RESEARCH AGENDA

My research centers on plea bargaining procedure. Plea bargaining began as an alternative to trial-based adjudication but has now almost completely supplanted the jury trial. The central thesis of my work is that the entire plea bargaining process is lacking in structural protections for defendants and society. These structural protections should be embodied in a system of checks and balances among the legislature, the executive (prosecutors), the judiciary (lower court and appellate judges), the grand jury and trial jury, and the general public (e.g. members of communities affected by crime), including the media. The ideal balance of powers between these structures should be determined through a fact-intensive analysis of the procedural feature under consideration and a balancing of the relevant social interests. Thus, while my analysis draws on separation of powers theory, it is more rooted in modern notions of due process.

Although we will likely never return to a true system of trial-based adjudication, modern due process jurisprudence is flexible enough to accommodate structural re-balancing of plea bargaining procedure to improve accuracy in adjudication, respect defendants’ rights, and best serve society’s interests in criminal justice. In particular, although much has been written about the outsized role of prosecutors in plea bargaining, much less has been written about the proper role of judges, especially as a check on the prosecution.

I became interested in these ideas during my eight years as a federal and state prosecutor. The vast majority of the cases I handled resulted in conviction by guilty plea; only a handful went to trial. Experienced state court prosecutors had a mantra: “This is my courtroom.” They were essentially correct. We chose our defendants and the charges against them. Judges rarely rejected our plea agreements, even though those agreements largely removed the judge from the adjudication and sentencing process. And the public and press were largely excluded from the process: the pre-plea proceedings were abbreviated and there was no jury to decide the case. Instead, the real adjudication happened in private negotiations between the prosecutor and the defense attorney, finalized in one brief guilty plea hearing on the public record.

My structural critique extends to all stages of the plea process, including pre-plea discovery, pre-plea in-court proceedings, plea negotiations, and the guilty plea hearing. It extends to regulating prosecutors; it also extends to players and institutions that have been marginalized as prosecutors have taken over the system, like judges, juries, the public and the press. Following are descriptions of my recent work and future work related to these themes.

A Structural Critique Of Pre-Plea Discovery (job talk piece; draft available for circulation)

Most defendants plead guilty, and they rely on prosecutors for much of the information on which they base their decision. Unfortunately, the law does not require federal prosecutors to turn over any discovery before the guilty plea. This can lead to innocent defendants pleading guilty and guilty defendants pleading guilty without information that could have affected the sentence contemplated in the plea agreement. In my job talk piece, A Structural Critique of Pre-Plea Discovery, I argue that the problem lies in the lack of structural protections for federal defendants who plead guilty. Defendants who go to trial get a jury to adjudicate guilt and an active judge to preside over the proceedings and pronounce sentence. The jury hears an adversarial presentation of the evidence, and the judge at sentencing can consider an even broader spectrum of information about the defendant and the crime. But defendants who plead
guilty effectively act as their own judge and jury (although the threat of a heavier sentence if they lose at trial distorts their decision-making). Unfortunately, because prosecutors are not required to provide any pre-plea discovery, the defendant who pleads guilty may not have nearly as much information as the judge and jury would have at trial and sentencing. This can cause innocent defendants to plead guilty and, for guilty defendants, increased unwarranted disparities in sentencing.

Experience has shown that prosecutors generally do not provide sufficient discovery to the defense unless it is in their own interests or Congress or the Supreme Court mandate such discovery. The lack of a consistent regime for federal pre-plea discovery is fundamentally unfair because it leaves prosecutors making discovery determinations without judicial or Congressional oversight. This regime lacks checks and balances.

One hopeful development is that several district courts, using their Congressionally-granted local rule-making authority, have promulgated their own rules for pre-plea discovery. I argue that Congress should adopt several of these time-tested rules for the whole country to give both guidance to prosecutors and authority to judges to enforce liberal pre-plea discovery.

Judges As Framers Of Plea Bargaining, 26 STAN. L. & POL’Y REV. ___ (forthcoming 2015)

Plea negotiations remain one of the least regulated stages of criminal adjudication. Currently, they are conducted off the record between the prosecutor and the defense attorney. When the parties strike a deal, the judge has a strong incentive to accept it. Scholars have generally believed that judges cannot play a role in plea negotiations without compromising their role as neutral arbiters. In Judges as Framers of Plea Bargaining, I argue that judges, without the appearance of partiality, can and should become more actively involved in pre-trial proceedings to give guidance to the parties about the likely sentence in the case.

I propose the following procedure. Early in the case, the defendant would request two proposed sentences from the judge: one for if the defendant pleaded guilty as charged, and another for if the defendant were convicted at trial. The court would order that an early probation report be prepared and the parties conduct abbreviated litigation of key sentencing issues. The court’s tentative rulings on these issues would provide helpful guidance to the parties in their plea negotiations. The judge would thereby frame the parameters of the plea discussions without actually participating in them.

The difference between the two indicated sentences, commonly called a trial penalty or plea/trial differential, has been criticized by most commentators. My novel approach takes the plea/trial differential as a given but seeks to make it more fair by tailoring it to each case for reasons stated on the record. This would help defendants to make a more informed and less coerced decision as to whether to plead guilty. Additionally, an important feature of my proposed procedure is that it puts part of the plea negotiations on the public record.

Plea Bargaining in the Public Interest
The basic aims of the criminal justice system are to sort the innocent from the guilty consistent with the Constitution and to respond to crime in a socially beneficial way. In doing so, the system expresses our collective decisions about how such concepts as justice, mercy, retribution and rehabilitation should manifest themselves in responding to crime. The criminal jury trial has
historically functioned as a sort of morality play, reinforcing public values such as abiding by the law and providing the accused due process of law. Adjudication by plea bargaining has largely ignored such public values of criminal justice in favor of a more privatized and bureaucratic form of justice. In *Public Plea Bargaining*, I would be interested in studying how plea bargaining can be modified and made more public to reinforce these public values.

In *Private Waivers of Public Rights*, I will consider how, if criminal procedure serves public values, our law of waiver is overly focused on private rights. Jury trials have public benefits, such as reinforcing public values and providing opportunities for jury service. Therefore, judges ought to weigh that in the balance when defendants desire to waive their right to a jury trial. Related to this is the notion that certain structural rights ought not to be waived at all, simply because the resulting criminal process would be fundamentally unfair. For example, defendants cannot waive their rights to a neutral and detached judge to preside over the proceedings. I would like to study how waiver theory could accommodate public values, and how judges might take public values into consideration in assessing wavers.

**Regulating Prosecutors**

In a future article, *Regulating Prosecutors Through Fiduciary Law*, I plan to examine a different mechanism for prosecutorial regulation: public fiduciary law. The fiduciary model has not previously been applied to the role of the prosecutor, but I believe that the framework fits the prosecutor’s role well. A fiduciary has discretion with respect to the beneficiary’s critical resource. Here, the public (beneficiary) grants wide discretion to prosecutors as chief law enforcement officers of the criminal justice system (critical resource). Prosecutors choose their defendants and the charges to be brought, and conduct the ensuing litigation on the public’s behalf. Thus, the relationship between prosecutors and the public is fundamentally fiduciary in nature.

A key feature of fiduciary law is providing means for public beneficiaries to monitor their fiduciaries. These means are especially lacking where the public proceedings are abbreviated incident to privately negotiated plea bargains. Fiduciary principles dictate more openness in the exercise of prosecutorial discretion. For example, grand juries could perform a useful role in monitoring prosecutors’ exercise of charging discretion, and administrative processes could also be designed to allow direct public input into prosecutorial policies concerning the charging and disposition of cases.

The legislature should clearly define what the public expects of prosecutors. At a minimum, prosecutors should have a fiduciary duty of loyalty, requiring them not to exercise their discretion in a self-interested manner. They should arguably also have duties of care and competence. Such duties might be violated, for example, for inadvertent failures to provide exculpatory evidence to the defense in a timely manner. The legislature should also define consequences for violating fiduciary duties, including civil suits against prosecutors and their agencies.

In a similar vein, I would like to study how the Department of Justice regulates its own prosecutors. The Department has a long-standing policy that guides federal prosecutors nationwide in charging and pleading out their cases. In my future article, *An Intellectual History of the Federal Principles of Prosecution*, I will track the changes to that guidance over time,
reflecting, for example, different notions of whether retribution should be prioritized over rehabilitation or considerations of cost.

**TEACHING INTERESTS**

I would be happy to teach courses in criminal law and procedure, including all aspects of criminal procedure (e.g. investigation, adjudication and sentencing), immigration law and juvenile justice; professional responsibility; evidence; and alternative dispute resolution (e.g. plea bargaining). At some point, I also hope to have the opportunity to teach a seminar on the War on Drugs. These courses intertwine with my research and draw on my eight years of experience as a federal and state prosecutor.

I would also be happy to teach first-year courses in civil procedure, torts and remedies. I teaching these courses I could draw on my experiences both as a federal district court law clerk and in leading joint civil-criminal investigations as an Assistant United States Attorney. Having participated in Stanford’s education law clinic, I would also be comfortable teaching a course in education law. Finally, I could teach Law and Religion, because I studied the First Amendment under Kathleen Sullivan and have been exposed to additional scholarship in the Religion Clauses at BYU Law School.