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RESEARCH AGENDA

My primary research and teaching interests are criminal law and criminal justice. Specifically, I examine real-world enforcement of criminal law, which is shaped—not solely by what happens at trial and on appeal—but by the decisions made and the actions taken within communities, police precincts, and courthouses. I focus on the often competing (but sometimes harmonious) incentives of various institutional players, concentrating particularly on underappreciated differences in the way parties approach low-stakes and high-stakes cases.

Currently, I am working on three projects. First, I have an article in progress, entitled *Punishing the Innocent*, which is forthcoming in the *University of Pennsylvania Law Review*. In *Punishing the Innocent*, I challenge the conventional perception that there is an innocence problem in plea bargaining. Specifically, I posit that for the typical innocent defendant in the typical case—which I demonstrate is a recidivist facing petty charges—the best resolution is generally a quick plea in exchange for a light bargained-for sentence. If there are problems that lead to punishment of the innocent, they are problems at the points of arrest, charge, and/or trial. Once an innocent defendant is arrested and charged wrongfully, the costs of proceeding to trial often trump the costs of pleading to lenient bargains. Put differently, many recidivist innocent defendants are punished by process and released by pleas. Consequently, plea bargaining is no source of wrongful punishment, but instead may serve to cut such punishment short. I conclude that plea bargaining is normatively appropriate for the innocent, and, as such, the criminal justice system should ensure that innocent defendants have equal access to plea bargains and guilty pleas. Accordingly, I propose systemic re-conception of false pleas as ethically accepted legal fictions.

Second, I have an article in progress, entitled *Contraindicated Drug Courts*, which is forthcoming in the *UCLA Law Review*. In the article, I explore the under-appreciated costs of treatment failure in drug courts. Drug courts have gained traction as popular alternatives to the conventional war on drugs (and to its one-dimensional focus on incarceration). Under the typical model, a drug offender enters a plea of guilty and is enrolled in a long-term outpatient treatment program that is closely supervised by the drug court. If the offender completes treatment, his plea is withdrawn and the underlying charges are dismissed. But, if he fails, he receives an alternative termination sentence. My premise is that drug courts provide particularly poor results for the very defendants that they are intended to help most. Specifically, the most likely participants to graduate are volitional drug users, who strategically game exit from undesired conventional punishment and game entry into treatment that they do not need. By contrast, the most

likely treatment failures are genuine addicts and members of historically disadvantaged groups, who thereafter receive harsh termination sentences that often outstrip conventional plea prices. In short, drug courts are contraindicated for target populations and may thereby lead to longer sentences for the very defendants who traditionally have filled prisons under the conventional war on drugs.

Third, I have an essay in progress, entitled *Grassroots Plea Bargaining*, which I presented at the Conference on Plea Bargaining at Marquette University Law School, and which is forthcoming in the *Marquette Law Review*. In the essay, I identify a novel plea bargaining influence that I call grassroots plea bargaining. By grassroots plea bargaining, I mean a bottom-up pressure that may lead prosecutors to reduce plea prices in order to purchase communal acquiescence to police policies that otherwise lack public support. Specifically, I focus on policing and prosecutorial decisions in New York City in the 1990s. The city implemented a particularly vigorous and localized brand of order-maintenance policing, which created a crisis of systemic legitimacy within the affected (predominantly poor and minority) communities. Notably, however, enforcement was heavy-handed on the policing front only. When it came to plea bargaining, prosecutors provided more frequent lenient no-time or short-time pleas to reduced charges. I conclude that prosecutors did so to ensure that affected communities would accept—or at least tolerate—increasingly hard-nosed police tactics.

These three works in progress touch on certain additional questions that are beyond the scope of the current projects, but that I hope to explore in future projects. First, in *Contraindicated Drug Courts*, I focus only on the felony drug-court model. In a future project, I plan to contrast the felony model with the misdemeanor model. Specifically, I plan to explore the ways in which decisions to enter each type of court are colored by background sentencing laws and plea prices. For example, felony drug defendants have great incentives to enter drug-court programs, because conventional pleas carry substantial jail or prison terms. However, misdemeanor drug defendants have fewer incentives to enter long-term drug-court programs (that threaten termination sentences of months in jail), because conventional plea prices are typically only short-time or time-served jail terms.

Second, in *Contraindicated Drug Courts*, I discuss how the drug-court model is the product of compromises between varying institutional factions. On the surface of it, the model provides an attractive and politically feasible middle ground that seems to promise something beneficial for all stakeholders. However, the give-and-take that characterizes such institutional compromises has the tendency to produce theoretical dissonance and unanticipated consequences. In a future project, I plan to expand upon this insight by identifying other areas of institutional compromise (both within and outside the criminal-justice system) where compromise leads to disoptimal and/or unjust results. Welfare reform, for instance, may provide an apt point of comparison.

Third, in *Grassroots Plea Bargaining*, I identify a heretofore unrecognized plea-bargaining influence, but I make no serious empirical effort to conclusively demonstrate its existence—much less the scope of its influence. In a future project, I plan to

collaborate with an empiricist to create a model that might measure the impact of grassroots plea bargaining. One possible avenue might be a corollary of a model constructed by George Akerlof and Janet Yellen in their essay, *Gang Behavior, Law Enforcement and Community Values*. Akerlof and Yellen focused on a gang's optimal level of criminality. They hypothesized that a "cooperation/noncooperation" boundary exists in all communities, below which law-abiding members withhold necessary assistance from authorities. Accordingly, in communities with high levels of systemic disaffection, gangs maximize wealth by victimizing community members just up to this "cooperation/noncooperation" boundary. Likewise, prosecutors use grassroots plea bargaining to win the same leverage along the same axis—albeit in the opposite direction. Specifically, prosecutors lower plea prices to manipulate public goodwill—to make sure that public sentiment stays *just above* the critical cooperation boundary.

Fourth, in *Punishing the Innocent*, I discuss how the process costs of proceeding to trial influence defendants' decisions whether to accept plea bargains. In a future project, I plan to explore in greater detail the degree to which the process costs of proceeding to trial affect different categories of defendants in different ways. Specifically, there is a curious parallel between indigent recidivist street-crime defendants charged with petty crimes and defendant corporations. For both, conviction prices are relatively slight compared to the costs of charges. The recidivist indigent defendant is often jailed as a result of charge and released as a result of plea. And the defendant corporation often suffers substantial economic losses as a result of indictment but far smaller fines as a result of conviction. In short, for both groups of defendants, the process (and not the conviction) often provides the principal punishment. Conversely, defendants who are not held on bail and who do not suffer significant charge-based reputation and/or employment costs find themselves abler to take cases to trial.