Plea Bargaining Institute Academic Working Group Newsletter

October 2026

Featured Guest Column

Bargaining Away Sex

By Thea Johnson

Last month, Tina Zottoli, co-chair of PBI's academic working group, and I published *Bargaining Away Sex* in the **American Criminal Law Review**. The paper starts with a puzzle. Why do we sometimes see serious sex-crime cases end with a guilty plea to something that isn't a sex crime at all? To solve the puzzle, we turned to a dataset from Ohio. Justice Michael Donnelly, formerly of the Ohio Supreme Court, collected nearly 500 cases in two separate counties that began as felony rape or other felony sexual assault charges and ended in convictions for non-sex offenses. He then turned those cases over to us to see what we could find.

These 500 cases are, of course, a subset of the total rape cases in those counties. For our next paper, we're working on compiling a full dataset to compare these cases against. But the dataset that we used in *Bargaining Away Sex* is rare and important. It follows each case from indictment to plea and includes details about the facts, the people involved, and the outcome. We used these cases to observe how a case moves from a sex crime to a non-sex crime. Some cases moved in ways that make sense. A rape charge became an assault charge. A sexual abuse of a minor charge became child endangerment. These outcomes help defendants avoid sex offender registration, but the charge pleaded to was within the range of possibility given the initial charge.

Other convictions had no obvious connection to the original charge. For instance, we observed rape cases ending in convictions for interference with custody, inducing panic, and obstructing official business. One child pornography case with forty-two counts became a single count of felonious assault. A rape and kidnapping case became "corrupting another with drugs," though no one alleged drugs were involved. We classified 38 percent of the pleas as fictional, meaning convictions for crimes that everyone in the room understood the defendant hadn't committed.

The most common fictional plea was aggravated assault, which worked as a catch-all. It sounds serious and leaves a felony on the defendant's record. But in Ohio the offense requires that the victim provoked the attack, much like the heat-of-passion doctrine in homicide law. In one case, a court let the plea stand while acknowledging what it called the "elephant in the room": that the nine-year-old victim had not provoked her stepfather into sexually assaulting her.

We think the motivation behind these pleas, at least for defendants, is a strong desire to avoid the "sex offender" label. Registration carries lasting legal consequences and a stigma that many defendants will go to great lengths to avoid. Some defendants in our dataset pleaded to charges as serious as, or more serious than, the ones they originally faced. These pleas cut against the usual assumption that defendants always plead down. But we suspect that such lateral or “up” pleas are meant to maneuver around the sex offender label while keeping a serious charge on the defendant’s record. Researchers have seen a similar pattern in international criminal law, where some war criminals reportedly prefer a plea to mass murder over mass rape.

Prosecutors have their own reasons to agree to these deals. Victims may be reluctant to participate. Child witnesses may not hold up under cross-examination. Some prosecutors simply want a conviction. In our dataset, the fictional pleas often involved a victim who was under 21, a charge of unlawful sexual conduct with a minor, or a defendant who was the victim's guardian or a guardian's partner. In each of these cases, the victim’s vulnerability or connection to the defendant may pose challenges to securing a conviction, making a plea bargain all the more enticing to the state.

One final note: We don’t think that sentencing is driving these deals. Most defendants in our sample received no jail or prison time at all, including those who pleaded to charges of equal or greater seriousness. The state could have reached the same sentence through a plea to a lower sex offense. Nearly every sentence also carried other penalties, such as probation, treatment programs, restitution, or loss of a professional license. The label and associated collateral consequences appear to be what is being negotiated; not the sentence.

Our findings suggest that mandatory sex offender registration leads the parties to a workaround. When a sanction is mandatory, the people in the system find a way around it. Advocates have long made this argument about mandatory minimum sentences, and we think those minimums have helped drive the growth of plea bargaining and fictional pleas. Mandatory collateral consequences may have the same distorting effect on plea bargaining.

In addition, our findings show how little hold truth has on the plea process. We understand why each party takes these deals, and in many individual cases the reasoning is sympathetic. But when a rape charge can become obstructing official business, the system has drifted away from truth. I've argued elsewhere that truth should be a core value of the criminal system, because justice depends on it. A system that routinely records convictions everyone knows to be false should worry us all.

The full article is available from the American Criminal Law Review.

Read the Full Column

Recently-Published Article Summaries

The ***Federal Sentencing Reporter*** has an upcoming special issue on guilty pleas and plea bargaining (Volume 38, Issue 4), currently available as an **Advance Publication**. The issue was assembled in collaboration with the Plea Bargaining Institute and it opens with an Introduction from the Institute's Founding Director, Lucian Dervan. A variety of stakeholders contributed, including academics, practitioners, and policymakers. The issue includes articles addressing questionable assumptions surrounding guilty pleas (i.e., Redlich et al., 2026) and the plea-bargaining process (i.e., Kramer, 2026). It also highlights how guilty pleas exclude important actors from the justice process (i.e., the public, Neily, 2026; victims, Johnson, 2026; appellate courts/judges, Blair, 2026); as well as the questionable bargains that arguably compel defendants to plead guilty (Leckar & Reimer, 2026). Another article by Michael P. Donnelly, former justice of the Supreme Court of Ohio, reminds us that the requirements of Alford pleas (when they were first recognized by the U.S. Supreme Court) are infrequently met. Finally, the issue concludes with two pieces concerning guilty pleas in military courts (Goldberg, 2026; Rosenblatt, 2026). Overall, this issue provides valuable information on the state of guilty pleas and plea bargains from numerous perspectives.

Johnson, T. & Zottoli, T.M. (2026). Bargaining away sex. American Criminal Law Review, 63(3), 415-463.

Read the paper that Professor Thea Johnson discussed in this issue's guest column. Drawing on case records from two Ohio counties, Thea Johnson and Tina Zottoli offer a close examination of *fictional pleas*—when a defendant pleads guilty to charges that everyone in the room knows are not supported by the actual facts of the case. About 38% of the cases in the data set could be classified as *Fictional* and the analysis suggests that avoiding sex offender registration, or the sex offender label, may be a stronger incentive than charge or sentence reductions. Indeed, in a small percentage of cases defendants pleaded to offenses of greater severity than their original charges. This paper offers a rare look into the often hidden workings of plea bargaining and asks readers to contemplate the implications of a system in which truth itself becomes part of the bargain.

News & Announcements

The Plea Bargaining Institute submitted its second *amicus curiae* **brief** to the State of New York Court of Appeals, in collaboration with Vladeck, Raskin & Clark, P.C.. The motion for leave to file the brief was granted by the Court on September 17, 2026. The case is *People v. Ogden*, and the Court is considering whether a defendant's guilty plea, which included a broad appellate waiver, precludes him from challenging a previous court's decision to remove him from family court (particularly in light

of recent “Raise the Age” legislation). PBI suggested that the decision to remove a juvenile from family court should remain challengeable, even after an appellate waiver, and that juveniles should be subject to searching judicial inquiries before they waive Constitutional rights. The brief further proposes that broad appellate waivers are generally problematic (an argument seemingly supported by the U.S. Supreme Court’s recent opinion in *Hunter v. U.S.*).

Read the Full Brief

Seeking Volunteers

One of the aims the Academic Working Group is to help distill empirical research into accessible, “ready-to-use” text for legal briefs and expert reports. Drs Annabelle Frazier and Melanie Fessinger have volunteered to serve on a committee drafting language on the validity of waivers and pleas. We would like at least two more people to join them, preferably including someone with legal training.

If you are interested in helping with this —or would like more information—**please complete the PBI AWG Qualtrics survey.**

Learn More & Volunteer

Grant Opportunities

Russell Sage Foundation (in collaboration with Arnold Ventures): Causal Research on the Criminal Justice System

Arnold Ventures: Causal Research on Community Safety & the Criminal Justice System

William T. Grant Foundation: Institutional Challenge Grant (“Date for the next competition will be posted in spring 2027”)

William T. Grant Foundation: Improving the Use of Research Evidence (“Deadlines for 2027 will be posted in November”)

Research – Collaboration – Reform

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