Efficient *or Unjust?*

The vast majority of state and federal cases end in plea bargains. The practice has eased backlogs and may benefit some defendants — but the trade-offs, some say, are too steep. Is there a better way?

Scholars estimate that at least 90 percent of state and federal cases are resolved by plea bargain.[1] The vast and persistent use of pleas to decide huge case volumes has made the practice an engine of efficiency in the courts — as well as fodder for constitutional critique. Even a former U.S. president has opined that "[i]n many courts, plea bargaining serves the convenience of the judge and lawyers, not the ends of justice, because the courts lack the time to give everyone a fair trial."[2]

Does plea bargaining indeed serve the "ends of justice"? If not, given the reality of current caseloads, what apparatus might take its place? These questions are well-worn but enduring for a reason, and a group of leading scholars and practitioners are invigorating the debate with new perspectives. In fall 2022, *Judicature* hosted a roundtable discussion on plea bargaining that included **JEFFREY BELLIN**, professor at William & Mary Law School and author of *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How It Can Recover* (Cambridge University Press, 2023); **ERIN BLONDEL**, an associate research scholar at Columbia Law School and former assistant U.S. attorney; **JOHN FLYNN**, president of the National District Attorneys Association and current D.A. of Erie County, N.Y.; **ELANA FOGEL**, director of the Criminal Defense Clinic at Duke Law; **ANJELICA HENDRICKS**, a research fellow at the Quattrone Center at the University of Pennsylvania Carey Law School; and **CARISSA BYRNE HESSICK**, professor at the University of North Carolina School of Law and author of *Punishment Without Trial: Why Plea Bargaining Is a Bad Deal* (Harry N. Abrams, 2021). A lightly edited version of their conversation follows.

How would you describe the current state of our plea-bargaining system?

HENDRICKS: If I could choose two words, I would say "judicial deprivation." I believe the process of plea bargaining has gotten to the era in which individuals are waiving so many of their rights that we should be questioning whether the pleas are knowing and voluntary. I know we usually discuss plea bargaining as an aspect of "judicial efficiency," but I would argue that now we are headed toward the "judicial deprivation" era.

BELLIN: This is a big question since there's so much variation. But one insight I might add is that the questions, "Is plea bargaining good or bad?" ▸

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and "How well is it working?" are the wrong questions. The real question is "compared to what?" You could say, "Well, plea bargaining is really awful." And I think a lot of people would agree with that. Nobody really endorses plea bargaining as a way to resolve criminal cases, but, in a lot of scenarios, it's better than going to trial, even from the defendant's perspective. I have a new book about mass incarceration [*Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How It Can Recover*] that illustrates that there are a lot of problems with the system. Plea bargaining often reflects those problems, and reacts to them, but that doesn't mean it causes them.

FLYNN: Due to COVID, plea bargaining has evolved from an "efficiency," as Anjelica said, into a "necessity." Given the backlog that we were seeing across the country in criminal cases, if we did not have plea bargaining, the system would literally shut down. That's how bad it's gotten. I hate to blame everything on COVID. I think it's intellectually lazy to do that. But when it comes to plea bargaining in this country — especially what I'm seeing here in my district attorney's office in Buffalo, N.Y. — it's a necessity right now. Once we come out of the backlog and get back to pre-COVID, then I would call it an efficiency.

HESSICK: When I talk about plea bargaining, the thing that I emphasize is the way that it has overwhelmed the system. It is the default. But while plea bargaining is the default in practice, it is not the default in doctrine. That is something that our system has really failed to grapple with.

Plea bargaining is how we resolve almost all cases: The percentage of cases resolved by plea bargaining keeps getting larger and larger and larger — we're down to zero trials in some areas in a given year. But the legal rules that we have regarding how cases get disposed of don't address plea bargaining at all. So not only does plea bargaining overwhelm the system, but it does so in a lawless or a near-lawless fashion.

The reality is that almost all cases resolve short of trial, but the court procedures and pretrial procedures and practices still often treat each case as if it's going to eventually be tested at trial. That mismatch creates justice problems.

—ELANA FOGEL

FOGEL: Plea bargaining defines the system and, in that immensity, also distorts the system as we envision it and as our legal standards consider it. The reality is that almost all cases resolve short of trial, but the court procedures and pretrial procedures and practices still often treat each case as if it's going to eventually be tested at trial. That mismatch creates justice problems.

BLONDEL: I think the word "efficiency" can sometimes give a misleading view of what's going on. The word sounds kind of lazy and dismissive of the serious rights that somebody is giving up when they plead guilty. You shouldn't give up your constitutional rights just because it's easy on the government. That sounds wrong.

But efficiency is also standing for something more substantial, which is: How can you operate an enormous public safety system in a way that moves things along for the benefit of everybody, including criminal defendants and people caught up in the system? And what would it take — especially given the number of procedural rights that people have, which have increased substantially over time, both pre- and post-conviction — to conduct more trials? Resolving many more cases by trial might actually create other problems within the system itself, such as doubling or tripling the number of police, and that might make us all pretty uncomfortable.

Conventional critiques cite the "trial penalty" — or the disparity between a sentence offered pretrial and a sentence handed down after trial — as the primary reason that defendants engage in plea bargaining. Is this a fair focus?

HESSICK: Yes. The trial penalty is a big reason why defendants plead guilty. But I think defendants also plead guilty because people expect them to plead guilty. If you have been charged with a crime, and you go to your lawyer and say, "What do I do?" your lawyer is probably not going to tell you to go to trial. When the case advances, you may even hear from the judge that you ought to plead guilty. That actually happened with one of the January 6 defendants. When he showed up in court, the judge commended him for

pleading guilty and told him that that was the right decision.

Other things probably motivate a guilty plea as well. But it's worth noting how infrequently people do what's not expected of them. We are all creatures of social convention, and when you show up in a system and the system says "this is what happens, defendants plead guilty," you're pretty likely to go along with it.

BELLIN: Is the trial penalty a fair focus? In some ways. I noted in a recent article that defendants generally don't plead guilty because they want to be punished.[3] They plead guilty because they see it as better than the alternative. And the alternative is what their counsel advises them is likely to happen if they go to trial. That alternative sentence is typically higher than what the plea deal is — that's the trial penalty.

But in other ways, the trial penalty might not be the right focus because in any system that gives the defendants some agency in how to react to the charge, there's going to end up being a trial penalty. Even in jurisdictions that got rid of plea bargaining, there was still a trial penalty for people who just pled guilty to whatever they were charged with versus those who went to trial.

I just listened to a book about the Salem witch trials.[4] As it turned out, many people accused of witchcraft in the Salem witch trials confessed even though they couldn't have been guilty. But the people who confessed were spared while the accused who didn't confess were executed. So what's going on? In the Salem witch trials, of course, there wasn't any kind of plea bargaining system. There weren't even prosecutors. Confessing was just a tactic — to throw yourself on the mercy of the court, to go along, like Carissa's saying, and plead guilty. And that is always a possibility.

If you are accused of a crime, you can always cooperate with the police or not. You can admit that you're guilty or not. And as long as that option is there, people are going to admit that they're guilty when they see an advantage. And that will result in some kind of differential that becomes a trial penalty for those who fight the charges and are convicted. And, finally, if you got rid of the trial penalty, you'd also get rid of the plea discount. Practicing attorneys are not as critical of plea bargaining as academics are. And part of it is because a lot of defense attorneys have the hard job of convincing their client to plead guilty because they know that's a much better deal than if they go to trial. The trial penalty is the flip side of the plea discount, and that makes critiquing the trial penalty complicated. So while the trial penalty is important, I'm not sure it's what's wrong with plea bargaining.

FLYNN: I think that there is a definite fairness problem with the disparity here. There's no doubt about that. But again, I go back to my earlier point: Where it's a necessity or an efficiency, it's a reality here. If there was no incentive for a defendant to plea down and take the offer, the system would literally shut down to a certain extent. Now, again, that doesn't make it right in a perfect world, but, unfortunately, we don't live in a perfect world. Erin mentioned that if we want to hire more police, prosecutors, judges, and public defenders, we may be able to get to that perfect world where everything goes to trial or goes to a final disposition of some sort. But that's not where we are now.

I actually used the disparity to an advantage of a defendant this morning. This defendant was just found with a gun — a pure gun possession case. He didn't shoot the gun. He didn't use the gun. He just got caught with a gun. And because he had two priors, he was looking at 15 to life here in New York under our persistent felony offender rule, which enhances the sentence on the third offense. And obviously I thought that 15 to life for just a simple gun possession case was ridiculous, so I actually offered a two- or three-step reduction just to make the sentence fair. Again, a lot of times the plea bargain works in the defendant's favor. Again, that's assuming you get a good D.A. like me.

HENDRICKS: I believe the trial penalty is a factor, but as a former public defender here in Philadelphia, I believe a larger factor is the individual's custody status. I don't think we can discuss plea bargaining without discussing bail and pretrial detention. Many incarcerated individuals plea when the negotiations include release or release within the foreseeable future, rather than waiting for a trial that may take months or even years to come about, especially if they have some sort of probation detainer that precludes them from being released pretrial.

We have a lot of data that show that the plea bargaining process depends greatly on custody status. I'm going to lean on my colleagues at Penn, Paul Heaton and Sandra Mayson, as well as Megan Stevenson at UVA. They looked into this issue in their article titled "The Downstream Consequences of Misdemeanor Pretrial Detention,"[5] and found that detained defendants are 25 percent more likely than similarly situated defendants to plead guilty. And so their examination alone puts into doubt the argument that the plea bargaining process is voluntary.

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FLYNN: I agree — but, like you said, that only applies to misdemeanor cases. And that's been addressed in New York with bail reform, which eliminated money bail for most misdemeanors. So that problem has pretty much been eliminated totally here, and I would recommend that other states consider that.

FOGEL: The expectations around plea bargaining from an individual defendant's perspective are largely set by how the judicial process unfolds from the very beginning: how you're detained, what sort of bail you receive, whether you're held with or without bail, the pretrial discovery that you witness or lack thereof that you see coming your way, the judicial rulings on your pretrial motions (if you're able to get to that point), the delays that you're exposed to.

Like Anjelica said, in a misdemeanor context, you're often getting a time-served offer just because you've been waiting for any real process to occur. By the time you get a 60-day offer on a low-level case, you've been in that long already. I think those expectations that Carissa mentioned do definitely play a part in it, but they don't exist on their own. They're created by how we display what we view as justice these days or how the court comports itself and treats individual defendants.

To John's point, I just wanted to push back a little bit on this notion of efficiency and that the only solution is more police, more public defenders, more prosecutors. I think the flip side of that is an acknowledgement that we are over-policing and over-prosecuting, and part of the reason there is so much backlog and this feeling that, "Well, we couldn't possibly give everybody who wanted a trial a trial," is that we are expanding the impact of criminal justice in more places than we necessarily need to. Another solution besides growing the system is exercising prosecutorial discretion, charge discretion, and shrinking the system.

What would an alternative to a plea bargaining culture look like? What would the trade-offs be, and would it actually address the objections critics have? What evidence exists concerning alternatives to plea bargaining?

HESSICK: The solutions piece of this is really tricky, because it's not just plea bargaining that affects the criminal justice system. To reform that system, we would have to revisit the laws that we've passed, sometimes very explicitly with the knowledge that those laws would be used in plea bargaining, rather than applied as written.

I did a study of state legislatures and sometimes came across arguments that certain statutes, like the one that John was mentioning, were written too broadly, and then people testifying in front of the legislature would say it's OK to vote for those laws because prosecutors have discretion in plea bargaining. So we've written our laws in a way to facilitate plea bargaining, and if we take plea bargaining away, we're stuck with these really harsh laws. Also, as Jeff was mentioning, the trial penalty is not limited to plea bargaining. Judges were imposing the trial penalty long before prosecutors got involved. Trial judges were imposing longer sentences on defendants who went to trial before prosecutors were offering plea agreements, just because the judges didn't want the hassle of a trial. It's shocking, really, that the trial penalty originated with judges, because you would think if anyone was opposed to punishing people for the exercise of their constitutional rights, it would be members of the judiciary.

Does that mean it's impossible to fix the system? Of course not. Are there alternatives? Sure, there are alternatives. But those alternatives have their own problems.

For example, Stephen Schulhofer published an article in the *Harvard Law Review* about court practices in Philadelphia in the early 1980s.[6] The custom in the criminal courts there was not one of plea bargaining — in part because the local D.A. wasn't that interested in it. Instead, defendants were pressured into accepting a bench trial rather than a jury trial. The sentences given out after the bench trial were comparable to those for people who pleaded guilty, but not those who opted for a jury. If you insisted on a jury and got convicted, the judges still gave you the trial penalty.

And what did Schulhofer see? He saw 44 percent of defendants continue to plead guilty, but more than 50 percent proceeded to trial. Contrast that to where we are now, where we have only 2 percent of defendants proceeding to trial. The trials weren't particularly long, but they were still trials. They weren't "slowly pleading guilty" as is the conventional wisdom; you saw some people getting acquitted.

The Philadelphia system had its own problems. It cut juries out of the system by punishing defendants who demanded a trial by jury. That seems unconstitutional, though not significantly more than the plea bargain system we see elsewhere. But I mention it because if what we really care about is efficiency, there are other options besides plea bargaining — options where people are not negotiating behind closed doors and from completely unequal positions of power.

HENDRICKS: Philadelphia still does that currently. It is the practice I was trained in. Our clients in Philadelphia are entitled to what's called a de novo trial, where you do your bench trial in front of a judge. These are for charges where it's possible for you to receive up to five years in jail, which can include some felonies as well. If you are acquitted, then that is the end of the case. If you are found guilty, you could petition for a trial de novo in the court of common pleas. All misdemeanor cases have this flexibility unless the prosecutor demands a jury trial.

For F1 and F2 felonies, if a lawyer is advising their client to waive their right to a jury trial, it may be because the lawyer strongly believes the waiver judge will rule favorably. If you elect to do a jury trial, the judge assigned to the trial may not be a favorable judge. However, for misdemeanors, a waiver trial does not relinquish a defendant's right to a jury trial — if they are found guilty after a waiver trial, they maintain the right to a de novo appeal. Because of this tiered system, Philadelphia maintains a larger trial rate compared to other jurisdictions.

BELLIN: John mentioned that if we didn't have plea bargaining the system would crash. At the academic conferences I go to, people would celebrate that, saying, "That sounds great. That would be wonderful." And the other thing that people at those conferences would say is, "Well, why can't you solve the problem, as a prosecutor, by just reducing the case volume?" What's the answer to that? Why isn't the answer that the prosecutor, who has some control over the caseloads, can just reduce the amount of cases, and focus on the important ones, and preserve time and resources that way? What do you think of that argument, John?

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FLYNN: Well, that does happen to a certain extent, Jeff. My office doesn't actually charge anyone. Quite frankly, most D.A.s across the country are not in the business of charging. The police agencies in our jurisdiction file the charges and we get them the next morning. Now, we could dismiss them the next morning. But most D.A.s in New York are involved in pretty much all the filing and charging decisions. That's not the case in Buffalo and it's not the case, quite frankly, in the majority of offices across the country.

I also think you have to look at this in two different worlds: There's misdemeanor world and there's felony world, and obviously you can't do the same in both worlds. In misdemeanor world, we can get rid of a lot of cases and keep this system from crashing. There are diversion programs — that helps tremendously. The legalization of marijuana cuts the caseload. So there are things we can do to get rid of cases on the front end or even after a few weeks in the system in misdemeanor world. It's much more difficult to do that in felony world. I don't see many ways to solve that, quite frankly, without building the system up — and putting more resources toward taking them all to trial.

BLONDEL: John is right about charging — in my state, North Carolina, the police usually charge. By the time an A.D.A looks at the case, the train has left the station and it's a question of what to do with it.

One statistic that I think gets overlooked in plea negotiation discussions is that roughly a quarter of felonies nationwide are dismissed outright.[7] So we're talking about the 75 percent that a prosecutor has now looked at and determined for whatever reason is worth going forward.

The challenge is that the system is often largely reactive, even at the ▸

policing level. If there's a homicide or a 911 call about a shooting, somebody has to respond. It doesn't mean that the system functions well all the time. It doesn't. There are a lot of problems with it and people have raised a lot of very good critiques of it, and over-policing and over-incarceration have some very serious consequences that end up undermining public safety. But the reality is that, when an incident occurs, the justice system cannot ignore the situation completely. Somebody has to respond quickly, and responders often are acting on incomplete information.

But at some point, the system needs to shift from quickly reacting to thoughtfully judging the entire situation, including the offender. It is important to have, somewhere in the system, the ability to make arguments about the underlying circumstance of this person's life or why the person did what they did — more sentencing-type arguments, which you can't really make in front of a jury these days under our current legal structure. Right now, these are things that become an integral part of plea negotiations.

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As a prosecutor, one of the things I always wanted to hear was what the defense attorney had to tell me, because I don't get a chance to talk to the defendant. I can't. I'm ethically prohibited from doing it, but I learn a lot from their attorneys. I don't get to know defendants as people, necessarily, in an investigation in the way you do from somebody who's their advocate. It doesn't mean we always agreed at the end of the day, but I considered that an important piece of information before we ever talked about a plea resolution.

Now, you could put that "give" somewhere else. You could have jury sentencing be the place where you make these sorts of discretionary calls, and that is what some jurisdictions do. But the criminal process system is a judgment system. We are making a judgment on a person and what they have done, and that's a serious process. And I think what makes plea bargaining so troubling is how much of that ends up falling to the prosecutor versus other outside observers, juries, or judges, and maybe what it is we need to bake in more.

The military does this through sentencing hearings, and it tends to be less punitive, but then sentencing hearings are extremely complex, with lots of witnesses, and they take hours. So maybe that's one way to do it. But I do think you want somebody somewhere to just be listening to, "You know what? Technically this person did it, but looking at all the circumstances, we really need to take a soft approach here."

HESSICK: I'm happy that Erin mentioned dismissal rates, because I think that that's something that doesn't get enough attention. I'll just add, the 25 percent figure that she mentioned is an important figure. In the research that I did for my book on plea bargaining, I went to a de novo trial system like the one that Anjelica was mentioning, but this one was in Salt Lake City. And I got the stats for not just trial rates but also for dismissal rates in both the trial de novo system and the ordinary system with the trial penalty. The dismissal rate in the court where defendants weren't facing the trial penalty and where prosecutors were facing more trials was significantly higher. That suggests to me that plea bargaining also affects when prosecutors are willing to take a case to trial. So, as Erin was pointing out, whether they are facing a real risk of trial affects how prosecutors' discretion gets exercised.

BLONDEL: One reason why cases tend to get dismissed is lack of victim or witness cooperation for good and bad reasons. I was a sex crimes prosecutor, and that is a huge issue in that world.

And it is worth noting that the burden of having a victim of domestic violence or sexual assault come in and testify is a major factor in those dismissals. Of course, people have an absolute right to trial. They have an absolute right to confront and cross-examine their accusers. I am not questioning that. But the reality is that, when you think about trade-offs, the cases that are most likely to get dismissed are going to be those that involve victims and witnesses who might have trouble facing the defendant in open court. So I do think, as a sex crimes prosecutor, that's something I would want to consider.

How can judges improve the plea bargaining process? How can defense lawyers and prosecutors improve the process?

HENDRICKS: One way to improve this process is to examine the timing of the plea and which rights are being forfeited. Are defendants waiving their right to investigate the allegations? Are they waiving their right to discovery, to pretrial motions, to appeal? The more rights the defendant is asked to waive, the more scrutiny should be placed on the voluntariness of the plea.

And, as a former public defender, one way to ensure that defense counsels are adequately advising people is making sure that they're fully funded and supported and equipped with necessary staff, investigators, and mitigators to help search through these charges and investigate the allegations. And due to the risks of wrongful convictions from guilty pleas and guilty verdicts, there should be more opportunities to contest the evidence and the allegations rather than the increased barriers to exercising due process.

An example is allowing defendants an interlocutory appeal when they lose pretrial motions. Why is it that defendants cannot do an interlocutory appeal? It's baffling to me that prosecutors who lose their motions to suppress can seek an interlocutory appeal but defense counsel cannot. And that actually changes the dynamics of whether defense counsel is going to advise their client to plead or not.

Johanna Hellgren's recent article, "The Defense Lawyer's Plea Recommendation,"[8] describes how several defense counsels' primary rubric to determine how they will advise their client is the probability of conviction. That leans a lot on the pretrial motion practice. If we are requiring that defendants plead guilty before exercising all of their pretrial rights, that decision should be evaluated with the highest degree of scrutiny. In an ideal world, the guilty plea offer would be the same regardless of whether the defendant litigates pretrial issues. The most dangerous pleas are the ones in which defendants are required to relinquish their right to litigate motions to suppress, identification issues, and any other pretrial matter.

FOGEL: I agree. I'm also coming out of public defense, federal practice, in a jurisdiction where the sentencing guidelines can explicitly incorporate reductions for expediently resolving a case, not pursuing legal motions, and waiving rights. In advising a client about their options, to plead or fight a case, defense counsel has to explain that what the sentencing guidelines recommend as a sentence is tied to how far a defendant takes their case, in terms of litigating and testing potential trial issues. I think that plays out sort of less formally in places that don't have structured sentencing like that.

But in the space between the 25 percent that get dismissed outright and the cases that go all the way to trial or get resolved by plea, there's still plenty of work to do. The reality of our system — where so many cases resolve short of trial — must emphasize the importance of those pretrial motions and the exchange of discovery.

So often, when the police do the charging, prosecutors get discovery late in the process. They're waiting for reports from officers. So it's hard. Even those offers to plead that are made in the pretrial context are poorly informed in many cases where the prosecution doesn't have all the discovery they would ideally have to assess the strength of a case. That obviously gets passed over to the defense who doesn't have any of that.

A further problem occurs, of course, when prosecutors have the discovery and don't hand it over. But focusing some on pretrial procedures is nec- ▸

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essary — just given the reality of the prevalence of pleas in our system — to get at some of those fairness issues and think about how we might improve them. A clear solution might be requirements in the exchange of discovery, more scrutiny in pretrial motions and, like Anjelica was saying, opportunities for appeal. We need to stop penalizing people for exercising those rights or testing out the strength of the case in the pretrial context to make informed decisions about how to proceed, if we're not testing the vast majority of cases to the full extent of trial.

We've been talking about the kinds of broader improvements that various actors could make to the current plea bargain system. What can judges specifically focus on to bring about positive change?

FOGEL: Judges can hold the prosecution to discovery deadlines. If evidence is not turned over in a timely fashion, judges should impose actual consequences, including dismissal. This is an important intervention that people pay lip service to, but my experience is that there's often some hesitation to actually follow through with that. And similarly, judges should operate from the reality that many cases aren't going to go to trial and have that final test of the evidence. They should recognize that pretrial motions are that much more important. If the reality is that less than 2 percent of cases will go to a trial, a motion to dismiss is not pro forma. A motion to suppress becomes all the more important where that motion is the only real opportunity to scrutinize the evidence. I think from a judicial perspective, I would focus on regulating discovery with some teeth and embrace the reality of the importance of pretrial practice and bail.

HESSICK: I have an essay forthcoming in the *William & Mary Bill of Rights Journal* called "Judges and Mass Incarceration"[9] that talks about what judges could do. So I will just name a couple.

First of all, judges have the power to decide whether to accept a guilty plea or whether to reject it. That power gives them an awful lot of room to decide what plea bargaining looks like. A judge can say, "I won't accept a guilty plea until the prosecution has turned over discovery to the defendant." There are some federal judges who use their power to do this.

A judge can say, "For the misdemeanor defendants who are being held pretrial, if there's a plea on the table here for time served, I'm going to continue my acceptance of the plea and release the defendant so that he or she has the time to decide whether to accept this without having the pressure of pretrial incarceration."

Judges can also waive defendants' appearance so that they don't have to constantly come back to court for all of these pretrial appearances. Those appearances cause them to lose wages and pay for transportation. There's a judge, Phil Calabrese, in Ohio, who did precisely that. The process is the punishment, and it pressures a lot of misdemeanor defendants who are out on bail to plead guilty.

So there's an awful lot that judges could do here to make this system more fair. Maybe it won't eradicate plea bargaining. But there's no reason, given the power judges have, for the process to look as egregious as it does now.

HENDRICKS: Impeachment material is important here, too. If you ask a thousand people "What is discovery?" they may have a thousand different answers. I have a recent article that was published in the NYU *Journal of Legislation & Public Policy* titled "Exposing Police Misconduct in Pretrial Criminal Proceedings,"[10] and, in that article, I address how to disclose this information in light of *United States v. Ruiz*. [In *Ruiz*, the Court unanimously held that the government is not required to disclose material impeachment evidence before entering a plea agreement with a criminal defendant.]

Ruiz created a system in which prosecutors are shielded from their duty to disclose as it relates to impeachment material. But *Ruiz* really just establishes a constitutional floor. Courts, state attorneys general, and even legislators can create policies that require prosecutors to disclose this information before plea agreements. Twenty years after *Ruiz*, even though we have this floor of *Ruiz*, we have examples of jurisdictions that are now requiring this. One example is New Jersey. In 2019, its attorney general reminded prosecutors of their court rules. The courts created this rule that requires prosecutors to disclose, before a plea, impeachment material that would undermine the credibility of witnesses. So I just want to make sure when we are discussing discovery, we're also discussing impeachment material as well.

To the extent judges are not taking these kinds of proactive measures in the plea bargain context, why is that?

HESSICK: I think it has to do with how judges perceive themselves. There's a culture behind plea bargaining that the two parties negotiate, that the two parties understand the case best, and that the judge ought to be deferring. There are lots of ways that we could criticize this view. Personally, I try to talk about it in formal, constitutional

terms, in the hope that this will resonate with judges.

Judges should not view a plea bargain as a contract between two private parties. It is the moment in a criminal case when a judgment of conviction gets entered. The court has to be involved in order for that to happen. That means that, unlike a nonprosecution agreement, which could be a private agreement between the parties, for a plea bargain you have to have judicial action. You have to have the entry of the order of conviction. The entry of an order is something that falls within the very core of Article III's judicial power.

Because the entry of an order requires a judge and judicial power, deferring to the parties on plea bargains is basically deferring to the parties about how judges should exercise their constitutional judicial power. Hopefully putting it in those terms will resonate enough with judges to make them understand that deference isn't appropriate under our Constitution. The Constitution doesn't contemplate plea bargaining. But it does contemplate the exercise of judicial power before someone can be found guilty of a crime. When judges see the entry of an order of conviction as a contract between two parties, rather than a substantive decision that requires fair conditions and under circumstances that could be characterized as the due process of law, then I think we've really lost something there.

BLONDEL: One study by Nancy King and Ron Wright found that some states actually let judges get involved in plea bargaining a little bit.[11] In the federal system, it's absolutely verboten, on the theory that it might make defendants feel like they have to plead out, and that you don't want to pressure anybody into that. On the other hand, that study found that participants — prosecutors, the defense, even victims — welcomed judicial involvement because it gave everyone more certainty about the likely sentence.[12] So there's that idea, which I think is an interesting one.

Judges have the tools they need to reject plea bargains they don't agree with and to push attorneys to modify plea deals.

— JEFFREY BELLIN

Critics of plea bargaining often complain, "We don't know why the prosecution did what it did." As a prosecutor, I always had a pretty clear idea why I was offering the plea I was, and I didn't consider that particularly privileged information. Usually I explained it on the phone to defense counsel at some length, but I think maybe judges should just hold prosecutors' feet to the fire, and ask prosecutors in the plea colloquy "Why is this plea in the interest of justice?" Defense counsel could say, "That's not what we discussed," or, "Yep, so and so is exactly right." The prosecution is working for the people and should be able to defend any decision that is supposedly in the interest of justice.

BELLIN: When you talk to judges and you talk to prosecutors and you talk to police, you hear a lot of, "We can't do anything." Like John said earlier, the police charge, and I get that, but at some point the police go away, they leave the room and, now, if you're a prosecutor, it's just you and the judge, and you can change the charge. Prosecutors can also change how charging works. In D.C., when I was a prosecutor, we used to joke that the police charged everything as an attempted murder, and then we would change it to the actual crime the facts showed. So prosecutors are not stuck with the police charges.

But I think judges also deflect responsibility. Judges say, "Oh, prosecutors craft plea deals and the legislators make the sentencing rules. We judges just call balls and strikes." But judges are not just neutral observers of this process. Judges have the tools they need to reject plea bargains they don't agree with and to push attorneys to modify plea deals.[13]

The truth is that judges like plea bargains, just like everybody else in the system, because plea deals are efficient, and judges care about efficiency. Guilty pleas help clear out backlog, and judges are evaluated, in part, on their case backlogs. That's why judges are going to be resistant to anything that slows down case flow, and clogs up their dockets. So it's important for judges to hear that it's not just other people's fault that there's so much plea bargaining. It's not just prosecutors' fault. It's not just legislators' fault. It's judges' fault, too, and to the extent that judges don't like how many plea deals there are, or that there are no trials anymore, that's on judges as much as anyone.

FLYNN: Jeff hit it on the head here. Don't forget, throughout this whole hourlong conversation here, we haven't brought the subject up that judges want to move their calendars just as fast as public defenders and prosecutors do. ▸

There's a concept here in the New York judicial system called "standards and goals," where if a case is on the docket too long, a judge gets in trouble with their chief. They've got to move cases. And so that's the elephant in the room here that we haven't talked about: Judges want to move cases just as much as everyone else does. Getting back to what could be done better from a judge's standpoint, if you remove the standards and goal and you remove the incentive to have judges move cases quicker, that may have an impact on the system.

Plea bargains are often cited as a reason for the decrease in criminal jury trials (and, accordingly, jury participation). Should we be concerned about how this may impact public confidence in the justice system? Relatedly, should we be concerned that law enforcement agents have grown accustomed to plea bargaining — and may not be investigating and collecting evidence at the same standard of proficiency that they would if they knew there would be a trial?

FLYNN: The second point, I haven't seen. I don't see a decrease in law enforcement agencies collecting evidence or doing their job. I mean, I see a decrease in law enforcement doing their job for other reasons in the past couple years — COVID or just the backlash of the criminal justice movement, where some officers feel that they're not appreciated in society. That's had an impact on how they do their job. That's a whole other hourlong discussion.

But as far as officers not doing their job and collecting evidence because they know the case is not going to go to trial, in reality I have not seen that, I have not heard of that in any jurisdiction at all. It may be happening, but it certainly has not come to my attention and I certainly have not seen that.

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—JOHN FLYNN

But to your first point — should we be concerned about the lack of jury trials affecting overall confidence in the system? — absolutely we should. If there's no trust in the system, then that's a problem not just for the criminal justice community but for all of us in society.

HENDRICKS: Instead of "confidence," I would use "legitimacy." Is there legitimacy in this system? I don't think we can have this conversation without addressing some of our abolitionist scholars, disparities throughout the system, and mass incarceration and its disproportionate impact on Black, Brown, and Indigenous populations. What we have here is just mass arrests and mass overcharging, and then once it gets to the plea bargaining process, there's also disproportionate impact. We need to be able to respond to the criticism of legitimacy, if we are reliant upon this plea bargaining process to sustain it.

And when there is a plea, what happens to the evidence that is not disclosed? We're in the landscape of over 3,000 wrongful convictions since 1989. The National Registry of Exonerations' database shows that the evidence in those wrongful convictions cases, especially after they plead guilty, rested in a police officer or detective's basement in a cardboard box that they just haven't opened since the plea. There has to be a lot of policy reports or orders from the judiciary, from attorneys general and law enforcement agencies themselves to ensure that even when there is a plea, the defense counsel should always still be receiving that evidence as well. It should not be resting in some dusty basement.

HESSICK: Legitimacy is definitely the right word. Jurors are fact-finders, but a lot of our laws require them to exercise judgment as well. If you think about a disorderly conduct charge, words like "reasonableness" or "material" show up in an awful lot of laws, and what those laws are saying is that someone has to exercise judgment to decide whether this should be criminal or not.

The people who wrote our Constitution talked about the jury involvement as sort of like a retail moment for democracy. In contrast, voting for representatives is sort of a wholesale moment of democracy. When we take juries out of the equation, that means that we don't have any nongovernment actors making those important moral decisions — just police and prosecutors. That's a problem for the legitimacy of the system.

Anna Offit's recent book, *The Imagined Juror*, explains how prosecutors have a hypothetical juror in their mind that they use when making decisions. I assume that the fewer trials that happen, the less accurate

that hypothetical juror is going to be. If your entire jurisdiction saw no trials in a year, I do question how much we can rely on that hypothetical juror and how much the hypothetical juror is no more than cover for personal opinions or personal predilections.

FOGEL: I totally agree. The communities that are overrepresented in criminal justice on the defendant's side are those who are underrepresented in the legal community. Those of us who practice in court often can get into a little bit of an echo chamber about what's normal, what's reasonable. Bringing in the jury, especially given the mismatch of the demographics, is just so critically important to judicial legitimacy, and the rule of law.

And I think the decrease in trials allows for diminishing quality in the investigation of cases, or at the very least delayed investigation that results in missing, lost, or destroyed evidence. The quality of law enforcement investigation in a case is informed by the reality that the evidence they gather is unlikely to ever be tested at trial. Whether officers are pursuing video in a timely fashion or speaking to witnesses quickly enough, I have to imagine that they are more diligent when their investigation, or lack thereof, is likely to be tested under cross-examination. When that testing at trial becomes less and less likely, those gaps and those errors do arise.

BLONDEL: I agree that trials perform a vital disciplining function on prosecutors and law enforcement. And, unfortunately, I do think a minority of prosecutors and law enforcement occasionally cut corners because they do not expect to have to go to trial. And although flat-out mistakes — including very serious ones — probably do sometimes occur, corner cutting usually affects the *quality* of evidence. There is a difference between evidence that shows guilt and evidence that will persuade a jury beyond a reasonable doubt. And, in my experience, the possibility of a plea can sometimes make people less likely to work hard to close that gap.

Ultimately, prosecutors are responsible for ensuring they can prove guilt beyond a reasonable doubt at trial. They need to always keep that essential job in mind. And sometimes they need to find their backbones and insist that investigators meet the prosecutor's comfort level, even if it means more work.

That said, people often overlook one factor that preserves the disciplining function of the trial: Prosecutors cannot always rationally predict which cases will plead out. The defendant ultimately makes that decision, and defendants are not always completely rational negotiators. Even in cases with very strong evidence, some defendants go to trial for emotional or other reasons. So prosecutors should anticipate most cases could go to trial, even if objectively a trial seems unlikely.

Finally, though I strongly agree that trials promote legitimacy, there would also be a legitimacy problem if we reached a point in which we were only able to handle a fraction of the criminal offenses that occurred. Set aside more controversial offenses like minor drug dealing. Focusing just on core crimes like homicides, shootings, and rapes, people do want to see their justice system doing something, and they get frustrated when they don't see that.

What you want is to hit that sweet spot where the system functions, but functions in a way that is open, transparent, and includes this vital function that the jury provides of bringing in our fellow citizens and having them hold the government to its evidence and having them actually perform that judgment function.

1 Lindsey Devers, Bureau of Justice Assistance, U.S. Dep't of Justice, *Plea and Charge Bargaining: Research Summary* at 1 (Jan. 24, 2011).

2 *See Excerpts from Carter's Speech to the Bar Association*, N.Y. Times, May 5, 1978 (quoting President Jimmy Carter's speech to the Los Angeles Bar Association at its 100th anniversary luncheon).

3 Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 Texas L. Rev. 539, 551 (2023).

4 Stacy Schiff, The Witches: Suspicion, Betrayal, and Hysteria in 1692 Salem (2016).

5 Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stanford L. Rev. 711 (2017).

6 Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev. 1037 (1984).

7 Brian A. Reaves, U.S. Dep't of Just., Felony Defendants in Large Urban Counties, 2009 – Statistical Tables, at 24 tbl.21 (2013).

8 Johanna Hellgren & Saul M. Kassin, *The Defense Lawyer's Plea Recommendation: Disentangling the Influences of Perceived Guilt and Probability of Conviction*, 28 Psych., Public Pol., and Law 546 (2022).

9 Carissa Byrne Hessick, *Judges and Mass Incarceration*, 31 Wm. & Mary Bill Rts. J. 461 (2022).

10 Anjelica Hendricks, *Exposing Police Misconduct in Pretrial Criminal Proceedings*, 24 N.Y.U. J. of Legislation & Public Pol. 177 (2021).

11 Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 Tex. L. Rev. 325 (2016).

12 *Id.* at 373–76.

13 *See* Jeffrey Bellin & Jenia I. Turner, *Sentencing in an Era of Plea Bargains*, 102 N.C. L. Rev. ___ (forthcoming 2023).