Introduction to Symposium on Pleas

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Guilty pleas and plea bargaining dominate the criminal justice system. When the U.S. Supreme Court affirmed the constitutionality of plea bargaining in 1971,[1] fewer than 20% of convictions were the result of a trial.[2] Today—a half century later—that number has shrunk to less than 3%,[3] leading the modern Supreme Court to recognize "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[4]

Although guilty pleas and plea bargaining dominate the criminal justice system, they do not dominate the academic legal literature. Law reviews publish far more scholarship about searches and seizures[5] and about juries[6] than they do scholarship about guilty pleas and plea bargaining.[7] This symposium on pleas aims to help remedy that shortcoming by collecting new scholarship by well-respected law professors and practitioners on the issue.

The symposium begins with an article by Professor Thea Johnson, which helps to explain why plea bargaining continues to thrive despite its many detractors. She digs beneath the criticism of modern plea bargaining to identify an unappreciated ambivalence about trials. Although trials provide much better process for defendants than plea bargaining, they often produce far worse outcomes in the form of harsher sentences and unfair collateral consequences. Those who argue against plea bargaining know that a return to trials will mean far more procedural protections, but those protections come at the expense of the ability to mitigate severe sentences

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[1] *See* Santobello v. New York, 404 U.S. 257 (1971).

[2] *See* Santobello, 404 U.S. at 264 n.1 (Douglas J., concurring) ("In 1964, guilty pleas accounted for 95.5% of all criminal convictions in trial courts of general jurisdiction in New York. In 1965, the figure for California was 74.0%.") (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967)); Brady v. United States, 397 U.S. 742, 752 & n.10 (1970) (observing that "at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty" and further stating that "[i]t has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea") (citing D. NEWMAN, CONVICTION, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 and n. 1 (1966)).

[3] CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 24 (2021)

[4] Lafler v. Cooper, 566 U.S. 156, 170 (2012).

[5] A search in the Westlaw database of law reviews for "fourth amendment" in the title returned more than 1,000 articles published since 2010.

[6] A search in the Westlaw database of law reviews for jury or juries in the title returned more than 1,400 articles published since 2010.

[7] A search in the Westlaw database of law reviews for (guilty /2 plea!) or (plea /2 bargain!) in the title returned fewer than 350 articles published since 2010.

and other consequences of convictions. This tradeoff between better process and better outcomes helps to explain the resilience of plea bargaining despite its many flaws.

Clark Neily and Jay Schweikert offer a proposal to improve trials which could address the worse outcomes that Professor Johnson identifies. Specifically, they proposed to inform jurors about their right to nullify, about the pressure on defendants to plead guilty, and the consequences of conviction. Surprisingly, some states have laws that would treat efforts to educate jurors about these matters as illegal jury tampering. Mr. Neily and Mr. Schweikert make the case, grounded in the history of the American jury and the protections of the First Amendment, that a public education campaign that advised jurors of this important information would be constitutionally protected. They argue that, if jurors possess this information, it would change the balance of power in plea negotiations, making trials more attractive than they are now. Fully informed jurors would be more likely to acquit, reducing the leverage that prosecutors have to pressure defendants into pleading guilty.

Professor William Berry takes on the constitutionality of plea bargaining itself in his article about plea bargaining in cases involving the threat of capital punishment. Although courts have often placed limits on the death penalty that they do not impose on other forms of punishment, they continue treat the threat of capital punishment no different than any other leverage that prosecutors can use to secure a guilty plea. Professor Berry constructs a constitutional argument that the confluence of Fifth, Sixth, and Eighth Amendment principles ought to prohibit plea bargain agreements in capital cases—especially those the result in sentences of life-without-parole.

Professor Will Ortman's contribution also addresses the prohibition of plea bargaining. He gives a thorough historical account of practical and intellectual efforts to abolish plea bargaining. While the abolition of plea bargaining might seem unthinkable today, during the 1970s, a surprising number of judges, prosecutors, academics, and even a Nixon-administration crime commission tried to outlaw the practice. Those efforts obviously failed, but the lessons that Professor Ortman draws from those failed efforts provide important lessons for modern critics of plea bargaining.

In the final article of the symposium, Jared Keenan gives us a glimpse into one modern effort to curb—or at least regulate—plea bargaining. Specifically, he describes the assembly line of plea bargains in the Early Disposition Court system of Maricopa County, Arizona. (Maricopa is Arizona's most populous county, which includes the city of Phoenix.) The Maricopa County prosecutor's office uses the Early Disposition Court system not only to pressure defendants into pleading guilty, but also into waiving a preliminary hearing and their right to discovery—both of which are guaranteed to them under state law. Mr. Keenan is one of a team of lawyers who has filed a lawsuit challenging the constitutionality of this court system.

The modern American criminal justice system is so unfair that some people insist on calling it "the criminal legal system" as an acknowledgment that the system

dispense law, not justice. Plea bargaining and the overwhelming pressure to plead guilty are a major source of that unfairness. By better understanding the shortcomings of trials, the constitutional arguments against plea bargaining, and both the historic and current efforts to prevent or regulate plea bargaining, this symposium aims to provide more information about the injustices of modern plea bargaining in the hope that the system could be reformed.