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Foreword

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This conference assembled many of the country's leading scholars on plea bargaining to discuss the potential impact of the Supreme Court's recent decision in *Missouri v. Frye* and *Lafler v. Cooper*.

As Judge Louis Sands observed in his keynote address, these decisions raise more questions than they answer. Trial judges, like Judge Sands, now have to grapple with what it means to be an effective plea bargainer and how to craft remedies when courts find that defendants received ineffective assistance in the negotiation phase.

Judge Frank Easterbrook offered his long-standing support for plea bargaining as providing an opportunity for defendants and prosecutors to trade leniency for a certain conviction. He expressed his concern, however, that the Supreme Court's latest cases would grant a windfall to defendants who had gone to trial and thus passed on an opportunity to barter a chance of acquittal for leniency.

A number of participants at the conference were more enthusiastic about the changes these decisions could work in plea bargaining. Susan Klein expressed her hope that these decisions change the political terrain and create pressure for judicial oversight of the process. Specifically, she hoped that pre-plea discovery conferences will become the norm, a proceeding at which prosecutors explain whether this offer is standard and, if not, what circumstances called for a departure from the standard offer. Russell Covey suggested that the Supreme Court is not done with fashioning rules relating to plea bargaining and that limits on the acceptable magnitude of discounts for pleading guilty may follow. Stephanos Bibas offered that non-judicial actors may well take an active role in improving plea bargaining. Lawyers, he proposed, may develop internal guidelines and training and trial judges may become more involved in the plea bargaining process. I echoed that these opinions may change the ethos of defense lawyers who

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have thus far focused their training on trial and appellate skills and that these opinions invite judges, in crafting remedies, to inquire into the motives of prosecutors, thus indirectly fashioning guidelines for the exercise of prosecutorial discretion.

Nancy King offered a voice of caution to those of us who thought these decisions were game-changers. She observed that currently existing legal doctrines permit defendants to waive claims of ineffective assistance of counsel during the negotiation phase, thus effectively negating the work of the Court in *Lafler* and *Frye*. She hoped that subsequent courts would not permit waivers of this right because considering claims of ineffective assistance in the plea phase is necessary for regulation of the plea bargaining process. Nothing in existing law, she noted, however, prevents waivers of ineffective assistance of counsel claims in negotiations.

Al Alschuler offered an even stronger critique of those of us who believe *Lafler* and *Frye* portend substantial change in plea bargaining. With a nod to the urban cowboy era, Alschuler suggested that we are looking for landmarks in all the wrong places. He observed that a number of lower courts recognized claims of ineffective assistance of counsel, thus, he concluded these decision change nothing.

The decisions also invite a conversation about the legitimacy of plea bargaining. The Court recognized that "plea bargaining is not an adjunct to the criminal justice system; it is the criminal justice system." Al Alschuler and Richard Lippke strongly criticize this system of resolving criminal cases that vests extraordinary and unchecked power in the hands of prosecutors. Bruce Green specifically criticized the dissent for objecting to a decision that might add some degree of regulation to the process of plea bargaining.

Jack Chin offered a critique to one prominent defense of plea bargaining. The late William J. Stuntz's work on plea bargaining—and his strong criticisms of the power of the prosecutor in this system of adjudication—influenced the work of virtually all of the people to present at this conference. Chin takes on Stuntz's claim that innocent defendants could be worse off in a world without plea bargaining.

Finally, David Abrams questioned not the legitimacy of plea bargaining, but its value from a defendant's perspective. His study of Chicago courts suggested a highly controversial position that defendants are statistically better off going to trial than accepting guilty pleas.

This was the first of hopefully many symposiums organized by the Criminal Justice Program at Duquesne Law School. There could have been no better way to kick off the efforts of this newly created program. On behalf of the entire law school community, I thank all those who contributed to this very successful event and am sure you will find the ideas in this volume to add immensely to the discussion about the Supreme Court's latest foray into plea bargaining.