<u>DISCLAIMER</u>: This topic overview is provided by the National Forensics League to assist coaches in teaching the new topic. It is not intended to be a definitive statement of the topic to be debated, to prescribe what direction the debate should go, or to provide the "framer's intent" for the topic. Accordingly, the topic overview should not be quoted or referred to in any actual debate round.

In the United States, plea bargaining in exchange for testimony is unjust.

The United States judicial system is a complex working of legislation, application and punishment in an attempt to achieve some semblance of justice, both for society as a whole and for the individual who has been accused and/or convicted of violating that society. The point of the system is to safeguard the individual being processed and to arrive at both the closest decision to truth possible and a fair punishment to reflect what that individual owes to society as a result. Within this system are tools at the disposal of the prosecution, defense and law enforcement to extract that truth to the best of their ability. One of those tools is plea bargaining, or, the reduction in sentence for one guilty individual in exchange for information regarding another illegal act or guilty individual. In the case of the resolution, the reduction in sentencing is done in order to elicit active testimony from the first individual. Plea bargaining has a long history in the American judicial system as an effective tool in achieving results; however, the question before debaters is whether it is an effective tool in achieving *justice*.

The question of the resolution is whether a specific use of plea bargaining is a just use of the system and information. Clearly, the first focal point needs to be on what justice is. The problem of justice, however, is an age-old question with many different answers, each dependent on the social system in which the question is being posed. In the United States, we still have a number of interpretations of justice; however, we typically expect that the judicial system will render what each individual is due, or mitigate competing claims. Those competing claims can come from society versus the individual or two individuals versus one another. In the context of the resolution, either claim scenario is possible, meaning that a just society would be one which produces the best outcome for all parties involved. The question of this debate would then be: does plea-bargaining render the greatest outcome for society and the individual? That said, each side will need to define for him/herself an interpretation of justice which works for his/her own position.

The primary question of the resolution deals with a potential difference between procedural and results-oriented justice, so the affirmative and negative will need to resolve these comparable benefits for themselves in the debate. In addition to justice, the resolution looks at a specific practice within the judicial system. Plea bargaining can be traced, in America, back to the late 1700s as a means of protest against unfair penalty. There was question about the necessity of severe punishment for a rather "petty" crime, which led the convicted to agree to plead guilty to the charge and save the court time, if the sentence would be reduced.

The question of the resolution addresses a specific use of plea-bargaining: in exchange for testimony. A number of sources will address plea bargaining as a general concept; however, it will be very important to ensure that they are specific to one individual doing more than offering information and actively testifying in exchange for the lessened sentence. The purpose of plea bargaining in exchange for testimony is so that the first individual with important information can serve as a conduit for information which will justly convict another guilty individual. The first individual then gets leniency from the state, which takes into account the cooperation s/he shows during the process. The questions to ask in follow-up, however, are "is this leniency important to getting this information?" and "is this information important to the conviction?"

SUGGESTED READING

Alschuler, Albert W. "Plea Bargaining and Its History." *Columbia Law Review*, Vol. 79, No. 1. (Jan., 1979), pp. 1-43.

Ashworth, Andrew. Sentencing and Criminal Justice (Law in Context) *This book argues that the practice of plea bargaining is unjust because it allows for criminals who have confessed to committing certain crimes to be punished for crimes less severe than the ones to which they confessed.*

Buckle, Suzann R. Thomas. Bargaining for Justice: case disposition and reform in the criminal courts. New York: Praeger, 1977. *Examines functions of plea bargaining (equity, efficiency, necessity) and gives conclusions. Also gives a definition and explanation of plea bargaining.*

Cahill, Michael T, and Robinson, Paul H. Law Without Justice, How Criminal Law Doesn't Give People What They Are Due. *In this book, the two authors discuss many pitfalls that are present within the US justice system. It devotes several chapters to arguing how both plea bargaining and leniency in exchange for testimony violates the principle of desert and how they are antithetical to justice. The book also discusses how prosecutors and judges abuse these practices, resulting in the harm of society.*

"The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope." *The Yale Law Journal*, Vol. 72, No. 8. (Jul., 1963), pp. 1568-1612.

Halberstam, Malvina. "Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process." *The Journal of Criminal Law and Criminology* Vol. 73, No. 1. (Spring, 1982), pp. 1-49.

Israel, Jerold H. King, Nancy J, LaFave, Wayne R. Principles Of Criminal Procedure: Post Investigation Concise Hornbook**.** *This book discusses the principles of criminal law that underpin the US criminal justice system. The book defends the practice of plea bargaining by explaining how the system is reliant upon it. Without plea bargaining, the justice system would not have enough resources to pursue very many criminals.*

Langbein, John H. "Land without Plea Bargaining: How the Germans Do It" *Michigan Law Review*, Vol. 78, No. 2. (Dec., 1979), pp. 204-225.

Madinger, John. Confidential Informant: Law Enforcements Most Valuable Tool. CRC Press, 1999. *The book discussed how many criminals are caught because of the practice of trading years off of a sentence in exchange for information, and how the said practice protects society.*

Marcowitz, Joseph C. Plea Bargaining: An Annotated Bibliography. American Judicature Society, 1978. *Provides dozens of books, studies, and reports that concern examples of plea bargaining.*

Miller, Herbert S, et. al. Plea Bargaining in the United States. National Institute of Law Enforcement and Criminal Justice; Washington, D.C: 1978. *Comprehensive report on plea bargaining with statistics, views from both sides and definitions.*

Purpura, Phillip. Criminal Justice: An Introduction. *This book defends the practice of plea bargaining on the basis that the criminal makes up for the reduction in sentencing by saving society the appropriation of resources because society does not have to arrange a jury trial.*

Standen, Jeffrey. "Plea Bargaining in the Shadow of the Guidelines." *California Law Review*, Vol. 81, No. 6. (Dec., 1993), pp. 1471-1538.

Vogel, Mary E. Plea Bargaining, the Courts, and the Making of Political Authority. Oxford University Press, 2007. *Vogel posits that the courts' usage of these practices has allowed for the state to dominate the judicial system in an unjust fashion.*

Welch, Michael. Corrections: A Critical Approach McGraw-Hill, 2003. *This book discusses the pitfalls of the US criminal justice system. It devotes a chapter to discussing the wide-spread practice of plea bargaining. Welch refutes the common argument that the practice of which the resolution is discussing helps round up criminals by arguing that many people around organized crime commit criminal acts, assuming that they can have their sentence commuted by ratting out their friends.*

Wolfson, Warren D. "Immunity: How It Works in Real Life" *The Journal of Criminal Law and Criminology (1973-)*, Vol. 67, No. 2. (Jun., 1976), pp. 167-180.

LESSON 1: TOPIC ANALYSIS

In the United States, plea bargaining in exchange for testimony is unjust.

Pre-Lesson Assignment—Distribute one-page topic introduction.

To get started, students need to have a general understanding of the resolution, which is why the basic reading on the topic is so important for starters. Once attaining a basic understanding of the resolution, consider using the following questions as discussion starters, essay topics or free-writing jumping-off points. The goal of this activity is to give students a starting point for their thought-process, but also to take topic analysis very slowly so that students can pay attention to the more important questions as they go and ensure understanding of the more complex issues.

What is plea bargaining?

How does plea bargaining function in the United States?

What are the different uses for plea bargaining in the judicial system?

Is plea bargaining used in any other places or any other circumstances than in the judicial system?

What types of things are pleas used for in the judicial system?

How does the judicial system elicit testimony from those with information vital to a trial?

What is justice?

What are different interpretations of justice?

How can justice be determined (how do we know when it's been achieved)?

What theories of justice are pertinent to the United States judicial system?

How can justice be attained in the United States judicial system?

How much of what is considered just or unjust depends on the circumstances?

Is justice based on outcome?

Is justice based on the process used to reach the outcome?

How can plea bargaining contribute to or detract from the outcome of the process?

How can plea bargaining contribute to or detract from the process as a whole?

Is the use of plea bargaining a just process or way to reach a desirable outcome?

LESSON 2: TOPIC READING

In the United States, plea bargaining in exchange for testimony is unjust.

Pre-Lesson Assignment—Distribute two or three articles for students to read and mark up.

1. **Plea Bargain** (Dirk Olin) can be accessed at:
   http://www.truthinjustice.org/bargaining/htm
2. **The Case Against Plea Bargaining** (Timothy Lynch) can be accessed at:
   http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf
3. **In Defense of Plea Bargaining** (Timothy Sandefur) can be accessed at:
   http://www.cato.org/pubs/regulation/regv26n3/v26n3-8.pdf

Olin writes about the history of the plea bargain in the United States, giving a number of examples. To begin with, however, he focuses on the absence of Constitutional protection for such a procedure:

> "The Bill of Rights makes no mention of the practice when establishing the fair-trial principle in the Sixth Amendment, but the constitutionality of plea bargaining has been repeatedly upheld, and the bargain's basic dynamic is well known to viewers of pulp TV. In fact, says Albert Alschuler, a University of Chicago law professor, roughly 90 percent of convictions occur when the defendant waives the right to trial and pleads guilty. And most of these pleas involve a deal that reduces punishment."

Considering what he says about the plea bargain in America:

- Where do you think plea bargaining first came from if it wasn't guaranteed in the Constitution?
- If a plea bargain means that a defendant actually avoids going to trial for a crime, how can it be said to be protected by the 6th Amendment?
- Why do only 90% of convictions come from a defendant pleading guilty? What does that say about the efficacy of our judicial system?
- Do all plea bargains mean a reduced penalty?

He continues to discuss why it isn't true that plea bargaining produces a reduced sentence and is actually not in the legal interests of the accused:

> "…[Hypothetically], there are 100 cases a year; the D.A. has a budget of $100,000. With only $1,000 to spend investigating and prosecuting each case, half the defendants will be acquitted. But if the D.A. can get 90 defendants to cop pleas, he can concentrate his resources on the 10 who refuse, spend $10,000 on each case and get a conviction rate of 90%. A defendant faces a 90% chance of conviction if he goes to trial and makes his decision accordingly. He will reject any proposed deal that is worse for him than a 90% chance of conviction but may well accept one that is less attractive than a 50% chance of conviction, leaving him worse off than he would be better off if none of them accepted the D.A.'s offer, but each is better off accepting."

In the United States, given the limited resources of the court system, D.A.s would be better off with plea bargains; however, if there is a smaller conviction rate when there aren't enough resources to investigate circumstances, it seems not in the best interest of the accused.

- Does plea bargaining cause more problems than it solves?
- Is it possible to prevent some of the acquittals which happen without a plea?
- How ought decisions be made in terms of who should and shouldn't be offered a plea bargain?
- How much power is given to the defendant in criminal cases when a plea bargain is offered?
- Why should the accused have any say about his/her penalty or the process by which that decision is reached?

Timothy Lynch writes about governmental misuse of plea bargaining to save the time of the court:

> "There is no doubt that government officials deliberately use their power to pressure people who have been accused of crime, and who are presumed innocent, to confess their guilt and waive their right to a formal trial. We know this to be true because prosecutors freely admit that this is what they do."

Consider what he says about the right to trial.

- What does the Fifth Amendment guarantee to those accused of a crime?
- What does the Sixth Amendment guarantee to those accused of a crime?
- If someone has the right to a speedy, public trial by jury, how could plea bargaining compromise this right?
- Do you think that the government has any specific obligation to avoid a practice like plea bargaining if it would encourage an accused individual to give up his/her right to a fair trial? Why or why not?

Lynch gives an example of a "watershed precedent":

> "Paul Lewis Hayes, for example, was indicted for attempting to pass a forged check in the amount of $88.30, an offense that was punishable by a prison term of two to 10 years. The prosecutor offered to recommend a sentence of five years if Hayes would waive his right to trial and plead guilty to the charge. The prosecutor also made it clear to Hayes that if he did not plead guilty and 'save the court the inconvenience and necessity of a trial,' the state would seek a new indictment from a grand jury under Kentucky's 'Habitual Crime Act.' Under the provisions of that statute, Hayes would face a mandatory sentence of life imprisonment because of his prior criminal record. Despite the enormous pressure exerted upon him by the state, Hayes insisted on his right to jury trial. He was subsequently convicted and then sentenced to life imprisonment."

- What do you think should have happened to Hayes? Why?
- Should he and his attorney appeal the decision? Why or why not?
- Is this a legitimate use of plea bargaining?

The appeal process occurred like this:

> "On appeal, Hayes argued that the prosecutor violated the Constitution by threatening to punish him for simply invoking his right to a trial. In response, the government freely admitted that the only reason a new indictment was filed against Hayes was to deter him from exercising that right. Because the indictment was supported by the evidence, the government maintained that the prosecutor had done nothing improper. The case ultimately reached the U.S. Supreme Court for a resolution. In a landmark 5–4 ruling, *Bordenkircher v. Hayes*, the Court approved the prosecutor's handling of the case and upheld the draconian sentence of life imprisonment. Because the 1978 case is considered to be the watershed precedent for plea bargaining, it deserves careful attention. The *Hayes* ruling acknowledged that it would be "patently unconstitutional" for any agent of the government "to pursue a course of action whose objective is to penalize a person's reliance on his legal rights." The Court, however, declined to overturn Hayes's sentence because he could have completely avoided the risk of life imprisonment by admitting his guilt and accepting a prison term of five years. The constitutional rationale for plea bargaining is that there is 'no element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.'"

As a result of not using plea bargaining, Hayes will spend the rest of his life in prison.

- Was the Supreme Court correct in its ruling? Why or why not?
- Is this a problem with plea bargaining or another facet of the judicial system?
- Is plea bargaining supposed to be a tool for the accused, the state or both?
- In what ways was this case consistent with justice? Injustice?

<u>Follow-Up</u>—Encourage students to read and follow similar questions for at least two other articles suggested on the readings page and to do their own research on the topic.

LESSON 3: TOPIC BRAINSTORMING

In the United States, plea bargaining in exchange for testimony is unjust.

Pre-Lesson Assignment—Ask students to come up with 5 reasons why the resolution is true and 5 reasons why the resolution is not true.

First Step: Get out and record *every* idea

At this point in the topic analysis process, students have probably come to several of their own conclusions about both sides and have some questions which need to be answered either from their reading or from their own interpretation and understanding. Try using the first part of the class for a "brain dump," or just listing as many arguments as possible, before continuing on beyond the initial brainstorming session.

Second Step: Plea bargaining as an action

Most students will look at the topic and come in with an idea of it being "plea bargaining good" versus "plea bargaining bad." This is a good place to start. Plea bargaining, like most actions or procedures of the judicial system (or society in general), may be analyzed in three terms: the intent of the action, the action itself and the supposed outcome of the action.

- First, look at what prosecutors or defense attorneys might ***intend*** to accomplish through plea bargaining.
- Second, look at what the action itself is. Can you evaluate the procedural merit of plea bargaining without considering what the intent or outcome is? It can be considered consistent with the judicial system because it is presently allowed in courts or, inconsistent because it gives attorneys access to witnesses and gives witnesses power they haven't previously had over the system and those involved.
- Finally, look at consequences of plea bargaining. What do attorneys want to happen when they engage in this practice? What are some good things which might happen as a result? What are some bad things which might happen as a result?

Things to consider also include if plea bargaining is relevant on a level separate from the judicial system (like personally, civilly, etc.), if it is possible to evaluate an action's injustice if we don't know the consequences or in what way we can evaluate the justice/injustice of the intent of the action at all, and if the same harms and benefits may apply to other circumstances.

Third Step: The rest of the resolution

Break down the additional parts of the resolution to see how they function with plea bargaining. The resolution doesn't just ask if plea bargaining is just or unjust (or even good or bad). It also asks the debaters to discuss if plea bargaining being used ***specifically in exchange for testimony*** is just or unjust. It isn't just an issue of using the plea to get information about the whereabouts of a victim or information on how a crime was committed for the police to know. The question is specific to getting testimony, which means that the individual with the information will be actively contributing to the process in some way.

- Can something be "just" and not necessarily "good?" How?
- Can something be "unjust" but not necessarily "bad?" How?
- Is using plea bargaining in exchange for testimony any different than simply using plea bargaining for information or details which do not require testimony?

- What are the different types of plea bargaining and how do they influence the just or unjust nature of getting testimony?

Fourth Step: Alternatives

Since this resolution is specific to evaluating one particular action of the judicial system and one particular purpose of that action, it is unnecessary to discuss alternatives initially. After these initial discussions, however, if it is determined that it would be beneficial to consider an alternative to reaching the same or similar outcome which does not cause harm or causes comparatively different/less harm, ought that alternative be used and the previous option be judged "unjust?"

Fifth Step: Justice

This is a pretty complicated concept and there are a lot of different definitions which attempt to describe it, but are not necessarily specific enough to make the debate more clear. Here are some suggested *types* of justice to consider as you start the topic analysis process:

- Distributive
- Retributive
- Procedural
- Restorative
- Contractual (*see Social Contract*)
- Commutative
- Social

As you are reading about the different types of justice, consider not only which sounds to be the most probable or believable for the United States, but which makes the most sense in terms of plea bargaining and the opposite sides of the resolution. For example, procedural justice might work as a good interpretation on the affirmative because the affirmative can then demonstrate that plea bargaining violates sound procedure by functioning outside of the oversight of society; however, the negative may want to argue more in terms of restorative justice, which would demonstrate that a better outcome and restoration of near-original conditions is sufficient to demonstrate justice through plea bargaining.

Best of luck to you as you continue researching and debating this topic!