

Plea bargaining and mass incarceration

The United States incarcerates more people than any other country in the world. 'Tough on crime' legislation and the 'war on drugs' has led to criminal courts having too many cases to adjudicate. Plea bargaining has become a convenient mechanism for the mass adjudication of cases.

- The US has 5% of the world's population but 25% of the world's prison population
- 44% of Americans have a criminal record
- 1 in 12 Americans, including 1 in 3 black men, have a felony conviction

The United States now resolves almost all criminal cases through plea bargaining - **more than 97%** at the federal level and nearly as high in most states. The ease of obtaining convictions through plea bargaining has enabled legislatures to turn to criminal prosecution as a solution for social challenges.

Plea bargaining as both a facilitator and driver of mass incarceration is historically overlooked as a key element to understanding how we created a system of mass incarceration, and how we might move away from over-reliance on police, prosecution, and punishment to address social challenges,

How does plea bargaining fuel mass incarceration?

The United States, through political choices at federal, state and local levels, has created a system in which social ills are mediated through criminal prosecution.

Instead of investing resources in community needs like housing, education, health care, and conflict resolution, state, local and federal legislators have chosen to over-invest in law enforcement and prisons at the expense of public welfare and safety.

Undesirable behavior that could have been resolved through social welfare and adequate regulation has instead been criminalized, causing a drastic increase in the number of cases the criminal legal system must now adjudicate.

Earlier conceptions of plea bargaining saw it as an individualized decision on the part of defendants to take responsibility. However, it has now morphed into a conveyor-belt system, enabling huge volumes of criminal convictions with little due process and coercive prosecution practices. Defendants are forced to plead guilty in order to avoid disproportionately harsh punishment and lengthy pre-trial detention in dangerous conditions.

If every individual charged with a crime was given a constitutional trial, the numbers of prosecutions and convictions would necessarily reduce. This would require prosecutors to adequately filter cases, establish sufficient evidence of guilt, and provide true judicial and community oversight over the actions of state authorities.

Plea bargaining is the vehicle through which mass incarceration occurs

How could plea bargaining reform contribute to mass incarceration reform?

The restoration of due process to our criminal legal system is an essential part of the collective effort to reduce mass incarceration. It could slow the inexorable rush to mass convictions and ensure that a smaller number of investigations and prosecutions are undertaken with better accuracy, oversight, fairness, and public interest.

- Adequate access to a lawyer and to sufficient information about the case, evidence and process would mean that defendants were more able to take a knowing and voluntary decision about whether or not to plead guilty, and may be less likely to plead guilty in unworthy cases. Requiring fulsome discovery of evidence prior to a guilty plea would improve the quality of investigations and would decrease the likelihood of wrongful convictions.
- Prosecutors would not be able to “stack” charges and enhancements in order to coerce guilty pleas to lower (and usually more reasonable) charges – a harmful and common practice which tends to exacerbate disproportionate punishment. They would have to carefully filter cases to ensure there is sufficient evidence, lawful investigations and public interest earlier in the process, making sure that cases that are prosecuted are worthy of the state interest and do not ratify poor, abusive or excessive police action and legislative overreach.

Making plea bargaining fairer

Systematic criminal legal reforms that would make plea bargaining fairer include:

- The abolition of cash bail and excessive pre-trial detention
- The abolition of mandatory minimum and other harsh sentences
- The decriminalization of victimless misdemeanors.

Learn more: fairtrials.org/plea-bargaining