

THE GUILTY PLEA STATE

BY ANDREW E. TASLITZ

The United States Constitution and the individual states' constitutional analogues are replete with criminal procedural provisions promising that we will be governed by a web of fair procedures—a Due Process State. In the Due Process State, defendants are judged by a jury of their peers at a trial boasting a wealth of safeguards against excessive state power or of simple error: rights to confrontation, compulsory process, freedom from compelled self-incrimination, shelter from unreasonable searches and seizures, representation by competent counsel, at speedy and public trials. A host of statutory provisions likewise helps to implement and expand on these rights, offering complex codes of justice in each of these areas and then some. The innocence movement has, moreover, become increasingly successful in expanding procedural protections against wrongful conviction.

The state enjoys its own set of protections as well—an implicit constitutional authority to prosecute and punish criminal offenders, statutory rights to reciprocal discovery from the defense, evidence codes to protect both sides from wasteful, abusive, or misleading evidence, entitlement (along with the defense) to strike biased potential jurors for cause—being but a few examples. The state also brings with it tremendous resources and moral authority to counterbalance the oftentimes arguably meatier rights-protections given the defense. Both sides engage in meaningful adversarial combat under public scrutiny and the supervision of an informed and neutral judge, and both sides must convince ordinary people of the wisdom of their clients' (the suspects and the people respectively) positions.

But, in practice, the Due Process State is more promise than reality. This ideal vision does, of course, manifest itself, albeit in somewhat tarnished form, in the relatively small percentage of cases that actually reach trial before a jury. But in many jurisdictions bench trials far outnumber jury trials, and in virtually *all* jurisdictions resolution by guilty pleas overwhelmingly outnumbers any sort of trial—pleas being the resolution technique of choice in at least 90 percent of cases. Furthermore, a huge percentage of

these pleas are not “open” ones—not pleas for mercy by the court—but rather negotiated ones: a deal or contract struck between prosecution and defense. A more accurate description of our criminal justice's system reality is, therefore, not the Due Process State but the Guilty Plea State.

In the Guilty Plea State, negotiations take place largely in secret. The parties must persuade one another but not any representatives of the people. No judge supervises the proceedings. No transcript is made of the discussions. Moreover, few constitutional or statutory rights hold sway, and most of those that do can readily be waived.

Of course, negotiations occur in the shadow of the trial *in theory*, for the major part of what is agreed upon purportedly turns on an assessment of the risk of each side's loss at trial. Critics, however, insist that whatever shadow the trial does cast is a short one indeed, for, especially in the federal system, powerful incentives pressure the defense to cut a deal—incentives having little to do with the strength of the prosecution's case. Even a relatively weak case risks a conviction that can and likely will result in a harsh sentence. Tough sentencing guidelines that are supposedly advisory but that in fact usually serve as a presumptive sentencing code, combined with mandatory minimum sentencing legislation, explain this risk, making the price of a loss at trial astronomical. Agreeing to plead and cooperate in catching “Mr. Big” is often the only way for a defendant, under the guidelines, to have some confidence of a significantly reduced sentence. The trial game therefore becomes one usually not worth the suspect's playing.

Correspondingly, both sides suffer from crushing case loads and declining resources that make serious investigation and complex, time-consuming negotiation unaffordable in run-of-the-mill cases. These limitations can be as frustrating for prosecutors as defense counsel, for the former too often lack the time and other resources to ensure that they are “doing justice”—prosecutors' singular ethical obligation. It is not that they are knowingly doing injustice but rather that they are so harried that they are (or should be) uncertain just what it is they *are* doing. They are reduced to doing the best that they can under difficult circumstances. Some prosecutors accept this situation and rationalize it as a means of psychological survival, others rail against it and

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howl for change, still others just burn out and move on.

None of this means that guilty pleas should find their way to extinction. To the contrary, it is likely that the sheer size of the system means that it would collapse under its own weight were every case handled by the cumbersome means of a jury trial. Furthermore, both parties face *some* trial risks under any scheme, and it is likely that each side will want the freedom to assess relative risks in individual cases and to minimize those risks via contract where they deem it appropriate.

Accordingly, the real problem is the nearly unregulated status of the system, a consequence of pretending that we still live in the fictional Due Process State when it long ago withered away. A related problem is that advocates, caught up in the pressures of the moment, do not always appreciate how the Guilty Plea State's systemic realities constrain choices in individual cases. Accordingly, these same advocates may fail to adopt sound tactics designed to reduce those constraints. Nor do the narrow focus and time limitations of daily legal practice give most practitioners, especially prosecutors, the broad, considered view needed to work for systemic improvements or the guidance needed in confronting the difficult ethical issues that this system of contractual (rather than trial) justice creates.

This symposium tries to aid these busy practitioners in getting the tactical, reformist, and ethical information needed to operate effectively in the Guilty Plea State. David Leonard, for example, starts the symposium by addressing the role of Federal Rule of Evidence 410, which generally prohibits admitting statements made during a guilty plea negotiation against the defendant at trial. In *United States v. Mezzanatto*, 513 U.S. 196 (1995), the United States Supreme Court sanctioned the practice of some prosecutors' refusing even to discuss the possibility of a guilty plea absent a prior waiver by a defendant of his or her Rule 410 rights. The only limitation that the Court placed on the practice was that the waiver must have been "voluntary." Leonard examines *Mezzanatto*'s progeny to discover that courts are highly reluctant to find any such waiver involuntary. Accordingly, defense statements made during plea negotiations that do not ultimately result in a deal frequently serve as evidence against the defendant at trial. Leonard

concludes by offering specific advice for defense attorneys on how to address this problem when negotiating pleas with a prosecutor who insists on such waivers.

I pick up where Leonard left off by exploring the practice of many prosecutors of seeking waivers of a wide array of constitutional rights as a precondition to engaging in plea bargaining ("preconditional waivers"). I explore the case law that provides authority justifying prosecutors' use of such waivers, case law that at least implicitly sanctions the tactic on the grounds that any deal reached through equally matched adversaries represented by competent counsel will redound to society's benefit. I draw on cognitive psychology and behavioral economics, presented in a commonsense fashion, to explain why these assumptions are too often groundless. Next, I argue that constitutional rights must be treated differently—must be harder to waive—than nonconstitutional ones because of the special role that the former play in defining the American system of justice. Although I hope that defense counsel, judges, and law reformers will find what I have to say useful, my primary audience is, unlike Leonard's, prosecutors. I offer ethical advice for prosecutors struggling to do the right thing in this area. I am not interested in promoting new ethics rules or sanctioning prosecutors. Instead, I suggest some internal procedures that may enable prosecutors to decide when it is ethically wise and when not to seek preconditional waivers.

Ellen Yaroshefsky shifts the focus to a different problem, one that she argues there is reason to believe is widespread: guilty pleas entered into by *factually innocent* defendants. Yaroshefsky sees the central problem being that prosecutors have no constitutional obligation to provide the defense with preplea (as opposed to pretrial) disclosure of material exculpatory evidence. Although many prosecutors wisely provide such information voluntarily, far from all do so. Furthermore, ethics rules on the subject are inconsistent, ambiguous, and loophole-filled. Yaroshefsky proposes changes in the law to cure these failings in the hope of giving clearer guidance to the overwhelming number of well-meaning prosecutors, promoting more informed judgments by defense counsel considering plea offers, and protecting the innocent from complicity in their own wrongful

convictions.

Candace Zierdt and Ellen Podgor are worried about government overreaching concerning some specific provisions of corporate deferred prosecution agreements. In a post-Enron world, argue Zierdt and Podgor, corporations are eager to accept even the most draconian provisions in such agreements rather than face the virtual death sentence that the markets would pronounce once an indictment is returned and publicized. But, they maintain, some of these provisions hurt law enforcement in the long run as well as undermining core basics necessary to a competent and fair defense. Notably, they condemn insistence upon corporate waivers of the attorney-client and work-product privileges, waivers that, Zierdt and Podgor explain, will render corporate compliance programs ineffective as employees become reluctant to report information that may work its way into prosecutors' hands.

Zierdt and Podgor are also troubled by provisions that make prosecutors the sole judge of whether an agreement has been breached—with no judicial oversight—a judgment that can sometimes be mistaken and that vests the prosecutor with enormous discretion that can be wielded with disastrous consequences for the corporation and its employees. The final sort of provision that troubles these authors bars corporations from paying attorney fees for indicted employees, an approach that at least one court has held violates the Sixth Amendment right to the effective assistance of counsel. Zierdt and Podgor see the solution to these problems as lying in basic contract principles—especially duress and unconscionability—principles governing plea agreements but thus far rarely applied to corporate deferred prosecution agreements. Accordingly, the authors provide a detailed guide to practitioners seeking to make these contract-based arguments.

Laurie Levenson takes a different tack. Levenson is less interested in critiquing the current system than in guiding practitioners through the thicket. Her particular focus is on how to use the new landscape of a post-*Gall* world to improve plea bargaining tactics. In *United States v. Booker*, the

Court, of course, declared the portion of the U.S. Sentencing Guidelines that makes them mandatory as unconstitutional. But what exactly the standards for sentencing would be in this new world were unclear. *Gall v. United States*, 128 S. Ct. 586 (2007), and *Kimbrough v. United States*, 128 S. Ct. 558 (2007), filled much of this void, together offering detailed standards for how trial judges are to make their sentencing decisions and how appellate judges are to review those decisions on appeal. Those two decisions also made it clear that in the new regime sentencing judges are truly expected to have significant discretion to depart from the guidelines both downward and upward. Levenson counsels defense counsel and prosecutors alike that this opens up opportunities for both of them. Even if plea bargaining is not always based on a prediction about trial outcomes, it is based on a prediction about sentencing outcomes should a case go to trial. Lawyers well versed in the law and strategy of sentencing are thus well positioned to improve their bargaining power in plea negotiations. Levenson tells practitioners how to do just that and to do it well.

Taken as a whole, the pieces in this symposium reflect two common themes: first, that plea agreements are contracts and need more consistently to be treated as such; but, second, that they are unique contracts because of their central role in the criminal justice system, contracts that require heavier judicial policing than in the world of the civil settlement agreement and that raise special ethical and policy questions for all criminal justice system actors. Recognizing these two points should be of practical and theoretical benefit to prosecutors, defense counsel, judges, and law reformers alike. That some of these pieces may prompt controversy is all to the good, for these are matters that bear much further considered debate among all members of the legal profession. If there is a bias in the essays taken as a group, it is (with the exception of Levenson's piece) that the Guilty Plea State needs to be a regulatory state, not one ruled only by the "creative destruction" of unbridled adversarial competition. In short, it is a call for a New Deal for that state but not a revolution. ■