guilty as charged or to a lesser-included offense.3" As noted earlier, in ad hoc bargaining, the defendant may be permitted to plead guilty to a "hypothetical" or uncharged crime.31' Accepting settlements based on pleas to nonexistent or "hypothetical" crimes violates existing law. Parties should be held to legally established offenses (i.e., the charged offense or one of its lesser-included offenses). Even if the defendant pleads guilty to the charged offense or a lesser-included infraction, the parties may agree upon a sanction not established or permitted by law.313 Penalties should be selected from those established by law. This subpart first discusses noncharged offense bargains, then turns to the use of ad hoc sanctions. The principal objection to either is that the bargain is not established by law; thus, when the parties and the courts utilize such bargains to dispose of cases, they violate the separation of powers doctrine. But there are other objections. Such bargains can lead to (1) disparity in treatment among offenders, (2) criticism of the system by the public, and (3) sanctions against participants who violate laws and ethical rules in striking the bargain. a. Hypothetical or Uncharged Offenses Some systems limit their courts to the charges embraced in the charging instrument or lesser-included offenses by saying that the courts lack jurisdiction over noncharged offenses.314 Alternatively, in the case of indictments returned by grand juries, some states may not permit court amendment of those indictments." ' On the other hand, two other views or approaches exist. Some jurisdictions license the parties to create an offense in order to structure a settlement. 6 Others hold that by agreeing to a plea bargain built on a nonincluded offense, the defendant invites or participates in the scheme and thereby waives any review of the plea package.317 The latter two approaches should be rejected or abandoned. Courts should not entertain pleas to charges not properly before the court. Several concerns, such as the rule of law, separation of powers, disparity, and contract law principles support this position.

#### The aff access a sizable culture shift among attorneys. Colquitt 2k

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Enforcing ethical restraints against attorneys would have a comparable effect. Attorneys would be dissuaded from engaging in plea negotiations that seek inappropriate and impermissible results because they would be aware of the undesirable consequences. If attorneys refrained from proposing unauthorized or unethical plea conditions, much of the inappropriate ad hoc bargaining would cease. For example, in Ramos v. Rogers an offender sought to withdraw his guilty plea because, he asserted, it was based on "off-the-record" plea conditions that were not fulfilled.409 The court did not determine whether such conditions actually existed but noted that if they did, both the prosecutor and the defense attorney would clearly be "engaging in professional misconduct."'" Furthermore, the court notified the appropriate state disciplinary authorities of the possible ethical violations.4 11 Attorneys who devise plea conditions and intend that they remain off the record violate the ideals that attorneys create accurate records of all cases and are candid in all communications with the court. Holding attorneys responsible for these and other plea conditions that violate ethical principles would help ensure that all settlements comply with established law and that all parties are treated equitably and equally.

#### We need to bring ad hoc bargaining to light. Colquitt 2k

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Returning to the thought that "[t]he exercise of state power by public officers can only result in abuse when authority is illdefined,' 3 we simply must define and limit the powers of prosecutors to negotiate bargains that are not statutorily authorized, as well as the power of judges to accept such agreements when presented to the court by plea or motion for dismissal. Perhaps the battle against plea bargaining was not worth the fight, or was doomed to fail; perhaps it has failed.43' Regardless of the status of that battle, it is past time for the battle against impermissible ad hoc bargaining to begin. Ad hoc plea bargaining simply must attract more attention. We need to focus on what we are doing and how we are doing it. I have not proposed a Byzantine system of rules to be applied by judges in a mechanical fashion.432 But I have suggested that certain practices should be prohibited, others curtailed, and still others brought out into the open for all to see. Ad hoc plea bargaining must be controlled. Regardless of how effective plea bargaining may be in disposing of criminal cases, unless it is controlled, particularly at its fringes, we must ask: How much of this good thing can we tolerate? 431.