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Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems

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Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?

Cynthia Alkon*

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A. Plea Bargaining Defined ............................................ 385

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I. INTRODUCTION

Countries struggling with overburdened criminal justice systems often decide to introduce U.S.-style plea bargaining as part of a larger process of criminal procedure reform. Plea bargaining, however, is not simply a
technical change in process. Policymakers and rule of law assistance providers should consider the consequences of this new procedure beyond simple case processing. The introduction of plea bargaining requires legal professionals to adapt to a new way of doing their jobs. It potentially changes how defendants and victims view the system. It also carries the potential to change how the general public views the legal system. This can be of particular concern in countries struggling to establish the rule of law.

Plea bargaining requires informal negotiation. This informal negotiation may look like another form of corruption in countries whose legal systems already suffer from endemic corruption and serious legitimacy problems. This Article will examine the potential consequences of this emerging trend on rule of law development in countries lacking a strong human rights tradition, focusing particularly on countries of the former Soviet Union and the former Yugoslavia.

This Article questions whether it is advisable for policymakers and rule of law assistance providers to recommend and encourage troubled criminal justice systems, a term defined in Part II, to adopt plea bargaining. Part III provides two examples of countries that recently adopted U.S.-style plea bargaining: the Republic of Georgia and Bosnia and Herzegovina. Both countries illustrate the potential concerns and pitfalls of transplanting plea bargaining into a troubled criminal justice system. The Republic of Georgia provides an example of how plea bargaining's informal negotiation may look

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1 Plea bargaining is a direct negotiation between the prosecution and the defense to resolve "one or more of the criminal charges against the defendant without trial." NICHOLAS G. HERMAN, PLEA BARGAINING 1 (2004); see also discussion infra Part V.A.

2 The countries in Eastern Europe that have formally adopted (although perhaps not implemented) plea bargaining or abbreviated trials include: Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Poland, Russia, Serbia, Slovakia, and Slovenia. JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 139 (2009) ("At least across Eastern Europe, then, plea bargaining appears to be on a triumphal march.").

3 It is a challenge to find appropriate terms for the countries that are relevant to this Article's discussion. A frequently used term is "developing democracy" but this is not always appropriate as it is often used simply to indicate countries receiving rule of law development assistance that may in fact have firmly entrenched authoritarian dictatorships and be making questionable progress towards democracy. This Article will use the term "troubled criminal justice systems." For a definition, see infra Part II.

4 "Legal transplant" is the term this Article uses to discuss this process. The term "legal translation" describes the process of how imported laws or concepts are brought into a different legal system and adapted to a new country. See generally Máximo Langer, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, 45 HARV. INT'L L.J. 1 (2004) (arguing that the introduction of plea bargaining into civil law countries such as Germany, Italy, Argentina, and France does not represent a reproduction of the U.S. model but rather that each jurisdiction adapted or translated the new procedure into its own legal system). This Article expresses concern that one problem troubled criminal justice systems face is that they may not adequately adapt plea bargaining processes to address local needs; therefore the term "legal translation" is less accurate in the context of this discussion.
like another form of corruption in a country where the legal system already suffers from endemic corruption and serious legitimacy problems. Bosnia and Herzegovina provides an example of how difficult it is to integrate a new practice into an existing criminal justice system and the challenge to not repeat existing bad practices within the new process.

A key question is how this new process impacts the overall development of the rule of law. Part IV explores the importance of public attitudes and perceptions in developing the rule of law and looks to the social psychology literature on legitimacy and procedural justice. This literature suggests that troubled criminal justice systems should not introduce procedures that cause further erosion of public perceptions of legitimacy.

Part V distinguishes between abbreviated trials and plea bargaining, setting forth the proposition that these terms should not be interchangeable and that they are, in fact, very different processes for rule of law development purposes. This Article will discuss why abbreviated trials might be a better option for troubled criminal justice systems. The distinction between plea bargaining and abbreviated trials, for rule of law development purposes, is that plea bargaining by definition calls for informal negotiations between the prosecutor and the defense, while abbreviated trials are more formal and operate under more standardized procedures, including standard sentence reductions. Informal negotiation during plea bargaining may reinforce existing poor public attitudes towards the legal system.

Part VI summarizes concerns regarding plea bargaining in the United States to illustrate the areas policymakers and rule of law assistance providers should consider before introducing plea bargaining into a troubled criminal justice system. These concerns include whether plea bargaining is coercive and whether defendants receive disparate sentences. Part VII briefly describes the primary rule of law assistance providers working on plea bargaining issues in troubled criminal justice systems. Part VIII summarizes the advantages of importing plea bargaining, primarily in reducing case backlogs, helping to build complex prosecutions, and allowing for more creative sentencing. The Article then looks at the possible unintended negative consequences of importing plea bargaining, including violations of defendants' rights, the public perception of plea bargaining as a process beyond the law, its potential to encourage coerced confessions and the possibility of being a "failed" transplant.

Part IX offers specific suggestions to rule of law assistance providers, both at the legislative stage, when countries are considering importing plea bargaining, and at the implementation phase, after a country adopts plea bargaining or another alternative to criminal trials. One recommendation is that rule of law assistance providers encourage policymakers to consider other procedures, such as abbreviated trials, that might provide the value of increased efficiency in handling criminal cases without the downside of the perceived lawlessness, injustice, and informality of plea bargaining. Finally, if countries do adopt plea bargaining, Part IX goes on to recommend that rule
of law assistance providers improve their monitoring efforts to evaluate how the procedures comply with human rights standards and that countries consider introducing procedural justice practices to reduce the general public's potentially negative attitude toward plea bargaining. Part X concludes and summarizes the overall analysis.

II. TROUBLED CRIMINAL JUSTICE SYSTEMS: WHAT COUNTRIES FALL UNDER THIS CATEGORY?

This Article examines reform efforts in troubled criminal justice systems. There are four main factors that define a troubled criminal justice system. The first is that the judiciary is not independent or is widely perceived not to be independent. The second is that the country suffers from endemic corruption with the general public widely perceiving that government officials, including prosecutors and law enforcement personnel, act outside the law. A third factor is systemic human rights abuses in the criminal justice system, including coercion of confessions, use of torture, and

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5 By some definitions, the U.S. criminal justice system could also fairly be termed "troubled." The United States has the highest incarceration rate in the world and is routinely criticized both internally and internationally for a range of criminal justice policies, such as long prison sentences, poor treatment of juvenile offenders, and the death penalty. The United States incarcerates 756 citizens per 100,000. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, KINGS COLLEGE LONDON SCHOOL OF LAW, THE WORLD PRISON POPULATION LIST 1 (8th ed. 2009), available at http://www.kcl.ac.uk/deptsta/law/research/icps/downloads/wppl-8th_41.pdf. Russia is next in line with 629 per 100,000. Id.; see also James Vicini, Number of U.S. Prisoners Has Biggest Rise in 6 Years, REUTERS, Jan. 27, 2007 http://www.reuters.com/article/domesticNews/idUSN263705312007070627. This Article does not intend to suggest that the criminal justice system in the United States should be used as a model for others to follow or that it is beyond criticism. On the contrary, this Article will detail some of the serious criticism within the United States regarding the practice of plea bargaining. See infra Part VI.

6 For a discussion of how all these factors influence the criminal justice systems of Central Asia, see Cynthia Alkon, The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?, 8 PEPP. DISP. RESOL. L.J. 41, 59–66 (2007).

7 For an example of how to evaluate judicial independence, see American Bar Association [ABA], The Judicial Reform Index, http://www.abanet.org/rol/publications/judicial_reform_index.shtml (last visited Feb. 3, 2010).

8 One indicator of corruption is the Corruption Perception Index prepared by Transparency International. See Transparenci Int'l, Corruption Perception Index 2009, http://www.transparency.org/policy_research/surveys_indices/cpi (last visited Feb. 12, 2009). In troubled criminal justice systems, the police may frequently stop members of the general public and conduct unwarranted traffic stops and identity card checks. See, e.g., CHRISTOPHER P.M. WATERS, COUNSEL IN THE CAUCASUS?: PROFESSIONALIZATION AND LAW IN GEORGIA 65–66 (2004) (discussing traffic stops and corruption in the Republic of Georgia). Through these processes, people quickly learn to do what the police expect, which often includes small payoffs or bribes. This kind of regular contact reinforces the general public's view that the police, and by extension, the entire legal system, are corrupt. See id.
ill treatment. A fourth factor is that defense lawyers cannot adequately defend clients facing criminal charges due to restrictions in law or practice.

III. PLEA BARGAINING TRANSPLANTS: TWO EXAMPLES

The Republic of Georgia and Bosnia and Herzegovina have adopted U.S.-style plea bargaining provisions. Both countries provide a different example of what happens when a country introduces plea bargaining into a troubled criminal justice system. Georgia is an example of the danger of negative public perceptions, particularly in the early implementation stages. Bosnia and Herzegovina's experience illustrates the problems of integrating a new practice into an existing legal system and how a country can fail to protect defendants' rights in the process. Each country receives rule of law development assistance from the U.S. Department of Justice Office for Overseas Prosecutorial Development Assistance and Training ("OPDAT") legal advisors, the American Bar Association ("ABA") offices, and active international organizations such as the Organization for Security and Cooperation in Europe ("OSCE") and the Council of Europe ("CoE").


11 See infra Part V (defining plea bargaining). For a discussion of plea bargaining in the United States, see infra Part VI.


13 See infra Part VII.
law assistance providers played a role in adopting plea bargaining in each
country, although it is difficult to accurately assess how large a role.14

What follows is a summary of current developments and plea bargaining
laws in each country, highlighting the reported concerns and successes.
However, the information on practices relating to plea bargaining is far from
complete due to the difficulty of gathering information in each country. In
Georgia, no group comprehensively monitors plea bargaining or other judicial
practices.15 The OSCE has monitored trials and plea bargaining in Bosnia
and Herzegovina, and this Article will draw extensively from those reports.16
This summary is not intended as a comprehensive study of plea bargaining in
either country, but rather as an attempt to provide an overview to illustrate
the possible problems and concerns that policymakers and rule of law

14 For an example of one scholar’s attempt to trace the history of criminal procedure reform in
Latin America, see Máximo Langer, Revolution in Latin American Criminal Procedure: Diffusion
of Legal Ideas from the Periphery, 55 AM. J. COMP. L. 617 (2007) (describing how the prestige and
influence of neighboring countries influenced large-scale criminal procedure code reform in Latin
America). Miller describes four basic types of transplants: the “cost-saving transplant;” the
“externally dictated transplant;” the “entrepreneurial transplant;” and the “legitimacy-
generating transplant.” Jonathan M. Miller, A Typology of Legal Transplants: Using Sociology,
Legal History and Argentine Examples to Explain the Transplant Process, 51 AM. J. COMP. L.
839, 841 (2003). The “cost-savings transplants” occur when the drafter “confronted with a new
problem pulls a solution from elsewhere off the shelf . . . to save having to think up an original
solution.” Id. at 845. The “externally-dictated transplant” includes situations when a foreign
state or entity requires a change in the law either for funding or to do business in the country.
Id. at 847–49. The “entrepreneurial transplant” is one where “individuals and groups . . . reap
benefits from investing their energy in learning and encouraging local adoption of a foreign legal
model.” Id. at 849–50. The final type is the “legitimacy-generating transplant” which occurs
when a country adopts a transplant due to the “prestige of the foreign model.” Id. at 853.
Researchers face challenges understanding the legislative process in the chaotic legislative
atmosphere of many developing democracies. In such environments, it can be a challenge to
understand why a legislature passed a particular law or who had a role in its passage. For one
interesting account of the legislative process in Kazakhstan, see Scott Newton, Transplantation
and Transition: Legality and Legitimacy in the Kazakhstani Legislative Process, in LAW AND
INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 151 (Denis J. Galligan & Marina
Kurkchiyan eds., 2003).

15 The OSCE Field Mission to Georgia closed at the end of 2008. Organization for Security and
Cooperation in Europe [OSCE], OSCE Mission to Georgia (Closed), http://www.osce.org/georgia
(last visited Feb. 3, 2010). In the OSCE region the OSCE tends to take the lead in trial
monitoring and no other organization is currently conducting trial monitoring in Georgia. E-mail

16 See OSCE, OSCE Trial Monitoring Report on the Implementation of the New Criminal
Procedure Code in the Courts of Bosnia and Herzegovina, at 8–12 (Dec. 2004), available at
OSCE, Plea Agreements in Bosnia and Herzegovina: Practices Before the Courts and Their
www.oscebih.org/documents/4278-eng.pdf [hereinafter OSCE Plea Agreements Report];
OSCE, The Presumption of Innocence: Instances of Violations of Internationally Recognised Human
org/documents/7621-eng.pdf [hereinafter OSCE Presumption of Innocence Report].
assistance providers should consider before recommending U.S.-style plea bargaining to a troubled criminal justice system.\footnote{This Article relies largely on secondhand sources for this summary and these sources may be subject to problems of bias and inaccurate reporting of information.}

\section{A. The Republic of Georgia}

\subsection{1. Background}


At the end of 2007, an opposition party leader accused President Saakashvili of corruption and plotting murder, which sparked violent protests in the capital of Tbilisi.\footnote{See BBC News Country Profile, supra note 18.} President Saakashvili called a state of emergency and advanced the presidential elections.\footnote{See id.; see also OSCE, Office for Democratic Insts. & Human Rights [ODIHR], Georgia: Extraordinary Presidential Election—Election Observation Mission Final Report, Jan. 5, 2006, available at http://www.osce.org/documents/odihr/2006/09/29982_en.pdf. President Saakashvili’s hold on power is tenuous as Georgians protest and the
republics of Abkhazia and South Ossetia. The conflict flared again in the summer of 2008, when fighting erupted in South Ossetia.

This Article classifies Georgia as a troubled criminal justice system. Despite improvements, the general public continues to perceive corruption as a serious problem. Despite widespread changes in the police force, “the practice of torture and ill-treatment persists in the country.” Lawyers continue to face barriers including difficulties gaining access to their clients.

2. Plea Bargaining

a) Plea Bargaining in the Georgian Criminal Procedure Code

In 2003, Georgia amended its Criminal Procedure Code (“CPC”) to introduce plea bargaining as part of a package of anticorruption legislation.
Georgia amended the plea bargaining provisions in 2004, and again in 2005, to expand plea bargaining and to provide additional human rights protections in response to criticism following the 2003 amendments. The revised law allows prosecutors and defendants to engage in charge or sentence bargaining. In practice, the result of plea bargaining is either a reduction in jail time or payment of a fine without a plea to the charge. Following a 2004 amendment, the prosecutor must notify the victim about the agreement, although the victim has no rights beyond notification.

Under the CPC, any defendant can agree to plead guilty or accept the sentence (a nolo plea). The law does not limit plea bargaining to particular types of offenses or set a limit on maximum possible sentences. If there is a plea agreement, the law requires the defendant to sign an agreement to enter the plea indicating that the defendant consulted with his or her lawyer, understands the legal consequences, and understands the anticipated sentence. The law also specifically protects the defendant's right to a lawyer by requiring the “personal participation” of the defense lawyer for the guilty plea to be admissible. Requiring defense lawyer involvement provides some level of protection for the defendant. However, defense lawyers maintain that in practice, this provision is inadequate and that often lawyers are not involved in the plea until after the defendant has agreed to plead guilty.

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33 C. CRIM. PROC. art. 679(1)(6) (Geor.) (translation provided by the Office of the Resident Legal Advisor, U.S. Embassy, Republic of Georgia) (on file with the author) (allowing the prosecutor to reduce the sentence or “mitigate” (remove) part of the charges). The Georgian CPC uses the term “procedural agreement” for plea bargaining.

34 E-mail from Matthew Reger, ABA Criminal Law Liaison, Tbilisi, Georgia (June 26, 2007, 09:56 EST) (on file with author).


36 C. CRIM. PROC. art. 679(1) (Geor.) (translation provided by the Office of the Resident Legal Advisor, U.S. Embassy, Republic of Georgia) (on file with the author).

37 C. CRIM. PROC. art. 679(2)(2) (Geor.) (translation provided by the Office of the Resident Legal Advisor, U.S. Embassy, Republic of Georgia) (on file with the author).

38 C. CRIM. PROC. art. 679(1)(7) (Geor.) (translation provided by the Office of the Resident Legal Advisor, U.S. Embassy, Republic of Georgia) (on file with the author).

39 LEGAL PROFESSIONAL REFORM INDEX FOR GEORGIA, supra note 30, at 12.
Human rights groups and international organizations have criticized the Georgian government for using plea bargains to coerce defendants to give up their right to file torture complaints in exchange for reduced sentences.\(^4\) The government responded to these criticisms by amending the CPC to make it “inadmissible to conclude a plea agreement if it limits the defendant’s constitutional rights to request criminal prosecution against persons involved in torture, inhuman and degrading treatment of the defendant.”\(^4\) The 2005 amendments also require the court to “hear directly from the defendant” that he or she has “not been subject to torture, inhuman or degrading treatment by a police officer or other law enforcement representative.”\(^4\) Practices reportedly improved after this amendment.\(^4\)

\[b) \text{Plea Bargaining in Practice}\]

The Georgian criminal justice system first used plea bargains solely in cases of corruption. The press actively reported on these early cases, which included large payments by defendants to avoid criminal convictions.\(^4\) This early experience led to serious criticism of plea bargaining and to the perception that it existed as just another form of corruption in an already

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\(^4\)C. CRIM. PROC. art. 679(1)(7)(1) (Geor.) (amended Dec. 16, 2005) (translation provided by the Office of the Resident Legal Advisor, U.S. Embassy, Republic of Georgia) (on file with the author); U.S. HUMAN RIGHTS REPORT ON GEORGIA, supra note 29.


\(^4\)Council of Europe, Comm. for the Prevention of Torture, Report to the Georgian Government on the Visit to Georgia Carried Out by the European Committee for the Prevention of Torture or Degrading Treatment or Punishment (CPT) from 21 March to 2 April 2007, para. 10, CPT/Inf 42 (Oct. 25, 2007), available at http://www.unhcr.org/refworld/publisher,COE/CPT/,GEO,472042f02,0.html. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") visited Georgia in March 2007 and reported that the treatment of persons in custody had “considerably improved.” Id. The CPT reported that this may be due to amendments to the CPC lessening the reliance on confessions, and due to the amendments making a plea agreement invalid if it prevents prosecution of a complaint of torture or ill treatment. Id. para. 12. However, this report pre-dates the violent protests at the end of 2007 and new allegations of police misconduct toward the protestors. See Int'l Crisis Group, supra note 24, at 3–5; see also U.S. HUMAN RIGHTS REPORT ON GEORGIA, supra note 29.

This perception was extremely damaging to public confidence in plea bargaining. President Saakashvili acknowledged that plea bargaining "didn't look very good." Responding to these concerns, the government passed amendments in early 2005 that prevent officials from accepting payments of fines alone to terminate criminal prosecutions. Despite the changes in the law, at least one observer commented that the current system "remains an institutionalized form of bribery." President Saakashvili believed that corruption problems were so serious that the government had to move quickly and "[i]t was a trade-off between democracy and non-democracy... it was like the government had no money, and you had all these corrupt officials who had all the money."

Critics of plea bargaining in Georgia point to the government's failure to use plea bargaining to gain cooperative witnesses to fight trafficking and corruption. These flaws may be slowly changing. At least one high profile case used cooperative witnesses to convict the president of the Gamma Bank for laundering $1 billion. Crucial to the conviction was the testimony of ten bank employees who plead guilty to reduced charges and were prosecution witnesses at the bank president's trial in exchange for lower sentences.

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45 Pan, supra note 22 (noting that plea bargaining "helped avoid a budget crisis but left the impression that criminals could buy their freedom and prosecutors could extort payments from anyone."); see also, Reichelt, supra note 31, at 187–88.

46 Reichelt, supra note 31, at 187–88 ("the plea bargaining system in Georgia has done more to undermine the confidence of the citizenry than any other change to the system has done.").

47 Pan, supra note 22.

48 C. CRIM. PROC. art. 679(9)(4) (Geor.) (amended Dec. 16, 2005) (translation provided by the Office of the Resident Legal Advisor, U.S. Embassy, Republic of Georgia) (on file with the author). This amendment did not stop the public perception that plea bargains are about money and are solely for those who can afford to pay the price. Telephone interview with Matt Reger, ABA Criminal Law Liaison, Tbilisi, Georgia (May 16, 2007) (on file with the author). For a more detailed explanation of the various amendments to the plea bargaining provisions in Georgia and how these changes reflect criticism of the earlier provisions, see Reichelt, supra note 31, at 159.

49 Reichelt, supra note 31, at 185. Matthew Reger, the ABA Criminal Law Liaison in Georgia agreed with Reichelt's conclusions and that his account of plea bargaining in Georgia is "exactly what is happening." E-mail from Matthew Reger, supra note 34.

50 Pan, supra note 22. President Saakashvili also said that plea bargaining was "a compromise you have to make. Reform of society, especially if it's in bad shape, it's not really an academic process." Id.

51 Reichelt, supra note 31, at 179 (describing a case of trafficked women from Uzbekistan).


53 Id.
remains to be seen if this case will lead prosecutors and investigators to use this new procedure regularly.54

Georgia has steadily increased the percentage of criminal cases that it resolves through plea bargaining. In 2005, the U.S. Department of Justice ("U.S. DOJ") reported that Georgia resolved 12.7 percent of all criminal cases through plea bargaining.55 In 2006, the number of plea bargains increased to 27.9 percent of all criminal cases.56 In 2007, a total of 48.1 percent of criminal cases were resolved through plea bargaining,57 and by 2008, this total increased to 52.2 percent.58 The U.S. DOJ reports that plea bargaining is responsible for "eliminating much of the case backlog" in Georgian courts.59

In 2007, Georgia adopted the Criminal Law Guidelines ("CLG"), modeled on the U.S. sentencing guidelines, in response to criticism that the criteria on which cases were evaluated and handled was inconsistent.60 The CLG gives sentencing recommendations, not mandatory terms.61 In practice, however, judges do not deviate from the recommendations.62 Early reports indicate that the CLG has added to the leverage of the prosecutor in plea bargaining negotiations while decreasing the already limited defense leverage.63

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54 Interview with Catherine Newcomb, Acting Regional Director, Eurasia, OPDAT, in Washington D.C. (May 2, 2007) (on file with author) (any longer-term change could be linked to the concerted effort of the OPDAT program and the training and assistance OPDAT provided to legal professionals in Georgia). Nearly two years later, on March 4, 2009, Ms. Newcomb reported in a telephone interview that Georgia was using plea bargaining more in trafficking cases to get witnesses to testify. Telephone interview with Catherine Newcomb, Acting Regional Director, Eurasia, OPDAT (Mar. 4, 2009). See also Embassy of the United States: Georgia, Department of Justice, http://georgian.georgia.usembassy.gov/doj.html (describing the Gamma Bank case) (last visited on Feb. 18, 2010).

56 U.S. REPORT ON U.S. STYLE PLEA BARGAINING IN GEORGIA, supra note 52, at 2.

57 Id.

58 E-mail from Nata Tsnoriashvilli, Legal Specialist, OPDAT, Tbilisi, Georgia (Mar. 13, 2009, 07:17 EST) (on file with author).

59 U.S. REPORT ON U.S. STYLE PLEA BARGAINING IN GEORGIA, supra note 52, at 1.

60 2007 LEGAL PROFESSIONAL REFORM INDEX FOR GEORGIA, supra note 30, at 12–13. For a discussion of the U.S. Sentencing Guidelines see infra Section VII.

61 2007 LEGAL PROFESSIONAL REFORM INDEX FOR GEORGIA, supra note 30, at 12–13. However, judges must explain in writing if they choose to sentence differently from the guidelines. Id. at 13.

62 Id. at 13.

63 Id. At least one report compares the CLG to the old Soviet practice of "telephone justice" where government officials called judges and told them what to do on individual cases. Id. For a description of this practice see e.g., Katheryn Hendley, 'Telephone Law' and the 'Rule of Law': The Russian Case, 1 HAGUE J. ON RULE L. 241–42 (2009). Critics maintain that the CLG replaces
Georgian lawyers criticize the CLG, stating that it has further eroded their role in plea bargaining as prosecutors tend to tell defendants what the CLG sentencing range is, what the plea bargain offer is, and then conclude the negotiation without defense lawyers. In a system where the defendant's only recourse if they refuse to plead guilty is a trial with a certain conviction and a predetermined sentence, these offers can appear to be the only real option.

The legal community in Georgia tends to view plea bargaining as an exchange of money for time: the more money paid, the less time the defendant will spend in custody. The ABA conducted an informal survey of defense lawyers in Georgia confirming this widely held perception and further confirming serious criticism of plea bargaining in Georgia. Lawyers reported that prosecutors usually don't offer plea bargains to defendants who are represented by court appointed counsel because that indicates the defendant does not have money and prosecutors consider money a condition precedent to plea bargaining.

No organization or individual has yet conducted a comprehensive monitoring of plea bargaining in Georgia. It is therefore difficult to fully assess how plea bargaining is used and the accuracy of criticism by the defense bar and the general public.

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64 2007 LEGAL PROFESSIONAL REFORM INDEX FOR GEORGIA, supra note 30, at 12–13.
65 See discussion infra Section V.
66 Telephone Interview with Matt Reger, supra note 48.
67 The ABA interviewed twenty lawyers from different regions of Georgia for this survey. E-mail from Matthew Reger, supra note 34.
68 Id.
69 At least one DOJ staff person was skeptical of the anecdotal reports on how plea bargaining is used as such information would be “one sided” without any comprehensive study. E-mail from Nata Tsnoriashvilli, supra note 57.
B. Bosnia and Herzegovina

1. Background

Bosnia and Herzegovina ("BiH") declared independence from Yugoslavia in 1992 and a devastating war began. The Dayton Peace Accords marked the end of the conflict and established the governing structure of BiH. Its population of 4.5 million people is divided between the Republica Srpska and the Federation of Bosnia and Herzegovina. The international community remains heavily engaged in security and government in BiH, although this involvement decreases each year. Under the Dayton Peace Accords, the Office of the High Representative ("OHR") had final authority to impose laws, amend laws, and perform a range of other actions to manage the implementation of the Dayton Accords. Pursuant to this authority, the OHR approved the Criminal Procedure Code discussed below.

This Article classifies BiH as a troubled criminal justice system. General levels of corruption continue to be high. In 2003–2004, the OHR oversaw a

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76 BiH rated 3.3 (placing it below the Republic of Georgia and ahead of Moldova) on Transparency International’s rating system where a score of 0 indicates “highly corrupt” and a score of 10 indicates “highly clean.” Transparency Int’l, 2007 Corruption Perceptions Index, at 6 (Sept. 2007), available at http://www.transparency.org/content/download/23972/358236 [hereinafter 2007 Corruptions Perceptions Index]. This was an improvement from 2006 when BiH scored 2.9 on the same scale. Transparency Int’l, 2006 Corruption Perceptions Index—Regional Highlights: Eastern Europe and Central Asia (2006), available at http://www.transparency.org/content/download/10853/93143/file/CPI%202006_regional_highlights_SE_Eur_CAsia.pdf. However, in previous years, BiH scored better. For example, in 2004 BiH scored 3.1.
judicial "reappointment" process in response to concerns about the quality of judges, their impartiality, and their lack of independence.\(^\text{77}\) The OHR approved new judicial selection criteria and 30 percent of the judges were not reappointed.\(^\text{78}\) Lawyers and judges now report lower levels of corruption and improper influence.\(^\text{79}\) However, the general public still perceives high levels of corruption in the judiciary and police.\(^\text{80}\) Human rights abuses also continue with regular reports of ill treatment of detainees.\(^\text{81}\) Defense lawyers face difficulties in representing their clients, including an appointment process that fails to assign lawyers, resulting in many defendants going unrepresented.\(^\text{82}\) War crimes trials continue in BiH and impact the general public's view of the legal system.\(^\text{83}\)

In 2003, BiH adopted a new Criminal Procedure Code ("CPC") moving from an inquisitorial system to a hybrid system that incorporates elements of

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\(^{80}\) Transparency International surveys the general public and asks questions about corruption. A score of "5" on the Global Corruption Barometer indicates "extremely corrupt" while a score of "1" indicates "not at all corrupt." Transparency Int'l, Report on the Transparency International Global Corruption Barometer 2007, at 22 (Dec. 6, 2007), available at http://www.transparency.org/policy_research/surveys_indices/gcb/2007 [hereinafter Global Corruption Barometer]. BiH’s judiciary and legal rate was a 4.2, while the police scored a 4.1. Id.


\(^{82}\) OSCE Trial Monitoring Report, supra note 16, at 8–12.

both traditional civil and common law approaches. This new code adopted an adversarial system changing the role of lawyers and judges. The new CPC reflects considerable involvement from the international community.

2. Plea Bargaining

   a) Plea Bargaining in the BiH Criminal Procedure Code

   The drafters of the new CPC apparently added plea bargaining primarily to address case backlogs and court overcrowding. Article 231 of the BiH CPC specifically allows negotiation between the accused, the defense lawyer, and the prosecutor on the “conditions of admitting guilt.” The CPC allows the prosecutor to “propose a sentence of less than the minimum prescribed by the law.” The CPC requires the court to “ensure” that there is sufficient evidence and that the accused enters into the plea “voluntarily, consciously and with understanding.” The CPC also requires the court to inform the victim about the “results of the negotiation on guilt.” In practice, and arguably under the law, plea bargaining is limited to sentence bargaining. The CPC does not limit the offenses eligible for plea bargaining.

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85 Id.
86 See discussion, supra note 74.
87 See C. CRIM. PROC. art. 231 (Bosn. & Herz.), available at http://www.sudbih.gov.ba/files/docs/zakoni/en/Zakon_o_krivicnom_postupku--3_03--eng.doc (last visited June 19, 2007); see also JUDICIAL REFORM INDEX FOR BOSNIA AND HERZEGOVINA, supra note 77, at 2 (reporting, at the end of 2005, a case backlog of 1.3 million cases nationwide, which includes both civil and criminal cases.). Many commentators point to case backlog as a reason to adopt plea bargaining. See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME TRANSITIONAL JUSTICES GUIDEBOOK FOR BOSNIA AND HERZEGOVINA 21 (2009), available at http://www.undp.ba/index.aspx?PID=36&RID=88. For a report praising the introduction of plea bargaining to deal with case crowding in Brčko before it was introduced in the rest of the country see Int'l Crisis Group, Courting Disaster, the Misrule of Law in Bosnia and Herzegovina, at 51 (Mar. 25, 2002), available at http://www.reliefweb.int/library/documents/2002/icg-bih-25mar.pdf.
88 C. CRIM. PROC. art. 231 (Bosn. & Herz.). Each entity in BiH has its own CPC. This article focuses on the federal code. However, since the Brčko District started using plea bargaining in 2001, two years before the rest of the country, those statistics are included in this discussion. OSCE Plea Agreements Report, supra note 16, at 6.
89 C. CRIM. PROC. art. 231(2) (Bosn. & Herz.).
90 Id. at 231(4)(a).
91 The language suggests that the court is obligated to report the outcome of the plea negotiation to the victim with or without a guilty plea. Id. at 231(7).
92 The OSCE analysis cites C. CRIM. PROC. art. 231(1) and (2) (Bosn. & Herz.) for the argument that charge and fact bargaining are not allowed under the law, as the CPC states that the prosecutor and defense lawyer can negotiate “on the conditions of admitting guilt for the criminal offence with which the accused is charged.” (emphasis added). Despite this, the OSCE observed
b) *Plea Bargaining in Practice*

Beginning in 2004, the OSCE Mission to BiH released a series of monitoring reports on the implementation of the new CPC, including the new practice of plea negotiations. The first report, in 2004, stated a number of concerns regarding the implementation of the CPC, including the use of plea negotiations. In 2006, the OSCE released a more comprehensive report that focuses on plea negotiations. By 2006, three years after adopting the new CPC, the OSCE reported that 13 percent of criminal cases nationwide ended in plea agreements. In 2007, the OSCE released a shorter report highlighting some specific concerns about the practices surrounding the use of plea negotiations.

All three monitoring reports showed, not surprisingly, that problems in the overall criminal justice system also exist in plea negotiations. These problems include inequality between the prosecution and the defense, lack of some limited instances of charge bargaining primarily by international prosecutors. OSCE Plea Agreements Report, supra note 16, at 8.

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93 C. CRIM. PROC. art. 231 (Bosn. & Herz.).

94 OSCE Trial Monitoring Report, supra note 16; OSCE Plea Agreements Report, supra note 16; OSCE Presumption of Innocence Report, supra note 16.

95 See generally OSCE Trial Monitoring Report, supra note 16.

96 See generally OSCE Plea Agreements Report, supra note 16.

97 Press Release, OSCE, Diminished Sentences Due to Plea Bargains Between Prosecutors and Defendants (Feb. 10, 2006), available at http://www.oscebih.org/public/default.asp?id=6&article=show&id=1710. Plea agreements resolved 10 percent of criminal cases in the Federation of BiH while the Republika Srpska resolved 15.5 percent of their cases through plea agreements. OSCE Plea Agreements Report, supra note 16, at 9. The highest reported plea agreement rate was 38.6 percent in Trebinje. Id. The lowest reported rate was 0.4 percent in Bihać. Id. In the Brčko District, 28 percent of criminal cases ended through plea agreements five years after adopting plea bargaining. Id.; see also Press Release, OSCE, Diminished Sentences Due to Plea Bargains Between the Prosecutors and Defendants (Oct. 2, 2006), available at http://www.oscebih.org/public/default.asp?id=6&article=show&id=1710. At least one researcher questions these numbers, thinking that the actual numbers are lower and that many of the guilty pleas fall under Article 353 and not the plea bargaining provisions in Article 246. E-mail from Florian Zagel, Graduate Student of E. European Law, Univ. of Regensburg, Germany (Sept. 12, 2008, 14:15:00 EST) (on file with author) (reporting results of his Master's thesis research). Article 350 allows defendants to plead guilty in cases where the maximum is no more than five years in prison. In such cases, the prosecutor can request a specific sentence in the indictment and that sentence can be a “fine, suspended sentence, forfeiture of material gain acquired by the criminal offense or forfeiture of items.” C. CRIM. PROC. art. 350 (Bosn. & Herz.). The OSCE seems to include both types of proceedings under their plea bargaining statistics. See OSCE Plea Agreements Report, supra note 16, at 9.

98 See generally OSCE Presumption of Innocence Report, supra note 16.

99 See generally OSCE Trial Monitoring Report, supra note 16; OSCE Plea Agreements Report, supra note 16; OSCE Presumption of Innocence Report, supra note 16.
access to defense counsel, unequal bargaining power between the prosecutor and the defense, and a failure to preserve the presumption of innocence.100

The 2006 monitoring report documented the lack of access to defense counsel, revealing that 27 percent of defendants entered a guilty plea without a lawyer.101 The OSCE reports “a trend among the judiciary that defense counsel is viewed as unnecessary during plea negotiating and plea agreement hearings.”102 This is an outgrowth of the general legal culture, particularly among judges, that looks to prosecutors to help unrepresented defendants rather than recognizing the role of a strong defense in an adversarial system.103

The reports also criticized the circumstances surrounding the guilty plea and the negotiations, or lack thereof, leading up to it.104 On average, 49 percent of those who pled guilty in BiH did so before they knew their sentence.105 Of this number, 52 percent entered a guilty plea without a lawyer.106 This indicates that while there might have been agreement, there was not much negotiation. The violation of the right to a lawyer is strongly connected to concerns about defendants not actually bargaining for their plea and therefore, presumably, not being in an equal bargaining position with the prosecution.107

In some courts, the numbers were significantly higher. For example, monitors in the Brčko District reported that 60 percent of defendants who plead guilty in court entered their plea before they knew their sentence.108 In these cases, prosecutors commonly “negotiate” with the defendant regarding

100 See generally OSCE Trial Monitoring Report, supra note 16; OSCE Plea Agreements Report, supra note 16; OSCE Presumption of Innocence Report, supra note 16.


102 Id.

103 Id. at 11–12.

104 Id. at 13.

105 Id. at 12. The CPC also contains a provision that allows defendants to plead guilty and accept “the sentence or measure proposed in the indictment,” after which the judge will “issue a warrant for pronouncing the sentence in accordance with the indictment.” C. CRIM. PROC. art. 353 (Bosn. & Herz.). Thank you to Florian Zagel for this observation. This provision does not call for direct negotiation between the prosecution and the defense. It is possible that some of the “plea bargains” referred to by the OSCE in fact occurred under Article 353. However, even under that provision the defendant should know what the sentence will be prior to entering the plea. See discussion, supra note 97.


107 Id. at 12–13.

108 What makes this statistic all the more troubling is that Brčko has used plea agreements longer than the rest of BiH so this practice seems more firmly entrenched. See discussion, supra note 88; OSCE Plea Agreements Report, supra note 16, at 12.
the sentence after the guilty plea. In these circumstances, the defendants plead guilty without any direct benefit, sacrificing their leverage with the prosecution. Furthermore, under the CPC, judges are required to ensure that “the agreement of guilt was entered voluntarily, consciously and with understanding.” The OSCE reported numerous instances where defendants did not seem to understand their guilty pleas or the consequences of the plea, yet the proceeding went forward and the court ultimately accepted the plea.

Exceptions to these uninformed plea bargains exist within BiH. Prosecutors’ offices in Orašje and Zenica prohibit their prosecutors from negotiating with a defendant after he or she has entered a guilty plea. Monitors in Bihać Municipal and Cantonal Courts observed no plea negotiations after a defendant entered a guilty plea. Although these courts still face defendants entering guilty pleas that were not the product of a negotiated settlement, the policy of not negotiating after the guilty plea can help discourage the practice and contributes to a perception that the prosecutors in those courts are not encouraging (or coercing) uninformed guilty pleas.

Judges are also required to ensure that “there is enough evidence” to prove that the accused is guilty. This provision recognizes the “innocence problem” and attempts to address it by requiring some level of judicial scrutiny of the evidence. The law allows judges to review the prosecutor’s evidence in each case, yet monitors for the OSCE observed widely varying judicial practices, including instances when the court did not conduct a review.

The OSCE monitors also observed judges who failed to maintain the presumption of innocence in the context of plea agreements. Judges reportedly encouraged defendants to enter plea agreements under circumstances that indicated that the judges assumed the defendant was

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110 To avoid giving guilty pleas entered without negotiation unwarranted credibility or confusing the actual process, the OSCE should consider creating a new category in any future monitoring reports such as "pleas without negotiation" or "unilateral guilty pleas."
111 C. CRIM. PROC. art. 231(4)(a) (Bosn. & Herz.).
113 Id. at 13.
114 Id.
115 Id.
116 Id.; see also discussion, infra Part VI.
118 Id. at 13–14.
The OSCE observed at least one judge who advised a defendant that if he did not plead guilty “he would have to prove his innocence in the continuation of the criminal procedure.” The OSCE states that these cases “reveal a concerning practice of judges proposing to defendants to plea negotiate.” The OSCE also expressed concern about the appearance of collaboration between judges and prosecutors “to ensure that defendants reach plea agreements.” The OSCE criticized instances when judges encouraged defendants to plead guilty by telling defendants that they would receive a reduced sentence for their plea.

Prosecutors in BiH rarely use plea bargaining for witness cooperation agreements. In 2006, the OSCE reported that only one of the four plea agreements in war crimes cases used cooperation. Organized crime and trafficking in human beings are other categories of cases where prosecutors used plea agreements to gain cooperative witnesses; however, observers reported that many of these defendants pled guilty without any active cooperation. The failure of prosecutors to actively use the cooperative witness aspects of plea agreements may indicate how the legal system has not yet accepted this practice.

The idea of a defendant readily pleading guilty is probably not as much of a stretch conceptually or culturally since confessions were and are common in the investigative stage and at trial. However, there is a difference between...
a confession and offering a defendant a bonus in the form of a reduced sentence for providing evidence against another. In the context of civil law legal cultures, legal professionals often view this type of provision as unfair because it allows similarly situated defendants to receive different sentences based solely on whether or not one "cooperates."\textsuperscript{129} Prosecutors may hesitate to use plea bargaining to gain cooperative witnesses because the CPC requires near-immediate sentencing, which means that if the defendant does not provide all the assistance they promised or if their testimony is not helpful in landing a bigger criminal, the prosecutor has no leverage to adjust the sentence or void the deal, since the defendant will have already been sentenced.\textsuperscript{130}

Just as aspects of BiH's legal culture impede the wider use of cooperation agreements, there are aspects of the legal culture that influence or limit the development of plea bargaining as a whole. The new CPC called for legal professionals to learn new skills and adapt to new procedures.\textsuperscript{131} BiH prosecutors reportedly adjusted well to plea bargaining and were satisfied with the improved judicial efficiency and the high numbers of plea bargained cases.\textsuperscript{132} Since negotiations often only consisted of the prosecutor stating what the sentence would be and the defendant agreeing to a guilty plea without disagreeing or suggesting any alternatives, it is, therefore, not surprising that prosecutors have adjusted well. This dynamic of the prosecutor dictating what will happen without argument is consistent with their experience in Yugoslavia and prior to the new CPC's passage.\textsuperscript{133} However, the increasingly active role for judges in plea bargaining is new and prosecutors complain when judges get more involved and do not simply "rubber stamp" the plea agreement.\textsuperscript{134} Prosecutors also complain that some judges give defendants the same pretrial deal after a trial, thereby taking

\textsuperscript{129} This is related to cultural resistance to more individualized sentences. \textit{See} discussion, \textit{infra} Part VIII.A.3.

\textsuperscript{130} C. CRIM. PROC. art 246 (5) (Bosn. & Herz) ("If the court accepts the agreement on the admission of guilt, the statement of the suspect or the accused shall be entered in the record ... within three (3) days at the latest"); \textit{see also} JUDICIAL REFORM INDEX FOR BOSNIA AND HERZEGOVINA, \textit{supra} note 77, at 21. This structural barrier is not unique to BiH. Many inquisitorial systems also require a single proceeding in which the defendant enters the guilty plea and is immediately sentenced. \textit{See, e.g.,} TURNER, \textit{supra} note 2, at 153 (discussing unitary proceedings as one reason cooperation agreements are not used in Bulgaria).

\textsuperscript{131} \textit{See, e.g.,} JUDICIAL REFORM INDEX FOR BOSNIA AND HERZEGOVINA, \textit{supra} note 77, at 21.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} For a summary of some of CPC's changes, see \textit{OSCE Trial Monitoring Report, supra} note 16, at 1–2.

\textsuperscript{134} \textit{See} JUDICIAL REFORM INDEX FOR BOSNIA AND HERZEGOVINA, \textit{supra} note 77, at 21.
away the incentive for defendants to plead guilty and avoid a trial. On the other hand, judges contend that they are unclear about their role in this procedure. Defense lawyers express concern that they are not included in the plea bargain process. All of these concerns reflect discomfort with this new process and the fact that so far, plea bargaining in BiH is not a comfortable or routine part of the legal culture.

Public criticism of plea bargaining in BiH focuses on two related concerns: the perception that defendants who enter guilty pleas receive lower sentences and a concern about the differences in sentences between similarly situated defendants. The OSCE reports different sentences for defendants pleading guilty to the same offense. The OSCE reported a full 48 percent of defendants who entered guilty pleas received sentences under the "special minimum" sentence provided by law. The OSCE further notes that the percentage of plea agreements under the "special minimum" sentence increases as the seriousness of the crime increases. However, public attitudes toward plea bargaining are not only influenced by domestic cases. The International Criminal Tribunal for Yugoslavia ("ICTY") uses plea bargaining in war crimes cases and this is undoubtedly a factor contributing to the negative public perception of plea bargaining within BiH. Reports from the ICTY led to perceptions that some defendants received lighter sentences due to plea bargaining and not due to objective determinations, under the law, of appropriate sentences for their crimes.

IV. THE RULE OF LAW: ATTITUDES MATTER

This Article explores whether a troubled criminal justice system's decision to introduce the process of plea bargaining into its criminal
procedure will influence the development of the rule of law.\textsuperscript{144} One challenge in addressing this question is that the development of the rule of law is far from an exact science.\textsuperscript{145} Professionals and academics working in the field are both fascinated and perplexed by questions of how the rule of law develops and what impacts its development.\textsuperscript{146}

Clearly, building the rule of law does not happen overnight and depends on many elements.\textsuperscript{147} One fundamental element is the attitude of the majority of the population,\textsuperscript{148} as the rule of law depends on the majority of

\textsuperscript{144} For the purposes of this Article, the definition of the rule of law is “a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.” Thomas Carothers, The Rule of Law Revival, FOREIGN AFF., Mar.–Apr. 1998, at 96. For a discussion of how different definitions of the rule of law influence rule of law assistance see Rachel Kleinfeld, Competing Definitions of the Rule of Law, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31 (Thomas Carothers ed., 2006); The World Justice Forum defines the rule of law, giving four “universal principles”:

(1) The government and its officials and agents are accountable under the law; (2) The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; (3) The process by which the laws are enacted, administered and enforced is accessible, fair and efficient; (4) The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.


\textsuperscript{147} Rule of law development is, by its nature, long-term work which may stretch beyond a single generation. This is one of the challenges for rule of law assistance providers who plan and implement projects under shorter timelines. See, e.g., Wade Channell, Lessons Not Learned About Legal Reform, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 141–43 (Thomas Carothers ed., 2006).

\textsuperscript{148} See, e.g., Denis J. Galligan, Legal Failure: Law and Social Norms in Post-Communist Europe, in LAW AND INFORMAL PRACTICES 22 (Denis Galligan & Marina Kurkchiyan eds., 2003) (stating that developing attitudes of respect for law “takes time and has to be developed piece by piece in
the population voluntarily following the law.\textsuperscript{149} Rule of law practitioners often identify changing attitudes in a specific part of a population (such as lawyers, police officers, or elected officials) as an underlying goal of rule of law assistance programs.\textsuperscript{150} Rule of law practitioners also identify changing the attitudes of the population at large as a goal, usually under the guise of "public awareness campaigns" or teaching law to non-lawyers.\textsuperscript{151}

Social psychologists use the term "legitimacy" both when looking at why people follow the law and when studying attitudes toward the courts, law enforcement, and government in general.\textsuperscript{152} Legitimacy looks at both whether the law itself is perceived as legitimate and whether individual legal authorities or institutions are perceived as legitimate.\textsuperscript{153} Legitimacy is a "key precursor of consent and voluntary acceptance" of the law and legal authorities.\textsuperscript{154} A leading scholar in this area, Tom Tyler, concludes that if people find that a law or legal authority is legitimate, they are more likely to comply with that law or legal authority.\textsuperscript{155}

Numerous studies conclude that a key to legitimacy is procedural justice, meaning that the process or rules followed by those in positions of power are perceived to be fair.\textsuperscript{156} The studies on procedural justice find that the process

\textsuperscript{149} Tom Tyler states that "the rule of law is based upon a willingness to defer to legal authorities." Tom Tyler, Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority, 56 DEPAUL L. REV. 661, 668 (2007) [hereinafter Does the American Public Accept the Rule of Law?]. One theory of why people follow the law is "social control," meaning that they follow the law to avoid punishment or reap rewards. See, e.g., TOM TYLER, WHY PEOPLE OBEY THE LAW 19-23 (1990). Other theories are that people comply due to "social relations" and "normative values." Id. at 23.

\textsuperscript{150} See, e.g., Gillian K. Hadfield, Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Economies, 56 DEPAUL L. REV. 401 (2007) (discussing the importance of lawyers in implementing new laws in the context of economic development).

\textsuperscript{151} The term "legal culture" is often used and projects often have as their goal a change in the legal culture. See STROMSETH ET AL., supra note 146, at 310-46 (arguing that "... [I]nterveners must seek to create a rule of law culture [in post-conflict societies]."). For a critical analysis of these efforts, see Brent T. White, Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies (Ariz. Legal Stud., Discussion Paper No. 09-09, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1359338; see also ADAPTING LEGAL CULTURES (David Nelken & Johannes Feest eds., 2001).

\textsuperscript{152} See, e.g., TYLER, supra note 149; Tom Tyler, Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government, 28 LAW & SOC'Y REV. 809 (1994) [hereinafter Governing Amid Diversity].

\textsuperscript{153} See, e.g., TYLER, supra note 149, at 27-30, 45-50.

\textsuperscript{154} Id. at 277.

\textsuperscript{155} Id. at 161-69.

\textsuperscript{156} Id. at 278.
is more important to people than the outcome. Procedural justice scholarship examines underlying attitudes and views about the legal process, looking at "four critical factors" that lead people to perceive a process as fair. These factors include: people being able to "state their case" to legal authorities; people being treated with dignity; neutral authorities; and authorities with good or "benevolent" intentions.159

Tyler finds that procedural justice improves both individual compliance with specific orders of legal authorities and the general public's overall compliance with the law.160 He concludes that people will defer to authority figures when they trust them and that authorities earn that trust primarily by making decisions that follow the rules or laws.161 Within the United States, attitudes on fair decision-making do not vary significantly between people of different ethnicities, ages, or income levels.162 Tyler summarizes the research, stating that “Americans generally accept the principles underlying the rule of law and defer to legal authorities when they believe that the authorities are acting in accord with those principles.”163

Members of the general public want authorities to make decisions that follow the rules and laws. The public perception regarding whether authorities are following the law will influence public opinion about the legal system. Accepting this conclusion leads to some difficult questions regarding the use of plea bargaining. The public perception of plea bargaining, in the United States and beyond, is often that it is essentially a


159 See, e.g., Does the American Public Accept the Rule of Law?, supra note 149, at 664.

160 Procedural Justice, Legitimacy, supra note 157, at 283-84; see also Trust in the Law, supra note 157, at 212-16.

161 Does the American Public Accept the Rule of Law?, supra note 149, at 674, 679.

162 See generally Governing Amid Diversity, supra note 152. The results of a study of attitudes toward procedural justice broken down by ethnicity, gender, education, income, and age and found that “there is substantial agreement in the weight given to elements of fair procedure across groups.” Id. at 829.

163 Does the American Public Accept the Rule of Law?, supra note 149, at 661.

164 People are more inclined to use corruption or other extralegal means to resolve cases when they do not believe the legal system will treat them fairly based solely on the merits of their case. Marina Kurkchiyan, Judicial Corruption in the Context of Legal Culture, in Global Corruption Report 2007 99, 103 (Diana Rodriguez et al. eds., 2007), available at http://www.transparency.org/publications/publications/gcr_2007.
procedure outside the law and not bound by rules. Of course, this is an overly simplistic and often inaccurate conclusion. A related question is whether plea bargaining contributes to justice in criminal cases and in the legal system overall.

How could procedural justice ideas apply to plea bargaining? Michael O’Hear recommends adopting “procedural justice process norms,” which would change how prosecutors conduct plea bargaining in the United States. He recommends that the plea bargaining process should allow defendants to tell their story (to be heard), that there should be objective (or fair) standards for the negotiations, that the reasons for a position in negotiation should be explained, and that prosecutors should avoid “pressure tactics like exploding offers and charging threats.” O’Hear focuses more on how this might improve the attitude of individual defendants and victims toward the criminal justice system and less on the general public. However, O’Hear considers that “transparency of plea bargaining may... contribute to the criminal justice system’s perceived legitimacy...” Studies looking at public perceptions of plea bargaining conclude that giving more information about actual sentences in specific types of crimes and more information about the plea bargaining process in general can help lessen the negative public view of plea bargaining. These studies support O’Hear’s


166 The federal system in the United States, explained infra Part VI, follows rules very closely.

167 Jean Sternlight, Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad, 56 DePaul L. Rev. 569 (2007) (questioning whether ADR contributes to justice and whether encouraging rule of law assistance providers to view the rule of law not as an “end in and of itself” but rather as a “means to an end”). Stephen Thaman questions whether the defendant has a real “trump card” to play in plea negotiations with the prosecutor if he or she will ultimately go to trial before a panel of judges and not a jury where the end result is not predetermined or easily predicted. Stephen C. Thaman, Plea-Bargaining, Negotiating Confessions and Consensual Resolution of Criminal Cases, Electronic J. Comp. L., Dec. 2007, at 50, available at http://www.ejcl.org/113/article113-34.pdf [hereinafter Plea-Bargaining, Negotiating Confessions].

168 See generally O’Hear, supra note 158.

169 Id. at 426–32.

170 Id. at 441–43 (“Defendants and victims, however, do pay attention even to the most routine of cases, so perhaps we ought to weigh their views of distributive justice more heavily than those of the inattentive public”).

171 Id. at 446.

suggestion to develop criteria and explain why certain decisions are made and that doing so may support legitimacy for the criminal justice system.\textsuperscript{173}

Most of the studies looking at legitimacy and procedural justice were done in the United States.\textsuperscript{174} The first significant cross-cultural studies examining whether legitimacy is specific to the United States concluded that it is not and that many of the findings in U.S. based studies seem to apply in different countries and cultures.\textsuperscript{175} These studies looked at attitudes in Chile, the United Kingdom, Slovenia, Mexico, Brazil, France, the Netherlands, Germany, and South Africa, finding that fair decision-making processes contributed to public attitudes that law enforcement and the legal system are legitimate.\textsuperscript{176}

The studies on procedural justice have not been replicated yet in the former communist world.\textsuperscript{177} However, studies in related areas show clear similarities in attitudes that are not culture specific.\textsuperscript{178} There are also studies of general attitudes toward law in post-Soviet societies.\textsuperscript{179} One scholar, Marina Kurkchiyan, distinguishes between societies with a "positive myth of parties" such as victims and judges improves public support for plea bargaining, but noting that the public supports plea bargaining less if it is seen to lead to more lenient sentences).

\textsuperscript{173} See Kurkchiyan, supra note 164; see generally O'Hear, supra note 158.

\textsuperscript{174} Michael Tonry, Preface, in LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 1, 3–4 (Michael Tonry ed., 2007) ("The scholarly literatures on procedural justice and legitimacy are distinctly American. It would be an exaggeration to refer even to nascent literatures in other English-speaking countries, continental Europe, or elsewhere.").

\textsuperscript{175} See generally LEGITIMACY AND CRIMINAL JUSTICE, supra note 174 (a collection of studies focusing more on law enforcement and less on the courts).

\textsuperscript{176} See generally id.

\textsuperscript{177} One notable exception is a study from Slovenia. Gorazd Meško & Goran Kelmenčič, Rebuilding Legitimacy and Police Professionalism in an Emerging Democracy: The Slovenian Experience, in LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES 84, 84 (Tom Tyler ed., 2008).

\textsuperscript{178} Studies show that the general public still values the rule of law even when they are highly skeptical about whether it exists; for example, public opinion polls in Russia show that Russians place equal value on the rule of law as other Europeans. James L. Gibson, Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data, in LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 77, 84–86 (Denis J. Galligan & Marina Kurkchiyan eds., 2003) (reporting that Americans hold the rule of law as a higher value while Russian responses fall within the ranges from other European countries including France and Spain). One study looked at views about criminal punishment in Russia, Japan, and the United States and in some instances found similar responses from residents of Detroit and Moscow regarding appropriate punishment. Joseph Sanders & Lee V. Hamilton, Legal Cultures and Punishment Repertoires in Japan, Russia and the United States, 26 LAW & SOC'Y REV. 117, 117–20 (1992) The study noted, however, more differences between all three countries and more differences between the Japanese respondents and those from the United States. Id.

\textsuperscript{179} See generally Marina Kurkchiyan, The Illegitimacy of Law in Post-Soviet Societies, in LAW AND INFORMAL PRACTICES 25 (Denis Galligan & Marina Karkehiyan eds., 2003).
law” and those with a “negative myth of law.” Individuals in societies with a “positive myth of law” tend to “have a strong belief that most of the people function most of the time according to the rule of law; that law is good, and [that there is a] just arbiter in all kinds of disputes; and that to break the law, or even to bend it, is socially disgraceful.” In contrast, individuals in societies with a “negative myth of law” tend to “assume that everybody else is routinely disobeying the law.”

Kurkchiyan researched attitudes toward law in Russia, Armenia, and Ukraine. She defined all three countries as “negative myth” countries and found high levels of distrust in officials and bureaucracy. One of Kurkchiyan's more challenging findings in these so-called negative myth countries was that even when there are positive examples of courts following the law, “it is interpreted in a cynical way consistent with the general assumption that no judicial decision is ever made according to the official principles.” This flows from a cultural understanding that law “does not symbolize morality, honesty, and justice,” but instead is “seen as a tactical game requiring expertise in maneuver, influence and persuasiveness.” This deeply rooted understanding of law means that individual observations and facts regarding institutional behavior conform to “pre-existing beliefs.” The challenge therefore lies in how people change these attitudes and beliefs and when those changes occur.

Procedural justice conclusions should not be considered so culturally bound that they are irrelevant to any discussion about rule of law reform in the former communist world or beyond. On the contrary, the conclusions of procedural justice research should form a starting point for research on the development of the rule of law. Since scholars have conducted most procedural justice studies in established democracies, they tend to look more at how to avoid losing legitimacy and are less prescriptive regarding how to

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180 See generally id.
181 Id. at 28.
182 Id. at 29.
183 Id. at 31 (explaining that a nationwide survey in Russia reported that “83 percent of Russians regard the police as corrupt, 79 percent assume the law courts and the prosecutor's offices are corrupt, and 71 percent believe that the high educational institutions are corrupt.”). Public opinion surveys in Armenia and Ukraine show similar levels of distrust. Kurkchiyan, supra note 179, at 31.
184 Id. at 33. This is consistent with egocentric biases, specifically confirmation traps and self fulfilling prophecies. See, e.g., Robert S. Adler, Flawed Thinking: Addressing Decision Biases in Negotiation, 20 OHIO ST. J. ON DISP RESOL. 683, 713–17 (2005).
185 Kurkchiyan, supra note 179, at 43.
186 Id. at 45.
187 Kurkchiyan points to the value of market forces in making these attitude changes. Id.
188 See generally Tonry, supra note 174.
build legitimacy. Bad behavior by the police or the courts can undermine and erode trust in both individuals and the system as a whole. Good behavior can reinforce already generally positive opinions. However, it is unclear whether procedural justice creates legitimacy.

Procedural justice studies provide some indication of what might assist in building legitimacy, or at least not contribute to its further erosion. If plea bargaining is introduced with clear and publicized rules about how and when it will be used, a skeptical public may be less likely to view it as one more example of acting outside and not within the law. If plea bargaining is accepted more readily when the general public does not perceive it as overly lenient, then policymakers may consider limiting the charges that are eligible for plea bargaining, as is often done with abbreviated trials. Understanding these studies can help policymakers and rule of law assistance providers by cautioning that policies should, both in fact and in perception, comply with procedural justice and avoid playing into the negative myths of law.

V. PLEA BARGAINING AND ABBREVIATED TRIALS

Most countries in the world face overloaded criminal court dockets and need to handle large numbers of cases efficiently. This pressure contributes to the development of alternative procedures. As Stephen Thaman noted, "The reality of all modern criminal procedures is that the 'normal' trial is rapidly becoming the 'alternative' procedure." Plea bargaining and abbreviated trials are the two most widely adopted forms to shortcut the procedure of formal trials. Discussions of alternative criminal procedures

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190 Id.

191 Id.

192 Id.

193 See discussion, infra Part V.

194 A trial delay could be a human rights violation. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 ("[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").


196 These procedures are sometimes referred to with the singular term "consensual procedures." See generally Stephen C. Thaman, Plea Bargaining, Negotiating Confessions, 11.3 ELECTRONIC J. COMP. L. (Dec. 2007), available at http://www.ejcl.org/113/article113-34.pdf. For the purposes of this Article, "consensual procedures" will not be used as the key distinguishing feature because the acknowledgement of informal negotiation as part of process is more relevant for rule of law development purposes than the consensual nature of the proceeding. See infra Part V.C.
often use these terms interchangeably. There is, however, a significant difference between the two procedures, which, depending on the country, might be important in the context of rule of law development. That difference is whether the system is based on informal negotiations between the prosecutor and defense, or on a more formalized procedure that includes standard statutory sentence reductions in exchange for guilty pleas.

A. Plea Bargaining Defined

For the purposes of this Article, plea bargaining is defined as “a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial.” In the United States, two basic types of plea bargaining exist: charge bargaining and sentence bargaining. In charge bargaining, the prosecutor may agree to dismiss one or more of the charges or to not charge particular offenses. Sentence bargaining occurs when the prosecution and defense negotiate the sentence or punishment, while agreeing to the charges as filed. Plea negotiations often include both sentence and charge bargaining. Depending on the seriousness and complexity of the case, plea negotiations can be simple and fast or complex and drawn out.

Scholars only recently have begun analyzing plea bargaining under negotiation theory. Under this theory, parties consider their “best
alternative to a negotiated agreement” (“BATNA”).\(^{205}\) In criminal cases, the parties usually do not have the option, or BATNA, of “lumping it” or walking away from the case.\(^{206}\) The prosecutor has the power to dismiss the case; however, this is not a commonly used option once the state files charges.\(^{207}\) Therefore, if the case is not dismissed, the only possible BATNA for both sides is a trial.\(^{208}\)

In the United States, the defendant’s most common leverage in the plea negotiation process is his agreement to waive his right to a jury trial.\(^{209}\) In more complicated cases, agreeing not to go forward with trial represents a significant cost savings to the system—saving days or weeks of court time and expense. Within the United States, the prosecutor has greater power (or leverage) in the plea negotiation relative to the defendant.\(^{210}\) A defendant who goes to trial and is found guilty can expect a harsher sentence.\(^{211}\) Many plea bargaining critics consider this aspect of plea bargaining coercive.\(^{212}\) Plea bargaining proponents tend to classify this difference as a “reward” or “inducement” for defendants who waive their right to trial.\(^{213}\)

**B. Abbreviated Trial Defined**

Abbreviated trials exist in various forms and under various terms. This Article defines an abbreviated trial as a shortened procedure whereby the judge reviews evidence, in addition to the defendant’s guilty plea, and gives

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\(^{206}\) See Hollander-Blumoff, Getting to “Guilty”, supra note 204, at 121.


\(^{208}\) See Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQ. L. REV. 39 (2007) (arguing that “quick and frequent trials have the effect of creating cooperation among lawyers”); see also HERMAN, supra note 1, at 5–7 (discussing the prosecutor’s interests in plea bargaining). However, going to trial may not represent a BATNA for the defendant due to high post-trial sentences. See discussion, infra Part VI.B.

\(^{209}\) See HERMAN, supra note 1, at 7–9 (discussing the defendant’s interests in plea bargaining). For a discussion of how trials influence plea negotiations, see Burke, supra note 207. For a view that defense lawyers may distort expected outcomes at trial, thereby influencing client decisions to accept deals and plead guilty, see Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205 (1999).


\(^{211}\) See discussion, infra Part VII.B.

\(^{212}\) See infra Part VI.B.

\(^{213}\) See, e.g., Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 623–26 (2005); see also discussion, infra Part VI.B.
the defendant a statutorily determined reduced sentence upon a finding of
guilt. What distinguishes the abbreviated trial from plea bargaining is that
the law does not provide for or require negotiation between the prosecutor
and the defense regarding either the charge or the sentence. In addition,
under most forms of abbreviated trials, the law clearly states the length of
the sentence reduction in exchange for the defendant agreeing to waive his
right to a full trial.

Many countries, such as Russia, specifically limit the use of abbreviated
trials to less serious crimes. The 2001 Russian Criminal Procedure Code
("CPC") limited abbreviated trials to defendants facing a maximum of five
years imprisonment. Russia seems to have adopted abbreviated trials due
to concern that jury trials would require more court time and further crowd
the courts, rather than a desire to develop a procedure aiding in complex
prosecutions. In 2003, the Russian legislature amended the CPC and

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214 In Italy, defendants charged with any crime except those punishable by life in prison may
request the Giudizio Abbreviato [Shortened Proceeding], COD. PRÔC. PEN. art. 438(1) (Italy). The
prosecutor must consent. Id. The judge will then review the evidence including the written
record of the case and hear oral arguments from the defense and prosecution. Rachel Van Cleave,
Italy, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 273, 459 (Craig M. Bradley ed.,
1999). The defendant is not required to plead guilty. Id. If the judge finds the defendant guilty using this
procedure, the sentence is reduced by one-third. Id.

215 See, e.g., COD. PRÔC. PEN. arts. 438, 440, 442 (Italy); Ugolovno-protsessual'ii kodeks RF [C.
CRIM. PROC. (Russ.)] art. 314 (English language translation in THE RUSSIAN FEDERATION CODE
OF CRIMINAL PROCEDURE (U.S. Dep't of Justice 2004)).

216 See, e.g., COD. PRÔC. PEN. arts. 438, 440, 442 (Italy); C. CRIM. PROC. art. 314 (Russ.) (English
language translation in THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE (U.S. Dep't of
Justice 2004)).

217 See Mirjan Damas, Negotiated Justice in International Criminal Courts, 2 J. INT'L CRIM.
JUST. 1018, 1023, 1205 (2004) (stating this indicates the general discomfort of continental legislators
with the idea and therefore concluding that "heinous crimes must be subject to the full
adjudicative process"); see also Plea-Bargaining, Negotiating Confessions, supra note 167.

218 See Catherine Newcombe, Russia, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 459 (Craig
M. Bradley ed., 2007). See also Nullification of the Russian Jury, supra note 9, at 368 (stating that
some observers attribute Russia's adoption of abbreviated proceedings to the influence and
experience of plea bargaining in the United States, although the procedure adopted is not the
U.S. model of plea bargaining, but instead is modeled after the Italian patteggiamento,
or "application for punishment on request of the parties"). For descriptions of the Italian procedure,
see, e.g., THMAN, supra note 195, at 152-58; Pizzi & Montagna, supra note 197, at 437-39;
Langer, From Legal Transplants to Legal Translations, supra note 4, at 46-53; Van Cleave,
supra note 214, at 271-75.

219 Matthew Spence, The Complexity of Success in Russia, in PROMOTING THE RULE OF LAW
ABROAD: IN SEARCH OF KNOWLEDGE 217, 232 (Thomas Carothers ed., 2006) (arguing that,
without abbreviated trials, the Russian courts would have been overwhelmed by jury trials,
requiring increased court time and resources); see also Nullification of the Russian Jury, supra
note 9, at 368-69. Although an increased use of abbreviated trials may assist in reducing court
caseloads initially, they were not designed to have any direct relation to jury trials. Id. at 367-
68. This is because jury trials were limited to the most serious offenses and abbreviated trials
were only used for far less serious offenses. Id. This means that the same defendant never faced
the decision of accepting an abbreviated proceeding for a reduced sentence or going forward with
expanded the list of cases that would be eligible for abbreviated trials to include charges with a maximum punishment of up to ten years imprisonment. In 2004, 16.4 percent of all criminal cases in Russia were resolved through this alternative procedure. The Russian CPC allows a judge to sentence the defendant to a maximum of two-thirds of the sentence allowable under the law if the case is resolved through an abbreviated trial. If the defendant, prosecutor, victim, or judge objects to an abbreviated trial, it will not proceed.

C. Negotiation and Discretion

Negotiation is the key element that distinguishes plea bargaining from other forms of case resolution in the context of troubled criminal justice systems. Plea bargaining requires some sort of negotiation between the

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220 C. CRIM. PROC. art. 314(1) (Russ.) (English language translation in THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE (U.S. Dep't of Justice 2004)).

221 Newcombe, supra note 218, at 459. It is unclear what percent of the individuals whose cases are eligible for abbreviated trials choose to use this procedure. Id.

222 C. CRIM. PROC. art. 314(7) (Russ.) (English language translation in THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE (U.S. Dep't of Justice 2004)). It remains unclear whether larger numbers of defendants in Russia are encouraged to stipulate to the charges by getting substantially reduced sentences. See also Nullification of the Russian Jury, supra note 9, at 369 (stating that Russia "does not regard an acceptance of guilt as a mitigating factor unless a person, by willfully appearing before officials, actively facilitates the arrest of the co-defendants and the reparation of the damage caused by the crime.").

223 C. CRIM. PROC. art. 314(6) (Russ.) (English language translation in THE RUSSIAN FEDERATION CODE OF CRIMINAL PROCEDURE (U.S. Dep't of Justice 2004)). Prima facie, this provision gives the victim the power to prevent abbreviated trials from going forward. See id. See also Plea-Bargaining, Negotiating Confessions, supra note 167, at 29–30 (explaining that U.S. prosecutors, in contrast to Russian prosecutors, are at most required to notify the victim of the disposition of the case, but victim consent is not required). This provision likely means that some sort of negotiation happens between the defendant, the prosecutor, the victim, and the judge prior to the abbreviated trial; however, the law does not provide for negotiation. See TURNER, supra note 2, at 143.

224 For the purposes of this Article, the contract and economic analyses of plea bargaining are less relevant in understanding the possible impact of plea bargaining on the development of the rule of law. See, e.g., Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 YALE L.J. 1909 (1992) (positing that defendants, prosecutors, and defense lawyers are all "rational actors"). But see Rebecca Hollander-Blumoff, Social Psychology, Information Processing, and Plea Bargaining, 91 MARQ. L. REV. 163, 182 (2007) (arguing that cognitive biases and heuristics play a significant role and make it "likely that lawyers will engage in automatic, biased, and heuristics-based information processing").
prosecutor and the defense. As the Georgian example illustrates, the general public distrusts this informality, or the appearance of informality, in plea bargaining. This distrust may be due to the lack of transparency in the process since lawyers generally negotiate plea bargains in relative secrecy. In the absence of clear guidelines and policies, this secrecy combined with the informality creates the appearance that plea bargaining occurs outside the law. If prosecutors fail to explain the procedures and their policies, the general public may view plea bargaining negatively. From this perspective, abbreviated trials provide a clear advantage, particularly if the law clearly states the specific sentence reduction in exchange for an abbreviated trial. Under those circumstances, it is less likely that the general public will view abbreviated trials as a process involving informal negotiation outside the law.

In addition, in systems where the prosecutor holds disproportionate power, the defendant might be at such a disadvantage that there is no real negotiation. In the United States, the threat of a jury trial carries tangible consequences in a system that depends on most defendants pleading guilty. A defendant threatening to go to trial in a system that expects most cases to do so, with a near 100 percent conviction rate, may not be much of a threat and may mean the defendant has no meaningful leverage in the negotiation.

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225 See supra Part V.A. (despite the formal recognition that negotiation is part of the process, it may be entirely absent or plagued by serious power imbalances); see also supra Parts III.A.2.b., III.B.2.b., for descriptions of how plea bargaining works in practice in Georgia and BiH.

226 See discussion, supra Parts III.A., IV; see also Colquitt, supra note 165; Cohen & Doob, supra note 165; Herzog, Public Perceptions, supra note 172; Herzog, Plea Bargaining, supra note 172.

227 See discussion, infra Part V.

228 See, e.g., Herzog, Public Perceptions, supra note 172; Herzog, Plea Bargaining, supra note 172.

229 See, e.g., Herzog, Public Perceptions, supra note 172; Herzog, Plea Bargaining, supra note 172; Cohen & Doob, supra note 165.

230 See discussion, infra Part IV.

231 See discussion, infra Part VI.B. and the example of BiH, supra Part III.B.2.b.; Russell D. Covey, Fixed Justice: Reforming Plea Bargaining with Plea Based Ceilings, 82 Tul. L. Rev. 1237 (2008). This argument is also made in the United States to support limiting prosecutorial discretion, with one scholar recommending plea bargaining “ceilings” to limit “sentence differentials.” Id.

232 See discussion, infra Part VI. Critics of plea bargaining in the United States maintain that due to the trial penalty, U.S. criminal defendants’ leverage is limited. Id.

233 Plea-Bargaining, Negotiating Confessions, supra note 167; see also the example of BiH, supra Part III.B.2.; infra Part VIII.
However, prosecutors, police, and courts will continue, under both plea bargaining and abbreviated trials, to exercise discretion. Police regularly exercise discretion in deciding whom to arrest and prosecutors usually decide who to prosecute and what charges to file. Judges can exercise discretion in a number of ways, including ruling on motions and sentencing. Depending on their perspective or specific circumstances, the public easily could perceive instances of exercising discretion as examples of corruption. By raising the question of whether plea bargaining can negatively impact the public’s perception of the rule of law, this Article does not advocate eradicating all discretion in any given legal system. As Kenneth Davis said, “to fix as the goal the elimination of all discretion on all subjects would be utter insanity.” Rather the goal should be “to eliminate unnecessary discretionary power, not to eliminate all discretionary power.”

In some countries plea bargaining could represent unnecessary discretionary power.

VI. PLEA BARGAINING IN THE UNITED STATES

Countries considering importing plea bargaining frequently look to the U.S. model because it is widely known and plea bargaining itself is generally associated with the United States. However, policymakers in countries with troubled criminal justice systems less frequently discuss the serious

234 For a more complete analysis of the advantages and disadvantages of discretion in the legal system, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 88–96 (1969).

235 For a discussion on police discretion, see id.


239 Thank you to Professor John Ohnesorge for raising this question.

239 DAVIS, supra note 234, at 43.

240 Id. at 217. Davis concludes that “administrative rule-making is a key” rather than legislative changes in statutes. Id. at 217–20. Davis recommends limitations on prosecutorial discretionary power, including that they “make and announce rules that will guide their choices.” Id. at 225. The U.S. DOJ has done a version of this. See discussion, infra Part VI.B.

241 This does not mean that the U.S. model is adopted uniformly. See Langer, From Legal Transplants to Legal Translations, supra note 4, at 1, 5; see also Langer, Revolution in Latin American Criminal Procedure, supra note 14 (stating that the U.S. model is not always the primary influence). One reason that countries may look at the U.S. model is due to U.S. "prestige." See Michele Graziadei, Comparative Law as the Study of Transplants and Receptions, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 457, 458 (Mathia Reimann & Reinhard Zimmermann eds., 2008) (discussing how the factor of prestige could impact legal transplants).
criticisms of plea bargaining in the United States. For that reason, this Article now turns to a brief discussion of plea bargaining in the United States. It examines both the reasons for plea bargaining and the criticisms of plea bargaining that policymakers and rule of law assistance providers might want to consider in discussing whether to introduce plea bargaining to a troubled criminal justice system.

A. Why Do We Have Plea Bargaining in the United States?

One fundamental reason for plea bargaining in the United States is that most people arrested are guilty and do not contest the charges—this means there are no facts in dispute and therefore, no need for a jury trial to resolve the facts. This is probably true for the vast majority of people facing criminal charges around the world. In addition, most cases are factually fairly simple, so scientific evidence and extensive investigations are unnecessary. On a practical level, the question in most criminal cases is not whether the defendant committed the crime, but what is the fairest way to handle the particular offense and offender.

242 See, e.g., Langer, From Legal Transplants to Legal Translations, supra note 4, at 1; discussion, supra Part III.

243 See, e.g., ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OR LAW 84 (2001) (observing that "guilty pleas often reflect straightforward confessions by defendants caught dead to rights, and the ensuing sentence reflects a 'going rate' well understood by the courthouse community"); see also Jerold H. Israel, Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom, 48 FLA. L. REV. 761, 774 (1996) ("[M]any defendants may desire to enter a guilty plea, rather than contest the charge, and would do so without regard to any extra incentives offered by a prosecutor or court. . . ."); CANDICE MCCOY, POLITICS AND PLEA BARGAINING: VICTIM'S RIGHTS IN CALIFORNIA 50-69 (1993); Damas, supra note 217, at 1023; Andrea Kupfer Schneider, Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?, 91 MARQ. L. REV. 145, 158 (2007) ("Prosecutors and defenders are negotiating over relatively few contentious issues and are negotiating over the sentence at the margins.").

244 See Interview with Chris Lehmann, Senior Reg'l Dir. for Eurasia & Asia/Pacific Programs, OPDAT, in Wash., D.C. (May 2, 2007) (on file with author).

245 For a listing of the types of questions a defense attorney should ask to prepare for plea bargaining, see generally HERMAN, supra note 1.

246 Plea bargaining arguably "protects" the system from the possibility of issuing a "wrong verdict." FISHER, supra note 237, at 178. It also removes from the system those cases where "the defendant faces the clearest evidence of guilt." Id. at 179. Albert Alschuler argued that "[t]his approach to plea bargaining plainly regards the process primarily as a form of dispute resolution rather than as a sentencing device." Albert Alschuler, The Changing Plea Bargaining Debate, 69 CAL. L. REV. 652, 684 (1981). Alschuler maintains that plea bargaining is "designed to compromise an unresolved dispute between the defendant and the state," not that plea bargaining arises out of the lack of a factual dispute, and is often reduced to a discussion (or dispute) about the sentence. Id. Alschuler is concerned about innocent defendants, and when the state does not have enough evidence to support a conviction. Id at 684–87. For more discussion of "the innocence problem," see infra notes 265, 266.
The second and most often cited reason for plea bargaining is the efficient handling of cases.\(^{247}\) Jury trials in the United States take considerable time and resources.\(^{248}\) Increasing the number of jury trials by even 20 percent would cost significantly more due to the need for more courts, judges, and lawyers.\(^{249}\) Although some U.S. jurisdictions have experimented with abolishing plea bargaining, the prevailing wisdom is that most busy jurisdictions do not have sufficient resources or staffing to ban plea bargaining.\(^{250}\)

The third reason for plea bargaining, usually offered by prosecutors and law enforcement, is that plea bargaining can be used to assist in complex prosecutions by offering deals to cooperating witnesses.\(^{251}\) For example, U.S. sentencing guidelines allow for a “sentence departure” for cooperating witnesses, and a significant number of defendants in the federal system take advantage of this.\(^{252}\) Organized crime prosecutions often depend on arresting and “flipping” lower-level players to prosecute the leaders.\(^{253}\) Prosecutors also


\(^{248}\) For an argument about the importance of jury trials and criticizing their disappearance, see William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 SUPFOLK U. L. REV. 67 (2006).


\(^{250}\) See, e.g., Howe, supra note 213, at 599, 609–15; Douglas D. Guidorizzi, Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics, 47 EMORY L.J. 753, 774–79 (1998). For a more detailed discussion of one example, see Roland Acevedo, Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study, 64 FORDHAM L. REV. 987 (1995). One study concluded that the trial rate is not related to the caseload, but instead other factors, primarily the local legal culture, influence the rate of guilty pleas. See Thomas W. Church, Jr., U.S. DOJ, EXAMINING LOCAL LEGAL CULTURE: PRACTITIONER ATTITUDES IN FOUR CRIMINAL COURTS (1982) (based on a study of the Bronx, Miami, Pittsburgh, and Detroit). Some have concluded that banning plea bargaining would not stop the practice of guilty pleas and that defendants would simply negotiate directly with the judge, thereby creating a system that is even more secretive. See, e.g., Kaplan, supra note 249, at 219–20.

\(^{251}\) See, e.g., Benjamin B. Wagoner & Leslie Gielow Jacobs, Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations, 30 U. PA. J. INT’L L. 183, 217 (2008) (“[T]he standard approach is to start near the bottom of the organization and work up the chain of command . . . lower level participants are ‘flipped’ or ‘rolled’ to provide evidence against higher level participants in the scheme.”).


\(^{253}\) See, e.g., Brown & Bunnell, supra note 252, at 1073 (“Cooperation agreements are critically important to law enforcement.”).
regularly use cooperating witnesses to build corruption and drug trafficking cases. Federal prosecutors tend to see this kind of deal-making as a necessary crime fighting tool.

B. Concerns About Plea Bargaining in the United States

Very few criminal defendants in the United States exercise their constitutional right to a trial. In fact, over 90 percent of all criminal cases in the United States are resolved through plea bargaining. It is widely acknowledged that the U.S. criminal justice system relies on plea bargaining to efficiently process the large volume of cases. Many observers note that plea bargaining grew in the United States as a direct reaction to the cumbersome procedures and protections introduced into the criminal justice system. The rules of evidence and the role of lawyers in trial “ultimately destroyed the system in the sense that they rendered trial unworkable as an

254 See, e.g., Wagoner & Jacobs, supra note 251, at 217.

255 See, e.g., Turner, supra note 2, at 34. Scholars and practitioners recognize the value of this tool in the fight against serious crime in post-conflict environments. Combating Serious Crimes in Post Conflict Societies: A Handbook for Policymakers and Practitioners 61–63 (Colette Rausch ed., 2006) (noting that “[i]mmunity from prosecution and mitigation of sentences have become useful tools in the fight against serious crimes”). Some reasons that countries have not introduced such measures include: concerns that doing so would violate existing laws (such as mandatory prosecution); that it would lead to possible abuse or unreliability of statements gathered; and that public opinion “particularly in a postconflict environment where similar legal measures may have been abused under a prior regime and thus may have negative connotations and associations for the population.” Id. at 63.


257 Some prosecutors have tried to ban plea bargaining with limited success. See, e.g., Acevedo, supra note 250.

258 See, e.g., John H. Langbein, Understanding the Short History of Plea Bargaining, 13 L. & Soc’y Rev. 2, 261 (1979); Kagan, supra note 243, at 85–89. Kagan compares U.S. criminal procedure to criminal procedures in Germany and the Netherlands and concludes that “[a] hierarchically supervised investigatory system and a short, less adversarial criminal trial seem to avoid, or to at least mute, the more coercive and tawdry effects of unrecorded and unreviewable plea bargaining—the ugly but affordable offspring of the woefully costly and inefficient American jury trial.” Id. at 89. But see Fisher, supra note 237. Fisher traces the development of plea bargaining in the U.S. to several interrelated developments concluding that plea bargaining “served the interests of the powerful,” notably prosecutors and judges. Id. at 2. However, Fisher found that trial length did not increase in the 19th Century when plea bargaining became more dominant. Id. at 9–10. For another contrary view of the historical development of plea bargaining in the 19th century in the United States, see Mike McConville & Chester L. Mirsky, Jury Trials and Plea Bargaining: A True History 10 (2005) (concluding that plea bargaining “can only be explained by looking at the effects of changes in the wider political economy on the nature and purpose of criminal prosecutions, the role of courtroom actors and the method of disposition.”). Id. at 9–10.
ordinary or routine dispositive procedure for cases of serious crime.”\(^{259}\) This Part will focus on the concerns and criticisms of plea bargaining, which are most relevant to a discussion about whether to import plea bargaining into a troubled criminal justice system.

One fundamental criticism of plea bargaining is that it is coercive. John Langbein compared the use of plea bargaining in the United States to the use of torture and argued that torture and plea bargaining are both coercive and involve “condemnation without adjudication.”\(^{260}\) A related concern of plea bargaining critics in the United States is the trial penalty.\(^{261}\) Critics point to the uniformly harsher sentences given to defendants who exercise their right to trial.\(^{262}\) Researchers report that defendants who go to trial and are found guilty can receive prison sentences that are over four times higher than those who plead guilty.\(^{263}\)

On the other hand, plea bargaining proponents state that the higher post-trial sentences reflect a reward to defendants who save the system the costs of trial, not a penalty to defendants who exercise their right to trial.\(^{264}\) While this argument may make sense in academic and political circles, it holds little force from the perspective of the defendant, particularly those defendants whose cases involve facts legitimately in dispute or who claim innocence.\(^{265}\)

\(^{259}\) Langbein, Understanding the Short History of Plea Bargaining, supra note 258, at 265.

\(^{260}\) John H. Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 1, 14 (1978). Although Langbein concedes that “the tortured confession is . . . markedly less reliable than the negotiated plea, because the degree of coercion is greater.” Id. at 15.


\(^{262}\) For a scathing critique of diminishing U.S. jury trials for both criminal and civil cases, see Young, supra note 248, at 74 (noting the “manipulation of the U.S. Sentencing Guidelines has the consequence of imposing savage sentences upon those who request the jury trial guaranteed to them under the U.S. Constitution”). “[A]n accused individual who requests a trial may, as a functional matter (though we obstinately deny it), be punished severely for requesting what was once a constitutional right.” Id. at 76.

\(^{263}\) See King et al., supra note 261, at 959, 992 (reporting trial penalties ranging from 13 percent to 461 percent, depending on the state and the offense); Reconsidering the Relationship, supra note 261, at 213, 224–30 (stating that the actual trial penalty could be substantially higher due to the fact that most statistics compare the sentence for similar charges and do not consider the fact that plea bargains often include pleading guilty to a lesser offense than the one originally charged); see also Berthoff v. United States, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001).

\(^{264}\) Under the U.S. Sentencing Guidelines (“the Guidelines”), a defendant who pleads guilty is “accepting responsibility,” entitling the defendant to a “downward departure.” USSG § 3E 1.1. Under the Guidelines, a defendant who goes to trial and loses is not entitled to the reduced sentence. See generally 18 U.S.C. §§ 3551–85.

\(^{265}\) In academic circles, this is referred to as “the innocence problem.” Some scholars question whether innocent defendants might be more risk averse and therefore more likely to plead guilty to avoid the uncertainty of trial. For articles discussing the seriousness of the problem and
Such defendants face the tough decision of risking a trial and the possibility of a considerably higher sentence or accepting the certainty of a lesser sentence without trial. For the defendant, this decision-making process can appear coercive, as it usually happens under time pressures and with the threat of significantly higher sentences after a guilty verdict at trial. This coercion may be less of a concern in countries where nearly 100 percent of defendants face conviction after trial. In such countries, defendants and the public at large may not see trial as an option that could possibly provide any tangible, positive results.

Possible changes in plea bargaining, see, e.g., Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. CHI. L. REV. 931 (1983) (proposing replacing plea bargaining with shortened forms of trials); F. Andrew Hessick III & Reshma Saujani, Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel and the Judge, 16 BYU J. PUB. L. 189 (2002) (outlining the roles and motives of professionals in the justice system in using plea bargaining and proposing changes to reduce incentives to plead guilty); Oren Bar-Gill & Oren Gazal Ayal, Plea Bargains Only for the Guilty, 49 J. L. & ECON. 353 (2006) (recommending reducing prosecutorial discretion in plea bargaining to decrease the number of innocent defendants who plead guilty due to substantial sentencing discounts); Brandon J. Lester, System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining, 20 OHIO ST. J. ON DISP. RESOL. 563 (2005) (recommending mediation in criminal cases and stating that the mediator could protect defendants' rights through the mediation process). For an article dismissing the seriousness of this problem, see, e.g., Howe, supra note 213, at 599, 629–26, 634.

Studies of factual innocence found that innocent defendants plead guilty. See, e.g., Chris Conway, The DNA 200, N.Y. TIMES, May 20, 2007, available at http://www.nytimes.com/2007/05/20/weekinreview/20conway.html?_r=1 (reporting that 4 percent of those freed through the Innocence Project plead guilty). A total of 25 percent of the cases included admissions or confessions. SAMUEL GROSS ET AL., EXONERATIONS IN THE UNITED STATES 1989 THROUGH 2003 12 (2004), available at http://www.soros.org/initiatives/justice/articles_publications/publications/exonerations_20040419/exon_report.pdf (finding that 6 percent of exonerated defendants plead guilty). The study also noted two high-profile police misconduct scandals resulting in high rates of exoneration after guilty pleas by most of the defendants in Tulia, Texas, and the Rampart case in Los Angeles, California. Id. Gross states that these exoneration occurred: because the false convictions in their cases were produced by systematic programs of police perjury that were uncovered as part of large scale investigations. If these same defendants had been falsely convicted of the same crimes by mistake—or even because of unsystematic acts of deliberate dishonesty—we would never have known.

Id. at 12.

See generally O'Hear, supra note 158, at 420–21; see discussion, supra Part IV.

For example, in Russia the conviction rate for judge trials (not jury trials) remains at 99 percent. Peter Finn, Fear Rules in Russia’s Courtrooms: Judges Who Acquit Forced Off Bench, WASH. POST, Feb. 27, 2005, at A01. Stephen Thaman questions whether all defendants should have the option for a jury trial if they reject a plea bargain (or other consensual process) due to concerns that without a jury, defendants will not have an impartial hearing of the facts in their case and that only with a jury trial will the defendant have a “real ‘trump card’ to play in the negotiations with the court or prosecutor.” Plea-Bargaining, Negotiating Confessions, supra note 167, at 50.

This contradicts the widely held public perception in the United States (and among many defendants) that trials have the power to achieve justice and vindicate the aggrieved. The
Critics also note that, depending on where they are arrested, defendants with similar records and similar offenses can receive vastly different sentences by plea bargaining.\(^ {270} \) A related concern is that plea bargaining creates a "game" atmosphere in the criminal justice system. As Robert Kagan observed, plea bargaining "transforms the act of confession from a ritual of moral and social healing into a cynical game, reinforcing the criminal's alienated view of society."\(^ {271} \) The ultimate deal can depend more on where a person is arrested and how crowded the courts are, than on the underlying facts of their individual case.\(^ {272} \) The federal system lessens these differences due to the combined impact of the U.S. Sentencing Guidelines and U.S. federal prosecutors' adherence to the U.S. Attorney General's relevant policy memo.\(^ {273} \) The U.S. Sentencing Guidelines specify what sentence is appropriate for each case after considering a number of factors including the current charge, the defendant's prior record, and whether the defendant provided assistance to the authorities or accepted "responsibility" for the offense.\(^ {274} \) The second important factor contributing to the overall "predictability and reliability" of outcomes in federal criminal prosecutions is confidence that many defendants place in the trial process is one type of heuristic, or mental shortcut, contributing to poor decision-making in the plea bargaining process. See generally Hollander-Blumoff, Getting to "Guilty", supra note 204.

\(^ {270} \) See generally Nancy King et al., supra note 261. One study examined differences in charge and sentence bargaining and concluded that if the underlying criminal law allowed for more options in charging and sentencing, there would be greater variations in the ultimate plea bargains. Ronald F. Wright & Rodney L. Engen, The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power, 84 N.C. L. REV. 1935, 1944-47 (2006).

\(^ {271} \) KAGAN, supra note 243, at 85; see generally Nancy J. King, Regulating Settlement: What is Left of the Rule of Law in the Criminal Process?, 56 DEPAUL L. REV. 389 (2007) (criticizing plea bargaining for allowing rights to be exchanged for guilty pleas and recommending structural changes in plea bargaining to better protect innocent defendants who might plead guilty); see also Kaplan, supra note 249, at 218.

\(^ {272} \) See, e.g., KAGAN, supra note 243, at 66-67.


\(^ {274} \) USSG §§ 3.E1.1, 5k1.1. In United States v. Booker, 543 U.S. 220 (2005), the U.S. Supreme Court held that the federal sentencing guidelines are not mandatory. Id. at 221-22. However, judges still sentence the overwhelming majority of cases in compliance with the U.S. Sentencing Guideline recommendations. See, e.g., Norman C. Bay, Prosecutorial Discretion in the Post-Booker World, 37 MCGEORGE L. REV. 549, 570-72 (2006); Barry Boss & Nicole L. Angarella, Negotiating Federal Plea Agreements Post-Booker: Same as it Ever Was?, 21 CRIM. JUST. 22, (2006) (stating that "[t]he balance in the federal system—which is weighted heavily toward government prosecutors—has changed little, if at all, post-Booker . . ."); Brown & Bunnell, supra note 252, at 1090 (concluding that Booker did not result in substantial changes in the practices in the District of Columbia including cooperation rates, although it did take "some negotiating leverage away from the prosecution.").
the clarity of the U.S. DOJ guidelines which were issued to all federal prosecutors in a memo by then-Attorney General John Ashcroft in September 2003.\textsuperscript{275} The memo, posted on the DOJ website,\textsuperscript{276} states the policies that all federal prosecutors should follow in both charging of cases and in plea bargaining.\textsuperscript{277}

According to the DOJ's policy, federal prosecutors are expected to "charge and pursue the most serious, readily provable offense."\textsuperscript{278} The memo specifies when exceptions to this policy are possible. In most instances, exceptions require approval by a higher ranking official of the DOJ.\textsuperscript{279} The memo also specifies the DOJ's policy regarding plea agreements, requiring federal prosecutors to follow the guidelines and give lower sentences (known as "downward departures") only when specifically allowed by the guidelines, or according to the limited terms outlined in the memo.\textsuperscript{280} The memo allows some discretion in that it does not require federal prosecutors to ask for the maximum.\textsuperscript{281} The clearly stated goal of the memo is to "ensure that all federal criminal cases are prosecuted according to the same standards" because "[f]undamental fairness requires that all defendants prosecuted in the federal criminal justice system be subject to the same standards and treated in a consistent manner."\textsuperscript{282} Critics argue that "consistency" and failure to exercise judicial discretion in sentencing contributes to the high incarceration rates in the United States.\textsuperscript{283} Another concern with a guideline system is the inordinate power it gives the prosecutor; the prosecutor decides what charges to file, which largely determines the outcome of cases.\textsuperscript{284}

\textsuperscript{275} See Memorandum, supra note 273. As of this writing, the Memorandum is still in full force and has not been changed or altered by Attorney General Eric Holder.

\textsuperscript{276} Id.

\textsuperscript{277} Id.

\textsuperscript{278} Id.

\textsuperscript{279} Id.

\textsuperscript{280} Memorandum, supra note 273, § II.C.–D.

\textsuperscript{281} Id. § II.D.

\textsuperscript{282} Id. Eighteen states also have "voluntary" or "advisory" sentencing guideline systems which, according to at least one observer, allow for a similar level of predictability. See Bay, supra note 274, at 572.


\textsuperscript{284} See, e.g., HERMAN, supra note 1, at 97–155 (providing the basic considerations used for plea bargaining under the U.S. Sentencing Guidelines and by U.S. Attorneys); Wright & Engen, supra note 236, at 37.
VII. RULE OF LAW ASSISTANCE PROVIDERS

Before giving specific suggestions to rule of law assistance providers working in this area, it is important to understand who engages in this type of work and their institutional constraints and perspectives. A variety of organizations and countries provide rule of law development assistance that focuses on criminal justice reform.\(^\text{285}\) Rule of law assistance providers focus their efforts on legislative reform, training legal professionals, and supporting institutions.\(^\text{286}\) The main providers of criminal justice reform assistance include the United Nations, the Organization for Security and Cooperation in Europe ("OSCE"), the United States, the Council of Europe ("COE"), and the European Union.\(^\text{287}\) Depending on the region, countries such as the United Kingdom and Germany may also provide criminal justice reform development assistance.\(^\text{288}\) Although plea bargaining does exist in some EU countries, thus far assistance efforts from EU countries have not included plea bargaining in any serious or systematic way. On the contrary, European-wide organizations, such as the COE, have expressed concerns about the introduction of plea bargaining.\(^\text{289}\) The OSCE provides criminal justice reform assistance in a number of countries.\(^\text{290}\) Although some of these countries, such as Serbia, recently adopted plea bargaining, the OSCE does not take a position recommending or discouraging specific approaches, so it has a more limited influence in plea bargaining discussions in individual countries.\(^\text{291}\) U.S. governmental and nongovernmental organizations tend to be the most visible groups providing assistance on issues surrounding plea bargaining.


\(^\text{286}\) See Alkon, The Cookie Cutter Syndrome, supra note 285, at 335–38 (describing the basic approaches used by rule of law assistance providers).

\(^\text{287}\) See, e.g., Samuels, supra note 285.


\(^\text{289}\) See discussion, infra Section VII.B (regarding the COE criticism of Georgian plea bargaining).


\(^\text{291}\) The Serbian government postponed the date of entry into force of the new CPC until 2008 and postponed it again in 2009. E-mail from Ruth Van Rhijn, Head of Rule of Law, OSCE Mission to Serbia (Mar. 24, 2009, 8:38 EST) (on file with author); E-mail from Ruth Van Rhijn, Head of Rule of Law, OSCE Mission to Serbia (May 29, 2007, 10:14 EST) (on file with author).
The United States actively provides criminal justice reform assistance to a wide range of countries through the DOJ Office for Overseas Prosecutorial Development Assistance and Training ("OPDAT") and the ABA Rule of Law Initiative. A key element of OPDAT assistance involves placing experienced prosecutors as Resident Legal Advisors in U.S. embassies so that they can provide direct support to, and coordinate, in part or in full, U.S. criminal reform assistance in the country. Nongovernmental organizations, such as the ABA, also place U.S. lawyers with prosecution or criminal defense experience in countries to provide direct criminal justice reform assistance.

OPDAT and the ABA place lawyers with extensive U.S.-based practice experience, but often with little international work experience, in countries with troubled criminal justice systems. This means that the lawyer on the ground may not know the full range of comparative criminal procedure approaches. Instead, they may view existing practices through the exclusive

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292 Aid providers, diplomats, and officials within countries receiving aid often criticize the United States and U.S.-funded aid providers due to the perception that they actively encourage countries to adopt U.S. models. It is difficult to accurately assess the influence of any one assistance provider, including the United States, in the dynamic world of legal reform. However, there are clear examples of many individual countries and larger regional organizations, such as the European Union, linking funding or otherwise putting pressure on a country to make particular policy changes or adopt particular laws. For a discussion of this problem in the context of commercial law reform, see Channell, supra note 147, at 137. Although the ABA is a non-governmental organization, its criminal justice reform work is financed largely through U.S. foreign assistance funds. This means that overall U.S. foreign policy objectives may determine or limit the direction and focus of the ABA's work. For a general description of ABA work, see ABA, Homepage, http://www.abanet.org/rol (last visited Feb. 3, 2010). For a general description of OPDAT see U.S. DOJ, Office of Overseas Prosecutorial Development Assistance and Training, http://www.justice.gov/criminal/opdat/ (last visited Mar. 20, 2010).

293 Other U.S. agencies providing criminal justice reform assistance may have personnel directly stationed in a particular country, including police assistance and assistance aimed at special interests such as antinarcotics and anti-trafficking. For an interesting account of the valuable aid that OPDAT can provide and the positive difference it can make, see Spence, supra note 219, at 217 (detailing the process surrounding the passage of the 2002 Criminal Procedure Code in Russia and how U.S. assistance providers aided those efforts).

294 The ABA consolidated its various regional programs providing rule of law assistance under the single banner of the Rule of Law Initiative. See ABA, Homepage, http://www.abanet.org/rol/ (last visited Mar. 11, 2010). Through the Rule of Law Initiative, the ABA's criminal justice reform work is primarily funded through the DOJ OPDAT. Interview with Mary Greer, Senior Advisor, Criminal Law Reform Program ABA Rule of Law Initiative, in Washington, D.C. (Apr. 30, 2007) (notes on file with author).

295 The ABA Rule of Law Initiative is a pro bono project relying on volunteer lawyers for much of its work. The more experienced (and paid) ABA staff tends to work in supervisory positions such as Country Directors or as consultants on specific issues such as corruption. See generally ABA, Homepage, supra note 294; see also, Blake K. Puckett, "We're Very Apolitical": Examining The Role of the International Legal Assistance Expert, 16 IND. J. GLOBAL LEGAL STUD. 293, 302–03 (2009) (discussing the minimal international backgrounds of many OPDAT lawyers and the short training periods).
lens of their legal experience in the United States.\(^{296}\) Less experienced rule of law assistance providers on the ground tend not to take a nuanced approach, or fail to recognize the impact that introducing a single change could have on the legal system.\(^{297}\)

Former U.S. prosecutors, as well as former defense lawyers, also provide rule of law assistance in multinational organizations.\(^{298}\) European organizations have more limited programs, placing experienced prosecutors in countries to provide direct assistance.\(^{299}\) The difference in influence is

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\(^{296}\) This is not unique to U.S. lawyers. See Channell, supra note 147, at 137. This problem is reduced when the rule of law assistance provider on the ground has worked abroad for a number of years and has come into contact with a number of legal systems, thereby expanding his or her horizons and world view of possible models for legal reform. Most lawyers working in rule of law development do not start out with a comparative law background and tend to have very limited comparative law knowledge at the beginning of their international career, and increase their knowledge through work experience. John C. Reitz, Export of the Rule of Law, 13 TRAN5NAT'L L. & CONTEMP. PROBS. 429, 461–63, 484 (2003). For a scathing critique of lawyers working in Latin America during the law and development movement, see JAMES GARDNER, LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA 8–9 (1980) ("American lawyers often arrived in foreign territory unencumbered by any significant understanding of the local language, law, polity, economy or culture. . . . As a result American legal assistance was inept, culturally unaware, and sociologically uninformed.").

\(^{297}\) One challenge is that individual assistance providers receive little or no training before beginning their jobs. Puckett, supra note 295, at 302–03 ("Preparatory training on the region or country might last a week or two."). International rule of law development is a field with virtually no barriers to entry; there is no certificate or training required. Generally, most organizations simply require a higher education degree (and not always a law degree) and a week or two of training. The ABA and OPDAT provide some orientation training before sending personnel out into the field. The Folke Bernadotte Academy in Sweden and the Zentrum für Internationale Friedenseinsätze ("ZIP") in Germany jointly conduct the EU rule of law training for European citizens. These programs are an admirable attempt to provide basic training. Nonetheless, the lack of training presents serious problems to all rule of law assistance providers facing the challenge of placing personnel in their first field assignments. See Folke Bernadott Academy, Rule of Law Course, http://www.folkebernadotteacademy.se/en/Training/Courses/Rule-of-Law-Course/ (last visited Mar. 20, 2010); see also Zentrum fur International Friedenseinsatze, Training Courses, http://www.zif-berlin.org/en/Training/TrainingCourses.html (last visited Feb. 3, 2010).

\(^{298}\) Including the United Nations, the Organization for Security and Co-operation in Europe ("OSCE"), and organizations specific to certain countries such as the Office of the High Representative in Bosnia and Herzegovina. Many U.S. citizens in multinational organizations working on rule of law reform began their international work with the ABA and moved to multilateral organizations after gaining international experience. See generally ABA, Europe and Eurasia Division Staff, http://www.abanet.org/rol/staff-ceeli.shtml (last visited Feb. 3, 2010).

\(^{299}\) There is no European rule of law assistance provider similar to the ABA or OPDAT that regularly places experienced legal professionals directly in countries receiving assistance. The European Union tried this model of direct assistance, notably in the Republic of Georgia, but without organizational support for staffing and without a longer term commitment, the effort ended after just one year. See Council of the European Union, EU Common Security and Defence Policy, http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=701&lang=EN&mode=g (last visited Feb. 3, 2010). The many experienced European lawyers working in the field providing direct criminal justice reform assistance tend to work for multinational organizations such as the OSCE or the United Nations.
substantial when U.S. assistance providers have experienced lawyers based in a particular country, as opposed to organizations that send in lawyers as needed and conduct programming from abroad.\textsuperscript{300}

Senior level management with OPDAT and the ABA categorize their work as providing assistance, and will not “force” or “push” for the introduction of particular types of criminal procedure, such as plea bargaining.\textsuperscript{301} OPDAT works on issues “in response to questions or requests.”\textsuperscript{302} OPDAT provides assistance with plea bargaining because officials in many countries have a “natural curiosity” and want to understand how it works.\textsuperscript{303} OPDAT’s policy is not to “push . . . any agenda, procedure or approach . . . [except] to assist countries to comply with international human rights standards, including the International Covenant on Civil and Political Rights (ICCPR) and, as applicable, the European Convention on Human Rights (ECHR).”\textsuperscript{304} However, OPDAT public information and reporting describes plea bargaining in positive terms when it is introduced in particular countries.\textsuperscript{305} OPDAT assistance takes a broad view of criminal procedure reform and has included assistance both for the introduction of plea bargaining and abbreviated trials.\textsuperscript{306}

The ABA also works on plea bargaining, although its representatives based outside the U.S. seem to take a more skeptical view of the value of introducing plea bargaining.\textsuperscript{307} The ABA and OPDAT tend to focus their work

\textsuperscript{300} Informal contacts and personal relationships built over time can be a critical component of successful development work. Rule of law development practitioners regularly tell stories of how they believe a particular idea got its start and many times trace it to an informal coffee or social event. However, it is difficult to assess why particular reforms are adopted. Influential factors include “prestige, power, and normative appeal of the exporter or promoter.” Randall Peerenboom, \textit{What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China}, 27 MICH. J. INT’L L. 823, 831 (2006). U.S. models are often widely known even without direct contact, due to widely available English language materials, U.S. movies, and television programs. Id.

\textsuperscript{301} Interview with Chris Lehmann, \textit{supra} note 244; see also Interview with Mary Greer, \textit{supra} note 294.

\textsuperscript{302} See Interview with Chris Lehmann, \textit{supra} note 244.

\textsuperscript{303} Id.

\textsuperscript{304} Id.


\textsuperscript{306} For definitions of plea bargaining and abbreviated trials, see discussion, \textit{supra} Part V.

\textsuperscript{307} ABA representatives in Armenia, Georgia, Ecuador, and Bosnia expressed concerns about current implementation of plea bargaining in those countries and beyond. Conference call, May 15, 2007 (notes on file with author) (ABA participants in the call included: Kent Mortimore, ABA Liaison, Oman; Charles Caruso, ABA Country Director, Ecuador; Dubravka Piotrovski, Staff
on different legal professionals and, therefore, have different perspectives. OPDAT focuses its efforts on prosecutors and law enforcement, while the ABA often focuses on assisting criminal defense lawyers. Both the ABA and OPDAT assist with legislative reform efforts in a number of countries and regularly participate in legislative reform working groups and round tables, including those focused on the introduction of plea bargaining.

While it is not the stated policy of either the ABA or OPDAT to encourage countries to adopt plea bargaining, U.S. lawyers working on rule of law development bring with them certain ideas of how a legal system should work. For many, this includes a system of plea bargaining as a method of case management. In addition, U.S. prosecutors, particularly those with experience in the federal system, rely heavily on plea bargaining in complex prosecutions. Plea bargaining is the tool prosecutors use to encourage defendants to “flip,” or become witnesses for the prosecution.

Once a country adopts plea bargaining, the question shifts to how it will be implemented. Organizations such as the OSCE can play an important role in the implementation phase, including the ability to provide regular monitoring. Obtaining accurate information continues to present serious challenges to rule of law assistance providers in many countries. Many

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308 Interview with Mary Greer, supra note 294; see also Interview with Chris Lehmann, supra note 244.

309 Interview with Mary Greer, supra note 294; Letter from Matthew L. Olmsted, ABA Criminal Law Legal Specialist and Catalina Aalbers, Staff Attorney, ABA Rule of Law Initiative, Moldova Office to author (June 25, 2007) (on file with author). Multinational organizations such as the OSCE and the United Nations may be more influential in the legislative drafting process in particular countries. European organizations have considerable influence in countries seeking EU membership.

310 See discussion, infra Part VI.A.

311 “It is probably true that American prosecutors can’t imagine how to do complex cases [without] flipping witnesses.” Interview with Chris Lehmann, supra note 244.

312 See discussion, infra Part VI.A.


314 The United Nations High Commissioner for Human Rights (“UNHCHR”) recognized this problem and developed a manual on monitoring. See UNHCHR, RULE OF LAW TOOLS FOR POST
governments are unable to accurately collect statistics. Furthermore, nongovernmental organizations may not be in a position to accurately collect information. The implementation questions include whether and how the law is used. Comprehensive monitoring of cases provides the most thorough answers to these questions. In Bosnia and Herzegovina, the OSCE completed a review of plea bargaining as part of their monitoring of the newly adopted Criminal Procedure Code. This is the only comprehensive monitoring conducted by an international assistance provider that looks specifically at plea bargaining and provides suggestions on how to better protect human rights based on the monitored cases.

VIII. SHOULD PLEA BARGAINING BE IMPORTED?

The question of whether a country should import plea bargaining can only be answered by close examination of a particular country and its criminal justice system. It is also a question that can only properly be answered by those who are from the country itself. However, there are considerations that can assist in the analysis. Plea bargaining is rarely adopted as a stand-alone reform. As the examples of Georgia and Bosnia and Herzegovina show, when plea bargaining is introduced, it tends to be part of an overall package of changes in criminal procedure. Therefore, any analysis of whether to include plea bargaining must be done as part of a complete analysis of the criminal procedure in a given country, including human rights concerns and the particular goals of the reform package.

This Part will first describe the reasons a country might want to import plea bargaining and then explain the possible unintended consequences. The

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315 This can be due to a lack of computerized records, a shortage of trained personnel, or due to concerns that the information will not support government positions on particular issues. For a discussion about the difficulty of gathering statistics in Central Asia, see Alkon, The Increased Use of “Reconciliation” in Criminal Cases in Central Asia, supra note 6, at 45–46.

316 This may be due to the overall weakness of civil society. See generally MARC MORJÉ HOWARD, THE WEAKNESS OF CIVIL SOCIETY IN POST-COMMUNIST EUROPE (2003).

317 The failure to use laws imported to a country has been called the “transplant effect.” See Daniel Berkowitz et al., Economic Development, Legality and the Transplant Effect (Sept. 2001), available at http://www.pitt.edu/~dmberk/Bpreerfinal.pdf.

318 See discussion, infra note 332.

319 See discussion, supra Part III.B.2.b.

320 Although the OSCE monitors trials in other countries, few reports are publicly available and thus far no other countrywide monitoring has looked specifically at plea bargaining. See generally Activities Rule of Law, http://www.osce.org (last visited Feb. 3, 2010); see discussion, supra Part III.B.2.

321 See discussion, supra Part III.

322 Id.
three generally stated reasons to import plea bargaining are: to ease docket overcrowding; to use as a tool in complex prosecutions; and to build more creative, individualized, and possibly noncustodial sentences. The possible unintended consequences of introducing plea bargaining may be of more concern in troubled criminal justice systems, as these are countries with less developed human rights protections, and more fragile or developing rule of law. The unintended consequences include: violations of defendants' rights, encouraging coercion of confessions, contributing to a negative public perception of the legal system, and possible failure to implement.

A. Reasons to Import Plea Bargaining

1. Overcrowded Dockets/Case Management Efficiency

Overcrowded dockets create serious human rights problems in countries without developed bail systems or other procedures to release people from custody pending trial. If the average criminal case takes months or years to go to trial, the average defendant spends that amount of time in custody, even if the charges are not serious. Pretrial detention facilities in many countries have notoriously poor conditions such as overcrowding, poor hygiene, poor nutrition, disease, and lack of physical safety. Therefore, reducing case backlogs can mean reducing the amount of time defendants spend in pretrial detention and ultimately the amount of time they spend in detention overall. This can have a substantial impact on the human rights situation in countries with poor detention and prison conditions.

2. Tool for Complex Prosecutions

The dual problems of corruption and organized crime can create paralyzing problems in developing legal systems. The challenge is that these dual problems are often strongly woven into the fabric of society, making it difficult or impossible to combat effectively. However, plea bargaining can be


324 See, e.g., Lehmann, supra note 12.


Congested pretrial detention centers are often chaotic, abusive, and unruly places where few inmates are given the supervision they require. In many countries the excessive use of pretrial detention has very real negative consequences for public health, family stability, social cohesion, and the rule of law. Poor pretrial detention practices not in compliance with international standards consequently endanger persons and communities far removed from those actually detained.

Id. at 3.
an invaluable tool to assist governments committed to taking action against corruption and organized crime if it is structured to allow prosecutors to reduce sentences or dismiss charges to reward cooperating witnesses.  

3. Creative, Noncustodial, and Individualized Sentences

A third reason for adopting plea bargaining is that it may provide greater flexibility in sentencing, allowing the prosecution and the defense to construct more individualized sentences through the informal negotiation process. For example, the prosecutor and defense could agree on a sentence that includes community service directed to the offense committed, such as a drunk driver working at a rehabilitation center with car accident victims. Rule of law assistance providers tend not to discuss this possible advantage of plea bargaining. One reason may be the large number of former federal prosecutors providing this assistance. The U.S. federal system is not a system that lends itself to creativity in sentencing due to the combined impact of the U.S. Sentencing Guidelines and the DOJ's strict policies regarding how to handle similar cases. Another possible reason is a resistance within many legal cultures, due to the fact that many civil law systems place a high value on treating defendants consistently. Allowing for disparate sentences, regardless of whether they are a product of creativity, or a more holistic approach to punishment, will be viewed with great suspicion by legal professionals in many countries.

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326 Some observers criticize this use of plea bargaining because it rewards defendants who are more deeply connected to criminal behavior and therefore have information or contacts to trade for a more lenient sentence. See 21 U.S.C. 841, 846. See also Jacqueline E. Ross, The Entrenched Position of Plea Bargaining in United States Legal Practice, 54 Am. J. Comp. L. 730, 731 (2006) (noting that plea bargaining for cooperation is part of the "government's investigative arsenal" making it unlikely that it can be prohibited and also noting that this kind of plea bargaining is "unlikely to ensnare innocent defendants.").

327 This reason was not mentioned during any of my interviews for this Article with rule of law assistance providers.

328 See discussion, supra Part VII.

329 See discussion, supra Part VI.B.

330 Prosecutors in both common law and civil law countries often have wide discretion and power to decide who to prosecute. For an example from a civil law country, see Richard Volger, Criminal Procedure in France, in CRIMINAL PROCEDURE IN EUROPE 171, 183–184 (Richard Volger & Barbara Huber eds., 2008). However, prosecutors' power is more limited in some civil law countries due to compulsory prosecution provisions and provisions limiting prosecutorial discretion. See, e.g., Thomas Weigend, Germany, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 205–06 (Craig M. Bradley ed., 1999); Luca Marafioti, Italian Criminal Procedure: A System Caught Between Two Traditions, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF PROFESSOR MIRJAN DAMAŠKA 81, 83, (John Jackson et al. eds., 2008).

331 For a discussion of some of the underlying philosophical differences between civil law and common law countries and how that impacts the decisions about whether to adopt plea bargaining, see Langer, From Legal Transplants to Legal Translations, supra note 4, at 46–53.
B. Possible Unintended Consequences of Importing Plea Bargaining

Proponents of plea bargaining in the United States and elsewhere can point to all the reasons stated above to support the introduction or continued use of plea bargaining in other countries. The arguments against plea bargaining are not that the above stated advantages are overstated or incorrect, but rather that there are possible unintended consequences that could be particularly important to consider in the context of introducing plea bargaining into a troubled criminal justice system. These consequences are: violations of defendants' rights, damage to the public perception of the legal system, possibly encouraging the continued use of coercive measures to obtain confessions, and transplant failure.

1. Violations of Defendants' Rights

Protecting the rights of defendants requires constant vigilance in every criminal justice system. Among the rights that are at the greatest risk are the right to a defense lawyer, the right to access the state's evidence, and the presumption of innocence. Countries introducing plea bargaining risk further entrenching bad practices unless the introduction is done with a full understanding of the most commonly violated defendants' rights, and with a realistic plan and procedures in place to ensure that those rights are not violated through the plea bargaining process. Plea bargaining can be done in a way to fully protect defendants' rights. As the example of Bosnia and Herzegovina illustrates, it is unrealistic to expect a criminal justice system that fails to adequately protect defendants' rights at other stages of the proceedings to not have the same problems in the plea bargaining process, absent a concerted effort to correct them.

332 Attempts at legislative reform often have very different consequences than originally intended. One example is the change in the law in Uganda prohibiting sex with girls under the age of eighteen years. The law was intended to protect underage girls from older men and pedophiles as part of an anti-AIDS campaign. Instead, teenage boys and young adults were the primary defendants and only those without influence or the ability to pay their way out of the case were prosecuted. Edmund Sanders, Going All the Way—to Jail, L.A. TIMES, Mar. 14, 2006, available at http://articles.latimes.com/2006/mar/14/world/fg-defile14. For a fascinating account of how the best intentions can go wrong, see Thomas Kelley, Unintended Consequences of Legal Westernization in Niger: Harming Contemporary Slaves by Reconceptualizing Property, 56 AM. J. COMP. L. 999 (2008).

333 For examples of how this was not done in Georgia and BiH, see supra Part III. Steven Thaman is highly critical of the abbreviated proceedings adopted in the post-Soviet world because they are built on top of the damaged foundation of the troubled criminal justice systems in these countries. "A plea bargaining system can only reach just and verifiable results in the post-Soviet world if it is based on evidence gathered pre-trial that has been subject to adversarial testing, which can really provide a factual basis for guilt." See Steven C. Thaman, The Two Faces of Justice in the Post-Soviet Sphere: Adversarial Procedure, Jury Trial, Plea Bargaining and the Inquisitorial Legacy, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT: ESSAYS IN HONOR OF PROFESSOR MIRJAN DAMASKA 117 (John Jackson et al. eds., 2008).
2. Public Perception of Plea Bargaining

As the example of Georgia illustrates, plea bargaining can contribute to a public perception that the legal system is corrupt and that officials are not bound by the law. Plea bargaining can look like the same informal practices commonplace in troubled criminal justice systems favoring the rich and powerful. This can be even more true when plea bargaining is introduced using fines as the most common sentence, or when it is introduced with high profile cases. However, there are clear human rights advantages to criminal sentences that include penalties other than time in jail or prison. A criminal justice system should include and use a full range of possible sentences including fines, community service, treatment for the offender, and time in custody.

Although creative sentencing can be a positive aspect of plea bargaining, serious public perception problems can arise if plea bargaining is introduced close in time to the introduction of previously unknown or unused alternative sentences and if plea bargaining commonly results, or is perceived to commonly result, in no jail time. Such plea bargains can look to the average citizen as if defendants are paying their way out of criminal responsibility. This can have a serious impact on the public perception of the legal system, helping to reinforce existing attitudes and lack of trust in legal institutions and professionals.

3. Encourage Continued Coercion of Confessions

Many developing legal systems rely heavily on confessions by the defendant as evidence against him in his criminal trial. This reliance often
results in coerced confessions, as many of these countries have a history of routinely heavy-handed government tactics to secure confessions. Under these circumstances, plea bargaining may at best fail to encourage any change in these practices, and at its worst could encourage the continued reliance on confessions gathered through any method. In such systems, plea bargaining will not contribute to changing the existing legal culture to prohibit or stop coerced confessions. Additionally, plea bargaining could reinforce to a skeptical public the idea that the government continues to routinely violate basic rights. In such an environment, it may be difficult to convince the public to look at plea bargaining as a process of meaningful negotiation that results in fair outcomes for both the prosecution and the defendant.

4. Transplant Failure

If plea bargaining is introduced without the support of the country’s legal professionals, it may never be implemented or suffer partial implementation. Moldova provides an example of a possible transplant failure. In Moldova, the legal community has not accepted this new procedure and has, therefore, apparently limited its implementation. Moldova can fairly be classified as

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One joke from the former Soviet Union illustrates the point:

One nasty morning Comrade Stalin discovered that his favorite pipe was missing. Naturally, he called in his henchman, Laverenti Beria, and instructed him to find the pipe. A few hours later, Stalin found it in his desk and called off the search. “But, Comrade Stalin,” stammered Beria, “five suspects have already confessed to stealing it.”


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343 As discussed, supra Part VI.B., critics of plea bargaining express concern about coerced guilty pleas in the U.S. system of plea bargaining. Bosnia and Herzegovina illustrate the concern about coercion of guilty pleas. See discussion, supra Part III.B.2.b.

344 Troubled criminal justice systems are not the only ones subject to transplant failures. For example, observers note that Italy has failed to fully implement and use the abbreviated procedures allowed under the 1989 CPC. See Marafioli, supra note 330, at 90–91; see generally Pizzi & Montagna, supra note 197. Economic legal scholars focus on why countries fail to use transplanted laws. See, e.g., Berkowitz et al., supra note 317; see also Jeremy J. Kingsley, *Legal Transplantation: Is This What the Doctor Ordered and Are the Blood Types Compatible? The Application of Interdisciplinary Research to Law Reform in the Developing World: A Case Study of Corporate Governance in Indonesia* 21 ARIZ. J. INT’L COMP. L. 493 (2004); see also John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657 (2008). The term legal transplant refers to countries borrowing laws from each other. See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974). For examples of the use of the term transplant, see Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant*
a troubled criminal justice system. The general public still widely perceives judges to not act independently, either because they respond to direct pressure from the executive or because they are corrupt. The general public also seems to widely perceive that the legal sector, including prosecutors and law enforcement, is corrupt. Regular reports of human rights abuses within the criminal justice system continue, including accounts of ill treatment of detainees and that law enforcement personnel coerce confessions. Moldova still fails to provide defense counsel with adequate access to their detained clients, and continues to limit how lawyers can do their jobs.

Moldova introduced plea bargaining in 2003 as part of its new Criminal Procedure Code. The new code included a number of fundamental changes to Moldovan criminal procedure, such as shifting to an adversarial system and was allowed for all offenses with a maximum sentence of less than fifteen

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347 Transparency International's Global Corruption Barometer rates corruption by sector and institution with a score of 1 indicating "not at all corrupt" and a score of 5 indicating "extremely corrupt." Global Corruption Barometer, supra note 80. Moldova's legal system/judiciary scored a 3.7, while police scored a 4.1. Id. Also, Moldova scored poorly on Transparency International's Corruption Perception Index with a score of 2.8. 2007 Corruptions Perceptions Index, supra note 76, at 6. Under this system, a score of 10 indicates a "highly clean" country and a score of zero indicates a "highly corrupt" country. Id. at 4.


349 See generally CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE, LEGAL PROFESSION REFORM INDEX FOR MOLDOVA (American Bar Association, Apr. 2004); Amnesty Int'l, supra note 348; 2007 U.S. HUMAN RIGHTS REPORT ON MOLDOVA, supra note 348.

350 C. CRIM. PROC. (Mold.), available at http://www.legislationline.org/download/action/download/id/1689/file/ebc7646816aadd2a3a1872057551.htm/preview. During the process of drafting the new criminal procedure code, Moldova looked to experiences in Russia, Italy, Germany, France, and the United States; the plea bargaining provisions reflect the influence of practices in the United States. Letter from Matthew L. Olmsted, supra note 309.

351 See generally C. CRIM. PROC. (Mold.).

352 Letter from Matthew L. Olmsted, supra note 309.
years in prison. The law specifically defined plea bargaining as “a transaction concluded between the prosecutor and the . . . defendant” who agrees to “plead guilty for a reduced sentence.” This wording suggests that plea bargaining in Moldova is limited to sentence bargaining. The law specifically prohibits judges from engaging in plea discussions. The plea bargain should be in writing, and defense lawyer participation is required for more serious crimes.

Before a plea bargain can be finalized, defense lawyers are required to “confidentially” discuss a number of matters with the defendant. These include procedural rights, possible defenses, maximum and minimum punishments, and that the defendant is not agreeing to the plea bargain due to threats or violence. In addition, the defense lawyer must submit a separate written certification that he or she has “personally examined” the written plea agreement and that it reflects “their previous confidential agreement.” The court should ask all questions regarding the plea agreement in a public hearing. If the judge refuses to accept the plea bargain, the prosecutor can challenge the court order refusing to accept it. The law does not specify acceptable sentences under plea agreements, so presumably the defendant could agree to either a fine or jail time. The CPC requires “the hierarchically superior prosecutor” to approve each plea bargain. Lawyers in Moldova interpret this provision to mean that only the Prosecutor General can authorize plea agreements. This interpretation

353 C. CRIM. PROC. ch. III, Plea Bargaining Procedure (Mold.).  
354 Id. art. 504(1).  
355 Id.  
356 Id. art. 504(3).  
357 Id. art. 504(2). The law is vague as to what should be in the written agreements, which has prompted criticism and the suggestion to amend the law to provide greater clarity. Letter from Matthew L. Olmsted, supra note 309.  
358 C. CRIM. PROC. art. 504(2) (Mold.).  
359 Id. art. 505(2).  
360 Id.  
361 Id. art. 505(5).  
362 Id. art. 506(1) ("except for cases where the law provides for the possibility of having a closed hearing").  
363 C. CRIM. PROC. art. 507(3) (Mold.). The code is vague as to the grounds under which the court can refuse to accept the plea and as to what happens if the prosecutor challenges the refusal to accept the plea bargain. The case will go to trial if the prosecutor chooses not to challenge the court’s refusal to accept the plea bargain. Id.  
364 See generally C. CRIM. PROC. ch. III, Plea Bargaining Procedure (Mold.).  
365 Id. art. 505(4).  
366 Letter from Matthew L. Olmsted, supra note 309.
presents a bureaucratic hurdle that reduces the number of cases resolved through plea bargaining.367

Statistics on the frequency of plea bargaining in Moldova are difficult to find.368 The Prosecutor General reports that plea bargaining is “frequently” used, while defense lawyers seem to think that it is rarely used.369 It is clear that there are criticisms of the current law and a general feeling that plea bargaining is not used to its fullest extent.370 For example, prosecutors report that they do not use plea bargaining to obtain cooperation from witnesses.371 Defense lawyers note that some courts refuse to accept plea bargains without providing a reason.372

IX. RECOMMENDATIONS TO ASSISTANCE PROVIDERS AND POLICYMAKERS

Plea bargaining and abbreviated trials are increasingly a part of criminal procedure worldwide.373 Countries currently receiving rule of law development assistance are part of this worldwide trend. This Part will give some suggestions to rule of law assistance providers and policymakers who are confronting new plea bargaining laws or who are faced with suggestions from a country whose policymakers want to adopt plea bargaining. All of these suggestions assume that the rule of law assistance provider has completed the necessary assessments and is familiar with the country’s legal system, history, culture, and current human rights situation. Each country is different and laws should not be transplanted or introduced without serious attention to, and analysis of, the particular situation in the country. This Part will provide some broad suggestions and “food for thought” to assist policymakers and rule of law assistance providers in their analytical process.

367 Id.


369 OSCE Analytic Report, supra note 368. Steven Thaman reported that by 2006, Moldova resolved up to 49 percent of its criminal cases through plea bargaining. Id. The Prosecutor General provided these statistics. Id.; see also Thaman, The Two Faces of Justice in the Post-Soviet Sphere, supra note 333, at 111.

370 Id.

371 This was reported during a plea bargaining conference organized by the ABA in 2004 in Moldova. At that same conference, defense attorneys in half the districts (rayons) of Moldova reported they had never used plea bargaining. Letter from Matthew L. Olmsted, supra note 309.

372 Id.

373 See, e.g., TURNER, supra note 2, at 271.
A. Legislative Drafting Stage

Drafting new legislation is usually the first stage of adopting plea bargaining or abbreviated trials. Often, rule of law assistance providers are not present during this stage, or are not invited by the country to be part of the process. Legislative drafting can be highly chaotic and may or may not adequately consider public opinion and greater public policy goals. It is beyond the scope of this Article to fully describe good practices in legislative drafting. One useful role that assistance providers often fill is to organize conferences, roundtables, or working groups to bring together the various stakeholders to discuss the proposed changes to the law and the problems that those changes will address. At this stage, providing exposure to other models can be helpful, as long as it is done in a way that shows that the models are just possible approaches. Often, the best way to achieve this is to provide a number of models and include countries that are closer to the experience of the country considering the legislative changes. During this stage, rule of law assistance providers can help highlight concerns about

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374 Plea bargaining can grow as an informal process that is not codified, as has been its history in United States. Civil law countries tend to codify this practice when it is introduced. See discussion, supra Part VII. However, this is not always done. See, e.g., Langer, From Legal Transplants to Legal Translations, supra note 4, at 39–46; Thomas Weigend, Decay of the Inquisitorial Ideal: Bargaining Invades German Criminal Procedure, in CRIME, PROCEDURE AND EVIDENCE IN A COMPARATIVE AND INTERNATIONAL CONTEXT 39, 47–53 (Craig M. Bradley ed., 1999).

375 See, e.g., Channell, supra note 147. One author has noted:

Donor-sponsored legislative reform projects frequently use what could be called a star chamber system in which a small working group of experts quietly drafts new legislation chosen in part by outside donors, which is then rapidly adopted by the legislature with little meaningful public comments. Lack of local input, not transplantation, is the problem.

Id. at 139–41.

376 For a description of legislative drafting including recommendations on the process, see generally ANN SEIDMAN ET AL., LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS (2001).

377 See, e.g., STROMSETH ET AL., supra note 146, at 199–202 (discussing how rule of law assistance providers can better assist in legislative reform in post-military intervention countries).

378 Unfortunately, assistance providers sometimes compete over whose model will be accepted. This competition is part of a larger problem of competition for contracts between rule of law assistance providers. See Veronica L. Taylor, The Rule of Law Bazaar, in RULE OF LAW PROMOTION: GLOBAL PERSPECTIVES, LOCAL APPLICATIONS 325 at 332-333 (Per Bergling et al. eds., 2009).

379 This is a basic “good practice” for anyone working in rule of law assistance and is regularly done by rule of law assistance providers including the ABA, OPDAT, and the OSCE. See generally ABA Rule of Law Initiative, http://www.abanet.org/roll (last visited March 9, 2010); OSCE Homepage, http://www.osce.org (last visited Mar. 9, 2010); U.S. DOJ, OPDAT, http://www.usdoj.gov/criminal/opdat/ (last visited Mar. 9, 2010).
proposed legislation and whether it will comply with international human rights standards.\textsuperscript{380}

A few specific recommendations can be made based on the concerns in a particular country. First, if the country suffers from widespread lack of public confidence in the judicial system, policymakers and rule of law assistance providers should consider adopting steps consistent with O'Hear's recommended "procedural justice process norms" and should develop objective criteria for plea negotiations.\textsuperscript{381} For example, prosecutors could promulgate clear and objective policies for a nationwide approach to plea bargaining at the same time as the implementation of the new plea bargaining law.\textsuperscript{382} This can help minimize the perception of ad hoc plea bargaining stemming from results that vary depending on the power and influence of the defendant. Prosecutors would need to publicize the policy, make it widely available, and have it ready at the time that the new law enters into force.\textsuperscript{383} However, clear policies can have the impact, as in the U.S. federal system, of limiting creativity in sentencing and increasing (or failing to decrease) incarceration rates.\textsuperscript{384}

If the key problem in a legal system is corruption or organized crime and not overcrowded dockets, plea bargaining could be limited to cooperating witnesses. Another option might be to consider abbreviated trials for all cases and to allow additional or improved deals for cooperating witnesses. The Georgian example illustrates the concern that countries with endemic corruption who introduce plea bargaining could reinforce poor practices and the widespread public perception of corruption while failing, at least in the beginning, to use plea bargaining as an aggressive anticorruption tool.\textsuperscript{385}

\textsuperscript{380} The OSCE, for example, regularly provides written analysis of draft legislation when requested by the government. See generally OSCE Homepage, http://www.osce.org (last visited Mar. 9, 2010).

\textsuperscript{381} See discussion, supra Part IV; see also O'Hear, supra note 158.

\textsuperscript{382} However, policymakers should exercise caution with this approach in countries where the prosecutor enjoys greater power, as promulgating such guidelines could further undermine the defendant's leverage in the negotiation. See, e.g., discussion, supra Part V; see also discussion about how plea bargaining functions in the Republic of Georgia and Bosnia and Herzegovina, supra Part III.

\textsuperscript{383} The timing can be difficult, particularly when new codes are adopted with very little time before entering into force. Prosecutor's offices in countries with more technology could publicize the new policy by posting it on the internet. See, e.g., Memorandum from John Ashcroft, supra note 273. The information could also be disseminated to the general public by publishing in local newspapers, through public service announcements on radio and television, and by making leaflets or other written material for distribution.

\textsuperscript{384} See discussion, supra Part VI.

\textsuperscript{385} See discussion, supra Part III.A.
B. Implementation Phase

After a new plea bargaining law is passed, rule of law assistance providers can play an important role in disseminating information, including educating or training legal professionals about the new law. Rule of law assistance providers should consider monitoring programs, opinion surveys, and training programs.

1. Monitoring

BiH provides a clear example of the value of comprehensive monitoring.\textsuperscript{386} The OSCE monitoring reports gave BiH legal professionals and policymakers a clearer picture of plea bargaining in BiH and identified areas of concern. In Georgia, information is difficult to gather.\textsuperscript{387} As a result, the legal community, policymakers, and rule of law providers rely on anecdotal information and must use their best guess to determine how plea bargaining works. The lack of information makes it difficult to plan assistance programs and to identify what, if any, legislative changes to recommend.\textsuperscript{388} Trial and case monitoring consumes time and resources. Few international organizations attempt monitoring programs in light of the difficulties inherent in establishing such programs. This is a mistake.

Oftentimes a country, because of financial or human resource issues, cannot conduct comprehensive monitoring. Good monitoring depends on a number of factors, including strong knowledge of the local law, developing a group of local monitors, and a long-term commitment so that the monitoring is not a onetime process, but extends over many years. Rule of law assistance providers must evaluate a number of factors in deciding whether to engage in monitoring.\textsuperscript{389} One factor is resources, both human and financial. Another factor is the overall political environment in the country. Good monitoring programs rely on good relationships with the host country government and legal community. Countries failing to make progress on rule of law may not be good candidates for comprehensive monitoring programs.\textsuperscript{390}

\begin{enumerate}
\item See discussion, supra Part III.B.
\item Id. at 2–3.
\item For a summary of how to organize trial monitoring and the issues that should be considered in establishing a monitoring program, see OSCE Office for Democratic Institutions and Human Rights, Trial Monitoring Reference Manual for Practitioners (2008), available at http://www.osce.org/odihr/item_11_30849.html.
\item This analysis goes beyond a decision to start trial or case monitoring. Rule of law assistance providers need to carefully evaluate whether it is worthwhile to provide any assistance in countries without the political will to reform. See Per Bergling, Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-operation 35–36.
\end{enumerate}
Another factor of good monitoring is the safety of the monitors. A successful monitoring program relies on local monitors who may be employed directly by the international organization or may be working or volunteering through a local nongovernmental organization. Countries with difficult security environments, serious human rights problems, or powerful organized crime networks could pose a danger to the monitors at a level where it would be irresponsible for an international organization to put the monitors in harm's way and risk their safety for the monitoring program. Rule of law assistance providers should consider establishing a monitoring program if such a program poses no threat to the monitors and the country has the necessary political will. Under these circumstances, monitoring should be considered a priority after a new plea bargaining law is implemented.

2. Opinion Surveys

Surveying opinions of the general public and legal professionals can help clarify existing attitudes toward plea bargaining. Assistance providers should base their evaluation on better information regarding what types of public information needs dissemination and how or if to approach training of legal professionals to give them a clear understanding of current attitudes and views. Because of resource and time issues, opinion surveys are rarely undertaken, meaning rule of law assistance providers must rely on anecdotal information and their “best guess” of current attitudes to determine programming.

Rule of law assistance providers tend to inhabit insular worlds, often coming into contact with only limited categories of legal professionals, such as defense lawyers or prosecutors. Often, their work is centered in the capital of a country, and depending on the length of time in the country, the individual rule of law assistance provider may not have much experience with or understanding of the differing attitudes and situations in other parts of the country. Clearly, opinion surveys can reach inaccurate conclusions depending on what questions are asked and how the survey is conducted. As with monitoring, rule of law assistance providers should carefully assess

(Interstertia ed., 2006); Rausch, supra note 255, at 137–47 (discussing factors that international aid providers should consider in assistance to combat serious crimes).

391 Survey takers need to exercise caution to avoid the tendency to “elicit simplistic answers to complex questions.” Herzog, Plea Bargaining, supra note 172, at 590, 595.

392 For examples of the types of questions and how to approach public opinion surveys including the distinctions between surveys of the lay people and experts, see Jose Juan Toharia, Evaluating Systems of Justice Through Public Opinion: Why, What, Who, How and What For?, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erick G. Jensen & Thomas C. Heller eds., 2003).

how to conduct the surveys and who will conduct them to ensure the most useful results. In some countries, rule of law assistance providers may be limited by time or resource constraints and unable to conduct full scale monitoring programs. Under such circumstances, surveying legal professionals about their experience with the new law might be a good alternative, providing solid information on which to base future programming decisions.

3. Training

Training is perhaps the most used tool in the rule of law development world. Some reasons for this are that training is often the easiest type of rule of law assistance to provide, it is easily quantifiable, and it is easily described to funders. When new laws come into place, there is undoubtedly a need to train the judges, prosecutors, defense lawyers, and police. Many countries do not have existing systems of continuing legal education, so legal professionals do not have regular access to seminars and conferences on particular legal topics. In some countries, rule of law assistance providers fill this void and engage in training either as stand-alone events, or through institutions such as judicial training centers.

A new law will not be implemented fully if the legal professionals charged with its implementation are unaware of its existence or how best to use it. However, training alone will not dislodge strongly held cultural biases against changing practices or adopting practices that contradict other values. Therefore, rule of law assistance providers should invest the time and resources into a training program only after a full assessment concludes that there is value in conducting the training. Rule of law assistance providers should also give careful consideration to the issue of who will conduct the training. If the goal is to achieve local "buy-in" to the new law, the majority of the trainers need to be from the country in question and should be trainers the audience will take seriously.

If rule of law assistance providers decide to conduct a training program, they will need to decide on the substance of the training. This is another area

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394 Training is part of what Thomas Carothers describes as the “standard menu” of rule of law assistance. THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 168 (1999).

395 For a critical and more detailed explanation of why training is such a popular form of rule of law assistance, see Alkon, The Cookie Cutter Syndrome, supra note 285, at 336–37.

396 For this reason many rule of law assistance providers focus efforts on creating new training institutions, such as judicial training centers, so this education can be locally provided. See, e.g., BERGLING, supra note 390, at 92–94.

397 All of the organizations discussed in this Article, including the ABA, OPDAT, and the OSCE, regularly engage in both types of training programs.

398 For example, a training program aimed at prosecutors should probably not have defense attorneys acting as trainers and vice versa.
where O'Hear's "procedural justice process norms" provide useful advice. It might be difficult to build into legislation the requirement that the "defendant has a meaningful opportunity to tell their side of the story," or that prosecutors should "explain positions taken in negotiations" or "refrain from pressure tactics." However, these recommendations can be addressed when training prosecutors, judges, and defense lawyers.

X. CONCLUSION

Troubled criminal justice systems face serious challenges in introducing reforms that better protect their citizens from both crime and human rights violations. Finding more efficient and fair ways to resolve criminal cases is a fundamental part of the process of rule of law development. Rule of law development does not depend on a singular change in the law or quick fixes. Instead, it depends on various pieces of a fragile puzzle fitting together and staying together through the test of time. The glue that holds those pieces together is the attitude of the general public. Therefore, rule of law assistance providers, policymakers, and legislators must carefully consider the actual and anticipated impact that changes in the law may have on public attitudes. Even changes that may seem highly technical and procedural can deeply influence and change public attitudes toward the legal system. While plea bargaining may assist in more efficient handling of criminal cases and can provide an invaluable tool in complex prosecutions, it does not necessarily contribute to the perception of fairness in a criminal justice system or to developing a positive public attitude toward the rule of law.

Rule of law assistance providers are only one small part of the dynamic for change and reform in any given country. This Article does not intend to suggest that reform in any country is dependent upon foreign assistance. In most countries, the dynamics determining reform are set by the interests of institutions and individuals competing for power and control. Outsiders can have a difficult time accurately evaluating these internal struggles, which contributes to the challenge of providing meaningful advice and assistance. Legislators, policymakers, and rule of law assistance providers are usually well aware that changing laws can start a process leading in directions that were not intended or envisioned by the legislature. Rule of law assistance providers should focus attention and analysis on these potential unintended negative consequences, including the impact that the reforms or

399 O'Hear, supra note 158, at 424–31; see also discussion, supra Part IV.

400 Some countries, such as BiH or Kosovo, are not fully sovereign, and the international community therefore exercises more power in the legal reform process. This Article has not distinguished between sovereign and not sovereign nations in its analysis, although clearly rule of law assistance providers hold greater responsibility for caution and care when they hold greater power to determine the legal structures and the pace and nature of legal reform. See generally STROMSETH ET AL., supra note 146; BERGLING, supra note 390, at 117–47.
proposed reforms may have on public perceptions of the criminal justice system and rule of law.

Georgia and BiH provide two cautionary tales of the limitations and unintended negative consequences of importing plea bargaining. This Article encourages policymakers and rule of law assistance providers to look beyond the first level of problems, such as overcrowded dockets, and to more thoroughly examine the dynamics at play in each country to determine what approaches might best assist in bringing about meaningful reform. Abbreviated trials can be a better alternative, due to the perceived informality and lack of legality of U.S.-style plea bargaining. However, abbreviated trials fail to provide a mechanism for encouraging witness cooperation in complex prosecutions and fail to allow for creativity in sentencing.

Regardless of the procedure adopted, regular and comprehensive monitoring of cases is needed. One of the challenges that rule of law development professionals face is a vacuum of information when making difficult decisions regarding the advice and assistance that they provide. Monitoring can help fill that vacuum by providing solid information to local government policymakers, legal professionals, and rule of law assistance providers. This information can help ground their decisions in what is happening in the particular country's legal system. Monitoring is not a quick and easy project. However, this should not dissuade rule of law assistance providers and their funders from devoting resources and time to developing and implementing monitoring programs. High quality monitoring with regular and reliable reporting can provide invaluable assistance to rule of law development. In the absence of such monitoring, it is difficult to fully or accurately evaluate the impact of legislative changes such as plea bargaining within the legal system. In many countries, providing this kind of clear information about current practices would be invaluable and could make a significant contribution to rule of law development.

As rule of law development professionals continue to discuss and provide assistance during the process of legislative change, they must keep in mind both the intended and the possible unintended consequences of such changes and adapt their advice accordingly. Plea bargaining will remain a key feature of such discussions and rule of law assistance providers should hesitate to agree that it provides a simple solution to heavy caseloads and other serious problems without identifying possible negative consequences. In the final analysis, each country needs to decide what its priorities are and decide whether adopting U.S.-style plea bargaining will provide the best option given the country's particular problems. This Article suggests that during the process of reaching their conclusions, countries should consider both intended and unintended negative consequences. In doing so, countries will be in a better position to offset unintended negative consequences, and rule of law assistance providers may be in a better position to provide meaningful assistance.