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Punishment Without Trial: Burns Center Hosts Virtual Book Talk on the Implications of Plea Bargaining

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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" discussed her book's arguments and implications for legal ethics in a virtual book talk with Professor Jessica Roth. Roth, who is Co-Director of the Jacob Burns Center for Ethics in the Practice of Law, asked Hessick about the history of plea bargaining, how it encourages lying, its impact on victims and how all of these factors can put lawyers in potentially problematic positions.

Hessick's book challenges the popular conception that most criminal cases include a jury trial by illustrating the long history of plea bargaining in the United States and providing real-life examples of how it has undermined justice. "The fact that our system sends so few cases to trial actually warps and changes the system in important ways that most people don't understand," Hessick opened.

Hessick argued that plea bargaining has a murky history since most early negotiations occurred in secret. It became pervasive in the 1920s, and according to Hessick, many found it to be a corruption of justice. In the early 1970s it was challenged in a Supreme Court case and the Court held that plea

bargaining was constitutional. It has since become increasingly common and the trial rate has continued to shrink.

When asked about the relationship between an increased lack of confidence in juries and a rise in plea bargaining, Hessick responded: “administrative regulators have pointed out that, much like Congress is this clunky institution that can’t get things done, so too are juries that are – like Congress – not filled with experts.” Thus, at one time, prosecutors and judges were seeking expertise in handling these cases by negotiating plea bargains instead of going to trial, she argued.

Hessick claimed that plea bargaining often relies on and encourages lying. “In order to be able to negotiate the level of punishment, what the lawyers end up doing is they negotiate about the crime,” Hessick said. For example, the charge of petty theft can be used in a plea bargain instead of grand theft. However, such a trade is not always possible in all cases. Hessick cited a practice where, when prosecutors were faced with sexual assault charges that were difficult to prove they would instead have defendants plead guilty to a different type of low-level assault that required some sort of wrongdoing on the part of the victim. “Obviously, this is outrageously offensive to the victim and has been applied in cases where it just could not be factually true,” Hessick remarked.

“Doesn’t plea bargaining put defense lawyers in a terrible position?” Roth asked. “Especially when they have a client who’s innocent, but they agree that the rational decision is to plead guilty?” Hessick focused on ethics in her response: “All the lawyer can do in that situation is just try to advise their client, but it’s difficult for them to know what to do because it’s supposed to be the client’s decision and at the same time it’s hard for them to know whether the client fully understands what’s happening.”

Hessick is the Ransdell Distinguished Professor of Law at the University of North Carolina School of Law, where she also serves as the director of the Prosecutors and Politics Project. Her book, “Punishment Without Trial: Why Plea Bargaining Is a Bad Deal,” was published in October 2021.