Research Handbook on Plea Bargaining & Criminal Justice (Máximo Langer, Mike McConville and Luke Marsh, Eds)

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Implications for Legal Education and Training in a Guilty Plea Environment

Plea bargains are forms of negotiations that can lessen the penalty for defendants if they plead guilty to an offence. Despite plea bargaining being commonplace in the United States and United Kingdom, and even though lifelong consequences can often flow from guilty pleas, new lawyers in these jurisdictions receive little or no training on this practice. In addition, with the increasing dominance of managerialism in the criminal justice system, requiring efficiencies and cost savings,[1] plea bargaining has led to the trial becoming a rare event as defendants are under increased pressure to plead guilty. Traditional models of plea bargaining tend to rely on coercive bargaining practices, the offer of sentence discounts, the threat of maximum sentences, as well as a passive defence.

From the 1970s, plea bargaining has gained in popularity but, from early on, questions arose over the inadequacy of legal education in preparing new prosecutors and defenders for the practice of law.[2] Instead, it was the serious crimes that were explored while the bulk of offences dealt with by the police and in the lower courts was ignored. Despite the significance of plea bargaining for lawyers dealing with cases in court, there is little or no legal education for law students on *how* a crime is proven, who decides on whether or not it should be prosecuted, where a trial should take place, and what pressures are on defendants to plead guilty.[3]

Without students being taught everyday practices within the criminal law, they have struggled over the years to be critical or challenging over the deleterious impact of plea bargaining. This is despite McConville being prescient when commenting in 1998 that the new arrangements have led to:

> a fundamental realignment of criminal justice in which an abstract system, etched in principles of adversariness and presumptions of innocence, has been converted into a process, the production lines of which are inscribed with the demands of efficiency and a presumption of guilt.[4]

When considering reform of plea bargaining, it is important for students to gain an understanding of the coercive and unfair practices that put people under pressure to plead guilty, including those who are innocent. Within plea bargaining practices there needs to be public funding to provide for an active and competent defence, which is not always the case. Without this, King notes how:

> The passive, acquiescent, and ineffective public defender in any system can function as a fig leaf, masking and legitimising the injustice of the system as it truly functions. Formal structures can appear to be set up to favour the rights of the individual accused over the interests of the state, the reality is often quite different.[5]

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[1] Jenny McEwan,' From Adversarialism to Managerialism: Criminal Justice in Transition' [2011] Society of Legal Scholars 519.
[2] Milton Heumann, *Plea-Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys* (Chicago University Press 1978).
[3] Richard Lewis, 'Clinical Legal Education Revisited' (2000) 13 Dokkyo International Review 149, 150.
[4] Mike McConville, 'Plea Bargaining, Ethics and Politics' [1998] Journal of Law and Society 562, 580.
[5] John King, 'The Public Defender as International Transplant' (2017) 38(3) University of Pennsylvania Journal of International Law 834, 886.

The problem identified, as with many adversarial systems was, "paying lip service to the ideal of an active, zealous and adversarial public defender as essential to the process while not providing either the resources or the legal culture to allow for the realization of such an ideal".[6]

There are advantages of plea bargaining, with a victim not having to relive a traumatic event by not having to give evidence at trial, and with defendants who show remorse receiving a reduced sentence. Plea bargaining can also achieve efficiencies and cost savings by avoiding a trial, but it can be seen as a 'bad deal' when relying on harsh laws, sentence discounts, and maximum sentences as a strong bargaining tool for prosecutors to punish people. For Hessick, plea bargaining has helped to create a mass incarceration machine which undermines justice at every turn and across social economic and racial divides.[7] Legal education can help to address some of these issues, not only by preparing students for the realities of practising criminal law, but also by encouraging them to see the wider societal issues within which plea bargaining operates.

In this chapter, we first consider the umbrella of negotiations within which defence lawyers could enter into day-to-day practices in plea bargaining, but which are rarely explored. These include negotiations taking place, or which could take place, at the police station - from the pre-charge to the post-charge stage, and also in relation to guilty pleas at court. We examine the role that lawyers do or could play in these negotiations in order to increase opportunities to divert suspects and defendants from the criminal justice system altogether, from court, or from custody. Next, after considering innovations and changes in plea bargaining practices in court, we explore how clinical legal education, and the training of lawyers can help shape the next generation of lawyers so they take an imaginative, holistic, social-justice approach to their role.[8]

Plea negotiations in the police station

As now well-established in criminal justice literature, there has been a shift in focus from the court to pre-trial stages in both adversarial and inquisitorial jurisdictions.[9] The traditional role of a defence lawyer has also changed from engaging in trial to pre-trial negotiations, and we need to consider their involvement at different stages. When the Scottish Sentencing Council commissioned research into plea bargaining, it also began at this pre-trial stage, as "The decision-making and preparation which occurs in these preliminary stages can be of crucial importance to the defence's assessment of whether pleading guilty is an appropriate route for the person accused of an offence to take."[10] Decisions to authorise and to divert from the criminal justice system or to an out-of-

[6] ibid 885. This was the problem in Chile, when the country moved to an adversarial system in an attempt to avoid the human right abuses of an inquisitorial process operating under a dictatorship but without funding an active defence.

[7] Carissa Hessick, *Punishment without Trial: Why Plea Bargaining is a Bad Deal* (Abrahams Press 2021).

[8] See Georgina Ledvinka, 'Reflection and Assessment in Clinical Legal Education: Do You See What I See' (2006) 9 International Journal of Clinical Legal Education 29; Nekima Levy-Pounds and Artika Tyner, 'The Principles of Ubuntu: Using the Legal Clinical Model to Train Agents of Social Change' [2008] International Journal of Clinical Legal Education 7-20.

[9] Ed Cape, Jacqueline Hodgson, Ties Prakken, and Taru Spronken (eds) *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia 2007); Andrew Ashworth and Lucie Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions' (2008) Criminal Law and Philosophy 2/21, 51; John Jackson, 'Cultural Barriers on the Road to Providing Suspects with Access to a Lawyer' in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016) 181; Anna Pivaty, Miet Vanderhallen, Yvonne Daly and Vicky Conway, 'Contemporary Criminal Defence Practice: Importance of Active Involvement at the Investigative Stage and Related Training Requirements' (2020) International Journal of the Legal Profession, 27:1, 25-44.

[10] Jay Gormley, Rachel McPherson and Cyrus Tata, *Sentence Discounting: Sentencing and Plea Decision-Making: Literature Review* (Scottish Sentencing Council 2020) 6.

court disposal are, we argue, additional hidden decision points in which the suspect can face pressure to accept guilt for a lesser disposal and the lawyer is involved in negotiating these justice outcomes. Such decisions can impact whether the victim feels they had justice, and whether wider society trusts their criminal justice system.

However, working in the police-controlled environment and within their processes presents many challenges, as lawyers can be marginalised in these investigative stages.[11] They are faced with a client in a vulnerable position, when time, and access to information is limited, heightened emotions may impact on clear communication, while they also seek good working relations with the custody staff and interrogating officer.[12] As Pivaty summarises, lawyers may face pressures in opposing the 'state', vested with immense power and resources, a resulting sense of powerlessness with fast-paced, unpredictable and demanding work and may feel a lack of control as other actors within the criminal justice system, such as their client, police, prosecutors and judges have the decision-making power.[13]

Added to these day-to-day pressures is the wider context in which lawyers operate. Lawyers work within their own occupational culture and organisational pressures, particularly in the context of managerialist reforms that reduce the time lawyers can spend on each case.[14] Many jurisdictions have seen a renewed focus on delivering justice more efficiently, in the interests of the offender, victim and general public, and of course the public purse.

Within this setting, the lawyer must "possess sufficient expertise and skill to engage actively in the defence of the accused".[15] From the first contact with the police, lawyers can help constructively challenge and balance from police officers' organisational pressure to detain individuals to detect and 'clear up' crime to protecting the suspect's right to liberty through challenging whether it is necessary to arrest and detain an individual.[16] The lawyer should act as a robust challenge to this decision-making, to ask whether the individual can be diverted and apply a more human approach within what can be a police and process-heavy environment.

As an external party, lawyers may also act to challenge racial bias within police decision-making, which can be amplified in the wider criminal justice system. In 2017, Lammy observed that the lower proportion of guilty pleas in Black and other minoritized groups is likely to be their result of distrust in the criminal justice system.[17] Although Black and minority ethnic individuals are more likely to get a lawyer in the police station, they are less likely to trust the advice they are given or believe they will have a fair hearing in the magistrates' court.[18] If lawyers are seen to be robustly considering cases and negotiating for the best outcome for their client, whether that is an end to their detention, or an out-

[11] Jodie Blackstock, Ed Cape, Jacqueline Hodgson, Anna Ogorodova and Taru Spronken, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia 2013).
[12] Violet Mols, 'Bringing Directives on Procedural Rights of the EU to Police Stations: Practical Training for Criminal Defence Lawyers' (2017) New Journal of European Criminal Law 8(3) 300, 306.
[13] Anna Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study* (Taylor & Francis 2019) 152.
[14] Mike McConville, Jacqueline Hodgson, Lee Bridges and Anita Pavlovic, *Standing Accused* (Clarendon Press 1994); Daniel Newman, 'Still Standing Accused: Addressing the gap between Work and Talk in Firms of Criminal Defence Lawyers,' *International Journal of the Legal Profession* (2013) 19(1): 3; Daniel Newman, *Legal Aid Lawyers and their Quest for Justice* (Hart Publishing 2013).
[15] Jacqueline Hodgson, *The role of Lawyers during Police Detention and Questioning: A Comparative Study* (Warwick School of Law Research Paper No. 2014/06) 8.
[16] Richard Martin, *Policing Human Rights, Law, Narratives, and Practice* (OUP 2021).
[17] David Lammy, *The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System* (London 2017) 25-26.
[18] ibid 27.

of-court disposal, or even a phone call home, this may be a step in the right direction to increase this trust.

Children looked after by the state are also disproportionately represented in the criminal justice system, being five times more likely to be cautioned or convicted than children in the general population.[19] They are also more likely to come to the attention of the police, particularly for incidents that would otherwise have been dealt with by parents in the family home. Accordingly, lawyers need to be more challenging of the criminalisation of children in care. With a large proportion of looked after children receiving custodial sentences, particularly Black and other ethnic minority groups,[20] lawyers also need to negotiate improved outcomes by tackling disproportionality and considering their clients' vulnerability.

Throughout the suspect's journey through custody, the lawyer can adopt a holistic approach to challenge decisions made by the police, considering the immediate implications of the individual in the case. These decisions can both impact how the suspect will respond to later stages, such as their resolve to refuse a plea bargain, but also impact on how future decision-makers may perceive the case.

Out-of-court disposals and settlements

Similar to a plea bargain, an out-of-court disposal presupposes that the suspect admits guilt and, at this earlier stage, waives their right to court.[21] This waiver of court underlines that the use of out-of-court disposals should follow due process rights and be issued only where it is "accepted…in full awareness of the facts of the case and the legal consequences [including any collateral consequences] and in a genuinely voluntary manner".[22] Suspects require individualised, legal and procedural information provided by a lawyer acting in their interests. This lawyer can remind the police to consider an out-of-court disposal and negotiate for their client by highlighting features of the case, such as a minimal offending history.

The lawyer can consider the needs of their client and recommend the most appropriate conditions to attach to any out-of-court disposal. Aware of the disposals available, as well as any regional[23] or innovative approaches, and the availability of local support, the lawyer can advocate for options that address their client's wider social context, and offer the support they need. The police will have a needs assessment with the individual to understand which conditions may be more appropriate in the case.[24] However, the lawyer may have more information about the client, such as information about their social situation, and so be in a good position to help decide what will be most helpful for them.[25] For example, one of the Dutch lawyers in Pivaty's ethnography explained "But negotiating you should see that you as a lawyer have some information that the police do not have. So that means you can say 'my client has many debts so he cannot pay a fine, but community service might be an alternative'".[26]

As well as being alert to where out-of-court disposals may be appropriate, lawyers must be ready for cases where they are not. This includes considering the evidence in the case, and whether their client is accepting guilt, to guard against the police

[19] Department for Education, *Outcomes for Children Looked after by Local Authorities* (Department for Education 2015).
[20] Lammy (n 17).
[21] Pivaty (n 13) 30.
[22] *Natsvlishvili and Togonidze v Georgia*, *n.* 9043/05 ECHR 2014-III 92.
[23] In England, for example, the Checkpoint scheme in Durham Constabulary, Turning Point in West Midlands Police or Divert in the Metropolitan Police Service, London, and other force approaches.
[24] Cerys Gibson, *Conditional Cautioning in England & Wales: A Socio-legal Analysis of Policy and Practice* (PhD Thesis, the University of Nottingham 2021).
[25] Pivaty (n 13) 136.
[26] Ibid 195.

administering an out-of-court disposal inappropriately or pressuring the suspect, such as a means to dispose of a case with weak evidence. While facilitating some open conversations, lawyers must guard against the police using the lawyer as a vehicle for securing the acceptance of an out-of-court disposal, by telling them that if their client accepts guilt, they will receive a caution.[27] In this way, lawyers can guard against up-tariffing, net-widening and over-dosing, in which well-meaning officers can inappropriately attach intensive conditions,[28] providing a check to ensure proportionality of treatment.[29]

An awareness of all the diversionary options available, both within and outside of the criminal justice system, coupled with an understanding of their client's needs, allows the lawyer to make representations for these to be considered, or for inappropriate out-of-court disposals to be challenged. A lawyer can act as an external actor within the criminal justice process, with a holistic approach to understand the social, economic and cultural environment in which the offending behaviour takes place. This can be an area that is missed from criminal justice decision-making, which can focus on making improvements for the suspect, and can miss the wider environment she acts within.[30] In England and Wales, this is increasingly supported through the use of other agencies, such as the NHS in the Liaison and Diversion services,[31] operating out of police custody to divert individuals to help, outside of a criminal sanction.

However, as in police custody, lawyers work within a heavily police-controlled environment, where the police act as the gatekeepers to who comes into police custody and voluntary attendance, and have some power to decide how they leave. It is therefore important that lawyers break away from a process-driven approach to continually ask what would be the best outcome for their client. Alongside their offence and offending history, the lawyer should consider their socio-economic context and, where needed, refer them to the right support, whether state or third sector, for their needs, to not lose sight of the humans involved amidst the high workloads and processes in place.

Pre-trial detention

Once it is decided that the case needs to go to court, lawyers must represent their client in deliberations on whether the individual should be detained pre-trial. An important decision for the defendant, as not only does pre-trial detention deprive them of their liberty, but there is a growing body of research that has established a strong correlation between pretrial detention and an increased likelihood of conviction, longer custodial sentences,[32] and may make it more likely that the individual will accept a plea bargain.[33]

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[27] ibid, 138.
[28] Claire Ely, Bami Jolaoso, Carmen Robin-D'Cruz and Vicki Morris, *Pre-court Diversion for Adults: A Toolkit for Practitioners* (Centre for Justice Innovation 2020) 11.
[29] David Hayes, *Confronting Penal Excess* (Hart 2019).
[30] Michael Rowe, Aaron Amankwaa, Paul Biddle, and Lyndsey Bengtsson, 'Streamlining Out-of-Court Disposals: Assessing the Impact on Reoffending and Police Practice' [2022] Criminology and Criminal Justice.
[31] NHS England, *NHS Commissioning: About Liaison and Diversion* <https://www.england.nhs.uk/commissioning/health-just/liaison-and-diversion/about> Accessed 17 October 2022.
[32] Ram Subramanian, Léon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining* (Vera Institute of Justice 2020), 11; Léon Digard and Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detent*ion (Vera Institute of Justice 2019), 2; Jacqueline G. Lee, 'To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction' (2019) Criminal Justice Policy Review 30(1) 128.
[33] Will Dobbie, Jacob Goldin, and Crystal S. Yang, 'The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges' (2018) American Economic Review 108(2) 201; Emily Leslie and Nolan G. Pope, 'The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments' (2017) Journal of Law and Economics 60(3) 529.

Nowhere is the need for the robust role of the lawyer more apparent than in Nigeria, a country with "an excessive use of pretrial detention that wastes human lives and perverts and undermines Nigeria's criminal justice system".[34] Here, a duty solicitor scheme was introduced to reduce the use of pre-trial detention through informing detainees' about their rights and the criminal justice system and assist with bail applications in an attempt to reduce such detentions.[35]

Our lawyer needs to continue to negotiate on their client's behalf, drawing on their knowledge of the decision-making guidance, their client, and the facts of the case, as well as any compromise options, such as conditions to attach to bail, to argue that there is a low risk that the defendant will fail to surrender, interfere with evidence or witnesses or commit further offences.

This is particularly important for Black and other ethnic minority groups, who are more likely to be held in pre-trial detention than white defendants, which can result in worse case outcomes, as they are more likely to accept a guilty plea and a worse plea than their white counterparts.[36] Our lawyer can therefore also act at this stage to reduce the cumulative disadvantage experienced by minority groups.

Guilty pleas

We hope we have shown that throughout the criminal justice process, and not just at court, there are key elements of negotiation that require the lawyer to argue for the best outcome for their client. The traditional role of a defence lawyer has shifted from trial to pre-court negotiations and we need to consider the lawyer's role at each stage.

The lawyer represents their client's interests to ensure they are fairly treated, with appropriate evidence used against them and a proportionate sanction for any crimes they may have committed, or a not guilty verdict. This is particularly important as defendants are those likely to be vulnerable, based on their mental health, socio-economic disadvantage, or belonging to a minority group, and may be innocent people pressured to plead guilty.[37] The lawyer can ensure that the defendant fully understands any defences they may have available, their possible sanctions in court and the consequences (including collateral consequences) of a guilty plea,[38] to help them make an informed choice.

At this stage too, lawyers must adopt a holistic view of the case and ask whether it is one that could be disposed through a guilty plea, or indeed if it should be thrown out altogether. As at other stages of the process, lawyers must guard against being carried by the processes surrounding them and their own working cultures and pressures. In France, an inquisitive system with its own forms of guilty pleas,[39] concerns have been raised that the public prosecutors responsible for these plea bargaining decisions are pressured to process cases as quickly as possible, which can result in the "bureaucratization of prosecutorial decision-making through the use of standardized tables and the delegation of a large part of procureurs' caseload to less qualified staff".[40]

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[34] Stanley Ibe and Felicitas Aigbogun-Brai, *Lawyer at the Police Station Door: How REPLACE Provides Legal Aid in Nigeria* (Open Society Justice Initiative 2015) 1.
[35] ibid 6.
[36] Subramanian (n 32) 26; Digard (n 32) 7.
[37] Jay Gormley, Julian V. Roberts, Jonathan Bild and Lyndon Harris, *Sentence Reductions for Guilty Pleas, A Review of Policy, Practice and Research* (Sentencing Academy, 2020) 12-15.
[38] See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).
[39] Laurène Soubise, 'Guilty Pleas in an Inquisitorial Setting – An Empirical Study of France' (2018) Journal of Law and Society 45(3) 398, 400.
[40] ibid 402.

As Soubise notes, the procureurs are torn between their judicial role and the pressures to administer criminal casework efficiently.[41]

Before considering the legal education and training of lawyers, it is useful to explore how different actors in court have been helping to bring about positive changes to plea bargaining practices in court.

Reforming plea bargaining practices in court

With the injustices that can arise in traditional models of plea bargaining, this has led to changes in some areas due to interventions made by the judge, prosecutor and/or defence lawyer to help in bringing about a more fair and just process. Discussions of defence lawyers' input into plea bargaining practices, however, can sit uncomfortably in a context of a failing criminal justice system, where changes to legal aid and ongoing cuts sit, we hope, at the forefront of policy-makers' plans.[42] Having recently carried out a Review of Criminal Legal Aid in England and Wales, Sir Christopher Bellamy stated that the review was "about much more than the remuneration of defence lawyers, it is also about the effectiveness of the CJS (criminal justice system) as a whole."[43] Without sufficient funding, it is not possible to restructure legal aid remuneration to focus on the 'front end' of the system which, as recommended by Bellamy and discussed above, is needed to support better engagement between the defence and prosecution at the pre-charge stage and prior to the first hearing.[44]

In her review of plea bargaining in the US, Hessick comments on changes made in a number of states to try and address the unfairness of plea bargaining practices.[45] These included prosecutors and defence lawyers negotiating on facts 'off the record', which were different to the 'on-the-record' proceedings and then striking deals that left victims and the public in the dark about what actually happened. A Judge in Ohio decided to take on an active role in the bargaining process by "refusing to let prosecutors take one position in private and another in public, as well as refusing to accept pleas when there were no facts to support them."[46] Instead of focusing on the number of convictions as a measure of success, these changes intentionally increased the number of cases dismissed by the Judge.[47]

The County Prosecutors in another couple of states brought about change due to plea bargaining practices that had made it too easy to punish people brought before the courts. The prosecutor in Boston, for example, made changes to bail which had been set at high cash amounts, even when dealing with minor offences. Commenting on this problem, she said, "Bail is one of the biggest things that exposes the penalty of poverty", with the injustice of those having money buying their freedom, while the poor remain on remand.[48] In another state, the prosecutor was critical of prosecution practices that led to 'charging to the hilt' and then using the charges as leverage to get compliance with a plea bargain. Requiring prosecutors to charge with 'accuracy and constraint', this increased the number of cases dismissed. The prosecutor also introduced rehabilitation programmes, restorative justice, and other initiatives as an

[41] ibid.
[42] Frank Stephen and Cyrus Tata, *Impact of the Introduction of Fixed Payments into Summary Legal Aid: Report of an Independent Study* (Scottish Executive Social Research 2006) 220.
[43] Sir Christopher Bellamy, *Independent Review of Criminal Legal Aid* (Ministry of Justice 2021) 10.
[44] It is acknowledged in the Review that there have been no increases in the relevant fees for publicly funded defence lawyers for 15 years or even 25 years in some cases. The rates for police station and magistrates' court work are lower in cash terms than they were in 2008 or even in the 1990s (ibid 6).
[45] Hessick (n 7).
[46] ibid 200.
[47] ibid 212.
[48] ibid 80.

element of the plea bargain in trying to get to the root causes of an individual's problems.[49]

Change is also taking place in some public defender offices.[50] The founder and executive director of Bronx Defenders, stated in 2004 that, "public defenders everywhere are starting to reassess the most fundamental questions of what it means to provide effective representation for their clients."[51] Instead of the 'traditional defender' office, the Bronx Defenders have transformed the culture of criminal practice to achieve a client-centred, community based, and holistic approach.[52] In addition to dealing with individual clients, they recently set up a specialised team to deal with 14-16 year olds who are prosecuted as adults, and they persuaded the District Attorney's office not to proceed with minor drug offences. With a dedicated team of defence lawyers, social workers, and an education lawyer, they also "strive to identify the best strategies to fight our client's criminal case, connect them with the services they need, and help set them on a path towards the future they desire."[53] In one case, for example, they persuaded the local Board of Education to pay for a residential treatment programme for a client who had earlier pleaded guilty.[54]

Changes in plea bargaining are taking place elsewhere. In 2013, plea bargaining was enabled in Brazil, although intended to be restricted to dealing with illegal acts associated with organised crime to try and encourage defendants to provide information about those involved during the trial to encourage an early resolution or lesser punishment. With a high backlog of cases, however, prosecutors took the opportunity to use plea bargaining in cases where it was not authorised. While the current approach is popular with the public in delivering rapid punishment, it is recognised by government as unacceptable and when eventually in a time of calm, it is intended such excesses will be addressed to try and ensure fair plea bargaining practices.[55]

A further change in Brazil was to address the patchy cover of Public Defender Offices by requiring an Office to be operating within each district. The 2014 Constitutional Amendment also required that in addition to supporting defendants in plea negotiations at court, Public Defenders should address wider issues arising out of clients' cases, including providing advice on welfare benefits, housing, health and education.[56] By tackling wide-spread legal injustices, the work of Public Defenders can include addressing racial disparities in the criminal justice system, the prevalence of police misconduct and brutality in poor Black and minority ethnic communities, and helping the reintegration challenges facing people with criminal records. This includes outreach work,

[49] ibid 211.
[50] That such change was needed is evidenced in the extensive report in: Mike McConville and Chester Mirsky, *Criminal Defense of the Poor in New York City*, in *Review of Law and Social Change*, vol. 15 (1987-88) 562-964.
[51] Robin Steinberg and David Feige, 'Cultural Revolution: Transforming the Public Defender's Office' (2004) 29 NYU Review of Law and Social Change 123.
[52] ibid 123-125.
[53] See The Bronx Defenders: Redefining Public Defence <https://www.bronxdefenders.org/> Accessed 17 October 2022.
[54] Steinberg and Feige (n 51) 128.
[55] Fundação FHC, Plea Bargaining — A Comparison Between the United States and Brazil (2018) <https://medium.com/funda%C3%A7%C3%A3o-fhc/plea-bargaining-a-comparison-between-the-united-states-and-brazil-55a59c80220f> Accessed 17 October 2022.
[56] Cleber Alves, 'Access to Justice and Legal Aid in Brazil and England and Wales: Contemporary Challenges and Comparative Perspectives' (2015) Lex Humana, Petrópolis, 7, 172.

with Public Defenders using street clinics to provide information and advice to local people in poor areas on housing, immigration, social welfare and other issues.[57]

In Europe, the training of defence lawyers began to be addressed through the creation of a two year training programme as part of a cross-border project to strengthen suspects' rights in pretrial proceedings[58] through practice-oriented training for lawyers, focusing on highly practical content and innovative training methods.[59] This training was based on the assumption that in addition to legal knowledge and skills, lawyers also need to develop a reflective practice, interdisciplinary knowledge and communication skills. Part of the benefit of this training was facilitating lawyers from different jurisdictions meeting and sharing good practice, and helping overcome the feeling of "professional isolation/boost lawyers' confidence when assisting suspects at the early stages of criminal proceedings and enforcing their clients' procedural rights".[60] Other methods included training on crucial communication skills such as intervening during a suspect interview and learning about police tactics and techniques,[61] with real cases to resemble authentic situations and time for self-reflection.[62]

With sufficient public funding, lawyers need to push against the formalistic processes surrounding them to help determine, and bargain for, the best outcome in the interests of their client. Such bargaining is an individual skill. It requires liaising with the client, counsel and judge, a keen awareness of the evidential and procedural rules and possible sanctions. It also requires wider skills such as "assertiveness, empathy, flexibility, social intuition, and ethicality"[63] to be a good problem-solver and negotiator.[64] These are skills which can, and must, be learned.

Clinical legal education and training lawyers of the future

With the pivotal role plea bargaining has in the criminal justice system, it is important that a strengthened approach to pedagogy not only teaches law students how this operates in practice, but they are also encouraged to see the potential for achieving change. Within a law clinic, students can be shown how it is people and not the doctrines they invoke, that make legal judgements, with clinical experiences leading to insights about how decision-makers could inform legal actions. In addition to recognising how law is embedded within social structures, such as class, gender, race and ethnicity, it is also important for law students to examine the role played by various gatekeepers, including the police, judiciary, prosecution and the defence.

Much work is being done in the US to continually improve training for future lawyers, with innovative methods, changing curriculum in focusing on skills, and other reforms to better train students for practice.[65] The Carnegie Report, published in the United States

[57] Cleber Alves and Andre Castro, *Challenges to Legal Aid in Brazil: National Report* (2018) <https://www.laf.org.tw/ifla2018/upload/2018/11/(Update)National%20Report%201-3_Brazil_Prof.%20Cleber%20Francisco%20Alves%20&%20Mr.%20Andr%C3%A9%20Castro.pdf> Accessed 17 October 2022.
[58] Mols (n 12) 307; Pivaty et al. (n 9).
[59] Maastricht University, University of Antwerp, Dublin City University, Hungarian Helsinki Committee, PLOT and the European Bar Association, *Report on the SUPRALAT Project* (2017 ECBA) 2.
[60] ibid 3.
[61] ibid 4.
[62] Mols (n 12) 307.
[63] Cynthia Alkon, 'Plea Bargain Negotiations: Defining Competence Beyond Lafler and Frye' (2016) American Criminal Law Review, 53, 377, 389.
[64] Andrea Kupfer Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style' (2002) Harvard Negotiation Law Review *7*(143), 185.
[65] Lisa A. Kloppenberg, 'Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach' [2013] Journal of Dispute Resolution 103, 112.

in 2007,[66] was seen as the most influential document in current debates at that time about the future of education. It emphasised the importance of law schools teaching less about what the law is and more about what the law does and what lawyers do with it. With the curriculum organised around foundational professional skills and the context for using them, it aimed not at *having* knowledge but at *using* knowledge. However, there is a growing consensus that law schools do not do enough to train tomorrow's lawyers,[67] with legal research skills remaining poor.[68]

In many universities in England and Wales, the core teaching of criminal law tends to be based on understanding legal principles arising out of case law, pre-occupied with very serious offences when exploring fine distinctions between mental states, particularly in seeking to distinguish murder from the lesser charge of manslaughter.[69] While Lewis was critical of his experience as a law student in the 1970s for having little to say about everyday realities within the criminal process, he notes that subsequently little has changed.[70] Many law schools use clinical methods when teaching law students,[71] and encourage extra-curricular pro-bono activities, as well as allow for students to choose to study the criminal justice process. Of particular note is the University of York, where from the first year of study, combined law and criminology students[72] are required to consider the relationship between law and other disciplines to see the practical realities within which plea bargaining operates in the real world, including engaging with some of the most vulnerable people in society.[73]

Through clinical models, by using role play and simulations on real life events, students can experience how plea bargaining operates in practice and explore the potential for change. For defence lawyers in particular, soft skills of 'communication' and 'negotiation' are important in gaining the trust and confidence of their clients when taking instructions, establishing guilt or innocence, and providing advice. Despite this, it is of concern that in data presented by Cunningham, clients reported being dissatisfied with the poor communication skills of their lawyers, due to inadequate listening and explaining.[74] Communication and interpersonal skills were highlighted as important in people's choice of a lawyer when surveying over 1,000 users in the criminal justice system in England and Wales (in police stations, courts and in prison). The two key factors highlighted as important was having a 'good' lawyer[75] and one with whom they could have a 'good relationship'. This meant that they wanted their lawyers to be 'friendly' and 'understanding', preferring those who were 'sympathetic', who 'listened', and 'explained' what was happening.[76] Simulations can help law students appreciate the day-to-day life experiences of people drawn into criminal processes, particularly as many

[66] William Sullivan Anne Colby, Judith Wegner, Lloyd Bond and Lee Shulman L (2007) *Educating Lawyers: Preparation for the Profession of Law* (The Carnegie Report, Jossey-Bass 2007).
[67] John Lande, 'Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice' [2013] Journal of Dispute Resolution 1.
[68] Barbara Glesner Fines, 'Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills throughout the Curriculum' [2013] Journal of Dispute Resolution 159, 167-168.
[69] Kris Gledhill and Ben Livings (eds) *The Teaching of Criminal Law - The Pedagogical Imperatives* (Routledge, 2018).
[70] Lewis (n 3).
[71] Vicky Kemp, Suzanne Gower and Tine Munk, *Clinical Legal Education: Looking to the Future* (Manchester University 2016).
[72] LLB (Hons) Law and Criminology, Combine Law and Criminology to Address Social Justice and Inequality. Year of Entry 2022/23 <https://www.york.ac.uk/study/undergraduate/courses/llb-law-criminology/> Accessed 17 October 2022.
[73] LLB (Hons) Law, A Radical and Innovative Approach to the Academic Study of Law. Year of Entry 2022/23 <https://www.york.ac.uk/study/undergraduate/courses/llb-law/> Accessed 17 October 2022.
[74] Clark D. Cunningham, 'What Do Clients Want From Their Lawyers?' [2013] Journal of Dispute Resolution 143, 144-145.
[75] Which includes giving 'good advice', is 'experienced', and 'knows what they are doing'.
[76] Vicky Kemp, *Transforming Criminal Defence Services* (LSRC 2010) 84.

are vulnerable, living in poverty and having poor physical and/or mental health, which can make communication with them extremely difficult.[77]

Negotiation skills are also important for lawyers when entering into plea bargains with a range of criminal justice practitioners throughout the criminal process.[78] Opposing groups of students can learn the art of negotiation by being given a realistic case file and asked to resolve issues in as economic and fair manner as possible and using client interviewing exercises.[79] As Roberts and Wright explain, negotiation techniques and strategies in the plea bargaining context are the most significant skills that defence lawyers will use every day.[80] This is important in achieving better outcomes for clients, and at a deeper level, help turn around a defeatist mindset of defence attorneys that they hold limited power in negotiations, giving them confidence in these skills.[81]

Through role play, students can learn the importance of adopting an active and 'full-blooded' adversarial role when negotiating with clients and other lawyers throughout the criminal process, with such an approach tending to be reserved for a trial.[82] Negotiation training is available in US law schools through Legal Education, Alternative Dispute Resolution, and Problem-Solving (LEAPS) Project, established by the American Bar Association. This is aimed at helping law faculties who want to incorporate more practical problem-solving materials in their courses through developing materials and establishing panels of consultants.[83]

Simulations such as moot courts are commonplace in law schools and as well as preparing students for the intricacies of advocacy, they can be used to convey the difficulties of introducing evidence and establishing facts in what might be a rapidly changing environment of a first instance tribunal.

With advances in technology, virtual simulations of plea bargaining will enable students to make choices in which they are invested, experiencing immediate and realistic consequences of the pressures that operate within plea bargaining. Virtual simulations can also help students to understand how structural issues of class, age, race and gender influence decision-making and explore how inequality and injustice can be challenged within plea bargaining practices. Through such virtual simulations, students can also see how guilt status matters beyond the shadow-of-the-trial. This could encourage future research to focus on ways of improving the system's ability to separate the innocent from the guilty by finding variables to interact with guilt status both in police stations and in court to moderate plea outcomes.[84]

Training lawyers to be agents of social change

[77] Criminal Justice Joint Inspection, Neurodiversity in the Criminal Justice System: A Review of Evidence <https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2021/07/Neurodiversity-evidence-review-web-2021.pdf> Accessed 17 October 2022.
[78] Solomon Oliver, Jr, 'Educating Law Students for the Practice: If I Had My Druthers' [2013] Journal of Dispute Resolution 85, 93-95.
[79] Lewis (n 3) 154.
[80] Jenny Roberts and Ronald F. Wright 'Training for Bargaining' (2016) William & Mary Law Review 57, 1445. See also Rodney J. Uphoff, 'The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach' (1995) 2 Clinical Law Review 73.
[81] Roberts and Wright (n 80) 1497-1498.
[82] John Jackson, 'Responses to Salduz: Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) Modern Law Review 987.
[83] American Bar Association, Resources (2022) <https://www.americanbar.org/groups/dispute_resolution/resources/> Accessed 17 October 2022.
[84] Miko Wilford, Kelly Sutherland, Joseph Gonzales and Misha Rabinovich 'Guilt Status Influences Plea Outcomes Beyond the Shadow-of-the-Trial in an Interactive Simulation of Legal Procedures' (2021) Law and Human Behavior 45(4) 271, 284.

Legal education can prepare the next generation of lawyers to use the law as a tool to achieve social justice within society. With the severity of the problems facing poor communities, together with the funding and resource issues faced by public bodies, law schools are in a prime position to use legal talent and resources to help resolve some of the most challenging problems in society. Through innovative teaching strategies, law schools can help shape legal minds and encourage legal skills to be used to promote social good and other humanitarian goals. Levy-Pounds and Tyner use the African philosophy of Ubuntu in their clinical 'Criminal Justice Project' at the University of St Thomas to encourage law students to focus on ministering to the needs of others through the utilisation of their legal skills and to serve the community in a more holistic manner.[85]

In relation to the skills required for plea bargaining, Levy-Pounds and Tyner's clinical project is helping lawyers to be effective agents of social change. They are shown how a client-centred approach can be adopted, with the skills students are taught including creative problem-solving techniques that can be used either instead of a plea bargaining (outside of the criminal justice system) or as an element of the bargain. Such an approach can help to reduce reoffending by addressing the problems/needs of suspects/defendants that can underly the offence and/or the offending behaviour.[86] Their students can also be encouraged to see the benefits of 'putting things right' by focusing on the harm caused to the offender's family, their victims, and the wider community. Restorative justice is encouraged as an inclusive and collaborative process, with Howard Zehr's 'The Little Book of Restorative Justice' being a foundational text to introduce their students to this approach.[87]

Through a number of clinics at the University of Chicago, law students are encouraged to engage with local poor and marginalised communities in helping to bring about social change.[88] The Criminal and Juvenile Justice Project, for example, teaches students to learn pre-trial and trial skills, including plea bargaining, while applying legal theory when advising and representing children and young people accused of delinquency and crime. The concept of legal representation includes the social, psychological and educational needs of young clients. Students are also required to "examine the juvenile and criminal justice systems relationship to the poor and marginalized through litigation, legislative advocacy, and public education, including the development of policies for crime and violence prevention and system reform".[89] In the Civil Rights and Police Accountability Project, students explore how to bring about social change through the lens of live-client work, examining how and where litigation can help to improve police accountability and ultimately the criminal justice system. Students are required to apply and critically examine legal theory in the context of representation of people in need and, through immersion in live client work, to engage in fundamental issues of race, class, and gender, and their intersection with legal institutions. In addition to fighting racism and discrimination, the Project's mission is to "remedy fundamental issues of injustice in our criminal justice system, while teaching students all that it means to be a lawyer".[90]

[85] The spirit of Ubuntu is to be humane and ensure that human dignity is always at the core of your actions, thoughts and deeds when interacting with others. See Levy-Pounds and Tyner (n 8).
[86] Lord Alexander Carlile, *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court* (National Children's Bureau 2014).
[87] Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2002).
[88] See The University of Chicago, The Law School: Clinics <https://www.law.uchicago.edu/clinics> Accessed 17 October 2022.
[89] The University of Chicago, The Law School: Criminal and Juvenile Justice Project <https://www.law.uchicago.edu/clinics/mandel/juvenile> Accessed 17 October 2022.
[90] The University of Chicago, The Law School: Civil Rights and Police Accountability Project (University of Chicago 2022) <https://www.law.uchicago.edu/clinics/mandel/police> Accessed 17 October2022.

Law students involved in training the lawyers

While law students can first learn about plea bargaining by observing courts and using role play and simulations, the next step would be to shadow practitioners when plea bargaining opportunities arise, both during the police investigation and at court. By learning about how plea bargaining works in practice, it is important for students to reflect on what they have observed because, without this, their exposure to real cases will be little more than 'work experience'. Reflection is seen by clinicians to be a vital part of the learning process and, for Ledvinka she describes it as "the magical ingredient which converts legal experience into education".[91] Based on a constructivist teaching methodology, learning is not seen as something that happens passively but requires students to participate actively and construct their own knowledge and share this with their colleagues.[92]

With the next generation of lawyers being prepared to practice in a fairer system of justice, their assessment of plea bargaining practices could be used in the training of criminal justice practitioners. This is important when the 'collateral consequences' for many people who receive a criminal conviction arising out of a plea bargain are often not known, even though these can include losing eligibility for certain jobs, housing or social services, issues that many defendants have to grapple with after completing a prison sentence.[93]

With more than 95 per cent of all criminal convictions in the United States being the result of a plea bargain, law students in the Harvard Negotiation and Mediation Clinical Project undertook an assessment of felony assessment conferences in the New Hampshire Superior Court. This included interviews with criminal justice practitioners and observing court processes, including plea bargains. Following their assessment, interest-based negotiation training was provided to members of the criminal bar and judges in the local area. This was with a view to help everyone participate more effectively in the settlement conference programme and improve their practice around plea bargaining. By engaging with practitioners and judges, the students were able to address problems arising on the ground, with some judges trying to speed negotiations along, attorneys sending one-line offers through email, and how some of the required timelines made it challenging to do interest-based work with clients. The training event was well received by local practitioners and, arising out of this activity, the students created a 200-page training manual.

Having received this training, lawyers in New Hampshire are now being trained on how to participate effectively in felony settlement conferences. While having much in common with the training for plea bargains, in addition to the prosecutor and defender negotiating the plea, felony settlement conferences can involve a judge (not the presiding judge) and the defendant. There can also be a restorative component as other people can be involved, including the victims, family members (of both the victim and the defendant), and the police.[94]

The Clinic project in New Hampshire illustrates how law students can learn about plea bargaining by observing practice, talking to practitioners involved, and by reflecting on their experiences, they can prepare and deliver training packages for criminal justice practitioners.

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[91] Ledvinka (n 8).
[92] ibid 34.
[93] Jennifer Reynolds, *Plea Bargaining 101* (American Bar Association 2020) <https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/plea-bargaining-101/> Accessed 17 October 2022.
[94] Ibid.

Through clinical programmes, post graduate students could assess local plea bargaining practices and, in addition to this assessment, they could draw more widely on their learning experiences when developing training for practising lawyers. This could help to influence positive changes to plea bargaining through the next generation of criminal lawyers, by applying a human approach.

Conclusion

We, as well as other colleagues in this book, have set out the widespread nature and importance of plea bargaining in the criminal justice system, as well as the wider negotiation decisions that take place in practice. We draw on strong examples from practitioners in the field and innovative approaches to pedagogy to emphasise the importance of teaching the skills of negotiation and communication to help students challenge processes and become agents of change.

It is through the adoption of a problem-solving approach that lawyers also need to recognise that clients can have a myriad of extra-legal issues that need to be addressed, ranging from psychological to social issues. This requires a paradigm shift by focusing on 'holistic lawyering', which addresses the whole person and not just a particular legal issue. It also requires collaboration with other problem-solvers in different roles. A community-based approach will help students to identify what services and projects are available locally to provide help and support so that the needs of individuals can be addressed. This needs to include in cases where an admission is not required, maximising opportunities for diverting suspects out of the criminal justice system, or out of court and, for those prosecuted, to avoid custodial sentences whenever possible.