

## WHAT'S GOOD ABOUT TRIALS?

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In response to Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

To the lawyers and judges who work in the criminal justice system, plea bargaining seems an efficient, fair, and perhaps even necessary means of resolving the ever-increasing number of criminal cases they face. However, to those who view plea bargaining from the outside, the practice appears unseemly at best, and at worst, a profound threat to the system's goals of finding the truth and doing justice.<sup>1</sup> Yet persistent outsider criticism—much of it emanating from the legal academy—has failed to weaken plea bargaining's hold.<sup>2</sup> As a result, most of the recent scholarship on plea bargaining starts with the assumption that plea bargaining is here to stay; the current agenda is thus one of reform, not abolition.<sup>3</sup>

The turn to incrementalism, however, presents an important theoretical challenge. Once one abandons a categorical rejection of plea bargaining as inherently coercive, fatally inconsistent with the criminal justice system's purpose of moral condemnation, or toxic to the effective functioning of the adversarial process, then one must develop a more complicated normative framework that is capable of endorsing some plea deals while disapproving of others. Such a framework must be true, on the one hand, to the lived experience of the criminal justice system's insiders, recognizing the reality that most de-

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<sup>1</sup> See Sergio Herzog, *Plea Bargaining Practices: Less Covert, More Public Support?*, 50 CRIME & DELINQUENCY 590, 590-91 (2004) (discussing research on negative public attitudes towards plea bargaining).

<sup>2</sup> See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 91 fig.1 (2005) (depicting a pronounced upward trend in guilty plea rates in the federal system since 1981).

<sup>3</sup> See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2145 (1998) (characterizing the plea bargaining system as "largely acceptable," but not "incapable of improvement"); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1123, 1126-27 (1998) (accepting plea bargaining "as a given" and arguing that prosecutorial offices should adopt a clear "plea-bargaining theory").

endants are guilty, few cases present genuine disputes of material fact, and mounting caseloads require expedited procedures. At the same time, that framework must acknowledge the deeply felt intuition of outsiders that, for all of its efficiency, something profoundly important that goes to the heart of what we mean by “criminal justice” has been lost in the move from trials to deals. For all of its creativity and insight, the new generation of plea bargaining scholarship has yet to meet this challenge in a fully satisfactory manner.

Professor Wright’s article exemplifies the very best of the new scholarship. He recognizes the need for what he terms a “mid-level theory” of plea bargaining; that is, a normative framework that will help us to move from the “enervating” abolition debate to a “regulatory strategy” that shows us how to “sort the good plea bargains from the bad ones.”<sup>4</sup> To this end, he proposes a “‘trial distortion’ theory”: criminal courts, he asserts, “produce too many dysfunctional guilty pleas when those guilty pleas distort the pattern of outcomes that would have resulted from trials.”<sup>5</sup> To illustrate the operation of his theory, Professor Wright offers a marvelously subtle analysis of federal case disposition trends over the past sixty years, raising considerable doubt as to whether plea bargaining in the federal system can pass the trial distortion test.<sup>6</sup> Finally, he suggests some specific reforms that might help bring the federal system into closer conformity with the nondistortion ideal.<sup>7</sup>

Despite my deep admiration for this and for all of Professor Wright’s work, I have my doubts about whether his trial distortion theory marks out the most promising track for plea bargaining reform. To be clear, I have no quarrel with his central empirical claims:

- (1) over a period of more than three decades, guilty pleas have been steadily displacing acquittals in the federal system;
- (2) the declining acquittal rate is more persuasively explained by reference to trial distortion than by improved case screening and trial preparation by prosecutors;<sup>9</sup> and

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<sup>4</sup> Wright, *supra* note 2, at 82.

<sup>5</sup> *Id.* at 83.

<sup>6</sup> *See id.* at 150 (“The acquittal trend reveals a system that probably distorts trial outcomes and produces less reliable results than it once did.”).

<sup>7</sup> *See id.* at 151-53 (arguing that any successful reform effort must target the prosecutorial monopoly on the power to entice guilty pleas through sentence discount offers).

<sup>8</sup> *Id.* at 106.

<sup>9</sup> *Id.* at 121.

(3) the apparent trend toward trial distortion is likely connected to the adoption of new sentencing laws that have greatly enhanced the plea-bargaining leverage enjoyed by prosecutors.<sup>10</sup>

Nor do I disagree with the specific reforms he proposes for federal sentencing law, which I think would make good sense even in the absence of trial distortion.

My doubts relate not to the *existence* of trial distortion, but to its *significance*. Trial distortion may be a genuine problem, but it is not likely a big problem (at least in the federal system), and it almost certainly does not capture any large part of the outsider discomfort with plea bargaining (at least outside the legal academy).

I elaborate on these points as follows. Part I identifies more specifically the problems that are and are not targeted by trial distortion theory. Part II calls into question whether trial distortion (as conceptually distinct from wrongful conviction of the innocent) truly is an inherent evil. Finally, Part III suggests an alternative normative framework for plea bargaining reform, one that focuses on fair *process*, rather than the replication of trial outcomes.

#### I. THE NATURE OF THE “TRIAL DISTORTION” PROBLEM

In targeting “trial distortion,” Professor Wright’s principal concern seems to lie with one particular class of defendants: those who plead guilty but who would have been acquitted had they gone to trial.<sup>11</sup> At the outset, it should be noted that in all likelihood this is a very small percentage of the total number of defendants. For instance, as Professor Wright’s data reveal, acquittals and mistrials reached a postwar *high* of only 5.5% of adjudicated federal cases.<sup>12</sup> Indeed, over the entire period between 1945 and 1980, the rate of acquittals and mistrials almost always stayed below 5% and was often below 4%—a mere three percentage points higher than the most recent number.<sup>13</sup> Given this reality during the “golden age” of federal acquit-

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<sup>10</sup> *Id.* at 132.

<sup>11</sup> *See, e.g., id.* at 83 (“Acquittals and dismissals play a starring role in the trial distortion story. These are cases that might have resulted in a defendant’s freedom . . .”).

<sup>12</sup> *Id.* at 102 fig.2.

<sup>13</sup> *Id.* The numbers would be a bit higher if dismissals were lumped in with acquittals, but not dramatically so. Moreover, as Professor Wright observes, given the various potential reasons for a dismissal, it is even more difficult to evaluate the significance of changing dismissal rates than changing acquittal rates. *Id.* at 114 (“[D]ismissals send out even more ambiguous trial-distorting signals than acquittals do.”). As a matter of convenience in this brief Response, I focus (as does Professor Wright) on acquittals,

tals, then even the elimination of *all* guilty pleas in cases that would otherwise end in acquittal is unlikely to make a dramatic difference in the federal criminal justice system. Put differently, there is every reason to believe that the vast majority of federal defendants would still find themselves convicted in a world without trial distortion, just as they are in our current fallen state.

In any event, there is a real disconnect between the broad scope of public complaints about plea bargaining, many of which Professor Wright ably catalogs at the beginning of his article,<sup>14</sup> and a particular focus on “acquittable” defendants. A normative framework that takes the outsider criticisms seriously should also have something to say about the clearly guilty defendants: How large a sentencing break should they get? What role should victims have in the plea bargaining process? What procedural rights should we permit the defendant to surrender, and how can transparency and public accountability be ensured? Trial distortion theory suggests an oversimplified binary analysis (guilty or not guilty); even if we get that threshold question right in every case, there may still be plenty of room to question whether a “criminal justice” system dominated by plea bargaining is really worthy of the name.<sup>15</sup>

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although most of my comments regarding acquittals would also apply with much the same force to dismissals.

<sup>14</sup> *Id.* at 80-81 (describing a range of complaints, including those from the victims that the defendant escaped with a light sentence or that they were denied a full public exposure of the crime, and those from innocent defendants who felt pressured into accepting convictions for crimes they did not commit).

<sup>15</sup> To be sure, it is possible that the trends documented by Professor Wright have a significance that goes beyond the relatively small number of lost acquittals, particularly insofar as the lost acquittals suggest the existence of other forms of distortion in some unquantified set of additional cases. Professor Wright himself makes this point. *See id.* at 83 (arguing that a system that produces fewer acquittals should “trigger[] a warning light about the truth-finding function of the criminal justice system”). It is certainly not implausible that prosecutors who misuse their sentencing leverage to extract guilty pleas from acquittable defendants also misuse their leverage to obtain pleas for more serious offenses than they would be able to prove at trial. Yet, at the same time, it seems equally plausible that prosecutors care most about their conviction rates and are less concerned about the substance of the conviction. This may be particularly true in the federal system, where sentencing law is supposed to minimize the consequences of the exact crime to which the defendant pleads. *See United States v. Booker*, 543 U.S. 220, 250-54 (2005) (describing the real-offense sentencing system adopted by Congress). Moreover, even assuming that the trial distortion problem encompasses a significantly larger number of defendants than simply the acquittables, the incremental harm of convicting a guilty defendant of the “wrong” crime (with uncertain sentencing consequences) seems considerably less compelling than that of convicting a defendant who would have otherwise escaped punishment altogether.

## II. CONVICTING THE ACQUITTABLE: WHERE'S THE HARM?

There is another important problem with focusing on the acquittables: despite their potential success at trial, they *chose* to plead guilty, most likely because they received a substantial benefit for doing so. As Professor Wright observes, in cases in which the government's evidence is weak, "the discount that a prosecutor offers might grow quite large, because a lucrative offer is needed to convince a defendant to give up a strong chance of outright acquittal."<sup>16</sup> And even if they surrender *potentially successful* defenses—trials, after all, are inherently unpredictable—the defendants who get the best deals hardly seem the most deserving of our sympathy. Indeed, even apart from the benefits offered by the prosecutor, there are many good reasons why it may be in the best interests of even an acquittable defendant to plead guilty, including the minimization of legal fees; the termination of tedious, intrusive, and otherwise stressful court proceedings; and the opportunity to accept responsibility for morally blameworthy conduct (notwithstanding the potential absence of *legal* liability). So where's the harm in trial distortion?

In answer to this question, Professor Wright directs our attention away from the defendants and toward the public at large.<sup>17</sup> He suggests two reasons the public may lose when an acquittable defendant pleads guilty. First, he asserts, "[A] guilty plea cuts short the public's chance to learn details about the facts in the case because the factual basis for the plea, as described at the plea hearing, will offer only a quick sketch of the evidence."<sup>18</sup> Fair enough, but this is not really an argument for trial distortion theory so much as a criticism of plea bargaining generally. The public loses an opportunity to learn more about the case whenever a defendant pleads guilty, regardless of the defendant's likelihood of acquittal at trial.

Wright's second area of concern relates more directly to trial distortion. He focuses here on legitimacy:

Because the criminal system emphasizes *public* responses to alleged violations of *public* values, the need to demonstrate the legitimacy of the criminal justice system must trump the preferences of defendants. At some point, the purchase of too many uncertain convictions undermines

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<sup>16</sup> Wright, *supra* note 2, at 109.

<sup>17</sup> *Id.* at 109-10 ("More to the point, these [sentencing] discounts might grow so large in some cases that they become unworthy of public support, regardless of their effect on defendants.").

<sup>18</sup> *Id.* at 110.

our confidence that the system is leading to the accurate results necessary for legitimacy.<sup>19</sup>

Upon closer inspection, however, these legitimacy interests provide only tepid support for trial distortion theory, and by no means clearly outweigh the individual interests of acquittable defendants in avoiding risky legal proceedings and getting the best possible plea deals.

There are at least two important problems with the legitimacy argument. First, there is the information asymmetry: typically, only the insiders know when a case is weak, and they usually have little incentive to undermine an otherwise agreeable plea deal by publicizing the likelihood of a defendant's acquittal. To be sure, there are occasionally high-profile cases in which the media diminishes the asymmetry and informs the public of viable defenses. But, even in such cases, it is unclear to what extent the lay public will ultimately question the expert decisions of the prosecutors who offer the plea deal or the judge who ultimately accepts the guilty plea. Nor is it clear that the public's view of the plea bargaining process is shaped more by the occasional unreliable conviction that comes to its attention than by the far greater number of guilty pleas routinely reported in the press without any question as to their accuracy.

Second, even assuming that the public somehow learns of a substantial number of guilty pleas by defendants who might otherwise win acquittal, there are good reasons to doubt that any sizeable subsection of the public would disapprove of such dispositions. Bear in mind that this is not a discussion solely concerning demonstrably *innocent* defendants, but merely those defendants who stand a good chance of winning at trial. A defendant might win as a result of any number of factors that do not really cast doubt on his or her guilt, such as the suppression of perfectly reliable evidence of guilt, the unwillingness or inability of a key witness to testify or to testify persuasively, the failure of the prosecutor to pursue the most appropriate charges, and so forth. Moreover, in light of the applicable burden of proof, a jury may acquit even if the evidence establishes that it is more likely than not that the defendant is guilty. In all of these circumstances, the public may justifiably prefer to see the probably guilty defendant convicted through a plea bargain than let off with no punishment at all.<sup>20</sup> In-

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<sup>19</sup> *Id.* at 111.

<sup>20</sup> Lending some support to this view, one recent empirical study found a statistically significant increase in the level of support for plea bargaining when the role of plea bargaining was explained in terms of avoiding the possibility of acquittal of de-

deed, to put the matter even more starkly, I suspect that the system's legitimacy in the eyes of the public is *more* threatened when a defendant who is believed by the public to be guilty wins at trial (especially when the win is attributed to a "legal technicality") than when a prosecutor secures a guilty plea notwithstanding the possibility of a successful defense (especially when the defense does not establish actual innocence). In the latter case, the system is at least displaying *some* consideration for the demands of retributive justice and public safety.

To be sure, the set of acquittable defendants must include some who are demonstrably innocent, and the conviction of such defendants via a guilty plea does raise serious legitimacy issues. However, given the broad scope of federal criminal law, the quality of the investigative resources available to federal prosecutors, and the ability of federal prosecutors to cherry-pick their cases, I doubt there are many federal defendants who qualify as demonstrably innocent. Moreover, even to the extent that such defendants exist and choose to plead guilty, it is not clear how the public is to become aware of them. An acquittable defendant's own protestations of innocence will doubtlessly be discounted by the public as self-serving. Moreover, as Josh Bowers has recently demonstrated, the defendants most likely to be wrongfully convicted via plea bargains are prior offenders, who tend to draw a disproportionate share of law enforcement attention.<sup>21</sup> Yet, for the same reason that they are apt to attract false charges, repeat offenders are also unlikely to get any benefit of the doubt from the public. In short, troubling as they may be in theory, guilty pleas by the truly innocent do not seem in practice a strong threat to the perceived legitimacy of the federal criminal justice system.

### III. AN ALTERNATIVE APPROACH: TRIAL PROCESS OVER TRIAL OUTCOMES

Despite my doubts about trial distortion theory, I am in full agreement with Professor Wright as to the need for some sort of regulatory strategy that will help to distinguish between good and bad plea

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defendants at trial. Herzog, *supra* note 1, at 606.

<sup>21</sup> See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. (forthcoming 2008) (manuscript at 8, available at <http://ssrn.com/abstract=983819>) ("[R]ecidivists are overrepresented among innocent defendants and probably comprise the majority of the population because institutional biases select for their arrest, prosecution, and trial conviction.").

bargaining practices. I would propose the following three criteria for such a strategy.<sup>22</sup>

First, a regulatory strategy should have something to say about what constitutes good and bad practices in the mine run of cases, in which there is no real doubt that the defendant is guilty of *something*, but in which there are important questions as to the severity of the offense and the most appropriate sentence. With an increasingly vast criminal code, a regulatory strategy that focuses merely on accurately separating the guilty from the innocent will necessarily be a modest one that is unlikely to do much to improve outsider opinions of the criminal justice system.

Second, as Professor Wright indicates, a regulatory strategy should concentrate on the problem of legitimacy:<sup>23</sup> what can be done to reassure outsiders that plea bargaining is not an exercise in self-serving or arbitrary lenience on the part of the insiders, but rather a practice that is principled and genuinely conducted in the public's interest. As a considerable body of social psychology research has demonstrated, perceptions that government authorities have legitimacy are associated with higher levels of acceptance of official decisions, more cooperation with the authorities, and higher levels of law-abiding behavior.<sup>24</sup> These are compelling ends that should be of central concern to the criminal justice system.

To diverge a bit from Professor Wright, though, I would focus a legitimacy-enhancing project particularly on defendants and victims. The public at large pays little attention to the vast majority of criminal cases, but defendants (always) and victims (often) tend to be far more engaged by, and are thus more likely to be influenced by, the quality of plea bargaining practices. Moreover, in the few cases that do attract wider notice, the public will often take its cues from the people closest to the case. If the defendant, the victim, and the system insid-

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<sup>22</sup> I elaborate on some of these ideas in two forthcoming articles: Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. (forthcoming 2007) (manuscript available at <http://ssrn.com/abstract=982220>) [hereinafter O'Hear, *Procedural Justice*]; Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. (forthcoming 2007) (manuscript available at <http://ssrn.com/abstract=1005373>) [hereinafter O'Hear, *Victims*].

<sup>23</sup> Wright, *supra* note 2, at 111.

<sup>24</sup> See, e.g., O'Hear, *Procedural Justice*, *supra* note 22 (manuscript at 13-14) (highlighting a study by Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 487-88 (1988), and a study by Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 175-76 (1997)).



ers all express satisfaction with the plea bargaining process and outcome, the public is unlikely to develop a more negative view.

Finally, a regulatory strategy should try to bring to plea bargaining, in some form or another, those characteristics of the trial that make the trial so much more attractive in the public imagination than the deal. So, what's good about trials? I doubt that their appeal actually has much to do with the quality of their outcomes. There is little reason to believe that juries are significantly more accurate decision makers than system insiders,<sup>25</sup> and indeed jury verdicts not uncommonly become sources of public outrage (think of the McDonald's coffee case or the O.J. Simpson trial). Trials may or may not do a better job of sorting the guilty from the innocent than plea bargaining, but any advantage they have is likely marginal.

The real reason to prefer trials lies in their procedural attributes: they are public events; they provide interested parties with an opportunity to tell their side of the story; the decision-making criteria (embodied in the jury instructions) are principled and transparent; basic norms of civility and decorum are closely observed; and a finely tuned system of checks and balances between the prosecutor, defendant, trial judge, jury, and appellate court offers robust safeguards against the arbitrary exercise of power. These attributes, which sharply distinguish trials from the popular image of prosecutors and defense lawyers cutting deals in courthouse corridors, resonate with our highest ideals of due process, equal protection, and democratic self-governance. Moreover, these attributes also echo what the social psychology research suggests in regard to legitimacy: perceived legitimacy is at least as much a function of fair process as of fair outcomes, and fair process is largely a matter of voice (i.e., giving people an opportunity to tell their side of the story), neutrality, and respectful treatment.<sup>26</sup>

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<sup>25</sup> For instance, one recent review of the relevant social science literature reached this equivocal conclusion:

[T]he evidence paints a mixed picture. Both judges and juries have advantages and disadvantages as reliable re-creators of past events. Given our current limited data, one might conclude that juries, on balance, may have a slight advantage over judges as factfinders, not because of an actual superiority in reliable factfinding, but because they are perceived as being superior . . . .

Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decision-maker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1145 (2005).

<sup>26</sup> See O'Hear, *Procedural Justice*, *supra* note 22 (manuscript at 12-13) (describing the research and conclusions of social psychologist Tom R. Tyler, who identifies "voice," "neutrality," "trustworthiness," and "respect" as attributes of a decision-making process that is perceived to be fair).

In my view, then, a regulatory strategy ought to try to make plea bargaining processes look more like trial processes. But not too much, or this regulatory strategy will devolve back into the dead-end debate over abolition. The trick is to find ways of injecting the values of voice, neutrality, and respect into the plea bargaining process without robbing plea bargaining of its efficiency advantages over the trial process. This is difficult, but not impossible. Let me provide just one example of a helpful, relatively low-cost reform: transparent prosecutorial charging and plea negotiation guidelines. Substantial field research indicates that plea bargaining occurs around “going rates” for different offenses, which are quite well understood by system insiders.<sup>27</sup> Yet, the schedule of going rates is almost never reduced to writing nor made available to outsiders. If prosecutors were to undertake this simple task and offer short, clear explanations at plea hearings for any deviations from the guidelines, it might go a long way toward reassuring defendants, victims, and the public at large that the system functions in a neutral, principled, and transparent manner—in short, that the system truly merits the respect of outsiders.

I suspect that Professor Wright would, in fact, agree with much of what I have written in this last section. As he has stated elsewhere, “When a prosecutor chooses to adopt a system that limits discretion and that allows greater public scrutiny of office decisionmaking, . . . it is reason to cheer. It is time for more prosecutors to step out from behind the curtain, and operate the administrative justice machine in the open.”<sup>28</sup> That seems to me a more compelling goal—and one that would make a more significant contribution to perceived legitimacy—than the reduction of trial distortion.

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<sup>27</sup> See, e.g., *id.* (manuscript at 8) (comparing descriptions of the different manners of plea negotiations in “high-volume, low-stakes cases”).

<sup>28</sup> Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003).