

## Probable Causation Bonus Episode 11: Carissa Byrne Hessick

**David** [00:00:08] Hello and welcome to Probable Causation, the show about law, economics and crime. I'm your host, David Eil, and my guest today is Carissa Byrne Hessick. Carissa is the Anne Shea Randsdell and William Garland "Buck" Randsell Junior, Distinguished Professor of Law at the University of North Carolina at Chapel Hill. She is the director of the Prosecutors and Politics Project and also the reporter for the ABA Criminal Justice section of Sentencing Standards Task Force. And most importantly, for our conversation today, she's the author of "Punishment Without Trial: Why Plea Bargaining is a Bad Deal" just published and available wherever you buy books. Carissa, welcome and thank you for joining me.

**Carissa** [00:00:44] Yeah, thanks so much for the invitation. I'm excited to talk to you today.

**David** [00:00:48] Great. So just to start off to give a little more background about you both for context, for your research, and also for our younger listeners who are still thinking about what career path to follow in life. How did you come to be a law professor and then how did you decide to write a book about plea bargaining?

**Carissa** [00:01:06] Sure. So when I was in college, I was a college debater, which I enjoyed, and most college debaters go on to go to law school. So that's what I did as well. And I absolutely loved law school. I just thought it was so much fun. It was all about ideas and sort of a pure form. And then with a policy bent and I really, really, really enjoyed being in law school. And when I got out and started practicing law first, I worked for a couple of judges and there was still a lot of that, though not quite as much as there was in law school, but then when I went to a law firm, there was very little of that.

**Carissa** [00:01:42] It was largely about facts and trying to make sure that your client wins. And so I just thought I wanted to get back to the place where we could talk and think about ideas all the time, which is basically what I do, right? If we're not talking about the ideas in the classroom that I'm in my office writing scholarship. So it's it's a dream come true. When I first started teaching, my area of interest was criminal sentencing and after working on that for a while, it just became clear that a lot of the decisions that prosecutors make in the plea bargaining process end up shaping the sentencing decision. So I started doing more research on prosecutors and on plea bargaining, and as I did this research, it became clear to me that when people talk about crime and when they talk about punishment, they do so, I think assuming that the world looks like what they would see on Law and Order and TV shows like that, and that's really just not true. So I wanted to write this book to let people know that the system looks really different from what they think. And because of that, when they push the people who represent them to pass new laws or they get upset about a case that they read in the paper, they should understand what those new laws do, and they should probably be even more upset when they find out about what happens in the system.

**David** [00:03:00] Yeah. So let's go right to, I think, one of the and as you describe in the book, one of the ways in which the system is really different from, I think, how many people perceive it, which is how common plea bargains are. So how common is it for a criminal case to be resolved by a guilty plea? And how has that changed over time?

**Carissa** [00:03:18] Oh, it's it's incredibly common right now. Once criminal charges are filed against a person, what's most likely going to happen is that they're going to plead guilty. It's also possible that the charges against them would be dismissed and only in a

very, very, very small number of cases might they actually go to trial so that the statistic that folks have, they look at the cases that resulted in the conviction, and it looks as though we don't have complete information about this. Fewer than three percent of cases that end in the conviction are the result of a trial as opposed to a guilty plea. And that's definitely changed over time. I mean, it's changed even since the late 1980s, when there were still not many trials but more than this, and it's hard to know exactly when this sort of shift occurred. We don't have good historical data. We have some federal data unclear how representative of the federal system is. And then when it comes to state information, we actually don't have good information. And even today for many states about what their guilty plea versus trial rate is, but some people trace the rise in plea bargaining to sort of the post-Civil War and then the progressive era sort of the late 19th and early 20th century. But it's I hesitate to throw that date range out there because there's just so much uncertainty.

**David** [00:04:42] And there are kind of two narratives, I think, around plea bargaining. And both of them have voice in your book. But I think also you can find judges that approach it and each of these different ways and also lawyers that are practicing within that kind of system. But one story is kind of that plea bargaining is terrible for defendants that prosecutors have all this bargaining leverage. They can ramp up the charges and the sentence that a defendant is going to face a trial basically arbitrarily and if they need to be able to ramp it up more, they can always go to the Legislature and tell the Legislature, "Here's what we want" and legislators are very responsive to prosecutors in that way. They can force defendants to accept or reject a deal before even allowing defendants to look at the discovery, the evidence the prosecutors have. And even at trial they're going to be advantaged because jurors, at least some of them are just very willing to be trusting of what prosecutors and judges say. So even for an innocent defendant, it's hard to take this big risk of going to trial and betting that a jury of your peers is going to find you not guilty. And then on top of that, many defendants are going to have to wait in jail while they're getting their trial. So there's just a lot of leverage that a prosecutor can bring to bear on a defendant to try and kind of strong arm them into pleading guilty.

**David** [00:06:11] And that results in a lot of defendants taking bad plea deals. And then there's a kind of completely in some ways, I think opposite story, which is that, you know, plea bargaining is great for defendants. They're getting these huge discounts on what the statutory sentences are supposed to be for what they've done. And prosecutors are going to give them those deals because trials are really expensive. You never know what witness is not going to show up or you know what police officer is just going to come off as a jerk on the stand or what juror is just going to decide that they don't like the prosecutors face and just hold out because of that, that juror now, after seeing not only the Law and Order shows, but CSI and all that, they think that the government is going to have all the scientific information in every case.

**David** [00:06:56] And prosecutors have a huge case loads to, you know, certainly public defenders do, but also prosecutors, and they're stretched thin. And so there's this big incentive for prosecutors to just get rid of cases by giving irresistible plea offers. And they're irresistible because they're they're so good that defendants get off with really light sentences. So are those inconsistent stories or are they both correct and fit together in some ways are they or some are true in some jurisdictions, others kind of fit the other story more. How did this kind of coexist?

**Carissa** [00:07:27] Yeah, no. I mean, I think you're right to pick up on the two stories that sound incompatible because they are and yet they both do exist, sometimes in the

same jurisdiction. And it just depends on the type of crime or the particular prosecutor. I mean, one of the big problems that we have is we have, you know, plea bargaining hands over an awful lot of discretion to individual prosecutors and it hands them that discretion without a lot of review or checks on how they can use it. And I think our sense about whether they used it in a way that's too punitive or use it in a way that's too lenient is really going to depend on the crime at issue and the particular factual circumstances. So I'll just I'll give you an example. We know that there's an awful lot of plea bargaining in cases involving sex crimes, and part of the reason there's so much plea bargaining is because prosecutors worry about being able to prove those cases to a jury. But at the same time, they have really powerful leverage, not only in the form of long sentences, but also in the form of collateral consequences like the sex offender registry and all of the various restrictions that come with that.

**Carissa** [00:08:43] And so what you get is you get people accused of very serious crimes pleading guilty to serve, not very much time in prison. And then the question becomes, was that an overly punitive outcome or was that an overly lenient outcome? And I think it depends because we don't know whether that person actually committed the crime or not. Did they succumb to the pressure and they were innocent? If so, that was a terribly, terribly punitive outcome, right? They're going to have a conviction and spend time in jail for something that they didn't do. If they did commit the crime, then we're probably concerned that they're spending far less time in prison than we have said that they ought to and that they're avoiding all of these restrictions that people think make the community safe, whether they actually make the community safe. I think it's a separate question. But you can see how the the same outcome looks both too harsh and too lenient because we don't have good information about whether this person was actually guilty or not.

**David** [00:09:42] So does the desirability of the plea then depend at least in part on whether the trial is a better test of guilt or not, whether the trial is going to give us more information about whether somebody is guilty or not guilty? I mean, the US relies even, you know, to the extent we rely on trials, which, as you explain in the book, is much less than people think. But most of our other kind of peer nations don't use jury trials at all. You know, they think that juries are not a very reliable test of guilt or innocence. And as you mentioned, four sex cases, that's kind of particularly salient because a lot of what determines the prosecutors success in presenting the cases, you know, whether particular witnesses are willing to testify in the first place, whether they're particularly sympathetic to just to lay people.

**David** [00:10:36] And that may not be that well correlated with whether the accused is actually guilty or not. I mean, I think there's increasing evidence that people are not really that great at judging the credibility of witnesses and what they say. In order to think that plea bargaining is bad, do we have to think that a trial is really good in that sense?

**Carissa** [00:10:58] So I think you're right to talk about plea bargaining as an alternative to trials and then to say, look, if this is a question of accuracy, which is more accurate, I think that it's totally fair to ask that question. And I'll say that we have reason to think that plea bargaining in many respects is going to be worse and in some respects might be better than trials. So when it comes to to accuracy, but I think that question might miss a much bigger picture. And I'll just say really quickly, like why would we think that it's that it's better? We might think it's better because it's not an all or nothing decision. Right? We can sort of say, look, if we're only 20 percent confident that this particular person is guilty, then maybe what we should do is give them sort of 20 percent of the sentence of what we would give to someone who's guilty. I mean, you could take that approach, right? That guilt

and innocence aren't a binary, but instead their points on a continuum. I'm not a philosopher, but that strikes me as not entirely compatible with how we talk about guilt and innocence in this country. As for whether jurors are bad at assessing things like credibility and so forth, I mean, I'm not a social scientist, but I don't know of any studies that have shown that prosecutors are better at that than 12 average people.

**Carissa** [00:12:13] I just don't know. But I think that the question about accuracy when it comes to guilt or innocence, it misses the couple of things. First of all, our system, now the system that's built on plea bargaining, it prioritizes efficiency above accuracy. So that's sort of the first thing to think about, right? Accuracy isn't the goal of plea bargaining. Disposing of cases quickly is but even in a system, even if we had an ideal system that we could build. I don't think that our criminal justice system that we have or that we had was just about accuracy it was supposed to serve other ends as well. It was supposed to encourage participation by the public. It was supposed to bring closure to the victim, supposed to provide transparency about how the government is operating in criminal cases and plea bargaining. Wow. If there's anything that it's really, really, really doing is obscuring what happens and that sort of lack of transparency is especially problematic because we here in this country and I get it, lots of other countries don't do this. We have a lot of public participation in the setting of our criminal justice policy.

**Carissa** [00:13:30] Our criminal laws aren't set by agencies, they're set by elected legislatures and elected legislatures are really active in revising the criminal law. We elect our prosecutors. We make all sorts of decisions in this country through a democratic or a representative process that just isn't repeated in those other countries. And if we're going to have our criminal justice policy set largely through public participation, a system that doesn't allow the public to see how everything plays out is especially problematic. It also just misses the fact that although we're using plea bargaining, we're using it in a system that's sped up for trials and that which I'd be happy to elaborate more on is really, really, really troubling because the the protections and the procedures that we have set up assume that people go to trial and don't assume that people plea bargain, and that can just lead to some, some really troubling mismatches and lack of protections.

**David** [00:14:32] Let's talk about that a little bit more because I think it is of a really important point that, you know, when you read the Constitution, it sounds like every. But he is going to be going to trial. There are all these protections that have to do with what happens at trial, but it's also the case that if we think about that is when you know, we're set up for trials. If you think about the Constitution and the various state constitutions, many of which were written and passed around the same time as that being when the system was kind of set up, at least in a sense, I mean, a lot of the Constitution are inherited from England and so forth. But it's also the case that the kind of trial contemplated at that time is very different than the kind of trial that's contemplated today and that is described by the constitutional protections elaborated kind of in the mostly 1960s by the Supreme Court. So how does that change? How we think about what the system is set up for and also how we should think about the necessity of plea bargaining?

**Carissa** [00:15:35] Yeah, I mean, this is a popular theory by some people who I think some of them were annoyed by some of the procedural protections that the Warren Court instituted. I personally have a hard time thinking that, oh, the real problem is that we give people lawyers now or we give them appeals, and that's what's broke the criminal justice system. For one thing, if you look at the timeline of plea bargaining that we do have. It doesn't seem to match up with when defendants were given more procedural protections.

So I think that that might be sort of like a post hoc explanation from folks who don't like the Supreme Court sort of taking an active role.

**Carissa** [00:16:09] But let's just talk for a second about the procedural mismatch. And you know, in some ways, I feel like we might be too close to trials. They might be something that we learn about and we think about when we're really young. And I think if we think about something that's more complex and something that's more modern, we can see the problem with the system we have now. So let me just give you an analogy. Imagine we had a government agency that was supposed to certify whether automobiles were safe and when they set up the agency, they said that the agency would conduct crash tests and they'd look at the results of the crash test. And if it looked as though the people who were in the car that was crash would be safe, they could send that certification to another agency or to another official who would rubber stamp it. And that's how we'd know whether the cars would be certified or not.

**Carissa** [00:16:54] And then over time, that agency decided to only crash test sort of half of the cars that were there. And for the other ones, they'd say, Oh, you know, this is kind of close to another car that we crashed just a little while ago. So we'll be more efficient and we'll say it's likely to perform from the same. And then, you know, the same government official sort of gives them the rubber stamp. And then as time goes on, there's a lot of turnover in the office. Someone who's there, maybe crash test has crash tested, you know, 10, 12 cars in their entire career, but they're rubber stamping a thousand cars and saying, I think this is probably safe or I think this is probably not safe. And then that's how the decisions are made.

**Carissa** [00:17:39] And then we compounded by the manufacturers who have more money are going to get a closer look at their application or a more favorable look at their application. And this is what we've done to decide whether cars are safer, right. That wouldn't-- people would freak out if that's how we treated road safety. If that agency wanted to move away from crash tests as the way of determining safety. They'd have to come up with another system they'd have to come up with. This is the engineering type analysis we're going to do. There would probably be more review of that decision making built in and all sorts of things like that. That's basically what we've done when it comes to criminal trials, right? So maybe the crash tests weren't perfect that determining road safety and trials weren't perfect at determining guilt or innocence. But instead of having trials, we rely on this sort of a gut check of someone within the system who doesn't have a lot of experience trying cases, and there's no review of their decision making.

**Carissa** [00:18:43] And what's more, they can take steps to shield the decisions that they're making from any sort of meaningful review. And we've never stopped to say, wait a second, if we aren't using a trial to test the work right to test the gut instincts of these government officials, what should we replace it with? We haven't replaced it with anything. In fact, judges say that they feel less confident making decisions when it comes to sentencing in a plea bargaining case than in a case involving trial, because they don't know the case very well. So they're more likely to defer to prosecutors when the prosecutor's been the only actor involved in these cases. So I guess what I'd say is I can certainly appreciate the idea that our society has evolved to a point where maybe matters have gotten more complicated or more crimes are being committed and so their economic pressure is not to bring anything to trial.

**Carissa** [00:19:47] I think there's an argument to be made here, but if you're going to make that argument, I think we need to talk about what procedures we would replace it

with, because right now we haven't replaced it with anything. We don't get the sort of inquisitorial review that you get in these Western European countries that don't have jury trials. We just have things happening in backrooms that probably the defendants don't understand very well, and members of the community certainly don't understand very well. And we say that we do this in the name of efficiency. And I don't know, I guess I see a trial as something that's as dangerous as worrying about how safe a car is. And yet we just don't we haven't brought any of the tools that we have with the modern administrative state to bear on it. We just let this all happen in backrooms.

**David** [00:20:40] I think that analogy of kind of the operation of the criminal justice system as being a delegation of power somewhat similar to the administrative state, but without the protections is powerful. I mean, I think in some administrative settings, it almost is like your crash test example, like with OSHA and OSHA, like OSHA is occupational standards that protects workers. Both of the federal and state level, you'll sometimes get these programs where, you know, the agency knows it's not going to investigate every workplace. Everybody knows it's not going to investigate any more than a very small share of workplaces, but they can kind of demand that businesses instituted programs that the agency likes. And in exchange, you get a much lower, basically zero risk of being visited by an investigator to look at stuff.

**David** [00:21:37] And in some ways, that is kind of like your car example in that you have standards that are made up by the agency, not based on particular investigations, but based on a number of safeguards that the company itself is going to put in place. But at least you could maybe challenge some of those demands that the agency is making in court, whereas it's harder for a defendant to challenge those kinds of practices that just the prosecutors office is set up as the way they're going to run their office, as opposed to things that are demanded by the Legislature.

**Carissa** [00:22:13] Definitely. And to be clear, when defendants have tried to challenge how prosecutors plea bargain, the courts have been incredibly, incredibly hesitant to step in. They'll say things like, Well, you know, defendants aren't entitled to a plea bargain, so it's fine for the state to condition you know, this bargain on the waiver of all sorts of unrelated rates or denying defendants the ability to look at discovery materials before having to decide whether to take a plea, or even if the office has a policy that they're going to seek a life sentence unless somebody takes a guilty plea and then they make those decisions, maybe at random, about who's going to be threatened with a life sentence unless they take the guilty plea. The courts have said, You know, this is this is all up to the prosecutors. This is all within their power and the courts will only get involved once things move to the trial.

**David** [00:23:20] So let's explore the role of the prosecutor in the American system a little bit more, because I think this is another area where, you know, lay people who watch Law and Order or whatever might misunderstand it. So I think towards the end of the book, you give an example that illustrates this. You describe a case where a prosecutor decides to drop a case despite the defendant having clearly done something that fell within the scope of the criminal statute. And you describe that as a pretty good outcome, given the facts of the case and right that prosecutors should decide whether enforcing the law as written would be a good use of their power. And I think to some people that might strike them as just kind of obviously wrong. That, of course, they're supposed to enforce the law as written. That's what their power is. But how does that that conflict with how you see the system that led you to say that sometimes it's not?

**Carissa** [00:24:10] Yeah, no. I'm so glad you asked that question, because this is one of the things that I wish the general public knew about the modern criminal justice system. We don't have a system where the laws clearly indicate what should be illegal and what should be legal. And then it's just up to the prosecutor to serve as like a functionary or a bureaucrat and enforce that. Instead, we've written laws that are either somewhat unclear or incredibly overbroad, and then we let the prosecutors sort of pick and choose to are the right people to enforce the law again, so I'll give you an example here from my home state of North Carolina. So North Carolina outlaws gambling and that's what the criminal law says. But you're not, you know, gambling is prohibited and it defines it and what have you, but it applies to all gambling. And how 20 or so years ago, a local prosecutor decided to bring charges against a group of men in a retirement home who had a poker game that they described as the nickel and dime game.

**Carissa** [00:25:17] He brought criminal charges because they were breaking the law, and it made the papers, and I don't know if he eventually dismissed the charges or not. But one of the papers interviewed a lawmaker here in North Carolina, actually the chair of the Judiciary Committee and one of the two chambers, and said, like, Are you guys going to change this law? Because it's obviously it shouldn't be a crime for people to play poker with a thirty five cent pot. And the lawmaker responded and said, no, but we hope that prosecutors show better judgment in the future. Will that mean better judgment? They mean don't file charges in cases that make us look like idiots for having written this law, even though we're not going to change the law to make clear what we think should actually be punished. We're relying on you to make those sorts of decisions. That's just like one example.

**Carissa** [00:26:10] There are lots and lots and lots and lots of examples of prosecutors looking at a law and saying what obviously covers this behavior? And we just accept that we assume that prosecutors are going to pick and choose between the people who deserve punishment, even if lots of people are violating the letter of the law. It's something that most Americans don't understand. Then they also don't understand that there's actually there's nothing that prevents the prosecutors from enforcing the law exactly as written, except that they might get a bad story in the paper about going after a bunch of senior citizens for their poker game.

**David** [00:26:51] Yeah, I think it's true, not just whether you're looking at who deserves punishment or not, but also how much punishment somebody deserves, and this is quite relevant for plea bargaining. I mean, I guess mandatory minimum and three strikes repeat offender type was are prime examples where the way the law is written, it really I mean, the Legislature is trying to make it very clear that whenever anybody you know, commits this offense is guilty of this offense or whenever anybody has this set of convictions on their record, they want at least this punishment.

**David** [00:27:25] It really sounds like what they're doing is telling the prosecutors, You haven't been doing your job and you know your perception of what's just is way more lenient than our perception of what's just and you need to change your practices to conform with what we the Legislature, why we get to tell you what to do. I mean, to anybody reading the statutes, I think it very much sounds like that, but it is not always like that.

**Carissa** [00:27:50] Well, I mean, I say it's it's often not like that. The message that the public gets is if you do this crime, if you commit this crime, you'll do this time. But the legislatures, the legislators themselves, don't say that there was a push a few years ago to

lower the mandatory minimum for certain drug crimes in Congress. And Chuck Grassley, who at the time had a really powerful chairmanship. He said, No, we're not going to do this. You guys are telling stories about how low-level drug mules could get caught with these drugs and go to jail for decades. But if you check the data from the U.S. Sentencing Commission, you see what happens is those people plead out and they cooperate. And very few of them ever actually get convicted of these crimes. And he said so the system is working the way it's supposed to. He said let's not change the law because the law exists in order to pressure people into pleading guilty and cooperating. He said that in the congressional record. So to add to the list of things that I wish the public knew about the criminal justice system is this isn't a story about prosecutors going rogue or prosecutors deciding to be too lenient. Everyone's in on the gag. I mean, the the lawmakers are passing these laws, not because they expect people to go to trial and be convicted and serve these sentences, but because they know they're giving more leverage to prosecutors when it comes to plea bargaining.

**David** [00:29:22] So I do think there's kind of a a necessity of that. If you want to have plea bargaining, resolving a lot of the cases, right? So like if you think that there's a relatively narrow band of punishment for a particular offense or set of actions, that is just so it's not like. Anywhere between zero and 20 years, it's just like, you know, maybe a couple of years here or there, but, you know, not not a huge disparity. You're going to have to have a pretty big gap between what's on the books and what somebody gets offered and a plea bargain in order to get a lot of people to take the plea bargain if the difference is not that great a lot of people are just going to decide like, Oh, well, I guess I'll just take my chances. A trial could get a not guilty verdict and go home. But at the differences big, then only one of those things, either the statutory punishment or the plea deal can be within our conception of justice, so either it's the case that prosecutors are giving kind of reasonable plea offers all the time and threatening a really unreasonable, unfair punishment, or it's the case that there are all these fair punishments on the books that prosecutors can get if they go to trial. But if they want to resolve it, the plea deal, they have to give something that's way too lenient compared to what the Legislature or maybe what society in general thinks is right.

**Carissa** [00:30:46] Yes. And that's why plea bargaining is a problem, right? Plea bargaining sets up a system where we have to try to get people not to do what the Constitution guarantees, and we can only do that by being too harsh or too lenient.

**Carissa** [00:31:06] Right. The system is designed to fail, right? If you think that both people should be able to exercise their constitutional rights and we ought to be able to calibrate punishments appropriately. Plea bargaining says you can't do that.

**David** [00:31:23] So let's talk about what kind of alternatives to plea bargaining. So efficiency is, as you said, that's the main reason for plea bargaining. And so if there are much fewer cases being resolved by plea bargain, either we would need much less costly trials or we would need prosecutors to bring way fewer cases. Is that a fair description of like we would have to do one of those two things?

**Carissa** [00:31:49] I mean, I think that there's another alternative, right, which is that we could actually pay for the criminal justice system, which we don't do really to a great extent, right. We don't adequately fund our courts. Frankly, we probably don't even adequately fund our police or at a minimum. We don't have the funding that goes to our courts and our police target the things that we really, really care about. I mean, if you look at the breakdown in the given a year in America, cases that are felonies and cases that



are misdemeanors, misdemeanors are with vanishingly few exceptions, just not particularly serious crimes and felonies obviously are or they're supposed to be. You have about a million felony cases filed in the United States in a given year and have about 13 misdemeanor cases filed. We could make a decision to really care a lot about those felony cases and then we could make a decision that maybe an awful lot of things that we've called misdemeanors maybe shouldn't be dealt with criminally. So we could retarget the way we're spending our money or we could just fully fund what we've said needs to be criminal.

**Carissa** [00:33:04] I mean, instead, what we've done is we've set up a system where lots and lots and lots of things are criminal and we don't really process through them through a system that gives people access to their rights or is designed to reach accurate outcomes and we sort of call it a day. There's sort of enough going on that I think members of the public don't know, right? I mean, they don't know, you know, how few burglaries and robberies and murders even that police solved. But they see police out on the street, arresting drug dealers, and so they think the police are busy. I think we can extend that to the entire criminal justice system and say if we had to, if we had to make a decision, maybe we want to pay for all of it. That's fine. I think that's a legitimate choice for us to make as a society. But if we don't want to pay for all of it, we probably want to pay more attention to what it is that we're doing and decide where to put those funds.

**David** [00:33:59] So the increase in funding alone wouldn't necessarily get us away from plea bargains. Like even if you hired a much more prosecutors and judges and public defenders, it would still be the case that for every case they have in front of them, the most, most efficient way to deal with that would be a plea bargain. So you'd also need some kind of procedural protections to make plea bargaining more costly or more difficult, right?

**Carissa** [00:34:22] Yes, that's right. You'd have to change the procedures surrounding how plea bargaining works in order to sort of disrupt what's happening now. I mean, one way to change that is that judges could do more than act as rubber stamps and some of them do.

**Carissa** [00:34:37] Right? You know, we've seen judges the judge in the Michael Flynn case, he said. Michael Flynn pleaded guilty, but I'm not going to sentence him until he's had an opportunity to see all of the discovery that the government has. Judges can decide to do that. They actually have quite a lot of power under the procedural rules because they're the ones that have to sign off on the guilty plea and enter the conviction. They can just refuse to play along with all sorts of, I'd say, sort of like power plays that the prosecutors use. They don't get involved, oftentimes because they worry that the prosecutors will use their leverage to give the defendant a worse deal. It's possible, but I think some of them could probably do more than there and they're doing now. My point about the funding, though, is we constantly hear the refrain that plea bargaining is necessary because the system can't handle the cases. I think the answer to that should be well, then the system should probably grow to the extent it needs to in order to be able to handle the cases. Though, as you know, I talk about in the book, I have questions about whether caseload can really explain what's happening here.

**David** [00:35:47] Would there evolve a kind of say you have situations where the prosecutor and the defendant really would like to plea deal, but the judge doesn't like it? Would there evolve a system of like there are some trials where the prosecutor and the defense attorney kind of agree ahead of time what facts are going to be presented a trial

like almost like an extended allocution in front of a jury? Like, would that be a bargain that you think prosecutors and defendants would want to work out outside of the scope of a judge's permission?

**Carissa** [00:36:18] Oh, I mean, judges can reject plea bargains if they want to we have some examples of of where they've done it that happened in one of the Enron cases. Usually judges will only reject plea bargains when they think they're too lenient, though when I was doing the interviews for the book, I did come across some defense attorneys who told me that if an offer seemed incredibly harsh, the judge sometimes would ask the line prosecutor if they could ask their their supervisor if they could give a more lenient plea. Do I think that judges are going to make basically prosecutors and defense attorneys go through the motions? I don't think so because as much flack as I have given to prosecutors and lawmakers here for where we are with plea bargaining judges are definitely to blame as well. Long before legislators started getting into the act with mandatory minimums to give prosecutors leverage, judges were just handing out incredibly, incredibly long sentences to defendants who insisted on going to trial because they were annoyed about the time and effort that it took for them in order for those trials to go forward.

**Carissa** [00:37:22] So I suppose getting back to your to your previous question in terms of what it would take to change things. I mean, it would take some structural changes that would also take a big cultural change in the criminal justice system for people to see plea bargaining as anything other than the well-worn path of how we deal with these cases.

**David** [00:37:42] So in that vein, I want to kind of throw out a few ideas and get your reaction to them. So there's a kind of weird feature of bargaining that a lot of times taking away some of your scope of action can improve your bargaining position. So the idea is like in a game of chicken if you throw your steering wheel away when you're driving the other car now, the other driver knows that you can't swerve away, so they better do it. So you can kind of win the game by committing yourself to something and committing yourself always means taking away your future satisfaction. So my my first couple of examples are in that vein. So what if bargaining were supervised by the court and the defendants could make a single take it or leave it offer? And if the prosecutor refuses, then the case would have to go to trial. There could be no bargaining after that.

**Carissa** [00:38:32] Yeah, I mean, I don't I don't know that I can sort of game theory all of that, except to say that you'd have to change a lot of other things besides just removing options from people. Because we have every reason to think that defendants aren't just rational actors here, right. There's a the sort of behavioral economics literature sort of suggests that we're going to have all sorts of problems here with people making on sort of clear eyed, rational decisions, given sort of that they're the sort of people sometimes who found themselves accused of a crime in the first place that they might not have the ability to sort of engage and sort of the right sort of discounting from present and all of those sorts of things.

**Carissa** [00:39:14] But on top of that, again, like if the defendants don't have enough information, they're just not going to be able to, I think, make an offer that they can sensibly. I'd be incredibly wary in doing that if I were a defendant or or advising a client if I were a defense attorney because they just probably aren't going to have enough information to be able to know how the prosecutor would respond.

**David** [00:39:36] What about if defendants could form unions? So instead of doing each case one by one, I mean, I think a big advantage for the prosecutor's office is that they can

formulate agency wide policy and stick to it, and defendants have to kind of each be on their own. What if defendants get form unions and insist that, you know, unless some standards of fairness are met, then they're all going to demand trials and overload the system?

**Carissa** [00:40:01] Yeah, I mean, look, I you know, I've seen that op ed from Michelle Alexander "Take it to Trial Crash the System." I mean, I always wonder how defense attorneys are supposed to ethically serve their clients if they're trying to advance the general good, when it might disadvantage a particular client. One of those clients might get a better deal and what they'd have to throw it away. And I think again, just to fight the hypo for a second, David, I don't think that you can put defendants and prosecutors on equal ground here because at the end of the day, the cost of going to trial for the prosecutor is some more work and hassle. And the cost of going to trial for defendants is, depending on the case, years and years and years more in prison. I just don't think that you can try to equal the playing field because the prosecutors just have very little skin in the game.

**David** [00:40:56] OK, so what about this is my third try. So kind of extending the administrative agency idea before defendants even get involved? We ask prosecutors offices to promulgate rules that are going to govern what they do, both in charging and offering pleas, and those rules are subject to the protections we have on administrative agencies. So the notice and comment and. Just review things like that.

**Carissa** [00:41:23] Yeah, I mean, I certainly think more transparency would be a good thing. And I know, you know, John Pfaff has written a lot about prosecutors. He's a big fan of New Jersey, where they all the prosecutors are appointed, how they have charging guidelines that limit prosecutorial discretion.

**Carissa** [00:41:40] I mean, I think there's there's a lot to recommend that sort of uniformity and transparency. I will say, though, if I had to put money on it, I would bet that that would result in harsher outcomes in several categories of cases where defendants get the deals that they do right now precisely because they're hidden from view. I think there's, you know, a lot of the performative displays of harshness that we see in High-Profile cases are because prosecutors don't want the public to know what they're doing. And if they were to articulate exactly what their policies are. My sense is they'd articulate some policies that are harsher than what they're doing right now. And I'll say this to the extent the defense attorneys have made a compelling case for plea bargaining. It's precisely because sometimes it's the best shot that their clients have at leniency.

**David** [00:42:37] So I do think you sold yourself short a little bit earlier by saying, you're not a social scientist. I want to to point listeners to empirical work that you've done on the political influence that the prosecutors have. But there are also lots of social scientists among our audience. And for those, you know, economists and sociologists and the like. What research questions would you want them to pursue that would be most helpful to you in your work?

**Carissa** [00:43:02] Oh, my goodness. First of all, call me please. I would love to collaborate, but I'd say this. I think that when people start studying the criminal justice system, they're always shocked by how little systematic data is available. That's why I've sort of started doing the work that I have. I don't really do particularly sophisticated analysis of what I find. I just sort of like count things and put the numbers out there because we know so little about our own criminal justice system.

**Carissa** [00:43:30] When it comes to plea bargaining I mean, you can check there are states that we just don't have data from. And especially once you get out of outside of large urban counties, we don't have much information at all about what prosecutors do, what defense attorneys do and what the outcomes are in their cases. So I'd look for the gaps. You can check with the National Center for the State Courts about the dozens of states that that don't report to them and do some data collection there. There's there's I mean, oh my gosh, there's so much to be done. It sounds really overwhelming. And the more people who want to do this work, the better, but I'd really, really, really encourage you to go out and to collect more data and don't just rely on the existing data sets. There just aren't that many data sets, and I think we're probably missing a lot. I'd be surprised if whether a jurisdictions decision not to collect any data had nothing to do with other policy choices that they make. My suspicion is the sorts of places to think it's important to collect and distribute. Their data probably also tends to make other policy decisions that are in favor of transparency and regularity. And all of those sorts of things.

**David** [00:44:46] My guest has been Carissa Byrne Hessick her book is "Punishment Without Trial Why Plea Bargaining Is a Bad Deal." Carissa, thank you so much.

**Carissa** [00:44:53] Pleasure. Good to talk to you, David.

**David** [00:45:00] You can find links to all the research we discuss on the show on our website [probablecausation.com](http://probablecausation.com). You can also subscribe to the show there or wherever you get your podcasts to make sure you don't miss a single episode. Big thanks to Emergent Ventures for supporting the show, and thanks also to our Patreon subscribers the show's listeners supported.

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