

# Trial Distortion and the End of Innocence in Federal Criminal Justice

by Ronald F. Wright\*

## ABSTRACT

This article starts with a troubling and unnoticed development in federal criminal justice: acquittals have virtually disappeared from the system in the last 15 years, and for all the wrong reasons. It seems likely that prosecutors have increased the “trial penalty” so much that defendants with meaningful defenses feel compelled to plead guilty, undermining the truth-finding function of the criminal process.

The article examines these federal developments in light of a proposed “trial distortion theory.” The theory I develop here evaluates the quality of plea negotiation practices in a jurisdiction by asking whether the system produces outcomes (convictions, acquittals and dismissals) similar to the outcomes that would occur if all the cases had gone to trial. The trial distortion amounts to a “mid-level” theory of plea bargaining. It is more demanding than the toothless standards that operate at the individual case level, focusing on the “voluntariness” of the defendant. On the other hand, it is more practically useful than “social purpose” theories that evaluate the global costs and benefits of plea bargaining as an institution. Given the stability and universal nature of the practice, the live questions about plea bargaining do not involve the virtues of abolition. Instead, what we need is a method to sort the positive from the negative plea negotiation practices. Trial distortion theory offers a handy diagnostic tool for evaluating plea practices in a particular jurisdiction.

The last half of the paper evaluates the federal system in light of trial distortion theory. Historical analysis of the federal system links the acquittal rates to prosecutor and judicial workload and the expanding role of defense counsel. The years since 1989 have produced the most troubling drop in acquittal rates, largely due to the federal sentencing guidelines and the power they give to prosecutors to make the trial penalty both larger and more certain. An empirical study of the 94 federal districts between 1994 and 2002 produces a regression analysis that identifies the prosecutorial practices with the strongest distorting effects on outcomes. These include heavy use of the “substantial assistance” departures and the enhanced “acceptance of responsibility” adjustments.

This topic is especially timely in light of the Supreme Court’s January 2005 decision in *Booker v. United States*, holding that the federal sentencing guidelines are unconstitutional. I offer both specific recommendations for revising the sentencing guidelines, and more general principles for Congress to follow as it restructures the federal sentencing statutes over the next few months and years. Those principles aim to achieve a “separation of powers” for sentencing, with a proper balance of authority between the prosecutor and the judge.

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## Trial Distortion and the End of Innocence in Federal Criminal Justice

### TABLE OF CONTENTS

#### Introduction

- I. Guilty Pleas That Resolve Cases But Not Questions
  - A. Federal Guilty Plea Growth spurts
  - B. Plea Bargain Theories, Looking High and Low
    - 1. Micro-Level Intentions
    - 2. Macro-Level Social Purposes
- II. Acquittals as a Warning
  - A. Federal Acquittal Rates and the Guilty Plea Connection
  - B. Acquittals and the Other Displaced Outcomes
  - C. The Mid-Level Trial Distortion Theory
    - 1. Trial Distortion and Trial Penalties
    - 2. Are Lost Acquittals and Dismissals Trial Distortions?
    - 3. The Accuracy Hypothesis
- III. What Made Federal Acquittals Disappear?
  - A. Case Volume
  - B. Legal Complexity and Defense Counsel in the 1950s and 1960s
  - C. Crime of the Decade
  - D. Sentence Severity and Trial Penalties in the 1990s
  - E. Prosecutor Power as the Leading Acquittal Culprit
- IV. Legal Environments Hostile to Innocence
  - A. Environmental Audits
  - B. Trials and Tribulations by the Numbers
  - C. The Sentencing Law Nexus

#### Conclusion

## INTRODUCTION

Listen for a while to crime victims and you will hear both frustration and resignation about plea bargaining, but you will hear no true believers. Some crime victims sound relieved that the plea bargain spares them from the prolonged ordeal of a trial: as one woman put it, “I just want it over with.”<sup>1</sup> Others take comfort in the idea that a guilty plea holds the defendant responsible: “It’s what we were looking for the last three years.... He admitted that he was involved and played a part.”<sup>2</sup> Some note that the plea eliminates any risk of acquittal at trial: “I know there are people out there who do far worse and get off for their crime.”<sup>3</sup>

Alongside these lukewarm endorsements, there are plenty of comments on the negative side of the ledger. Victims frequently say the punishment that the defendant received after a plea bargain was not what they expected, complaining about “a slap on the wrist.”<sup>4</sup> Some question the judgment of prosecutors who are too much driven by a fear of losing or the emotional costs of a trial: “[The prosecutor] told me that if they went to trial and he gets acquitted, she couldn’t live with that.... It’s not for her to live with. It’s for me.”<sup>5</sup> For others, the problem with a plea bargain

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<sup>1</sup> See Gwen Filosa, *Woman Changes Guilty Plea in Killing*, TIMES-PICAYUNE (New Orleans), May 4, 2004, at 1; Carol Demare, *Victim at Peace With Boxley Plea Deal*, THE TIMES UNION (Albany, New York), Dec. 24, 2003 at B1 (victim of sexual assault by politically powerful defendant says “Actually, I was relieved that a plea bargain could be reached. [I was] extremely nervous” about testifying).

<sup>2</sup> See Thomas McDonald, *Parents Accept Wreck Penalty*, THE NEWS & OBSERVER (Raleigh, North Carolina), July 2, 2004, at B1; Demare, *supra* note 1 (victim says “I felt most importantly that Boxley be held accountable for what he did and [the plea] took care of that”).

<sup>3</sup> See Sarah Coppola, *Sentence Has Some Victims Unhappy*, AUSTIN AMERICAN-STATESMAN (Texas), July 1, 2004, at B1 (quoting victim also employed by Child Protective Services).

<sup>4</sup> See Alan Gomez, *Delray Pastor to Serve No Time for Molestation*, PALM BEACH POST (Florida), June 25, 2004, at 1C; John Caher, *Ex-Assembly Counsel Boxley Sentenced to a Misdemeanor; Victim Denounces Prosecution for Sex Misconduct Plea Bargain*, N.Y. L.J., Feb. 24, 2004 at 1 (plea bargain is slap on the wrist); Coppola, *supra* note 3 (plea bargain in case of defendant who secretly videotaped 500 woman in dressing room of gym); McDonald, *supra* note 2 (“basically there were no dire consequences”). For survey evidence about popular disapproval of plea bargaining, see Stanley Cohen & Anthony Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85 (1989-1990); Patricia A. Payne, *Plea Bargaining: A Necessary Evil?*, in CRITICAL ISSUES IN CRIME AND JUSTICE (Albert R. Roberts ed., 1994); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, in CRIME AND JUSTICE: AN ANNUAL REVIEW (Michael Tonry, ed., 1992).

<sup>5</sup> See Gwen Filosa, *Family of Dead Teen is Against Plea Deal; Mother Says Shooter Should Stand Trial*, TIMES-PICAYUNE (New Orleans), April 6, 2004, at 1; Coppola, *supra* note 3; Gomez, *supra* note 4 (victim said prosecutors were too preoccupied with emotional toll a trial would put on her); Fred Lebrun, *Courtroom Shift Spurs New*

## Trial Distortion and the End of Innocence in Federal Criminal Justice

is that it blocks the public from learning the full story of the defendant's crime: "it prevents all the facts from coming out."<sup>6</sup> Worst of all, plea bargaining can pressure some defendants to accept convictions for crimes they did not commit.

It is little wonder that crime victims demonstrate such contradictory, even confused, reactions to plea bargains. Those of us who study or work in criminal justice full time are likewise conflicted and confused about the practice, and as a result we have not yet created coherent and comprehensive suggestions for how to change plea negotiation practices for the better.

Our current discussions of plea bargains offer little hope of improving matters because they take place either at too high or too low a level of abstraction. Sometimes we evaluate plea bargains at the case level. The trial judge asks whether a particular defendant entered a "knowing and voluntary" guilty plea, founded on some "factual basis."<sup>7</sup> Any plea meeting this standard will be legally sound and will meet the approval of most judges and attorneys. Yet this standard that courts use to evaluate guilty pleas at the individual case level is anemic, since the facts supporting guilty pleas can be remarkably thin, and many "knowing" and "voluntary" guilty pleas are nevertheless troubling and unjust.

At other times, we evaluate plea bargaining at a very high level of abstraction, treating this disposition of criminal cases as a social institution that deserves our embrace, or our

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*Debate*, THE TIMES UNION (Albany, New York), Feb. 24, 2004 at B1 (district attorney's office "said we could not win").

<sup>6</sup> See Rex Bowman, *Former Law-School Student Gets Life for Three Slayings*, RICHMOND TIMES-DISPATCH, Feb. 28, 2004 at A1 (statement of attorney for families of victims); Rose Dunn, *Plea Bargain Wasn't Punishment Enough*, HOME NEWS TRIBUNE (East Brunswick, New Jersey), Dec. 25, 2003, at A15 (citizen in letter to editor asks, "Why was this case decided by two people instead of a jury?").

<sup>7</sup> For various formulations of the standards for factual basis, voluntariness, and knowledge, see FED. R. CRIM. P. 11(b)(2) (before accepting a plea of guilty, court "must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises ... other than promises in a plea agreement"); FED R. CRIM. P. 11(b)(3) (court "must determine that there is a factual basis for the plea"); *cf.* U.S.S.G. § 6B1.2(a) (court may accept charge bargain if "the remaining charges adequately reflect the seriousness of

acquiescence, or our condemnation as a whole. Perhaps we should think of plea bargains as a method of making criminal adjudication more efficient, extending its power to control crime and punish wrongdoers;<sup>8</sup> perhaps instead we should consider it a squalid and unnecessary procedural shortcut.<sup>9</sup> In any case, the point is to evaluate the impact of all plea bargains on criminal justice and on the social order more generally.

This vantage point, considering plea bargaining as a social institution, delivers genuine insights about the practice, yet it is also enervating. Because nobody will abolish plea bargains entirely from the American criminal courtroom, what we need is a regulatory strategy rather than further insights on the question of abolition.<sup>10</sup> The case-level and society-wide levels of analysis have not shown us how to sort the good plea bargains from the bad ones, or how to respond to our lingering sense that something is amiss in bargain justice.

A mid-level theory would fit better with the current reality of plea bargaining in the United States and would best mark the road to reform. This sort of theory would allow us to analyze guilty pleas at the system level for each jurisdiction, recognizing that in some places plea bargain practices are relatively benign, while in others they are profoundly troubling.

This article develops a “trial distortion” theory as one possible mid-level evaluation of plea negotiation practices in particular systems. According to this theory, criminal courts in a jurisdiction produce too many dysfunctional guilty pleas when those guilty pleas distort the pattern of outcomes that would have resulted from trials. A healthy system would aspire to replicate through its guilty pleas the same pattern of outcomes that trials would have produced.

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the actual offense behavior and ... accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines”).

<sup>8</sup> See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

<sup>9</sup> See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

<sup>10</sup> See George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857 (2000).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Trial distortion theory calls attention to case outcomes rather than negotiations in progress, and to patterns across cases rather than practices in a single case. This approach offers the best use of readily available information because it focuses on the publicly-recorded results of the criminal process rather than unfruitful subjective inquiries into the defendant's level of voluntariness.

Acquittals and dismissals play a starring role in the trial distortion story. These are cases that might have resulted in a defendant's freedom, and when a system starts to produce fewer acquittals and fewer dismissals, it triggers a warning light about the truth-finding function of the criminal justice system.

In some systems, further inquiry might show that a drop in the acquittal rate amounted to a false alarm, revealing no real basis for concern. According to a reassuring line of reasoning that I will call the "accuracy hypothesis," fewer acquittals might simply reveal a system that produces increasingly accurate outcomes. The accuracy might be achieved through higher quality of cases entering the system, an improvement made possible when prosecutors make more time to screen the cases referred to them more carefully. Perhaps law enforcement agents get better at collecting the evidence needed to win a case. Similarly, downward trends in the acquittal rates might merely reflect better trial preparation and performance by prosecutors, or better negotiating skills among all the attorneys.

In some other systems, however, a drop in the acquittal rate could point to very real problems with the quality of criminal justice. Lower acquittal rates might show that prosecutors sell difficult cases too cheaply and only take easy cases to trial. On the other hand, lower acquittal rates might indicate that *defendants* sell too cheaply, either because a timid or under-funded defense attorney cannot or will not challenge the prosecutor's weakest cases, or (the most

chilling possibility) because the judge and the prosecutor threaten the defendant with too great a penalty for going to trial.<sup>11</sup> For reasons such as these, studying the patterns of acquittal and guilty pleas rates in a jurisdiction can help us identify those places where plea negotiation practices threaten the crucial truth finding function of the criminal process.

It is only possible to choose between these theoretical possibilities – the trial distortion theory or the accuracy hypothesis – by observing particular criminal justice systems at work, so this article interprets the patterns of guilty pleas and acquittals in the federal criminal justice system. Acquittals are steadily disappearing from the federal system. Indeed, acquittals are disappearing more quickly than any other outcomes, including trial convictions and dismissals, as guilty pleas expand to displace all other outcomes in federal court. The drop in acquittals over the last thirty years, when combined with the thirty-year increase in guilty pleas, flags some serious doubts about the quality of justice in the federal system today.<sup>12</sup>

A close look at the system tells us that increasing accuracy probably does not explain this trend; unfortunately, the pattern has unfolded because federal prosecutors have accumulated so much power under the sentencing laws that they can punish defendants too severely for going to trial. Federal law must respond to the current distorting form of plea negotiations by restoring counterbalances to prosecutorial bargaining power and by limiting the techniques available to reward the decision to waive a trial.

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<sup>11</sup> In addition, a long-term drop in the rate of acquittals might become worrisome when acquittals no longer serve their market discipline function during plea negotiations. Acquittals at trials might become so rare that they cannot check abuses during bargaining. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998) (trials might be “too rare to serve as a meaningful check on the executive authorities”).

<sup>12</sup> Michael Finkelstein pursued this insight about the importance of acquittals and dismissals in the evaluation of guilty pleas, in a path-breaking statistical analysis of federal criminal justice in 1975. Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in Federal Courts*, 89 HARV. L. REV. 293 (1975). For a discussion of the intellectual debt I owe Finkelstein and the limitations of his approach, see *infra* note \_\_\_\_.

## **Trial Distortion and the End of Innocence in Federal Criminal Justice**

Part I of this article reviews the under-appreciated history of guilty plea rates in the federal criminal justice system. Surprisingly, federal guilty plea rates stayed flat during some periods and even declined significantly during the 1950s and 1960s. After a relentless climb from the early 1970s to the present, however, the most recent numbers show the highest rates of guilty pleas in the history of federal criminal justice. Part II documents how acquittal rates moved down whenever guilty plea rates went up. In fact, since 1971 acquittal rates have dropped faster than other outcomes such as dismissals or trial convictions.

What explains the disappearance of acquittals in recent decades? In Part III we look for answers based in the history of federal criminal justice. Shifts in the types of crimes charged explain some of the patterns. The strengthened presence of defense counsel accounts for the declining guilty plea rate in the 1950s and 1960s. However, the most important cause of rising guilty pleas and falling acquittals in recent decades was a dramatic increase in prosecutorial resources. Surprisingly, federal prosecutors today handle far fewer cases per attorney than they did in the middle of the twentieth century.

Part IV pursues a deeper inquiry into federal plea practices, concentrating on more recent years. Building on the premise that each of the 94 federal judicial districts employs its own plea practices with distinctive side effects, I analyze district-level statistics from 1994 to the present to determine which environmental factors most strongly affect both guilty pleas and acquittals.

This study of legal environments points toward a symbiosis between plea practices and sentencing law. The federal system over the last three decades featured increasingly severe sentences, and the adoption of federal sentencing guidelines in the late 1980s enhanced the power of prosecutors and judges to reward cooperation from defendants. In those districts where prosecutors took full advantage of the tools available to them under the sentencing laws, it

became more expensive than ever for a federal defendant to insist on a trial; fewer paid the price each year.

Two of the most important tools used to increase the plea discount were “substantial assistance” departures that rewarded defendants with lighter sentences for cooperating with the government to develop cases against other defendants, and “acceptance of responsibility” adjustments to lighten the sentences of defendants who plead guilty early and give the government full information about their crimes.<sup>13</sup> What is remarkable about these tools is not the fact that districts using them the most also increased their guilty pleas the most. The real power of these tools appears when we notice that heavy use of these techniques in a district also decreased *acquittals* in that district. The trial penalty – that is, the differential between the sentence after plea and sentence after trial – convinced more defendants in those districts to abandon worthwhile defenses. The combination of charging and sentencing options gave federal prosecutors the power to distort trial outcomes.

Having identified some features of the federal legal landscape that contribute to the most distorting plea negotiation practices, can we put these discoveries to work? Is reform possible? The question achieved new urgency in early 2005, when the Supreme Court threw federal sentencing out of kilter with its decision in *United States v. Booker*.<sup>14</sup> It was immediately clear that federal sentencing would never be the same after this case arrived. Congress began considering ways to repair the broken system, and key legislators pronounced this to be a moment for serious rethinking of the federal sentencing system.<sup>15</sup>

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<sup>13</sup> See U.S.S.C. §§ 3E1.1, 5K1.1.

<sup>14</sup> *United States v. Booker*, 542 U.S. \_\_\_\_ (2005) (any facts that increase the maximum available sentencing range must be found by the jury rather than the sentencing judge); see also *Blakely v. Washington*, 542 U.S. \_\_\_\_, 124 S. Ct. 2531 (2004).

<sup>15</sup> See Sentencing Law and Policy Blog, available at <http://sentencing.typepad.com> (archival files for July 13, 2004, describing hearing of the Senate Judiciary Committee and for Feb. 10, 2005, describing hearing of the House Judiciary Committee).

## **Trial Distortion and the End of Innocence in Federal Criminal Justice**

In this rare time of reflection and redesign, the effects of sentencing rules on plea negotiation practices should remain at the center of our attention. When we judge plea negotiations by the patterns of outcomes they produce, they reveal the importance of two avenues for reform. First, sentencing rules need to check the monopoly power of prosecutors over key sentencing discounts. The judge needs credible authority to override prosecutorial decisions that punish defendants too severely when they insist on a trial. Second, sentencing reforms must keep within tolerable bounds the penalty that a defendant must pay for going to trial, whether the prosecutor or the judge is the source of that penalty. Sentence reforms moving in this direction will both restore a balance of powers in federal criminal justice and improve the accuracy of the system. Federal sentencing should become more a servant of truth, and less a slave to efficient case disposition.

### **I. GUILTY PLEAS THAT RESOLVE CASES BUT NOT QUESTIONS**

High-quality criminal justice and guilty pleas can co-exist under the right conditions. Nevertheless, for over a century, lawyers and judges in the United States have treated “high” levels of guilty pleas as a cause for concern.

The worries became more acute during times of change, when guilty pleas threatened to make the criminal trial disappear.<sup>16</sup> For instance, in the 1920s, working groups of practicing attorneys and academics studied criminal justice systems in many states and reported with alarm that criminal jury trials were vanishing.<sup>17</sup> In many cities, the percentage of convictions obtained

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<sup>16</sup> Similar concerns crop up periodically in the context of civil litigation. See Judith Resnick, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES No. 3 (2004).

<sup>17</sup> See, e.g., FELIX FRANKFURTER & ROSCOE POUND, CRIMINAL JUSTICE IN CLEVELAND 95, 149, 180, 208 (1922); HUGH N. FULLER, CRIMINAL JUSTICE IN VIRGINIA 79-81, 148-155 (New York: Century, 1931) (guilty plea rates in urban jurisdictions increased from 50 percent in 1917 to 75 percent in 1927); Georgia Department of Public

from guilty pleas reached above 70 percent – low figures by today’s standards, but jarring to attorneys at the time.<sup>18</sup> Concern about the loss of criminal trials picked up again in the late 1960s and 1970s.<sup>19</sup>

Although higher guilty plea percentages captured the headlines, times of growth were not a constant. For example, we know that guilty pleas fell dramatically during several decades during the nineteenth century in Massachusetts.<sup>20</sup> We know a lot about what sends guilty plea rates up, but we could also profit from asking what sends them sideways or down. Just as we can draw lessons from particular places that operate with unusually low levels of negotiated guilty pleas,<sup>21</sup> we can also learn much from concentrating on time periods when guilty plea rates decline. Special attention to periods of declining rates might better explain the causes and predict the future of guilty plea rates. The federal system has seen both – times of boom and bust – in guilty pleas.

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Welfare, *Crime and the Georgia Courts*, 16 J. AM. INST. OF CRIM. L. & CRIMINOLOGY 16, 24 (1924) (guilty plea rates increased 70% from 1916 to 1921).

<sup>18</sup> See Raymond Moley, *The Vanishing Jury*, 2 SO. CAL. L. REV. 97, 105 (1928) (of 24 jurisdictions surveyed, 3 showed less than 70 percent of convictions obtained through guilty pleas and 5 showed greater than 90 percent).

<sup>19</sup> See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 20 (1966); Albert Alschuler, *Plea Bargaining and Its History* 79 COLUM. L. REV. 1 (1979) (collecting references to studies of guilty plea rates); Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, n. 4 (1964) (guilty pleas and nolo pleas account for average of 79% of dispositions of all criminal defendants for fiscal years 1956-1962).

<sup>20</sup> Our most complete information about nineteenth century plea rates (and about early guilty plea practices more generally) comes from George Fisher’s engaging history of the middle-tier criminal courts in Massachusetts. GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003). Fisher also offers some useful breakdowns among different types of crimes, with distinctive movement in the rates for liquor sales crimes, murders, and other offenses. Here, for the first time, we see some noteworthy variation in the pattern: the plea rates began high at the start of the nineteenth century, then dropped to much lower levels in the 1840s and 1850s, only to increase even more quickly in every decade to the end of the century.

There were also some remarkable stretches of stability for the rates in New York and Connecticut. See New York State Crime Commission, *Report to the Commission of the Sub-Committee on Statistics* (1927). Milton Heumann constructed one of the few efforts to track plea rates over many decades in the twentieth century. His study of the Superior Courts in Connecticut confirmed that guilty plea rates fluctuated around 90 percent of all dispositions between 1880 and 1970. See Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC’Y REV. 515 (1975). Heumann constructed this study as part of an effort to show that caseload does not drive guilty plea practices; he matched the relatively stable guilty plea rate with the large increases in volume of cases filed (although he did not account for increased system resources to handle the additional cases).

If periods of increasing guilty pleas provoke questions about the quality of criminal justice, what answers have we found so far? What qualifies as a rate that is “too high”? The last section of this Part surveys the misleading answers we give at the individual case level, and the truthful but paralyzing answers we give at the societal level.

### **A. Federal Guilty Plea Growth spurts**

The federal courts handled federal crimes from the nation’s earliest years, but the number of criminal cases moving through the system each year remained quite small for several decades. Nationwide statistics about federal criminal enforcement first became available in convenient form in 1871, after Congress required an annual report from the Attorney General.<sup>22</sup> These reports collected figures for convictions, acquittals, dismissals, and jury trials, but in a telling omission, they did not include information about guilty pleas until the 1908 report.<sup>23</sup>

The reports depicted a growing system, although the expansion was uneven, as Table 1 shows.<sup>24</sup> The earliest annual reports, from the decade of the 1870s, reported an average of 6984 cases terminated in the federal criminal docket each year. During the 1920s and early 1930s, spurred by liquor prosecutions under the National Prohibition Act, the number of cases shot up

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<sup>21</sup> See Schulhofer, *supra* note 9 (study of exceptionally low rates in Philadelphia); Ronald Wright and Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) (limits on charge bargains and sentence bargains in New Orleans from 1970s through 1990s).

<sup>22</sup> See Statutes June 22, 1870, ch. 150, § 12 (establishing Department of Justice); Statutes June 20, 1872; Statutes Mar. 3, 1873, ch. 238, § 1 (content of annual reports).

<sup>23</sup> By 1940, the job of collecting and reporting the annual statistics on terminated criminal cases in the federal courts fell to the newly-formed Administrative Office of the U.S. Courts.

<sup>24</sup> See Edward Rubin, *A Statistical Study of Federal Criminal Prosecution*, 1 L. & CONTEMP. PROB. 494 (1933-34). For more complete annual statistics, see the web-based Statistical Appendix for this article, available at <http://www.wfu.edu/~wrightrf/Research/> (hereinafter “Statistical Appendix”). Earlier compilations of federal criminal case disposition statistics appear in Finkelstein, *supra* note 12, and AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, pt. I, at 56-58 (1934).

from 26,476 in 1920 to 95,820 in 1932, before dropping back to 38,667 in 1934, the year after the constitutional basis for the Act was repealed.<sup>25</sup>

**TABLE 1**  
**Average Annual Number of Defendants or Cases,**  
**Terminated in Federal Courts by Decades, 1871-2002**

1871-1879	6,984	1940-1949	41,234
1880-1889	9,179	1950-1959	37,366
1890-1899	14,026	1960-1969	32,782
1900-1909	8,718	1970-1979	46,619
1910-1919	14,334	1980-1989	46,202
1920-1929	58,333	1990-1999	61,364
1930-1939	64,759	2000-2002	76,519

The number of defendants<sup>26</sup> dropped modestly in the late 1940s and 1950s, partly a result of a decline in immigration cases. The number surged between 1970 and 1977 and then fell back temporarily from 1977 to 1980. Finally, the system grew in almost every year from 1980 to the present.<sup>27</sup>

Not surprisingly, the number of guilty pleas entered in federal court grew along with the system, but the overall *proportion* of guilty pleas also ballooned over time. Using a baseline of all adjudicated cases,<sup>28</sup> guilty pleatrended down from the 1950s through the 1970s before starting a sustained climb in 1980. The vertical line on Figure 1 marks the two distinct periods.<sup>29</sup>

<sup>25</sup> See National Prohibition Act, 66 P.L. 66 (1919) (also known as the Volstead Act, enacted pursuant to U.S. CONST. amend. XVIII); *United States v. Chambers*, 291 U.S. 217, 222-26 (1934) (taking judicial notice of the ratification of the 21st Amendment, and holding that the NPA, because it rested on a grant of authority from the now defunct 18th Amendment, was inoperative; any prosecutions or appeals pending after the repeal in December 1933 were to be dismissed for lack of jurisdiction).

<sup>26</sup> Starting in 1936, the federal statistics calculate the number of defendants rather than the number of cases. See American Law Institute, *supra* note 24, at 27 (argues that the difference between the two units of analysis is not very large in the federal system).

<sup>27</sup> Some of this growth is to be expected in a nation with a growing population. In 1950, the federal courts terminated one criminal case for every 3,580 people in the country; in 2000, the federal courts terminated one criminal case for every 4,760 people.

<sup>28</sup> For a discussion of the merits of adjudicated cases as a base (guilty and nolo pleas, trial convictions, acquittals and mistrials) and an alternative base of terminated cases (adjudicated cases plus dismissals), see the Statistical Appendix, *supra* note 24.

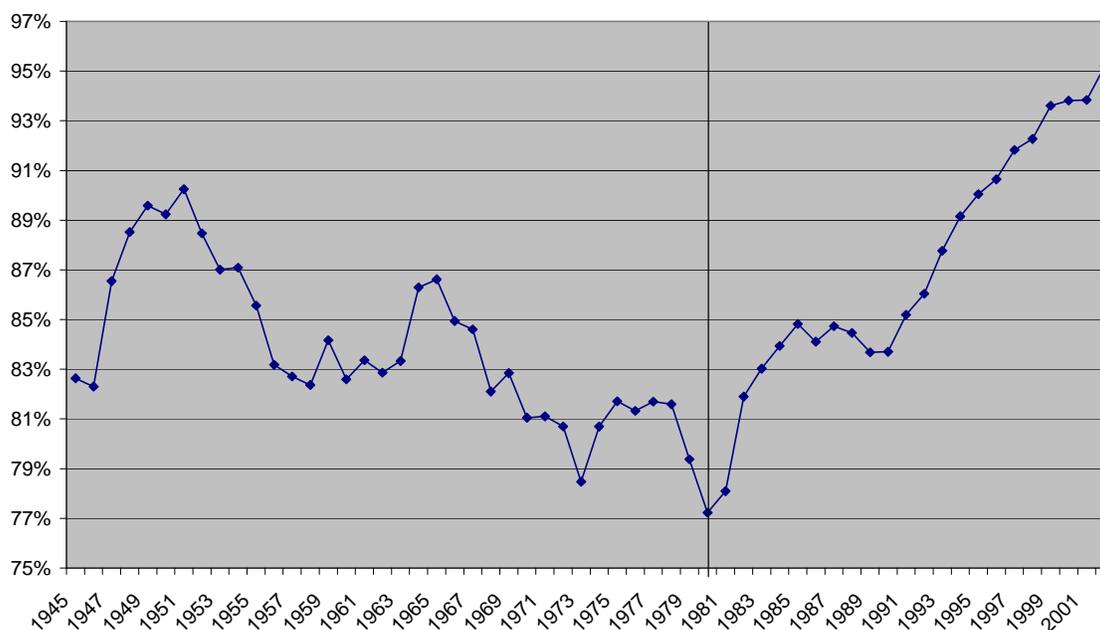
<sup>29</sup> The story from earlier years is interesting in its own right, but less pertinent for our immediate purposes. The first prominent event in the story of guilty plea rates is the remarkable growth between 1910 (with a starting point of 44.6 percent) and 1933 (when the rate reached 80.8 percent). A second phase, from 1935 to 1951, saw a brief drop to

## Trial Distortion and the End of Innocence in Federal Criminal Justice

By 2002, defendants pleading guilty represented the largest share of adjudicated cases in the history of federal criminal justice, at 95.2 percent.<sup>30</sup>

FIGURE 1

### Federal Guilty and Nolo Pleas in Adjudicated Cases, 1945-2002 (Percent)



These levels of change in the last half of the century carry serious consequences. If plea rates were to fall back to 1980 levels and the total number of defendants remained the same, the number of federal trials (and all the resources needed to support them) would increase nearly ten-fold.<sup>31</sup>

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69.2 percent in 1941, and then a decade of increases, topping out at 83.4 percent in 1951. See Statutory Appendix, *supra* note 24.

<sup>30</sup> That same year guilty pleas accounted for 96.2 percent of the federal *convictions*. Reports from the Bureau of Justice Statistics have noted the increase in the guilty plea rate in recent decades. Bureau of Justice Statistics, *Federal Criminal Case Processing, 2001: With Trends 1982-2001, Reconciled Data* (2003) (NCJ 197104).

<sup>31</sup> See Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970).

The possible explanations for these high and low tides of guilty pleas must wait for Part III. Before seeking out the causes of the changes, we must become acquainted with two ways to evaluate the growth of guilty pleas.

## **B. Plea Bargain Theories, Looking High and Low**

In an adversarial system of litigation, can true justice happen in the absence of trials?<sup>32</sup> There was a time in the United States when judges in criminal cases answered this question with a clear-cut “No.” Some judicial opinions from the nineteenth century refused to countenance negotiated guilty pleas, and some even had qualms about guilty pleas entered without apparent negotiations between the prosecution and defense.<sup>33</sup>

And yet the answer to this question today, for those who work daily in courtrooms across the United States, is a troubled “Yes.” Criminal justice experts – prosecutors, judges, and defense attorneys – assure us that plea bargains are necessary and create important public benefits, so the practice remains unpopular but stable.<sup>34</sup> The guilty plea rates are sky high everywhere and have stayed high for decades, yet the sky never falls.

We have created theoretical accounts of guilty pleas on two different levels in response to this reality. Some guilty plea theories evaluate plea negotiations on the micro-level, asking about the intentions of the parties in each case. Other theories pursue a macro-level approach, tracing the broad social effects of discounted sentences. This section will explain why both levels of analysis fail to help us diagnose and improve plea practices.

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<sup>32</sup> Cf. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984).

<sup>33</sup> See *Edwards v. People*, 39 Mich. 760 (1878); *Commonwealth v. Batts*, 1 Mass. 95 (1804).

## 1. Micro-Level Intentions

One of the important differences among guilty plea theories is the type of information they use for evaluation. Some of the most prominent accounts of guilty pleas look to the intentions of individual actors in each case. These tests fail, however, because they turn on information that is not routinely available.

The standard legal test for the validity of guilty pleas rests on a micro-level inquiry, asking whether the defendant in a particular case “knowingly and voluntarily” waived the right to trial.<sup>35</sup> Courts and procedural rules set up easily-achieved requirements for demonstrating knowledge: the defendant must know some specifics about the charges filed, the most important procedural rights available at trial, and at least some of the consequences of a conviction.<sup>36</sup> The defendant must also have competent legal counsel to explain this information before pleading guilty.<sup>37</sup> But when it comes to the defendant’s “voluntariness” – the second half of the formula – courts have walked away. The proper knowledge, together with a pro forma statement from the defendant that her guilty plea was not coerced, will normally suffice.

Consider some of the coercive environments that are said to produce “voluntary” guilty pleas according to this standard. The size of the differential between the post-trial sentence and the post-plea sentence can become enormous. When a defendant faces a possible life prison after conviction at trial and the prosecutor offers to reduce charges, making possible a sentence of only a few years, the resulting guilty plea is considered voluntary so long as the defendant says

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<sup>34</sup> See Barnett E. Hoffman, *Courts Would Stall Without Plea Bargains*, HOME NEWS TRIBUNE (East Brunswick, N.J.), Jan. 9, 2004, at A10 (letter from Superior Court judge); Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976).

<sup>35</sup> See generally MARC MILLER & RONALD WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 1037-1058 (2d ed. 2003).

<sup>36</sup> See *Henderson v. Morgan*, 426 U.S. 637 (1976) (critical elements of offense); *Boykin v. Alabama*, 395 U.S. 238 (1969) (trial rights); *State v. Bellamy*, 835 A.2d 1231 (N.J. 2003) (court must advise defendant of possibility of future civil commitment as a sexually violent predator); Fed. R. Crim. Proc. 11(b); *but cf.* *United States v. Ruiz*, 536 U.S. 622 (2002) (allowing guilty pleas entered after agreeing to limits on prosecutor disclosure).

the magic words at the guilty plea hearing.<sup>38</sup> The strength of the defendant's available defense does not figure at all. The government's evidence gets only the most perfunctory testing when the prosecutor orally summarizes, in a few moments at the guilty plea hearing, the "factual basis" of the government's case.<sup>39</sup>

A defendant can enter a "voluntary" plea even while maintaining her innocence; such *Alford* pleas are said to express the defendant's voluntary acknowledgement that the government's evidence is too strong.<sup>40</sup> Even if the judge who will preside at trial and pronounce sentence urges the defendant to accept a plea offer rather than going to trial, in many jurisdictions such a guilty plea is considered voluntary.<sup>41</sup> Only explicit browbeating from the trial judge will lead to a finding that a "knowing" plea was nevertheless "involuntary."<sup>42</sup>

This legal doctrine grows out of a contractual view of plea bargaining. In their purest form, contractual theories evaluate plea negotiations on the same grounds used to evaluate private contract negotiations. For each case, individual negotiators are presumed to act in their own best interests. The presumption is strong, perhaps irrebuttable: only the parties know their

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<sup>37</sup> *Moore v. Michigan*, 355 U.S. 155 (1957).

<sup>38</sup> For an account of an exceptional case in which the trial judge did not accept a plea of guilty despite the proper catechism responses from the defendant, see Associated Press, *Judge Nixes Guilty Plea in AOL Spam Case*, Dec. 21, 2004 (Judge Alvin Hellerstein refused to accept guilty plea from AOL software engineer Jason Smathers because judge was not convinced Smathers had committed a crime under the new federal "can-spam" legislation).

<sup>39</sup> See FED. R. CRIM. P. 11(b)(3). The guilty plea can be declared knowing and voluntary even if the judge accepts the guilty plea but does not accept the plea agreement that induced the defendant to plead guilty. See *United States v. Hyde*, 520 U.S. 670 (1997); Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroading of Criminal Defendants*, 75 U. COLO. L. REV. 863 (2004).

<sup>40</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>41</sup> See MONT. CODE §46-12-211; N.C. GEN. STAT. § 15A-1021(a) (judge may participate); ILL. SUP. CT. R. 402(d) (court may opine when parties propose plea deal); *State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000) (court may comment on plea deal proposed by parties).

<sup>42</sup> See Pa. R. Crim. P. 319(b)(1) (trial judge shall not participate in plea negotiations); *State v. Bouie*, 817 So. 2d 48 (La. 2002) (no voluntary plea after repeated statements by judge that acquittal was unlikely and that plea-to-trial differential in sentence would be at least 20 years; judicial efforts to encourage plea would be acceptable in less extreme circumstances).

own interests and any systemwide effort to second-guess the outcomes negotiated by willing buyers and sellers would be folly.<sup>43</sup>

These theories treat the potential results at trial as an imperfect measure of what really happened at the scene of the crime; the negotiating parties themselves will have more complete information on this score, without interference from rules of evidence and other artifacts of courtroom proof.<sup>44</sup> Thus, the match between potential trial results and actual negotiation results is not relevant to the quality of the guilty plea.<sup>45</sup>

We need an alternative theory of guilty pleas, one that transcends the hidden intentions and grudgingly-spoken words of defendants in particular cases. Such an external point of reference for evaluating guilty pleas becomes possible by concentrating on the systemwide pattern of results that plea negotiations produce. Whatever the words that defendants utter at the plea hearings, a system should not tolerate plea bargaining practices that distort the outcomes that would have occurred at trial.

An external evaluation of guilty pleas is necessary because none of the negotiating parties will reliably protect the public interest. The prosecutor, as an agent of the public, will not necessarily follow the wishes of the principal. Defense lawyers might also be viewed as agents of the public, assigned the duty of assuring accurate and accountable adjudications of crime. But

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<sup>43</sup> See Easterbrook, *supra* note 8 at 308-322.

<sup>44</sup> See Frank Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992) (negotiation between sophisticated persons unencumbered by the rules of evidence produces more accurate results than trials).

<sup>45</sup> Contractual theories also take more nuanced forms. Robert Scott and William Stuntz concede the defendant's voluntariness for most cases, but identify some exceptional settings where fully-informed (and innocent) defendants might enter an involuntary guilty plea. Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). The Scott-Stuntz approach shares some features with trial distortion theory. Like trial distortion theory, Scott and Stuntz measure the legitimacy of plea bargains by their ability to produce accurate convictions. However, they promote rules that make it easier for prosecutors to offer large discounts to defendants in weaker cases and reject efforts to evaluate plea bargains based on the outcomes they produce.

lack of funding and other obstacles may lead defense attorneys to fall short in these public duties.<sup>46</sup>

Thus, there are public interests at stake in plea negotiations that both parties at the table might ignore.<sup>47</sup> The public's interests in plea discounts of the right scope can be protected best in a process that is open to public scrutiny and accountability.<sup>48</sup> Outsiders must be able to estimate, based on the likely views of judges and juries who evaluate admissible evidence, what would have occurred at trial and use that estimate to test the predictions or calculations of the parties.

It may be impractical to make such judgments in individual cases, for that would require access to all the witnesses and evidence that might play out at trial. But the insistence that the parties do not always know best – central to a trial distortion theory – takes shape when observers review outcomes in many cases across time.<sup>49</sup> Patterns in outcomes can signal potentially plea negotiation practices, even if the reliability of evidence from case to case is unknowable.

Variations on the case-level contractual view of plea bargains – we might label them “motive” theories – focus on the personal motives of prosecutors. They attempt to identify recurring biases in the decisions of prosecutors about whether to accept a proposed plea bargain.

Too often, however, motive theories produce contradictory accounts. One might theorize, based on an economic model of rational behavior, that prosecutors try too *few* cases because they

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<sup>46</sup> See Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004); American Bar Association, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2005), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/>.

<sup>47</sup> See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1799 (1992); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988) [hereinafter Schulhofer 1988].

<sup>48</sup> See Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargaining*, 55 STAN. L. REV. 1409 (2003).

<sup>49</sup> For an earlier exploration of the conditions that make the parties less than trustworthy in evaluating plea bargains, see Bibas, *supra* note 11.

would rather spend time golfing or pursuing some other leisure.<sup>50</sup> Or one might argue that prosecutors try too *many* cases because they want to develop their trial skills and make themselves more attractive to private firms offering large salaries.<sup>51</sup> These theories are indeterminate because the incentives at work on prosecutors and other actors in individual cases point in different directions. The motive theories also concentrate on a secondary level of social problems by promoting efficiency rather than accuracy in criminal justice. The most compelling reason to try more criminal cases is not to encourage an honest day's work from public servants. It is to promote the central reason behind the criminal trial: to sort the innocent from the guilty.<sup>52</sup>

## **2. Macro-Level Social Purposes**

Other approaches to guilty pleas move outside the minds of the negotiating parties, and outside the criminal courtroom altogether, to ask whether guilty pleas serve larger social purposes. Some writers in this vein conclude that they do, while others judge plea bargains a failure and call for their abolition. Despite their disparate vantage points, these perspectives on plea bargaining share common ground: they discuss plea bargaining as a social institution that must stand or fall as a whole.

Crime control plays a leading role among the relevant social purposes that plea bargaining can serve. Under this approach, plea negotiations succeed if they extend the power of

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<sup>50</sup> See Schulhofer 1988, *supra* note 47. Similarly, one might theorize on the basis of sociological insights about “working groups” that prosecutors try too few cases because they put too great a value on stable and non-adversarial relationships with judges and defense attorneys. See HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 234 (1993) (working groups); JAMES EISENSTEIN & HERBERT JACOBS, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977).

<sup>51</sup> See Edward L. Glaeser, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000) (decision to take cases into federal system based partly on desire of prosecutors to develop human capital in trials).

<sup>52</sup> See AKHIL AMAR, CONSTITUTIONAL CRIMINAL PROCEDURE: FIRST PRINCIPLES (1999) (positing truth-finding function as central constitutional value of criminal procedure); WILLIAM PIZZI, TRIALS WITHOUT TRUTH (1994) (criticizing U.S. criminal procedure for placing insufficient value on truth-finding function).

government to punish (and therefore to control) crime.<sup>53</sup> Economic models of plea bargaining urge prosecutors to obtain as much criminal punishment as possible within a limited office budget.<sup>54</sup>

Social cohesion is another public purpose used to evaluate guilty pleas. Social historian Mary Vogel posits that plea bargaining allowed elite social classes in the nineteenth century to soften the enforcement of a criminal law that fell heavily on the lower social orders, and thus to reduce social conflict. Because guilty pleas accomplished this social goal over the last century, they earned legitimacy.<sup>55</sup>

Legal scholars who criticize plea bargains and call for the abolition or abatement of the practice answer these claims on several levels. First, they dispute the factual claims about the degree of crime control or social cohesion believed to flow from plea bargains.<sup>56</sup> And on a normative level, abolitionists give central importance to lawyerly process values: even weighty social ends do not justify sordid procedural means.<sup>57</sup> In utilitarian terms, it is corrosive to ignore the question of public confidence in the quality of criminal case outcomes.

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<sup>53</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Easterbrook, *supra* note 8; cf. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1150 (1998) (discussing taxonomy of just results theories and resource/efficiency theories). In Zacharias' scheme, trial distortion theory would be considered a "just results" theory.

<sup>54</sup> See William Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61 (1971); Jennifer Reinganum, *Sentencing Guidelines, Judicial Discretion and Plea Bargaining*, 31 RAND J. ECON. 62 (2000) (treating prosecutor's objective as maximizing prison sentences while minimizing cost of prosecution). Prosecutors themselves care more about accuracy and less about maximum coverage than economic theory suggests. See BARRY T. JOHNSON, *THE JAPANESE WAY OF JUSTICE* 98 (2002) (describing survey responses of American and Japanese prosecutors); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335 (1990); Brian Forst & Kathleen Brosi, *A Theoretical and Empirical Analysis of the Prosecutor*, 6 J. LEG. STUD. 177, 178-179 (1977).

<sup>55</sup> See Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 LAW & SOC'Y REV. 161 (1999); Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865*, 22 J.L. & SOC'Y 443 (1995). For persuasive critiques of Vogel's account, see Fisher, *supra* note 20; Stephanos Bibas, *Plea's Progress*, 102 MICH. L. REV. 1024 (2004).

<sup>56</sup> See Albert Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 940 (1983) (discussing plea ban in Alaska as evidence that plea bargaining does not save resources); Schulhofer, *supra* note 47.

<sup>57</sup> See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) (arguing that it is morally impermissible in Kantian terms to balance virtues of trials against economic costs of trials).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Both the positive social purpose theories and the abolitionist critiques take plea bargains at a high level of abstraction. Plea bargaining is addressed as a social institution, with similar effects for good or for ill wherever it goes. Discussion at the macro-level, however, has proven useless in viable legal reform efforts,<sup>58</sup> for its all-or-nothing reform agenda is dispiriting in a world where plea bargaining is so entrenched. Instead, we need a mid-level theory – something between the accounts focused on the individual case level and the social institution level – that evaluates plea bargaining as an artifact of a particular criminal justice system, with different features from place to place.

A mid-level theory would offer two sorts of advantages over the micro-level and social level accounts of plea bargaining. First, as an administrative matter the social purpose theories rely on evidence that is difficult to obtain. To evaluate guilty pleas under a social purpose theory, we must estimate whether a society might experience more crime or more social conflict if the law discouraged or barred certain plea negotiations. Instead, a mid-level theory would direct us to accessible sources when judging the quality of plea negotiation practices.<sup>59</sup> Such a theory would require us to examine the patterns of procedural outcomes across the system as a whole, rather than the intentions of the parties in particular cases or the larger social ends that guilty pleas might achieve. In short, a mid level theory would depend on the types of evidence that working criminal justice professionals already routinely collect, and it asks professionals and scholars to make judgments they are competent to make.

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<sup>58</sup> See Fisher, *supra* note 20.

<sup>59</sup> George Fisher presents the account of plea bargaining that most closely resembles the mid-level theory I elaborate here. Fisher rejects the social purpose theories and constructs an historical account of plea bargaining that looks to the evidence available from courtroom practices. See Fisher, *supra* note 25.

The second advantage of a mid-level theory is its ability to respond to meaningful differences among types of guilty plea practices. Public attitudes reflect this divided reality,<sup>60</sup> and fundamentals of human psychology suggest that some plea bargains are worse than others.<sup>61</sup> We now turn to one possible mid-level indicator of troublesome negotiating practices: the number of acquittals in a jurisdiction.

## II. ACQUITTALS AS A WARNING

Look around the globe, and you will find criminal justice systems where extremely low rates of acquittals reveal profound trouble.<sup>62</sup> In the courts of the former Soviet Union, for example, acquittal rates remained extremely low, largely because the judges knew that acquittals threatened their career advancement.<sup>63</sup> Soviet judges could not afford to take very seriously the truth-finding function of criminal adjudication. On the other hand, remarkably low acquittal rates in other countries inspire more confidence. The Japanese courts acquit very few defendants, yet the review and resources devoted to each case make the system a potentially positive model.<sup>64</sup>

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<sup>60</sup> See Sergio Herzog, *The Relationship Between Public Perceptions of Crime Seriousness and Support for Plea-Bargaining Practices in Israel: A Factorial-Survey Approach*, 94 J. CRIM. L. & CRIMINOLOGY 103 (2003) (public disapproval of plea bargaining is stronger for more serious offenses).

<sup>61</sup> See generally Bibas, *supra* note 11.

<sup>62</sup> The differences in acquittal rates correlate with differences in guilty plea negotiation practices. Today, most countries with a civil law tradition do allow some form of negotiation between the parties in criminal matters, but they are still less hospitable to guilty plea negotiations than we are in the United States. See Johnson, *supra* note 54 (guilty pleas not formally recognized in Japan, most cases based on “confessions”); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases*, 7 BUFF. CRIM. L. REV. (2004) (comparison of the roles of American federal prosecutors and their European counterparts in investigating, charging and sentencing confirms that our present system has “a decidedly inquisitorial case,” giving federal prosecutors all the powers of inquisitorial prosecutors without the formal and informal limits on that power).

<sup>63</sup> See Peter H. Solomon, *The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice*, 39 SOVIET STUDIES 531 (1987).

<sup>64</sup> Acquittals in Japan remain low, perhaps, because the prosecutors have the time and incentive to screen out their weakest cases. See Johnson, *supra* note 54, chapter 7; J. Mark Ramseyer & Eric B. Rasmusen, *Why Is The Japanese Conviction Rate So High?* 30 J. LEGAL STUD. 53 (2001); but see Hiroshi Matsubara, *Trial by Prosecutor*, LEGAL AFFAIRS at 11-12 (March-April 2003) (recounting apparent injustice in murder case against Nepalese man in Japan). For a discussion of acquittal and guilty plea rates in another common law system, see Michael Zander, *What the Annual Statistics Tell Us About Pleas and Acquittals*, 1991 CRIM. L. REV. 252 (pleas in Great Britain went up in 1980s from 62% to 72% of defendants, but acquittal rates stayed flat).

## **Trial Distortion and the End of Innocence in Federal Criminal Justice**

Such divergent lessons about acquittals also play out in the United States. Low acquittal rates in some jurisdictions might reflect a tragic indifference to the truth and the prosecutors' determination above all to secure convictions. Conversely, low acquittal rates might bring positive news of prosecutors who select and prepare cases with great care, defense attorneys who have enough time and resources to develop the best available defense, and sentencing judges who offer only a modest benefit for pleading guilty.

So a significant drop in acquittal rates is an important event in a criminal justice system, but it is ambiguous when it comes to the truth-finding function of the law. Lower acquittal rates should serve only as a warning light, a reason to examine a system more closely for other signs that could tell us whether the environment is compromising reliable outcomes. On this score, the federal system reveals a point of genuine concern: the increased guilty plea rates of the last 25 years are troubling because they displaced acquittals at a higher rate than dismissals or trial convictions.

### **A. Federal Acquittal Rates and the Guilty Plea Connection**

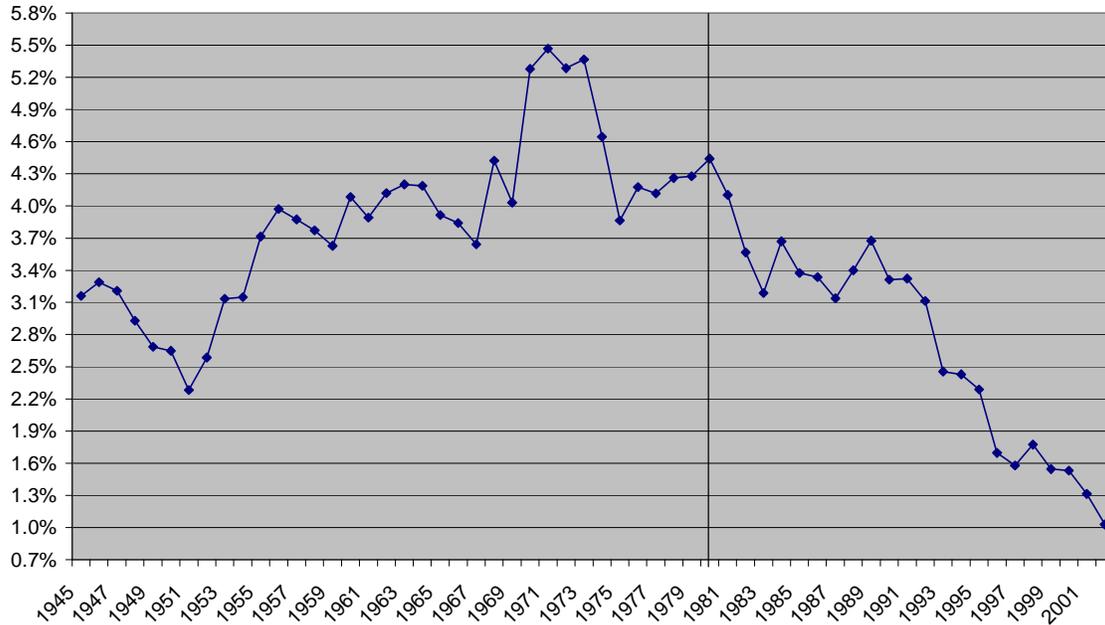
It is no surprise that when guilty plea rates rise, acquittal rates fall, and vice versa. Figure 2 shows the long-term trends for acquittals in the federal system.<sup>65</sup>

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<sup>65</sup> The statistics supporting this figure derive from the Administrative Office of the U.S. Courts and are compiled in the Statistical Appendix, *supra* note 24. The AOUSC classifies as “acquittals” to include acquittals, mistrials, or verdicts of not guilty by reason of insanity. In cases of multiple counts charged against a single defendant in a case, the outcome of the most serious charged offense is used to classify the case. Thus, a defendant who obtains an acquittal on the most serious count and convictions on lesser counts would be classified as an acquittal.

**FIGURE 2**

**Federal Acquittals and Mistrials in Adjudicated Cases, 1945-2002 (Percent)**



During the two decades from 1951 through 1971, acquittal rates rose to their highest post-World War II levels, up from 2.3 percent in 1951 to 5.5 percent in 1971. The years since 1971 brought acquittal rates down to the lowest level in the history of the federal criminal justice system, 1 percent in 2002.<sup>66</sup> The declines since 1989 have been particularly steep.

Although the acquittal rates show an intuitive connection with guilty plea rates (acquittal rates go down when guilty plea rates go up), a closer look reveals a more important and subtle feature of the relationship: comparably high guilty plea rates do not always produce equally low acquittal rates. The years 1951 and 2002 produced two of the higher points in guilty plea percentages, with roughly the same rates in both years (at 90.3 and 95.2 percent, respectively).

<sup>66</sup> Earlier periods also saw interesting interactions between guilty pleas and acquittals. Between 1910 and 1933, as guilty plea rates climbed, the acquittal rates fell more severely than at any other time in the century, from nearly 10 percent down to 1.7 percent, continuing a long-term slide from highs of almost 18 percent in the 1890s. Between 1934 and 1951, while the guilty plea rates fell and then rose, the acquittal rates rose and then fell.

Yet those same years did not generate equally low acquittals. The acquittals for 1951 (2.3 percent) were over twice as high as the level in 2002 (1 percent). Put in terms of a ratio, guilty pleas outnumbered acquittals 40 to 1 in 1951, and 93 to 1 in 2002, making the imbalance of recent years the most extreme in the history of federal criminal justice.

Even though acquittals tend to go down when guilty pleas go up, the link between these two outcomes is not causal. It is not that higher guilty plea rates cause lower acquittal rates. Rather, certain plea negotiation practices cause the changes in both of these dispositions. Those times and places where the ratio between guilty pleas and acquittals reach their highest point deserve the closest scrutiny, for there we find the greatest risk that plea negotiations are distorting the outcomes that would happen at trial.

## **B. Acquittals and the Other Displaced Outcomes**

So far I have treated acquittal rates and guilty plea rates as a bilateral relationship, when in fact the relationship is multilateral. Guilty plea rates change alongside acquittals, but they also change along with trial convictions, dismissals by judges, and dismissals by prosecutors.

As slices of the disposition pie, acquittals, dismissals, and trial convictions all tend to shrink as the guilty plea slice grows larger, but the amount that each shrinks is not preordained. It is possible that guilty plea negotiations could affect all the alternatives equally.<sup>67</sup> But it is also possible that guilty pleas could displace acquittals at a faster rate than the other non-plea

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Bench trial acquittals increased from 1982-2001 across all crime types. On the other hand, from 1946 to the early 1960s, judges had higher conviction rates than juries. See Andrew Leipold, *Why Are Federal Judges So Acquittal Prone?* [forthcoming 2005].

<sup>67</sup> For instance, imagine that a guilty plea rate of 70 percent occurs in Year 1 alongside 20 percent dismissals, 7 percent trial convictions, and 3 percent acquittals. If that guilty plea rate rises to 75 percent in Year 2, and simultaneously moves the dismissals down to 16.7 percent, the trial convictions to 5.8, and the acquittals to 2.5, then the growth in guilty pleas reduces each of the alternatives in equal proportions. That is, the mix among the non-plea outcomes remains the same; in both Year 1 and Year 2, acquittals account for 10 percent of the non-plea outcomes (3 of 30 in Year 1 and 2.5 of 25 in Year 2).

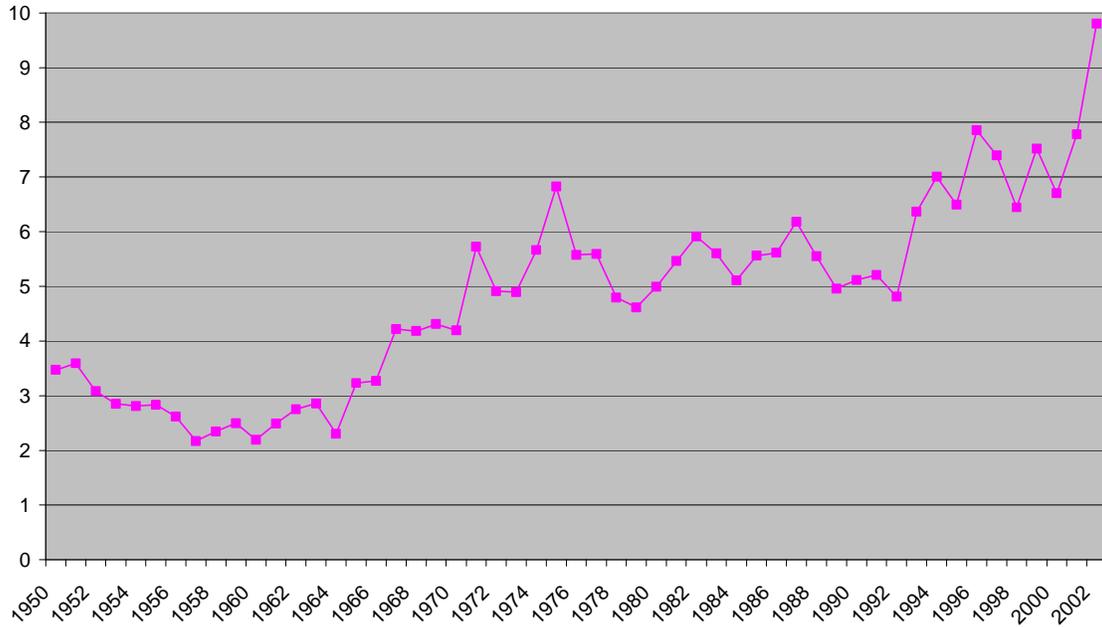
outcomes, and change the mix over time. As Figures 3 and 4 show, the acquittal slice of the pie in the federal system has been shrinking more quickly than the slices for dismissals or trial convictions. Acquittals now occupy a smaller portion of the non-plea outcomes than at any time since the repeal of Prohibition.

Figure 3 tracks the relationship between acquittals on the one hand and dismissals on the other, expressed as a ratio of dismissals to acquittals. Larger numbers (higher points on the vertical axis) denote a weakening of acquittals compared to dismissals. As the upward movement of the graph shows, acquittals lost ground to trial convictions and dismissals since the 1950s. Just before the rate of guilty pleas bottomed out in the 1970s, dismissals gained ground on acquittals and the graph line moved up more steeply. The most recent decade brought the highest ratios of dismissals to acquittals.

**Trial Distortion and the End of Innocence in Federal Criminal Justice**

**FIGURE 3**

**Ratio of Dismissals to Acquittals  
in Federal Court, 1950-2002**



**FIGURE 4**

**Ratio of Trial Convictions to Acquittals  
in Federal Court, 1950-2002**

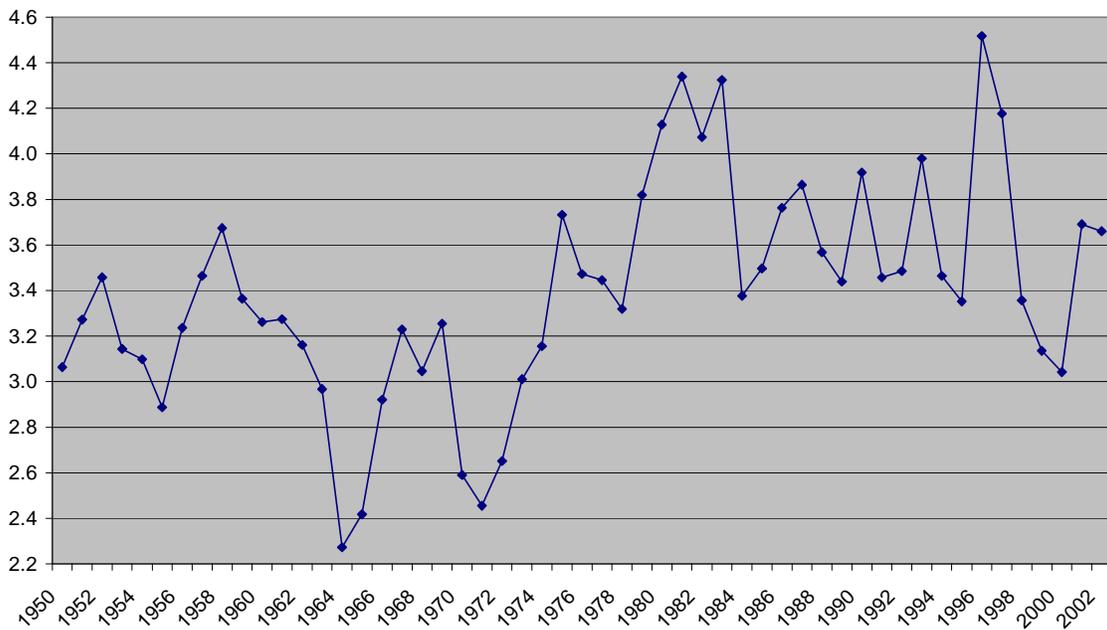


Figure 4 gives us a separate picture of the acquittal-trial conviction relationship. The graph line here also runs in a telling direction. During the 1950s and 1960s, when guilty pleas were decreasing, acquittals gained ground on trial convictions. In recent decades as guilty pleas increased, trial convictions became more common than acquittals and the graph line shifted higher.<sup>68</sup>

Overall, years of increasing strength for guilty pleas from the 1980s to the present are dangerous times for federal criminal justice. Guilty plea negotiations crowded out the wrong alternatives, taking the heaviest toll on acquittals.

### **C. The Mid-Level Trial Distortion Theory**

Up to this point, only a quick outline of the trial distortion theory was necessary as background to our review of guilty plea rates and changes in other dispositions in the federal system. More detail is now required, however, as we sort through the possible meanings one might attach to high guilty plea and low acquittal rates.

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<sup>68</sup> Because dismissals and acquittals both result in non-conviction (and freedom) for a defendant, one additional relationship among the outcomes merits attention: the changing ratio of dismissals and acquittals on the one hand to trial convictions on the other. A figure illustrating this relationship over time appears in the Statistical Appendix, *supra* note 24.

The relationship between acquittals and dismissals on the one hand and all convictions on the other hand was the center of attention in the 1975 analysis by Finkelstein, *supra* note 12. He labeled the difference between the average acquittal and dismissal rate and a particular district's acquittal and dismissal rate as the "implicit non-conviction" rate, arguing that the amount of non-convictions below the average likely would result in non-convictions if the district had a lower guilty plea rate. This article was based on an ingenious insight, and tracked federal criminal justice outcomes more thoroughly than anyone had done since the American Law Institute study in the 1930s. See American Law Institute, *supra* note 24.

While the idea is useful, Finkelstein's analysis remains incomplete for purposes of evaluating plea practices. First, he does not explore in any detail the different possible causes of below-average acquittal and dismissal rates. He uses a two-variable regression, tracking correlations between acquittals and guilty pleas without attempting to measure other differences among districts. Second, Finkelstein combines trial convictions and guilty pleas rather than tracking independently their interaction with acquittals and dismissals. This combination obscures the impact of guilty pleas across all the alternative outcomes. Third, Finkelstein does not use the diagnostic tool he pioneered to find particular plea practices to regulate. Instead, he treats the presence of "implicit non-convictions" as a basis for outright abolition of guilty pleas. Fourth, combining dismissals and acquittals makes it difficult to interpret the meaning of trends. Dismissals, more easily than acquittals, can be taken as a sign of increasing accuracy in a system, for reasons discussed in Part II C.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Trial distortion theory walks a path in between the micro-level and macro-level accounts of guilty pleas. It differs from micro-level methods of evaluating guilty pleas because it examines patterns across many cases rather than reconstructing evidence and events in particular cases.<sup>69</sup> The theory differs from macro-level methods because it remains focused on courtroom results rather than crime control, social cohesion, or other broad-based social effects. This path between the micro- and the macro-levels uses information ready at hand to create a targeted critique of plea practices.

Ideally, in this view, extra guilty pleas should produce the same mix of convictions and non-convictions that a system would produce if every filed case either went to trial or was dismissed.<sup>70</sup> Every person who holds a genuine factual or legal defense to the crime as charged should either be acquitted at trial, or leave the system when the prosecutor decides not to file the charge or when the prosecutor or judge dismisses the charge. Because such a person should not be convicted at trial, that defendant likewise should not plead guilty, at least from a societal perspective where the system's legitimacy is at stake.<sup>71</sup>

The theory at the bottom of this enterprise treats trial outcomes, by definition, as truthful outcomes. Obviously, trial outcomes do not always accurately reflect the events that occurred at the scene of the crime.<sup>72</sup> Nevertheless, trial distortion theory relies on the lawyerly assumption, built into the deepest convictions of the adversarial process, that this method of ascertaining the

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<sup>69</sup> A case-level effort to estimate acquittal rates that might exist in the absence of guilty pleas appears in William Rhodes, *Plea Bargaining: Its Effect on Sentencing and Convictions in the District of Columbia*, 70 J. CRIM. L. & CRIMINOLOGY 360 (1979). Rhodes collected several case file variables indicating the strength of evidence in the case to estimate the probability of conviction if a defendant pleading guilty had instead gone to trial.

<sup>70</sup> In this mental exercise, the imagined trials that the guilty pleas replace take an average length of time based on current trial practices, supported with the personnel and resources available for the typical trial.

<sup>71</sup> See Andrew Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297 (2000); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?* 49 RUTGERS L. REV. 1317 (1997).

<sup>72</sup> For one example of a gap between trial outcomes and truth in the real world, see Fox Butterfield, *Guns and Jeers Used by Gangs to Buy Silence*, N.Y. TIMES, Jan. 16, 2005 (describing witness intimidation in drug trials in Boston).

truth is more reliable – on average across a system – than other methods of reconstructing truth after the fact.<sup>73</sup> In particular, this theory treats the outcome of public proceedings as presumptively more accurate than the outcome of unseen negotiations between the parties. It also reflects the judgment that a prosecutor’s choices about which defendants are factually guilty and what range of punishment they deserve should be subject to evaluation by others.

## 1. Trial Distortion and Trial Penalties

From the earliest public discussions of “compromises” in criminal cases, defenders of plea bargains argued that the negotiating parties simply replicate the likely outcome if their cases were to proceed to trial.<sup>74</sup> Each party estimates the chances of conviction and the sentence a judge would probably impose after conviction at trial. Then together they settle on the proper amount to compensate the defendant for removing uncertainty about the outcome at trial and for saving the government and its witnesses the resources necessary to try the case. In this happy account of rational economic actors, the negotiations for guilty pleas take place “in the shadow of the trial” and merely save system resources.<sup>75</sup>

By invoking this hoary theme in the debates about the legitimacy of plea bargaining, I do not make any descriptive claim. Without a doubt, some bargains do *not* produce results that resemble what a trial would have produced; not all bargaining happens in the shadow of trials. Perhaps prosecutors have their reasons to grant concessions that are too large; perhaps defense

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<sup>73</sup> For a comparison and civil law and common law perspectives on the truth-finding function of the trial, see Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 556, 580 (1973).

<sup>74</sup> See Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 123 (1928) (summary of arguments favoring plea bargaining, as stated by prosecutors of the day); Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927).

<sup>75</sup> For examples of discussions treating plea bargains as taking place in the shadow of trials, see Thomas W. Church, Jr., *In Defense of “Bargain Justice,”* 13 LAW & SOC’Y REV. 509 (1979); Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?* 87 IOWA L. REV. 615 (2002).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

attorneys act as unfaithful agents for their clients and ask for too little.<sup>76</sup> Defendants themselves might poorly predict the likely outcome after trial.<sup>77</sup>

Instead, the trial distortion theory is normative: plea practices are good to the extent that they do mimic trial results, with proper routine sentence discounts. In this view, not all guilty pleas are created equal and not all forms of coercion used to induce a plea of guilty are equally troubling. The coercive power of strong evidence creates no concern. Some defendants plead guilty simply because they accept responsibility for their crimes or recognize the futility of resisting the government's strong evidence. These easy cases would have produced convictions even without the guilty pleas, but only after trials purchased at greater public expense, so the savings from the plea can be devoted to additional criminal cases or to other social priorities.

Trial distorting plea bargains are more likely to occur in cases where the government has weak evidence to support the charges as filed.<sup>78</sup> In these cases, 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. The rational prosecutor must set a "market-clearing" price high enough to obtain guilty pleas even in weak cases.

One difficulty with such large plea discounts (or trial penalties) is the effect they might have on defendants.<sup>79</sup> The difference between the predicted sentence after a trial conviction and

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<sup>76</sup> See CANDACE MCCOY, *POLITICS AND PLEA BARGAINING* xvii (1993); Schulhofer, *supra* note 47.

<sup>77</sup> Stephanos Bibas has ably catalogued a variety of reasons – some of them built into the institutional arrangements of the criminal courtroom, and others growing out of common human failures to process information rationally – to believe that most plea bargains do not accurately predict trial results. See Bibas, *supra* note 11.

<sup>78</sup> Cf. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58-65 (1968) (prosecutors seek bargains most persistently in weakest cases to obtain some sure positive outcome); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253 (1989); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115 (1994) (in jurisdiction that increased trial rates, defendants with best defenses went to trial rather than receiving largest discount offers from prosecutors).

<sup>79</sup> Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205 (applies prospect theory to plea bargaining; most likely reason for inapplicability of theory is that prosecutors offer such a large guilty plea bonus that it overcomes all other incentives).

the predicted sentence after a guilty plea could become so large that some defendants would not accurately weigh their options and would not dare go to trial, even with a strong defense.<sup>80</sup>

More to the point, these discounts might grow so large in some cases that they become unworthy of public support, regardless of their effect on defendants. Granted, the public normally should repay a defendant for the savings of trial preparation and court resources that flow from a guilty plea. However, in some notorious cases that implicate the integrity of criminal justice (for instance, prosecutions of wealthy or famous defendants that raise questions about the even-handed quality of enforcement), the public can benefit enormously from a public airing of the alleged offense and the government's investigation.<sup>81</sup> A defendant's offer to plead guilty 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. Prosecutors see an immediate resource savings in the office budget when a defendant pleads guilty, but they might undervalue the need for public awareness of the details that prosecutors already know about the crime and investigation.<sup>82</sup> Prosecutors with such a blind spot might offer overly large discounts to the defendant.

A second component of a guilty plea discount reflects the uncertainty that a defendant saves the government. There are some forms of uncertainty that the public should resolve only through a trial, even if the defendant offers to remove all risk from the case. When a defendant

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<sup>80</sup> See Robert Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992) (innocent defendants are more risk averse than guilty defendants and are more likely to accept bargain even when trial probably would vindicate them); Douglas G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (most plea bargains are unconscionable because they result from unequal bargaining power and involuntary because defendants do not understand their situation).

<sup>81</sup> See Barry Meier, *Two Guilty in Fraud at a Cable Giant*, N.Y. TIMES, July 9, 2004 (Adelphia); *Jury Finds Stewart Guilty on All Counts*, L.A. TIMES, July 9, 2004, at C2 (Martha Stewart). Such a public airing would be especially important for cases filed in areas where social attitudes are in social flux, such as possession of medicinal marijuana or hate crimes.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

accepts a steep discount to waive a trial that carries only a remote chance of conviction beyond a reasonable doubt (say, a 20 percent chance), this is no cause for rejoicing. Many features of the criminal trial, from the rules of evidence to the standard of proof, declare the importance of a high level of confidence in criminal convictions.<sup>83</sup> When uncertainty about the accuracy of a conviction reaches too high a level, the public should not be willing to accept the conviction, even when the defendant offers it.<sup>84</sup> 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 our confidence that the system is leading to the accurate results necessary for legitimacy.

The trial distortion theory, therefore, promotes guilty plea negotiations and sentence practices that offer only modest plea discounts to defendants. In setting the legal requirement that a plea of guilty be “voluntary,”<sup>85</sup> trial distortion theory defines improper coercion to include any discounts offered in weak cases that are large enough to undermine confidence in the outcome.<sup>86</sup>

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<sup>82</sup> See Gifford, *supra* note 80, at 70-73; Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567 (1996) (proposes techniques to protect public interest in system given over to party initiative and party control).

<sup>83</sup> Even defenses based on likely exclusion of reliable but illegally-obtained evidence should be considered in considering the necessary public confidence in criminal proceedings. One aspect of public legitimacy of criminal proceedings is the confidence that law enforcement officers respect the relevant legal constraints.

<sup>84</sup> To put the point another way, while “cost bargaining” is acceptable under trial distortion theory, the most extreme cases of “odds bargaining” are not. See Francis James, *Effective Plea and Sentence Bargaining in South Africa*, VERA INSTITUTE JUST ‘CAUSE, at 3 (Jan.-Feb. 2003) (South African lawmakers believed that “if accused defendants who were guilty knew for certain the outcome of a plea of guilty, they would in fact plead guilty.... Poorly implemented, however, plea bargaining could erode the quality of justice by encouraging the innocent to plead guilty and undermine public confidence in the administration of justice”); cf. Marc Miller & Norval Morris, *Predictions of Dangerousness: An Argument for Limited Use*, 3 VIOLENCE AND VICTIMS 263-83 (1988) (drawing distinction between level of proof at trial and level of certainty necessary to support use of prediction about defendant’s dangerousness); Moohr, *supra* note 62 (public trials provide a rational for sentences and educate the business community about the illegality of specific conduct; they also strengthen shared social norms of the business community against fraud).

<sup>85</sup> See Fed. R. Crim. P. 11(a).

<sup>86</sup> Cf. *Strickland v. Washington*, 466 U.S. 668 (1984) (prejudicial effect of substandard attorney performance can lead to reversal when it creates prejudice sufficient to undermine confidence in the outcome, a standard lower than preponderance of evidence).

If cases of a given evidentiary strength produce a certain pattern of trial outcomes (say, a conviction in two out of every three cases), plea negotiations should produce a similar pattern of outcomes. Better to have confidence in the accuracy of two convictions with sentences near full strength, along with one dismissal or acquittal, than to negotiate for three convictions that produce weaker sentences and inspire weaker confidence.

According to these guiding principles, federal plea practices under current sentencing law present a risky proposition. Granted, the ample resources of the federal system do allow agents to build solid evidentiary foundations for many cases. But even in weaker cases (where the risk of trial distortion is greatest), federal prosecutors have little to fear. The penalties they can impose on guilty defendants start well above the typical penalties that most states would impose and the penalties that public opinion would consider reasonable.<sup>87</sup> Thus, even after a federal prosecutor negotiates a discounted sentence, the public will not likely view the final result as too lenient. As we will see, current sentencing law gives prosecutors and judges many ways to reward cooperation, yet the discounts they offer are in the end not very costly to the government. Sentence severity in the federal system today carries a built-in risk that the plea discount will become too large and distort hypothetical trial outcomes.

## **2. Are Lost Acquittals and Dismissals Trial Distortions?**

Where do acquittal rates fit into this world centered around the hypothetical results that trials would produce? A trial distortion theory does not imply that there is a particular level of acquittals that is healthy or unhealthy; acquittals become a point of concern not simply when they become too high or low in absolute terms, but when they change persistently in one

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<sup>87</sup> United States v. Wilson (Jan. 2005, D. Utah) (Cassell, J.).

direction.<sup>88</sup> Moreover, the meaning of lower acquittal rates will differ from place to place. In some places, guilty pleas displace acquittals faster than other outcomes because plea bargains are being offered and accepted in weaker cases. In other places, however, lower acquittal rates show that prosecutorial screening and trial performance are improving. In such a place, lower acquittal rates reveal no problem of distorted trial outcomes.

Let us first explore the more discouraging scenario, when dropping acquittal rates show that more innocent defendants are being convicted. The number of defendants in weak cases who accept plea offers should rise over time if prosecutors or judges increase the trial penalty. These increases could result from changes in the law (say, the passage of a new mandatory minimum sentencing law that gives the prosecutor a new bargaining chip)<sup>89</sup> or from a change in policy or practice (perhaps an emphasis by a newly-elected prosecutor on filing habitual felon charges whenever possible).<sup>90</sup> The discount can become quite large; some estimates peg the guilty plea discount at roughly half the length of sentences received after conviction at trial.<sup>91</sup>

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<sup>88</sup> Movements in either direction could tell us something about the quality of results in the justice system. A sustained increase in acquittals might reveal prosecutors who are losing touch with the values of jurors and the community, or they could indicate sloppy investigations. The guilty pleas resulting from such a system might deserve some special scrutiny. But the more pertinent problem in the current federal system (and probably in many state systems, as well) is a persistent *decline* in acquittals.

<sup>89</sup> See Testimony of John Roth, Department of Justice, Before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources, House Committee on Government Reform, 2000 WL 644411 (F.D.C.H. May 11, 2000) (mandatory minimum drug laws give prosecutors “an indispensable tool for prosecutors” to induce defendants to cooperate).

<sup>90</sup> For an example of the range of charges available to a federal prosecutor to respond to a given set of facts, consider the case of Nathaniel Heatwole. This student at the Quaker-affiliated Guilford College hid box cutters on airplanes to expose weaknesses in airport security. Federal prosecutors originally charged him with a felony (taking a dangerous weapon aboard an aircraft) with a 10-year maximum sentence. After plea negotiations, prosecutors changed that charge to a misdemeanor with a maximum penalty of six months in prison and a \$5000 fine. He was ultimately sentenced to two years’ supervised probation, 100 hours of community service, and a \$500 fine. Associated Press, *Student Gets Probation, A \$500 Fine*, June 2004.

<sup>91</sup> For estimates of the size of the trial penalty, see U.S. SENTENCING COMMISSION, SUPPLEMENTAL REPORT (1989); David Brereton & Jonathan D. Caspar, *Does It Pay To Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC’Y REV. 45 (1981-1982); Comment, *The Influence of the Defendant’s Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204-222 (1956) (survey of federal judges whose estimates of trial penalty ranged from 10 to 95 percent); Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. OF LAW & PUBLIC POLICY 287 (1993); Hans Zeisel, *The Disposition of Felony Arrests*, 1981 A.B. FOUND. RES. J. 407 (45 percent or more).

Losses in at least some types of *dismissals* might also indicate trial distortion at work. Dismissals include decisions by judges to terminate a case before the end of trial because of inadequate evidence or some other problem. These dismissals are functionally similar to acquittals, so a decrease in this type of dismissal would mean roughly the same thing to defendants as a decrease in acquittals.<sup>92</sup>

Dismissals also include decisions by prosecutors to terminate cases before they go to trial. Prosecutors commonly dismiss a case after reviewing the file or interviewing the witnesses and realizing that the preliminary reading of the evidence was overly optimistic. We might think of these cases as negligently overcharged if a proper initial investigation would have revealed the misfit between the proposed charges and the likely factual findings. Alternatively, new but unforeseen facts might make the old charges unsustainable. If guilty pleas displace dismissals by the judge or prosecutorial dismissals of these two types, they distort the outcomes that would have emerged from the trial process.

Dismissals could also happen when a prosecutor finds it necessary to correct a *deliberate* overcharge. Under this scenario, after a prosecutor asks for a plea of guilty to an untenable charge (“it never hurts to ask”), the defendant is not fooled and declines the offer, and the prosecutor gives up on the ruse and dismisses the case.<sup>93</sup> A decline in this type of prosecutor dismissal could indicate that more defendants are taken in by the maneuver (and are pleading guilty to unfounded charges), a troubling prospect under the trial distortion theory.<sup>94</sup> But a decline in dismissals might also indicate that prosecutors are making fewer of these gambits in

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<sup>92</sup> Acquittals have different appeal and double jeopardy consequences than some dismissals by judges. *See United States v. Sanges*, 144 U.S. 310, 312-313 (1892).

<sup>93</sup> *See Model Rules of Professional Responsibility*, at \_\_\_\_.

<sup>94</sup> *See Joseph A. Colquitt, Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695 (2001) (criticizing bargains for pleas of guilty to nonexistent, inapplicable, or time-barred crimes; cases should instead be dismissed). If the prosecutor overcharges the case but the defendant ultimately pleads guilty to a lesser charge to which she has no viable defense,

the first place, which would mean good news for trial distortion purposes. Thus, given these various sub-types that point in different directions, dismissals send out even more ambiguous trial-distorting signals than acquittals do.

### **3. The Accuracy Hypothesis**

As we have seen, there is an alternative explanation for declines in both acquittals and dismissals, one with more benign implications than a trial distortion theory produces. Instead of postulating that fewer acquittals and dismissals result from more defendants abandoning viable defenses because of a higher trial penalty, such lower acquittal or dismissal rates might simply mean that the quality of cases filed is improving over time. This “accuracy hypothesis” could prove true if prosecutors screen cases more carefully as they enter the system or if investigators assemble stronger cases in the first place.<sup>95</sup> It could also happen if prosecutors solidify cases after they are filed through more complete preparation for trial.<sup>96</sup> If cases were strengthened in this way, a drop in the acquittal rate would accurately reflect the government’s better prospects at trial, and would not indicate any distortion of trial outcomes during plea negotiations.<sup>97</sup>

A prosecutor’s office that receives more resources (whether it be new funding from the legislature or more available hours because fewer existing cases go to trial) could spend those resources either on extra quantity or on extra quality. When the new resources buy extra

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then the prosecutor’s charging decision amounted to harmless error and the case presents no problems for trial distortion purposes.

<sup>95</sup> See Wright & Miller, *supra* note 21 (principled screening in New Orleans created positive outcomes while reducing reliance on plea bargains); Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, 60 IOWA L. REV. 1053 (1975) (improved screening in an Iowa county accounts for unchanged conviction rate despite fewer guilty pleas).

<sup>96</sup> See Bruce Kobayashi & John Lott, *In Defense of Criminal Expenditures and Plea Bargaining*, 16 INT’L REV. L. & ECON. 397 (1996).

<sup>97</sup> See Finkelstein, *supra* note 12 (acquittal and dismissal rates in different districts not likely based on more accurate charging because of similar mix of crimes charged); Alschuler, *supra* note 19 (discussing Finkelstein’s failure to examine in depth possible differences in charging and evidentiary quality from district to district).

quantity, newly-added cases are likely to involve less serious crimes or less persuasive evidence, because the office would have already selected the highest priority cases with the first available funds.<sup>98</sup>

When new resources buy extra quality, however, the system outcomes can change to reflect the better truth-finding function of the system. Improvements in case screening would shift careful prosecutorial scrutiny of the case to the pre-charge stage and would consequently drive down the dismissal rates.<sup>99</sup> An investment in higher quality case screening might also lead to lower acquittal rates. Roughly speaking, stronger cases selected at the start should produce stronger results at trial for the government.<sup>100</sup> Similarly, if improved preparation reveals flaws in the evidence that can be remedied (for instance, a witness who needs additional preparation or documentary support to tell the truth convincingly) the acquittal rate should go down.<sup>101</sup>

Thus, the tradeoff between quantity and quality of cases could offer an important clue as to whether dropping acquittals in a particular system present good news (the accuracy hypothesis) or bad news (trial distortion). Based on this criterion, it appears that the most recent era in federal criminal justice is the most worrisome, for reasons we will now explore.

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<sup>98</sup> See Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, J. CRIM. L. & CRIMINOLOGY (forthcoming 2005) (greater number of environmental prosecutions likely reflect more marginal cases being brought). The new cases added with the additional resources will not necessarily be the least serious in the mix, if the resources arrive as perceptions are shifting about which crimes are serious. For instance, if methamphetamine cases receive higher priority just as prosecutors find extra resources to devote to them, the new cases will not be perceived as the least serious charged.

<sup>99</sup> If a prosecutor's office adopts poor screening structures, a case that is too weak might get filed before the prosecutor reviews it carefully. When an overworked prosecutor finally turns to the case for trial preparation and discovers its weaknesses, dismissal is a better option than going to trial with only slim chances of success.

<sup>100</sup> It is possible that high-quality case screening can co-exist with high acquittal rates. Some prosecutors' offices that set consistently demanding standards for the filing of cases nevertheless take some calculated risks and lose a relatively large number of cases at trial. See Wright & Miller, *supra* note 21 (describing acquittals in New Orleans).

<sup>101</sup> If extra trial preparation reveals fatal flaws in more cases, it would probably *increase* the dismissal rate because the prosecutor will not often forge ahead to try a hopeless case.

Economic theory might suggest that prosecutors probably devote more marginal new resources to case screening and negotiating efforts than to improved trial preparation. Attorneys always give high priority to trial preparation because trials are such visible events with an impact on the prosecutor's professional reputation; put in economic terms, trial preparation resembles a fixed cost, while the quality of case screening and the quantity of cases reviewed for possible charges both look more like variable costs.

### **III. WHAT MADE FEDERAL ACQUITTALS DISAPPEAR?**

So far, I have argued that the combination of higher guilty plea rates and lower rates of acquittal in a jurisdiction create a real source of concern. Why did these outcomes shift over time in the federal system? In this section, I concentrate on the most likely causes for two eras of noteworthy change: the guilty plea decreases of the 1950s and 1960s and the guilty plea increases from the 1980s to the present. Part IV will narrow the focus to consider in more detail the troubling developments in the most recent decade.

The causation story changes as we move from one era to the next. Some earlier changes in guilty plea and acquittal rates may have reflected an increasingly accurate system, probably based on improvements in access to defense counsel and lower workloads for judges. Developments in the last 25 years, however, were more likely the result of prosecutorial negotiation techniques that distorted trial outcomes. In particular, federal sentencing law over those decades changed to give prosecutors and judges greater ability to impose an ever larger and more certain penalty on defendants who go to trial. It has become far too costly in federal court to claim and prove innocence.

#### **A. Case Volume**

The volume of defendants and cases passing through American criminal justice systems increased throughout the twentieth century. As time in the criminal courtroom grew more scarce, a major time saver grew to dominate the system: guilty pleas took less time than trials for prosecutors, judges, and defense attorneys. Not surprisingly, then, many historians of plea

bargaining point to rising workloads on criminal justice actors as the best explanation for their embrace of plea bargains.<sup>102</sup>

In the federal system, this account holds some weight, but the role of case volume and workload is complex. Once we adjust for the increasing number of judges and prosecutors assigned to the system over the years, case volume had mixed effects on guilty plea and acquittal rates. A lighter workload for judges over the years produced fewer guilty pleas and more acquittals, but lighter workloads for prosecutors over time led to just the opposite result: more guilty pleas and fewer acquittals.

We can explore caseload at the simplest level by tracing the volume of cases moving through the system each year. In gross terms, higher federal case volumes did seem to produce higher guilty plea rates. The increases in guilty plea rates that began in the 1980s happened alongside annual increases in the number of defendants moving through the system.<sup>103</sup> At first glance, the connection is also fairly strong between case volume and acquittal rates. The last three decades have been typical: as case volume went up, acquittals went down.<sup>104</sup>

Despite the apparent connection between volume numbers on the one hand and acquittal and guilty plea rates on the other, raw volume of cases offers a misleading proxy for the caseloads that prosecutors and judges actually face when processing cases. As the total volume

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<sup>102</sup> See FRANCIS ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 29 (1996); Robert M. Sussman, Comment, *Restructuring the Plea Bargain*, 82 *YALE L.J.* 286 (1972). For the view repudiating the importance of caseload, see Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 *AM. J. OF SOCIOLOGY* 1157, 1177 (March 1995); Stephen P. Lagoy, Joseph P. Senna, & Larry J. Siegel, *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 *AM. CRIM. L. REV.* 435 (1976).

<sup>103</sup> The number of defendants moved from 44,585 in 1971 up to 78,835 in 2002. The correlation over time between guilty plea rates and sheer volume, however, is not perfect. For instance, the volume of defendants stayed fairly steady during the period 1951-1971, when guilty plea rates dropped and acquittal rates climbed back up. By 1956, the volume figures reached the range of 30,000 to 40,000 defendants and stayed there during the long slide in guilty pleas until 1971. Guilty plea rates and volume figures part ways at other points, as well. In the period before Prohibition, guilty plea rates actually began their steep climb up in 1912, before volume picked up very much.

One statistical measure of the match between two sets of numbers, a Pearson's correlation coefficient, was moderately strong for the overall period, 1910-2002.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

in the system increases, legislatures periodically add capacity to the system by funding new prosecutors and judges.<sup>105</sup> Thus, a doubling of the case volume might produce no real change in the caseload for individuals if the number of prosecutors and judges also eventually doubles.

After adjusting the yearly number of criminal cases in light of the number of federal judges and prosecutors at work in those years, the connection between case volume and guilty plea rates and acquittal rates weakens quite a bit. The spectacular influx of cases during Prohibition did produce a link between increased workload and decreased acquittals. During those 13 years, the number of prosecutors and judges never had time to catch up with the increase in cases.<sup>106</sup> During later periods, however, when the growth in volume was more incremental and allowed time to add new judgeships and prosecutor positions, volume had much weaker effects. Surprisingly, the average number of cases terminated per judge and per prosecutor declined over the years because the number of new judges and prosecutors outpaced the rise in case volume.

When it comes to judicial caseload, the average number of criminal cases terminated per district court judge fell consistently from 1945 to 1981 (from about 245 criminal cases per judge to about 80 criminal cases per judge) and rose modestly during the last two decades (back up to about 130 in 2002).<sup>107</sup> When judges had more time to devote to cases, the guilty plea rate tended

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<sup>104</sup> The correlation between acquittal rates and volume of cases terminated for 1910-2002 equals -0.733; the correlation for 1945-2002 is similarly strong, at -0.7428.

<sup>105</sup> See Richard T. Boylan, *Fiscal Federalism and the War on Drugs* (available at <http://papers.ssrn.com/abstract=474161>) (higher fraction of drug incarcerations are federal in states where more individuals favor the decriminalization of marijuana and in states with lower per-capita income and presumably less capable of prosecutor drug cases at state level).

<sup>106</sup> See John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908-1934*, 24 *LAW & SOC'Y REV.* 413, 419-424 (1990); American Law Institute, *supra* note 24, at 57; Fisher, *supra* note 20, at 330 n. 10 (end of Prohibition might explain drop in guilty pleas between 1920 and 1936).

<sup>107</sup> The criminal cases flowing through the federal courts are not the only source of caseload pressure. Particularly for the judges, an expanding civil docket creates pressure to dispose of all cases more quickly. Fisher, *supra* note 10 (civil caseload gave judges incentive to allow plea bargains in Massachusetts). The number of civil cases filed grew much more quickly than the criminal docket over the last sixty years, and might have intensified the efforts of judges to clear their criminal dockets more efficiently. Thus, the volume of civil cases filed might have indirectly

to fall and the acquittal rate tended to rise: the judicial workload fell along with the guilty plea rate from the 1950s through the 1970s. The gentle rise in the judicial criminal caseload since 1981 corresponded with the large increase in the guilty plea rate and large decrease in the acquittal rate.<sup>108</sup> The match, however, between judicial criminal caseloads on the one side and guilty plea or acquittal rates on the other side is imperfect. Some years were mismatches and the guilty plea and acquittal rate changes over the last two decades were much stronger than the gradual increases in judicial criminal caseloads. Overall, there was only a weak correlation between judicial criminal caseload on the one hand and guilty plea or acquittal rates on the other.<sup>109</sup>

Although the fact is counterintuitive, the criminal caseload on prosecutors also appears to have become lighter over the last four decades. Unlike the judicial caseload numbers, which moved up and down over time, the prosecutors' caseload fell pretty steadily during the last half of the twentieth century. The average number of criminal cases terminated per prosecutor was about 55 in 1958, but by 1980 it was down to 19, and by 1991 the average reached 15, where it remains today.<sup>110</sup> Thus, the expansion in the number of federal criminal prosecutors more than compensated for the increased criminal case volume in the federal courts over the years.<sup>111</sup>

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made judges more willing to accept and reward guilty pleas. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459 (2004).

Between 1945 and 2002, the combined caseload per judge changed directions several times. Between 1945 and 1968, the combined judicial caseload went from 542 to a low of 311. The caseload then increased for a time, up to a high of 640 in 1985, before dropping back to around 550 in the last few years. (More detailed combined caseload numbers appear in the Statistical Appendix, *supra* note 24.)

The match between these combined judicial caseloads and guilty plea rates is tolerably good, but imperfect. The long decline in guilty pleas from 1951-1971 mostly coincided with a decreased judicial caseload, and the first half of the sustained rises in guilty pleas during the last three decades matched a rise in the judicial caseload. When judges had more time for each case, apparently they did not encourage guilty pleas so strongly. Since 1985, however, the connection between these factors has disappeared.

<sup>108</sup> More specific judicial criminal workload numbers appear in the Statistical Appendix, *supra* note 24.

<sup>109</sup> Between 1945 and 2002, the correlation coefficient between judicial criminal caseload and the guilty plea rate was 0.19686; the correlation with the acquittal rate was -0.15304.

<sup>110</sup> The number of Assistant U.S. Attorneys went from 582 in 1958 up to 5304 in 2002. More specific prosecutor workload numbers appear in the Statistical Appendix, *supra* note 24. The workload calculation used here (total cases

## Trial Distortion and the End of Innocence in Federal Criminal Justice

The fact that new prosecutor positions outpaced new case volume from the 1950s to 1990 suggests that over this stretch of time, prosecutors had more time to devote to each case on average. The drop in average criminal cases per prosecutor might suggest greater accuracy in the system: more time could translate into fewer mistaken case filings and more complete trial preparation.<sup>112</sup> During those times, the new resources<sup>112</sup> apparently went into higher quality rather than greater quantity of cases. However, prosecutor caseloads fell even during periods when acquittal rates rose (the 1960s). Moreover, prosecutor caseloads stayed flat from 1990 to the present, a period of sharply falling acquittal rates.<sup>113</sup>

These patterns do not speak well for the accuracy hypothesis. Since acquittal rates went *up* during some periods when the overall prosecutor caseload went *down*, it is difficult to maintain that federal prosecutors used their extra time to produce more accurate results through screening cases more accurately or preparing more thoroughly for trial. Since caseloads stayed flat during the most recent drop in acquittal rates, it is hard to believe that extra prosecutor efforts in each case produced more accurate outcomes during this period.

### B. Legal Complexity and Defense Counsel in the 1950s and 1960s

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terminated divided by the average number of Assistant United States Attorneys employed during the year) is imperfect because it includes both civil and criminal litigators, but a more precise breakdown is not available for a long stretch of years.

<sup>111</sup> The effect of the civil docket could also reach prosecutors, although the impact should be slight since the U.S. Attorney's offices devote separate staff to civil litigation. When we count only civil cases involving the government as a litigant, civil and criminal cases per prosecutor went down from the 1950s to 1974, up for the next decade, and then down from 1985 to 2002. Again, as with the criminal caseload, the decline in combined caseload per prosecutor happened early, and flattened out in recent years. *See* Statistical Appendix, *supra* note 24.

<sup>112</sup> The priorities of a law enforcement agency such as the FBI might also aim for quality over quantity, meaning that the cases get more factually complex and varied, so the amount of time needed to reach a minimum level of competence for each case goes up. *Cf.* Padgett, *supra* note 106 (professionalization of FBI during 1920s led to stronger evidence and contributed to declining acquittal rates in 1920s).

<sup>113</sup> Prosecutor criminal workloads correlated more strongly than judicial criminal workloads with guilty plea and acquittal rates. The correlation between prosecutor criminal caseload and guilty plea rates for 1958-2002 was a moderately strong, at -0.44743. The correlation between prosecutor criminal workload and acquittals was even stronger, at 0.616411.

The legal tools available to the judges, prosecutors, and defense lawyers who process criminal cases change over time. When legal rules change to create more cumbersome trials, in theory guilty plea rates should rise because the legal actors (especially the prosecutors and judges) have more incentive to avoid trials.<sup>114</sup>

These general observations about criminal practice, however, did not play out as predicted in the federal system. The legal rules operating in federal criminal courts became more complex during the 1950s and 1960s, but the rule changes that made trials more expensive actually contributed to *rising* trial rates and rising acquittals in that era. The most important legal changes of that era – especially the widespread availability of defense counsel – gave more complete information to defendants about the strength of the government’s case and made a defense threat to go to trial more credible.

During some earlier eras in federal criminal justice, simpler legal rules made it possible to conduct cheaper trials, and more trials did result, just as one might predict.<sup>115</sup> But the profound legal changes that reshaped federal criminal justice in the 1950s and 1960s also make it clear that some forms of procedural complexity – laws that make trials more expensive – can nevertheless cause trial rates to go up. The longest sustained rise in federal criminal trial rates happened between 1951 and 1971. During these same years, the Warren Court reinterpreted the constitution to provide federal defendants with several new claims to raise before trial, relating to

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<sup>114</sup> See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261 (1979); David L. Cook, Steven R. Schlesinger, Thomas J. Bak & William T. Rule II, *Criminal Caseload in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1579, 1593-1594 (1995) (number of criminal cases understates true workload, because criminal cases have become more complex).

<sup>115</sup> See Alschuler, *supra* note 19. Bench trials – which are usually simpler and less expensive than jury trials – became available in the federal courts in the 1930s, a time when guilty plea rates did fall. *Patton v. United States*, 281 U.S. 276 (1930); *Singer v. United States*, 380 U.S. 24 (1965); FED. R. CRIM. P. 23(a). However, the simplifying effect of federal bench trials did not last long, and by the 1940s guilty pleas started back up again even while the number of bench trials continued at their previous levels.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

searches, seizures, interrogations, and identifications.<sup>116</sup> These changes to the governing trial procedures had some effect on the cost of trials; one measure of these costs is the average length of the federal trial, which increased as the decades passed.<sup>117</sup>

Although many legal changes contributed to the length and complexity of trials, one in particular – defense counsel – probably helped decrease the guilty plea rates for a time. The drop in guilty plea rates between 1951 and 1971 coincided with the emergence of defense counsel in routine federal criminal cases. The right to appointed counsel in federal court, first recognized as a constitutional requirement in 1938,<sup>118</sup> did not become an everyday reality until more than two decades passed. Federal defendants who could not afford an attorney (an estimated one third to one half of all federal defendants at that time) received appointed lawyers,<sup>119</sup> but those lawyers received no compensation at all and no funds to pay for expert witnesses, investigators, or other defense services. They were also appointed to the case at arraignment after several important events in the case had already transpired.<sup>120</sup>

The formal right to federal defense counsel became more meaningful in 1964 with the passage of legislation to authorize and fund a national system of federal public defenders and panel attorneys.<sup>121</sup> When more federal defendants gained practical access to compensated

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<sup>116</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Spinelli v. United States*, 393 U.S. 410 (1969).

<sup>117</sup> In the 1950s, criminal trials averaged less than two days each; the average moved up through the years to a high of 3.48 day in 1997, before falling slightly for the last five years. Estimates of trial length, based on data from the Administrative Office of the U.S. Courts, appear in the Statistical Appendix, *supra* note 24. But the longer criminal trials in federal court occurred during both the increases and the decreases in the guilty plea rates. They occurred whether acquittal rates were high or low.

<sup>118</sup> A 1790 statute provided for appointed counsel in some capital cases. 1 Stat. 112, 118 (1790). The constitutional ruling was announced in *Johnson v. Zerbst*, 304 U.S. 458 (1938). See also *Evans v. Rives*, 126 F.2d 633 (D.C. Cir. 1942) (right to counsel in all criminal prosecutions not limited to felonies); Note, *The Constitutional Right to Counsel in Federal Courts*, 30 NEB. L. REV. 559 (1951).

<sup>119</sup> FED. R. CRIM. P. 44 (1963); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963) (hereinafter Allen Committee Report).

<sup>120</sup> See Allen Committee Report, *supra* note 118, at 14-21.

<sup>121</sup> \_\_\_ Stat. \_\_\_ (1964).

defense lawyers for the first time, they became more likely to go to trial.<sup>122</sup> The appointed lawyers helped argue for lower bail and advised some defendants during preliminary hearings.<sup>123</sup> Defense attorneys gave more defendants an independent estimate of their odds of victory at trial, and the availability of investigators and experts actually increased their odds of acquittal.<sup>124</sup>

Another legal tool strengthened the position of defendants during this time and may have empowered them to go to trial more often. Congress passed the Bail Reform Act in 1966, which made it easier for federal defendants to gain their release from detention before trial.<sup>125</sup> Because defendants who remain in detention before trial are more anxious to resolve their cases, they plead guilty more often than defendants who are released pending trial; because detained defendants cannot assist their attorneys in locating witnesses and evidence, their chances for an acquittal are lower.<sup>126</sup> Thus, changes in pretrial release practices could have contributed to the guilty plea decreases and the acquittal increases of the late 1960s (although both of these trends began well before the passage of the bail statute).<sup>127</sup> Similarly, the arrival of pretrial detention under legislation passed in 1984 and upheld three years later against constitutional attack<sup>128</sup> may have contributed slightly to the increased guilty plea rates and decreased acquittal rates of the 1980s and 1990s (although the rates started moving a few years before the bail statute took effect).

It appears, then, that many of the same legal changes that made federal trials longer and more complex also made acquittals more realistic for defendants. In particular, the spread of

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<sup>122</sup> See Allen Committee Report, *supra* note 118, at 19. The federal experience appears to conflict with Malcolm Feeley's thesis that plea negotiations increase when more defendants have access to defense attorneys. See Malcolm Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUSTICE SYSTEM J. 338 (1982).

<sup>123</sup> See Allen Committee Report, *supra* note 118, at 24.

<sup>124</sup> *Id.* at 26-29.

<sup>125</sup> See 18 U.S.C. § 3146(b).

<sup>126</sup> See Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031 (1954); VERA INSTITUTE, TEN YEAR REPORT, 1961-1971 (1972).

<sup>127</sup> See DANIEL FREED & PATRICIA WALD, BAIL IN THE UNITED STATES (1964).

defense counsel made defendants better informed and less desperate during plea negotiations. These changes in the adversarial testing of each case, in turn, likely improved the accuracy of outcomes in the federal system during the 1960s and 1970s.

### **C. Crime of the Decade**

The federal criminal code, even more than state criminal codes, has expanded to reach more and more conduct over the years.<sup>129</sup> But the real footprint of federal criminal justice is measured not by the reach of the code, but in the number and type of cases actually filed.

There are certain constants in the mix of crimes that attract the attention of federal prosecutors. Various forms of fraud and theft have remained staples of the federal docket, occupying between 20 and 35 percent of the cases filed over the last six decades.<sup>130</sup> But the federal criminal docket also changes in important ways as the generations pass, either as criminal behavior changes or (more likely) as the priorities of U.S. Attorneys change.<sup>131</sup>

The shifting mix of crimes prosecuted helps explain the peaks and valleys in the rates of guilty pleas and acquittals. Some crimes are simply easier to prove than others; perhaps some investigating agencies are especially efficient at assembling the necessary facts to support a

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<sup>128</sup> 18 U.S.C. §§ 3141 et seq. (1984); *Salerno v. United States*, 481 U.S. 739 (1987).

<sup>129</sup> See John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation* (2004) (report for the Federalist Society); Steven Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64 (1948). For more on this expansive trend in state codes, see William J. Stuntz, *The Pathological Politics of Crime*, 100 MICH. L. REV. 505 (2001).

<sup>130</sup> For the precise figures, see the Statistical Appendix, *supra* note 24. See also Cook, et al., *supra* note 113, at 1586 (forgery and counterfeiting cases declined).

<sup>131</sup> For a discussion of immigration, automobile theft, bank robbery, and weapons crimes and their affects during different eras on the federal criminal docket, see Statistical Appendix, *supra* note 24. For the period since 1995, immigration cases have become more prominent and the high guilty plea rate and low acquittal rate for those cases have shifted the overall case mix. For the period 1960-1980, relatively simple Dyer Act prosecutions had some influence.

criminal conviction.<sup>132</sup> Whatever the precise reason, a change in the number of certain crimes can shift the overall trends in guilty pleas or acquittals.

The liquor cases filed between 1920 and 1933 offer one possible explanation for a period of high guilty plea rates and low acquittal rates.<sup>133</sup> In one sense, the liquor cases were not radically different from other federal cases, for they produced acquittal rates and guilty plea rates virtually identical to those seen in the rest of the federal criminal docket.<sup>134</sup> However, the differential between the sentence imposed after trial and the sentence imposed after a guilty plea (a rough approximation of the trial penalty) was much different in the liquor cases. The proportion of liquor defendants receiving a prison sentence went up by 28 points when the defendants went to trial; for the non-liquor defendants, the increase was only 7 points.<sup>135</sup>

These are evocative numbers when viewed through the lens of trial distortion theory. Apparently in the liquor cases federal prosecutors had to offer larger concessions in their recommended sentences before defendants would give up their valuable trial rights. It is possible that the jury appeal of the liquor cases made them systematically weaker than other federal cases. If that was the case, the offers of greater discounts in liquor cases helped to suppress what otherwise might have been a serious increase in the acquittal rate.

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<sup>132</sup> Cf. Lawrence Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979) (plea bargaining resulted less from caseload pressures than from increased quality of proof as consequence of professionalization of prosecutors and police).

<sup>133</sup> National Prohibition Act used to be 27 U.S.C. § 1 et seq., 66 P.L. 66; see NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 56 (1931) (Wickersham Commission) (discusses plea bargains in federal system, made necessary by caseload pressures); Rubin, *supra* note 24.

<sup>134</sup> Based on a sample of cases from 13 districts, 2.3 percent of terminated liquor cases ended in acquittals, versus 2.9 percent of terminated non-liquor cases. Comparable numbers also appear for guilty pleas, with 72.6 percent of the liquor cases ending in guilty pleas and 72.5 percent of all other cases. See American Law Institute, *supra* note 24, at 115.

<sup>135</sup> See American Law Institute, *supra* note 24, at 141. The percentage of sentences involving prison in liquor cases was 82.1 after trial and 75.6 after guilty plea.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Like the liquor cases, federal narcotics cases also varied in important ways over the years.<sup>136</sup> The proportion of the federal criminal docket devoted to narcotics cases grew spectacularly in the last half of the twentieth century, more than a six-fold increase over five decades. These crimes accounted for 6 percent of the defendants on the docket in 1951, then climbed to 12 percent in 1971 (after the passage of a new anti-drug statute in 1970), 21 percent in 1973, 30 percent in 1988, and 37 percent in 2002 (now the largest single category of crime type).<sup>137</sup>

When narcotics crimes constituted a smaller part of the docket, defendants were especially likely to go to trial: in 1951, about 75 percent of the drug defendants ended their cases in guilty pleas, compared to 83 percent of the total pool. During the 1950s and 1960s, the guilty plea rate for drug cases stayed below the rates for other types of crimes, even as the overall rates declined.<sup>138</sup> But when the guilty plea rates for non-drug crimes started back up in the early 1970s, the plea rates for drug cases moved up more quickly and drew closer to the norm.<sup>139</sup> Thus, as the drug cases asserted a larger and larger role in the federal docket, the guilty plea rate for those crimes also came much closer to matching the plea rate for other federal crimes.

The odds of acquittal in narcotics cases also shifted over time. In 1950, federal drug cases produced an acquittal rate above the norm for that year: 3.3 percent of narcotics cases versus 2.4

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<sup>136</sup> See Cook, et al., *supra* note 113, at 1583-1590 (drug cases fell 1973-1980, but rose from 1980-1994).

<sup>137</sup> Note also that the mix of drug cases shifted more decisively over time from possession to distribution cases. See Cook, et al., *supra* note 113, at 1586-1587.

<sup>138</sup> More details about the guilty plea rates in narcotics cases, compared to the rest of the pool, appear in the Statistical Appendix, *supra* note 24. The guilty plea rate was 63% in 1956, and 64% in 1961. See Bureau of Justice Statistics, *Federal Drug Offenders, 1999 with Trends 1984-1999* (2001) (NCJ 187285).

<sup>139</sup> Frank Bowman and Michael Heise noted an increased guilty plea rate in drug cases in the 1990s. Frank O. Bowman III and Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001).

percent of federal cases overall. Today, drug cases are less likely than the normal federal case to end with an acquittal: 0.6 percent for drug cases versus 0.9 percent overall for 2002.<sup>140</sup>

Plainly, something happened to federal drug crimes over the years. They became much more numerous, harder for defendants to win, and more likely to end with a guilty plea.<sup>141</sup>

Possibly the narcotics cases, like the liquor cases in earlier days, drew closer to the norm on guilty plea and acquittal rates through an increasing trial penalty. Perhaps the best we can do for now is to say that the phenomenal growth (one might even call it metastasizing) of drug cases simply reflects narcotics' long-term rise in the priorities of federal prosecutors and lawmakers.

The various types of crimes that influenced the mix of outcomes over the years are not limited to liquor and drug cases. In recent years, immigration and weapons cases have become salient, and in earlier eras automobile theft cases held some sway.<sup>142</sup> In each of these instances, the effect of the crime was noteworthy but brief. Liquor cases dominated the federal scene, but only during the 1920s and early 1930s. Narcotics cases mattered not at all until the 1970s, because there were so few of them until that time. Particular crimes always stay on the leading edge of changes in federal acquittals and guilty pleas, but the identity of those leading edge crimes change often across the years.

#### **D. Sentence Severity and Trial Penalties in the 1990s**

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<sup>140</sup> Dismissals might become an especially important disposition in drug cases, where successful motions to suppress can produce dismissals that effectively end the case.

<sup>141</sup> Various features of drug cases that show something about their seriousness (such as type of drug, amount of drugs, or number of persons involved in the distribution) can only explain a small portion of the changes in acquittal and guilty plea rates. See Bowman & Heise, *supra* note 139 (during 1990s, amount of drugs in federal cases increased, number of co-conspirators remained constant, type of drugs shifted to methamphetamines and marijuana); Frank O. Bowman III and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477 (2002) (prosecutor workload correlated with sentence reductions, judicial workload did not).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Sentencing law becomes relevant at the end of a criminal case, after conviction, but the effects of sentencing radiate back much earlier in the case to influence both guilty plea decisions and acquittal outcomes. Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.

Given this clear logical connection between sentencing laws and guilty plea rates, it makes sense to concentrate on the Sentencing Reform Act of 1984 and the massive changes in federal criminal sentencing that the statute wrought. The statute abolished parole, instituted the U.S. Sentencing Commission, and instructed the commission to create federal sentencing guidelines that would direct the sentencing decisions of federal judges.<sup>143</sup>

The sentencing guidelines that took effect nationwide in 1989, together with some important mandatory sentencing laws that Congress passed between 1984 and 1989, dramatically shifted the sentencing outcomes in federal court.<sup>144</sup> Sentences became far more severe: the use of probation withered, and prison terms stretched out.<sup>145</sup> Given this new severity, some predicted that the sentencing guidelines would prompt a catastrophic increase in the trial rate, because defendants facing such severe sentences would have little to lose by going to trial.<sup>146</sup> Those

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<sup>142</sup> See the Statistical Appendix, *supra* note 24. Immigration cases affected guilty plea and acquittal rates whenever prosecutors filed them in large numbers, but these cases appeared in high volume only during the 1940s, the early 1950s, and from the mid-1990s to the present.

<sup>143</sup> Pub. L. No. 98-473, tit. II, ch. 2., 98 Stat. 1987 (1984); see generally Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on Federal Sentencing*, 90 CAL. L. REV. 1 (1991).

<sup>144</sup> See *Mistretta v. United States*, 488 U.S. 361 (1989); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1989).

<sup>145</sup> U.S. General Accounting Office, *Sentencing Guidelines: Central Questions Remain Unanswered* (Aug. 1992, GAO/GGD-92-93); U.S. Sentencing Commission, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* (1991) (Tables 138, E-12, Figures 24-26).

<sup>146</sup> See Terence Dunworth & Charles Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99 (1992); Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161 (1991); cf. Jennifer F. Reinganum, *Sentencing Guidelines, Judicial Discretion, and Plea Bargaining*, 31 RAND JOURNAL OF ECONOMICS, Issue 1 (2000) (game theoretic model suggesting that guidelines will increase average sentence length but not guilty plea rate).

predictions turned out to be wrong, because guilty plea rates continued to climb after the guidelines took effect.<sup>147</sup>

Predictions about the effect of the sentencing guidelines on guilty plea rates initially focused on the wrong factor. The severity of sentences generally matters less in plea bargaining than the *size of the discount* that a defendant receives for pleading guilty.<sup>148</sup> Whether the final sentencing outcomes produce long or short prison terms, high or low fines, the critical calculation is how much of the sentence could be saved by foregoing a trial. To the extent the plea discount is large and certain, guilty pleas will follow; when the plea discount is small and uncertain, more trials will happen.<sup>149</sup>

One key accomplishment of the federal sentencing guidelines was to make the plea discounts more certain than before. It became clear that defendants typically had to plead guilty to receive the two level or three-level sentence discount for “acceptance of responsibility,”<sup>150</sup> since about 94 percent of the defendants who pled guilty received the discount while only 8 percent of the defendants who went to trial were given credit at sentencing for accepting responsibility.<sup>151</sup> In a similar vein, prosecutors were highly unlikely to recommend a “substantial

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<sup>147</sup> The two-year hiatus in growth, for 1989 and 1990, could be attributed to the uncertainty of the parties over how to apply the new rules. Several Department of Justice policies issued between 1989 and 1992 attempted to control the use of plea bargains by line prosecutors, and these policies might help explain the depressed rates of guilty pleas in the 1989-1991 period. See Miller & Wright, *supra* note 35, at 1014-1025. But if that were the case, why would rates go back up in 1992, when those policies were still in effect?

<sup>148</sup> See Bibas, *supra* note 11, at 59; Andrew Leipold, *Why Are Federal Judges So Acquittal Prone?* (forthcoming 2005); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004).

<sup>149</sup> See Anne M. Heinz & Wayne A. Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC’Y REV. 350 (1979) (60 percent of defendants interviewed said that prospect of more severe sentence after trial was important factor in decision to plead guilty); Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC’Y REV. 291-313 (1987).

<sup>150</sup> See U.S.S.G. § 3E1.1; Michael M. O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: *The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. UNIV. L. REV. 91 (1997); Andrew J. Hosmanek, *Beyond Remorse: True Acceptance of Responsibility and a Proposal for the Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, <http://papers.ssrn.com/abstract=613687> (Nov. 2004).

<sup>151</sup> More specifically, according to Sentencing Commission data for fiscal year 2001, 6.1% of defendants pleading guilty or nolo contendere failed to receive a discount for acceptance of responsibility, while 92% of the defendants going to trial failed to receive such a discount.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

assistance” departure for defendants who insisted on a trial.<sup>152</sup> Other portions of the guilty plea discount were delivered through “guideline factor bargains” (in which the parties agree to the applicability of certain adjustments up or down in the guideline calculations) and “fact bargains” (in which the parties stipulate to the presence of certain facts relevant to the sentence).<sup>153</sup>

These methods of guaranteeing a plea discount, especially when combined with the increased certainty that the judge (now subject to appellate review) would remain near the sentence range that the parties recommended, promoted more guilty pleas. It also appears likely that the size of the discount bulked up during the guideline years.<sup>154</sup>

The federal guidelines changed more than the size and certainty of the trial penalty: they also changed who controls the penalty. Where the judge and the prosecutor once competed for control over the rewards for pleading guilty, the sentencing guidelines operating in a high volume system shifted more of this control away from the judge and toward the prosecutor. Defense attorneys grumbled that prosecutors operating under the sentencing guidelines can make it virtually impossible to resist a guilty plea offer.<sup>155</sup> Judges also observed frequently that the sentencing guidelines increased the relative strength of the prosecutors and upset the balance of

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<sup>152</sup> See 18 U.S.C. § 3553(e); U.S.S.G. § 5K1.1. In fiscal year 2001, 17.7% of defendants who plead guilty also received a substantial assistance departure, while 1.7% of defendants who went to trial received such a departure sentence.

<sup>153</sup> See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284 (1997) (guideline factor and fact bargaining).

<sup>154</sup> The average prison months imposed in 2001 was 42.5 after guilty or nolo plea, and 138.5 after trial.

<sup>155</sup> See Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425 (2004) (federal defense attorneys have changed their description of job to counseling defendants on sentencing consequences rather than resisting charge and risking loss of credit for cooperation); Laurie P. Cohen & Gary Fields, *How Unproven Allegations Can Lengthen Time in Prison*, WALL ST. J., Sept. 20, 2004 (defense attorney Bill Zuhdi says “Probation officers go to town and kill defendants who go to trial.... If you go to trial and lose, you get the book thrown at you – without having a jury consider all the facts of your case. It dissuades you from your constitutional right to go to trial”).

power in the system.<sup>156</sup> More interestingly, federal judges observed that the price of going to trial had become so high that it undermined confidence in the accuracy of guilty pleas.<sup>157</sup> Academics and journalists made the same observation in passing.<sup>158</sup>

Recent developments in federal sentencing law accelerated the trend toward centralizing the control over the trial penalty in the hands of the prosecutor. In 2003, Congress amended the sentencing statutes (in the so-called “Feeney Amendment”) to restrict the power of judges to depart from the presumptive guideline sentence, except in cases where the prosecutor recommends a discount.<sup>159</sup> The same law gave prosecutors absolute control over one part of the sentence discount for acceptance of responsibility.<sup>160</sup>

In 2005, another profound change in federal sentencing shifted the law back toward shared control between the prosecutor and the judge. The U.S. Supreme Court ruled in *Booker v. United States*<sup>161</sup> that a sentencing judge cannot increase the presumptive guideline range to apply to a defendant unless a jury finds the facts needed to authorize the increased sentence. Yet in a remarkable application of severability doctrine, the Court also declared that the remedy for this unconstitutional application of the guidelines in some cases was to treat the guidelines as non-

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<sup>156</sup> See Molly Treadway Johnson & Scott A. Gilbert, *The U.S. Sentencing Guidelines: Results of the Federal Judicial Center’s 1996 Survey* at 6 (1997) (at <http://www.fjc.gov/public/pdf.nsf/lookup/gssurvey.pdf>); KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 195 n.12 (1998).

<sup>157</sup> See *United States v. Green*, \_\_\_ F. Supp. 2d \_\_\_, 2004 WL 1381101 (D. Mass., June 18, 2004) (ruling sentencing guidelines unconstitutional, based partly on power of prosecutor to penalize trial).

<sup>158</sup> See Mary Pat Flaherty & Joan Biskupic, *Prosecutors Can Stack the Deck*, WASH. POST, Oct. 7, 1996 at A1; Marc Miller & Ronald Wright, *Prosecutor Rex*, PHILADELPHIA INQUIRER, 19 December, 2003; Morvillo & Bohrer at 137 (guidelines give prosecutors “greater leverage to virtually compel plea bargaining, force cooperation, and in essence determine the length of sentences”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Lowenthal, *supra* note 144, at 78 (threat of filing charge with a mandatory minimum sentence “pressures defendants, who might otherwise test the state’s evidence, into accepting guilty pleas”).

<sup>159</sup> The Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (2003). For commentary on the effects of the PROTECT Act, see Miller, *supra* note 148; Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295 (2004).

<sup>160</sup> Protect Act, 117 Stat. at 671; Margareth Etienne, *Acceptance of Responsibility and Plea Bargaining Under the Feeney Amendment*, 16 FED. SENTENCING REP. 109 (2003).

<sup>161</sup> *United States v. Booker*, \_\_\_ U.S. \_\_\_ (2005); *Blakely v. Washington*, 542 U.S. \_\_\_, 124 S. Ct. 2531 (2004).

binding in all cases. Because the guidelines are now non-binding, the plea discounts that prosecutors offer to defendants are less certain than before. The judge might follow the recommendation for a guideline sentence or she might not, and different judges will present different levels of uncertainty about whether they will apply the sentence discounts as expected to a defendant who pleads guilty.<sup>162</sup>

The federal guidelines were not the only source of changes in sentencing law that affected the price defendants paid for going to trial. The guidelines took effect in 1989, but the severity of federal sentences imposed on defendants increased for many years before that, just as guilty plea increases and acquittal decreases pre-dated the guidelines.<sup>163</sup> Over the long haul, as the severity of the sentencing options that prosecutors could put into play increased, it made larger plea discounts possible.

While acknowledging the longer-term forces at work in the law of federal sentencing, we must keep the guidelines at the center of the story. Recall from Figure 2 that acquittals in federal court, while declining throughout the 1980s, began their steepest decline after 1989.<sup>164</sup> The greatest imbalances between acquittals and other outcomes (including guilty pleas, trial convictions, and dismissals) all appeared in the 1990s. In short, the federal sentencing guidelines were a driving force in the disturbing disappearance of acquittals from the system.

## **E. Prosecutor Power as the Leading Acquittal Culprit**

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<sup>162</sup> The precise contours of this uncertainty will depend on the type of appellate review that develops under the “reasonableness” standard of review that the *Booker* court created.

<sup>163</sup> Bureau of Justice Statistics, *Federal Criminal Case Processing, 2001: With Trends 1982-2001, Reconciled Data* (2003) (NCJ 197104).

<sup>164</sup> One aspect of the federal sentencing guidelines changed the value of partial acquittals. Relevant conduct provisions made it more likely that even acquitted conduct would still increase the defendant’s sentence. See Rachel Barkow, *Recharging the Jury*, 152 U. PA. L. REV. 33, 93-94 (2003).

As we have seen, several different features of federal criminal practice could have shifted guilty plea and acquittal rates over the decades. But it is one thing to know the possible culprits, and another thing to know which were the most important and how they interacted. Furthermore, our list of possible causes for guilty pleas and acquittals is only a partial one.

How might we estimate which of the many likely causes were most important? One clue comes from longevity. The effects of particular types of crimes (especially narcotics crimes) and procedural complexities (such as the presence of defense counsel and the expansion of pretrial release) were concentrated in fairly small windows of time. The effect of prosecutor and judge caseloads, however, worked across many decades and for that reason caseloads were probably more important than crime type or procedural complexity

Statistical techniques also allow us to see the relative strength of several causes that contribute to a single effect. A standard statistical tool of social scientists known as multiple regression analysis tracks the effect of several different factors on an outcome, and estimates the weight of each factor while holding constant the influence of the others.<sup>165</sup> Treating the yearly rates of guilty pleas and acquittals as the two “effects” to be explained, multiple regression analyses for the years 1945-2002 (set out in the Appendix) confirm that the number of prosecutors was the strongest among the potential causes.<sup>166</sup>

The significant influences on the guilty plea rate in a given year included the number of federal prosecutors, the number of district court judges, and the percentage of immigration crimes prosecuted that year. For acquittal rates, the significant variables included those same three factors plus the combined civil and criminal caseload on judges.

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<sup>165</sup> For a fuller description of regression analysis, see MICHAEL O. FINKELSTEIN & BRUCE LEVIN, *STATISTICS FOR LAWYERS* 323-329 (1990). The two regressions presented in the Appendix to this paper are weighted least squares regressions because the number of cases terminated in each year varied, making the percentages for some years more reliable than others.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Among all the significant variables, prosecutor resources showed the largest effects. A larger number of prosecutors tended to send acquittals down and guilty pleas up. Meanwhile, the number of judges had just the opposite effects: a larger judiciary produced higher acquittal rates and lower guilty plea rates. Judges with larger combined caseloads led to lower acquittal rates.

Why would *more* prosecutors – presumably with more time to devote to the available cases – tend to produce more guilty pleas and fewer acquittals (even after controlling for the number and complexity of criminal cases terminated in a given year)? This may be a sign that when the Department of Justice hired new prosecutors, they added to the quantity more than the quality of cases.

Another relationship among the possible causes of these outcomes deserves close attention, as well. The positive and negative signs for the judge resource variables point in the opposite direction from the signs for the prosecutor resource variables. Every prosecutor positive finds a matching judicial negative, and vice versa.

The polarity at work here – additional judges and prosecutors had opposite effects on both the acquittal rate and guilty plea rate – speaks volumes about the accuracy hypothesis.<sup>167</sup> If additional prosecutors were presenting stronger and more convincing cases at trial, the addition of new judges to preside over these supposedly more reliable cases should not send the acquittal rate up. Instead, the extra judges would make it possible to achieve more trial convictions in these higher-quality cases.

Granted, it is conceivable that extra judges made trials less accurate, perhaps by giving extra consideration to defense motions to exclude reliable but improperly obtained evidence.<sup>168</sup>

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<sup>166</sup> There is some risk of multi-collinearity in the use of annual data. For that reason, the regression in Appendix explores a minimal number of variables and its results should be interpreted cautiously.

<sup>167</sup> Cf. Fisher, *supra* note 20 (caseload pressures on judges made them more amenable to plea bargaining).

<sup>168</sup> See Pizzi, *supra* note 52, at 69–72, 222–223 (1999).

But to explain the statistical polarity between prosecutors and judges this way requires us to believe that judges acted against type for many decades. The aspiration of the trial judge in an adversary system is to promote justice through accurate factual findings.

Statistical analysis that shows judges and prosecutors working at cross purposes, and prosecutors exerting the larger influence, does not speak well for the overall accuracy of the system. In a world where additional prosecutors and judges have opposite effects, it seems more likely that new prosecutors add new (probably weaker) cases to the system and keep the guilty plea rate high by increasing the size or certainty of the guilty plea discount.

The interaction of the limited number of factors explored so far tell us that guilty plea rates move higher and acquittal rates move lower when prosecutors have the time to push them there. The displaced acquittal is a marker of prosecutorial opportunity and power.

Yet it is also clear that the factors discussed so far do not exhaust the possibilities. For one thing, we have reviewed potential causes internal to the criminal justice system (such as the legal rules and resources available to the parties), but no factors external to the system. For instance, changing crime rates or the type of crime politics at work in a particular era might give prosecutors different attitudes about guilty pleas.<sup>169</sup> Judges under different social conditions might prove more or less willing to reward defendants for pleading guilty.

Many social conditions could affect the pool of potential jurors, making them less inclined to acquit. Public attitudes toward crime changed over the years, and very well could have affected the pattern of outcomes in federal court. In the last twenty years in particular, there

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<sup>169</sup> See generally TED GEST, *CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* (2001); STUART SCHEINGOLD, *THE POLITICS OF STREET CRIME* (1990).

has been a hardening of public attitudes about crime.<sup>170</sup> Such a shift of attitudes might have encouraged guilty pleas and made acquittals more difficult to achieve.

Some additional factors “internal” to criminal justice, such as the role of defense counsel or particular types of sentence discounts, have also only received passing attention so far. Surely, then, our brief look at the federal criminal docket over the decades could benefit from a closer look. Part IV takes a more detailed tour of the possible causes for guilty plea and acquittal rates in the federal districts during the remarkable recent era of 1994-2002.

#### **IV. LEGAL ENVIRONMENTS HOSTILE TO INNOCENCE**

The federal criminal system divides into 94 distinct districts, each sharing some common features. Every district implements the same federal statutes defining crimes, adjudication procedures, and sentences, and each follows the same policies set by “Main Justice” in Washington, D.C. for the entire Department.<sup>171</sup> The U.S. Attorneys’ offices also operate under centralized budgetary constraints from Congress, money that the legislature sometimes uses to encourage particular priorities for investigation and prosecution.<sup>172</sup>

But each of the 94 federal districts also has much autonomy and each produces its own distinctive brand of federal justice. The United States Attorney for each district makes all the hiring decisions for local attorneys and support staff and allocates resources to respond to the priorities of the district. The prosecutors in each district interact with a defense bar with a

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<sup>170</sup> See T. Tyler & R. Boeckmann, *Three Strikes and You’re Out, But Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 LAW & SOC’Y REV. 236 (1997); Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171; Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 31 (Joseph Sanders & V. Lee Hamilton, eds. 2001) (explores sociological and psychological functions that punishment serves).

<sup>171</sup> A few federal districts must process a distinctive set of crimes because of the presence of Indian reservations or large government installations such as military bases. See Assimilative Crimes Act, 18 U.S.C. § 13.

distinctive local character,<sup>173</sup> and they encounter different trial judges in every district, each with individual priorities and habits, along with the life tenure to protect that individuality.<sup>174</sup>

This setting creates the conditions for a natural experiment.<sup>175</sup> While holding constant the basic legal framework from district to district, the environment changes as prosecutorial policies and habits of working groups shift from place to place. Tracking these environmental changes allows us to see which of them contribute to high guilty plea and low acquittal rates.<sup>176</sup>

This Part explores some key characteristics of the 94 federal districts between 1994 and 2002. Although the time frame is much shorter than our previous inquiry, it covers most of the era of the sentencing guidelines and an era that, as we have seen, produced levels of guilty pleas and acquittals extreme enough to sound a clear warning. The inquiry now becomes narrower but deeper.<sup>177</sup>

Comparing districts in this period adds further detail to the tentative bottom line from Part III – namely, that prosecutor choices hold the key to acquittal and guilty plea rates. Because the sentencing laws in place since 1989 gave the prosecutor and the judge greater power to create a substantial and certain reward for pleading guilty, high guilty pleas are the predictable outcome. Lower acquittal rates are the disturbing side effect.

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<sup>172</sup> For an example in the arena of weapons crimes, see Daniel C. Richman, “*Project Exile*” and the Allocation of Federal Law Enforcement Authority, 43 ARIZ. L. REV. 369 (2001); cf. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

<sup>173</sup> Some are privately retained, some are attorneys in private practice appointed by the court under the Criminal Justice Act (“CJA panel attorneys”), and others are staff attorneys for the Federal Public Defender.

<sup>174</sup> See U.S. CONST., Art. III.

<sup>175</sup> Others have taken advantage of this natural experiment feature when exploring other questions relating to federal criminal justice. See Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 9 NOTRE DAME L. REV. 221 (2004); Bowman & Heise, *supra* notes 139, 141.

<sup>176</sup> Cf. J. Fred Springer, *Burglary and Robbery Plea Bargaining in California: An Organizational Perspective*, 8 THE JUSTICE SYSTEM JOURNAL 157 (1983) (three-county study isolates environmental factors contributing to different guilty plea practices).

<sup>177</sup> The shorter study period also makes it practical to consider a longer list of potential causes based on consistent data sources. Unless otherwise indicated, the district-level data in this Part are all compiled from case-level data assembled by the Administrative Office of the U.S. Courts or the U.S. Sentencing Commission (the ADJOUT and

## **Trial Distortion and the End of Innocence in Federal Criminal Justice**

Patterns of outcomes in the districts reveal some of the particular sentencing laws that contribute most clearly to the loss of acquittals over the last decade. Departures from the sentencing guidelines based on a defendant's "substantial assistance" made a measurable difference. The same was true of the three-level "super acceptance of responsibility" discount. Where these methods – largely controlled by prosecutors – were used most commonly, they contributed to an environment in the district that convinced defendants to plead guilty and to opt out of trials that might have ended in acquittals. More generally, the prosecutor's power to adjust the offense level under the guidelines resulted in more guilty pleas and fewer acquittals.

The power to identify the effects of sentencing devices such as these points the way to a more healthy sentencing law down the road. Sentencing discounts resting solely in the hands of prosecutors, such as substantial assistance departures, create the greatest threat of trial distortion. The size of the trial penalty can remain reasonably small and relatively uncertain – as it should be – only if judges retain some authority to disagree with prosecutors about proposed discounts. Rules that treat judges as legitimate counterweights to prosecutors create a separation of powers for sentencing, a state of affairs that holds the best hope for reliable and accurate criminal justice.

### **A. Environmental Audits**

The two separate regression analyses constructed here use two different "dependent variables" (the phenomena that are caused by the "independent" variables).<sup>178</sup> The percentage of guilty pleas and the percentage of acquittals in a particular district for a given year occupy the

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USSCOUT databases) available for downloading at [fjsrc.urban.org](http://fjsrc.urban.org). Many of the variables studied here are not available in consistent and convenient formats prior to fiscal year 1994.

<sup>178</sup> Because the dependent variables for the two studies are expressed as a percentage, I use a weighted least squares regression to account for the different volume of cases in each district. The weighting variable, the number of defendants in each district for each fiscal year whose cases were terminated, is found in the Annual Report of the Administrative Office of the United States Courts, Table D-7.

center of attention, because a key indicator of trial distortion happens when guilty pleas rates move up while acquittal rates move down.<sup>179</sup>

The independent variables (that is, the potential causes of change) fall under several different headings. A first group of variables attempt to measure the workload that the key actors must carry. They track the number of cases that each prosecutor and judge handled in each district for each year.<sup>180</sup> The average number of days devoted to each criminal trial also could affect the workload of the actors and the willingness of the parties to go to trial.<sup>181</sup> Perhaps the busy prosecutor with a heavier caseload is less anxious to take a case to trial (particularly if the average trial lasts many days) and will be more cooperative in plea negotiations, or will increase the discount for pleading guilty.<sup>182</sup> Those steeper discounts could convince more defendants to plead guilty, including a number who otherwise might have been acquitted.

A second group of variables estimate the influence of the leadership within each prosecutor's office. One variable shows the years in office of each U.S. Attorney, and another

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<sup>179</sup> I removed the Middle District of Georgia for every year in the study, because of its extremely high number of acquittals, a product of the large number of traffic offenses prosecuted as federal misdemeanors in that district. In a unique arrangement, the federal courts process all traffic violations that occur on two large military bases in the district. See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?* (forthcoming 2005). Data was often unavailable for at least one variable in Puerto Rico, the Virgin Islands, Guam, and Northern Mariana Islands; because the weighted least squares regression in Table 2 uses a crosswise delete method, these districts are not included in the study.

<sup>180</sup> The Administrative Office of the U.S. Courts calculates a "weighted" criminal caseload per judge for each district in each fiscal year, appearing in Table X-1A. The prosecutor workload is necessarily a more crude figure, obtained by dividing the number of defendants whose cases were terminated in the district by the number of AUSAs working in the district that year.

<sup>181</sup> Figures that form the basis for this average in each district for each fiscal year appear in the Annual Report of the Administrative Office of the United States Courts, Table T-2. For details on the calculation of this figure, see the Appendix to this article.

<sup>182</sup> See Bowman & Heise, *supra* note 139 (prosecutor workload correlated with sentence reductions in drug cases; judicial workload did not); Richard T. Boylan & Cheryl X. Long, *Size, Monitoring, and Plea Rate: An Examination of United States Attorneys*, online at <http://fmwww.bc.edu/RePEc/es2000/0089.pdf> (July 2000 draft). Boylan and Long explored drug cases from 1993 to 1996 and concluded that prosecutors from the largest and smallest offices are the ones most likely to go to trial, while average-size offices are more likely to produce guilty pleas. They postulate that prosecutors in settings where monitoring is difficult will be more likely to go to trial, to develop their "human capital" in trial skills.

the political party of the President who appointed each U.S. Attorney.<sup>183</sup> After the lead prosecutor in a district takes office and puts new office practices into place, attorneys in the district should become more certain how various types of cases will be handled, and the number of guilty pleas should increase.

A third set of variables track various resources and characteristics of the defendant. The average number of “criminal history points” of defendants sentenced in a district might indicate the amount of experience that defendants have with the criminal justice system, and could affect the willingness of the judge and prosecutor to discount a sentence.<sup>184</sup> Federal prosecutors have relatively little control over the criminal history points that figure into a defendant’s sentence.<sup>185</sup> As a result, this variable presents a test of the accuracy hypothesis: a district with more serious high-priority repeat criminals to prosecute ought to produce fewer acquittals. If prosecutors in a district were becoming increasingly accurate, they would emphasize quality over quantity and the district would contribute more than its share to a declining acquittal rate.

Because defendants who are detained until the date of trial are considered more likely to plead guilty, a variable notes the percentage of defendants in a district who are released before

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<sup>183</sup> The tenure of United States Attorneys designates the year of appointment as a 0, and adds one for each additional year in office. United States Attorneys appointed by Republican Presidents were coded as 1, and Democratic appointees were coded as 0. Information about the appointment of U.S. Attorneys was located on [thomas.loc.gov](http://thomas.loc.gov). See Richard T. Boylan, *Salaries, Turnover, and Performance in the Federal Criminal Justice System*, 47 J. LAW & ECON. 75 (2004) (use of U.S. Attorney tenure as independent variable, longer tenure does increase guilty plea rate).

<sup>184</sup> The average criminal history points for defendants sentenced in each district for each fiscal year came from databases of the U.S. Sentencing Commission, using the TOTCHPTS variable.

<sup>185</sup> The prosecutor might make some adjustments at the margins, but prior record plays out more or less the same regardless of any negotiated agreements between the parties. There are some limited exceptions to this observation. Prosecutors do have more practical control on the use of “armed career criminal” and “career criminal” enhancements. See USSG § 4B1.1, 4B1.4. These enhancements apply in relatively few cases. As we will see, the usage of career criminal enhancements in a district had no significant effect on guilty pleas or acquittals. The percent of career criminal enhancements applied in each district during each fiscal year was calculated based on the Sentencing Commission database, CAROFFAP variable.

trial.<sup>186</sup> The percentage of defendants in a district who are Hispanic, black, or female also go into the model.<sup>187</sup>

Another defendant resource to consider is the type of counsel working on the case.<sup>188</sup> An unusual number of defendants in the federal system retain private counsel, and in many settings it might be reasonable to expect stronger results from private attorneys.<sup>189</sup> However, the appointed attorneys in the federal system are exceptionally well-trained and funded, so it is just as plausible to guess that the type of counsel used in a federal district does not affect the guilty plea or acquittal rates in that district.

The next group of variables explore the types of crimes charged in each district. These include the percentage of drug crimes, violent crimes, theft and fraud crimes, weapon crimes, and immigration crimes terminated in each district for each year.<sup>190</sup> As an overall estimate of the seriousness of the crimes charged, one variable calculates the average “offense level” under the federal sentencing guidelines for defendants sentenced in the district.<sup>191</sup>

In contrast to the variable for criminal history points, the offense level tells us more about the prosecutor’s discretionary choices than about the raw material that the docket presents in a district. When it comes to the offense level to be assigned, the federal prosecutor has enormous

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<sup>186</sup> See Bibas, *supra* note 11, at 1491-1493.

<sup>187</sup> Other scholars have noted a racial differential in the decision to plead guilty. See Celesta A. Albonetti, *Race and the Probability of Pleading Guilty*, 6 JOURNAL OF QUANTITATIVE CRIMINOLOGY 315 (1990).

<sup>188</sup> The percentage of cases in each district defended by CJA panel attorneys, Federal Public Defender attorneys, or private attorneys (along with the percentage of cases involving waiver of attorney) can be found in the AOUSC Out database, using the FLCOUNSL variable.

<sup>189</sup> Privately-retained attorneys are generally believed to be more likely to go to trial and to obtain acquittals. See Allen Committee Report, *supra* note 118; William Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 35 & nn. 123, 124 (1997).

<sup>190</sup> The types of crimes terminated in each district for each fiscal year are available in the AOUSC Out database, using the TIGRON variable, which classifies all crimes according to a six-variable classification system of the Bureau of Justice Statistics.

The U.S. Sentencing Commission, in its 1995 Annual Report, hypothesizes that guilty pleas are increasing because of an increase in immigration and fraud cases. But George Fisher, *supra* note 20, at 344 n. 77, points out that the increased plea rates in drug cases over time is a better explanation.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

discretion.<sup>192</sup> If the average offense level in a district affects the guilty plea or acquittal rates, that should reflect both the raw materials available to the prosecutors (giving us some reason to credit the accuracy hypothesis) and the negotiating power of prosecutors (giving us reason to believe the trial distortion theory).

More clear-cut tests for the trial distortion theory come from variables that measure more directly the perceived guilty plea discount that defendants encounter as they decide whether or not to proceed with trial.<sup>193</sup> These include some of the most well-known methods that prosecutors have to reward cooperative defendants, including sentencing departures for those who provide “substantial assistance” to the government,<sup>194</sup> and the enhanced three-point discount for defendants who fully accept responsibility for their crimes.<sup>195</sup> The rate of judicial downward departures from the sentencing guidelines could also reveal efforts to reward defendants for pleading guilty.<sup>196</sup>

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<sup>191</sup> The average offense level for each district in each fiscal year was calculated based on the database from the U.S. Sentencing Commission, using the XFOLSOR variable.

<sup>192</sup> See David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENTENCING REP. 339, 339 (1996) (about forty percent of probation officers believe that guideline calculations set forth in plea agreements in a majority of cases are not supported by offense facts).

<sup>193</sup> Another potential measure of the prosecutor’s power to create a guilty plea discount is the percentage of charges filed under statutes carrying mandatory minimum sentences, under such statutes as 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (B) (narcotics amounts); 21 U.S.C. §843(b) (telephone count); 18 U.S.C. §924(c) (use of firearm). However, because the discounting effect of mandatory minimum charges can be achieved either by filing the charges and dismissing them later, or by threatening to file the charges, this model does not track mandatory minimum charges filed.

<sup>194</sup> U.S.S.G. § 5K1.1. The percentage of cases in each district receiving the substantial assistance departure is available in the Annual Sourcebook of Federal Sentencing Statistics of the U.S. Sentencing Commission (for 1996-2002) and in the Annual Report of the Commission (for 1991-1995).

<sup>195</sup> During the period 1994-2002, the judge retained final authority over the rewarding of the three-point AR discount, but they relied heavily on prosecutors to determine whether the plea of guilty arrived early enough to save the necessary resources. The percentage of cases in each district for each fiscal year receiving a three-point discount for AR is calculated based on the USSC database, using the ACCTRESP variable.

<sup>196</sup> The percentage of cases receiving a judicial downward departure in each district is available from the Annual Sourcebook of Federal Sentencing Statistics and the Annual Report of the Sentencing Commission. Other studies have treated departure sentences as dependent variables. See Jeffrey T. Ulmer & John H. Kramer, *Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383 (1996) (explores departures in three Pennsylvania counties; formal rational factors interact with extralegal criteria deemed relevant by local court actors, legally-sanctioned sentencing criteria are intertwined with defendants’ race and gender and exercise of trial rights).

Other blunt measures of the trial penalty are also worth noting. Two variables try to capture the differential between the sentence after trial and the sentence after a guilty plea: one looks to the extra proportion of prison sentences imposed when defendants go to trial, while the other measures the extra duration of prison sentences imposed after trial.<sup>197</sup>

Finally, several variables estimate the influence of different Circuit Courts of Appeal on the guilty plea and acquittal rates, after controlling for the other case characteristics described above.<sup>198</sup> Differences among the circuits might reflect distinctive legal rules imposed by the appellate courts, or they could capture regional differences in courtroom practices and cultural differences in regions of the country that could translate into different acquittal or guilty plea rates.

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<sup>197</sup> The differential for each district between the sentencing result after trial and after a guilty plea is calculated based on the AOUSC Out database. The figures are available through a cross-tabulation of the DISPOSIT variable and the TOTPRISN variable (for duration) or the SENTENCE variable (for prison percentage).

Because the cases going to trial may not be randomly selected, it is possible that any difference in the sentences attached to the cases in the guilty plea and trial pools is not actually a discount for pleading guilty. It may instead show that one or the other of the pools involves more serious crimes. See Fisher, *supra* note 20, at 345 n. 85; Terence D. Miethe and Charles A. Moore, *Socioeconomic Disparities Under Determinate Sentencing Systems: A Comparison of Pre-guideline and Post-guideline Practices in Minnesota*, 23 CRIMINOLOGY 337-363 (1985); Richard S. Frase, *Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota*, 2 CORNELL J. OF LAW & PUBLIC POLICY 287-337 (1993). Note that offense level, prior criminal record, and several other case features are controlled in this study.

<sup>198</sup> The Circuits were coded as categorical variables, and the regressions presented in Table 2 used the Fifth Circuit as the reference category. Because the circuits are categorical variables, the standardized coefficients for the circuits only allow comparisons between the size of impact relative to other circuits; no comparisons with other factors are possible.

## **Trial Distortion and the End of Innocence in Federal Criminal Justice**

The results of the two regression analyses – one for guilty plea rates and one for acquittals – appear in Table 2.

TABLE 2  
 WEIGHTED REGRESSION OF ANNUAL DISTRICT-LEVEL GUILTY PLEA  
 AND ACQUITTAL RATES, ON FACTORS RELATED TO  
 CASE PROCESSING AND PROSECUTORIAL DISCRETION,  
 FEDERAL CRIMINAL CASES, 1994-2002

	Guilty Plea %			Acquittal %		
	Coefficient	Standardized	t	Coefficient	Standardized	t
Caseload Factors:						
Prosecutor Criminal Caseload	8.735E-05	0.031	0.980	-5.16E-06	-0.008	-0.186
Judge Criminal Caseload	-4.25E-05	<b>-0.165**</b>	-3.300	3.203E-06	0.051	0.800
Average Trial Days	-4.75E-03	<b>-0.139**</b>	-4.030	1.540E-04	0.019	0.421
Prosecutor Office Leadership Factors:						
U.S. Attorney Tenure	3.601E-04	0.020	0.829	-1.44E-04	-0.032	-1.070
U.S. Attorney Political Party	3.974E-03	0.038	1.469	-1.31E-03	-0.052	-1.564
Defendant Factors:						
Black %	4.466E-02	<b>0.201**</b>	3.710	-1.295E-02	<b>-0.238**</b>	-3.440
Hispanic %	3.726E-02	<b>0.206*</b>	2.482	-4.84E-03	-0.126	-1.182
Female %	5.035E-02	0.046	1.339	2.613E-03	0.010	0.224
Pretrial Release %	5.930E-03	0.023	0.692	-5.75E-03	<b>-0.091*</b>	-2.162
Counsel Private %	-5.85E-03	-0.019	-0.454	7.147E-03	0.094	1.786
Counsel FPD %	1.708E-02	0.073	1.626	-2.76E-03	-0.049	-0.847
Counsel CJA %	-6.32E-03	-0.022	-0.556	-1.10E-03	-0.016	-0.311
Criminal History Points, Average	5.186E-03	<b>0.125**</b>	3.331	-1.14E-03	<b>-0.114*</b>	-2.361
Career Criminal Enhancement %	7.542E-02	0.033	0.922	-3.38E-02	-0.064	-1.407
Crime Type Factors:						
Offense Level, Average	-9.96E-03	<b>-0.521**</b>	-11.583	7.138E-04	<b>0.154**</b>	2.673
Drug Crime %	-2.49E-02	-0.070	-1.473	7.076E-03	0.082	1.346
Violent Crime %	-3.83E-02	-0.033	-1.087	1.524E-02	0.054	1.394
Theft-Fraud Crime %	-5.89E-02	<b>-0.145**</b>	-3.253	8.137E-03	0.083	1.446

## Trial Distortion and the End of Innocence in Federal Criminal Justice

Weapon Crime %	-0.131	<b>-0.129**</b>	-3.870	1.237E-02	0.050	1.177
Immigration Crime %	-1.47E-02	-0.048	-0.612	-1.08E-02	-0.144	-1.454
Plea Discount Factors						
Substantial Assistance Departure %	8.117E-02	<b>0.117**</b>	5.591	-2.18E-02	<b>-0.196**</b>	-4.840
Acceptance of Responsibility %	0.260	<b>0.663**</b>	15.952	-3.99E-02	<b>-0.418**</b>	-7.870
Judicial Downward Departure %	3.097E-03	0.010	0.233	-1.48E-03	-0.020	-0.360
Prison %, Trial Differential	5.471E-02	<b>0.111**</b>	3.562	-2.86E-02	<b>-0.239**</b>	-5.992
Prison Duration, Trial Differential	5.554E-05	<b>0.052*</b>	2.226	-7.48E-06	-0.029	-0.965
Regional Factors:						
1st Circuit	9.453E-03	0.027	0.995	7.022E-03	<b>0.084*</b>	2.381
2nd Circuit	2.089E-02	<b>0.125**</b>	3.592	-1.20E-03	-0.030	-0.666
3rd Circuit	2.942E-05	0.000	0.015	2.056E-03	0.041	1.070
4th Circuit	-1.16E-02	<b>-0.087*</b>	-2.165	5.517E-03	<b>0.171**</b>	3.316
6th Circuit	-1.15E-04	-0.001	-0.022	5.882E-03	<b>0.149**</b>	3.616
7th Circuit	-1.84E-03	-0.008	-0.310	-3.38E-03	-0.063	-1.829
8th Circuit	2.994E-03	0.016	0.520	2.799E-03	0.062	1.567
9th Circuit	1.831E-02	<b>0.173**</b>	3.256	-3.25E-03	-0.130	-1.862
10th Circuit	1.269E-02	<b>0.071*</b>	2.372	-3.48E-04	-0.080	-0.210
11th Circuit	-1.96E-02	<b>-0.140*</b>	-4.360	8.093E-03	<b>0.238**</b>	5.810
Constant	0.943		51.606	3.460E-02		6.096
Adjusted R Square	0.663			0.449		

N = 789, \*\* p < 0.01, \* p < 0.05

## **B. Trials and Tribulations by the Numbers**

For readers unfamiliar with regression analyses, a brief guide is in order. The key entries in Table 2 appear in bold under the “Standardized” column for each of the two studies (one for guilty pleas and one for acquittals). The standardized coefficient allows a reader to compare the relative size of the impact that various factors have on the dependent variable.<sup>199</sup> Larger standardized coefficients (either in a positive or negative direction) indicate a stronger effect of that variable on guilty pleas or acquittals in the districts. The positive or negative sign of each standardized coefficient is also worth noting: a negative sign means that when the independent variable on that row increases, guilty plea rates decrease (or acquittal rates decrease for the right-hand column of standardized coefficients). A positive sign means that when the factor in question increases, guilty plea or acquittal rates also increase. The variables worthy of attention appear in bold typeface; these produced effects clear enough to leave us confident that the patterns were not merely a product of chance.

The variables that deserve attention first demonstrate a statistically significant impact on *both* guilty plea and acquittal rates. Two of these variables with a double impact offer some of the most clear-cut signs of prosecutor influence. The first is the enhanced three-point “acceptance of responsibility” sentence discount (or “super AR” for short). The connection between guilty pleas and an ordinary two-point AR discount is no surprise, for virtually all defendants who plead guilty receive the discount and virtually nobody who loses at trial receives it.<sup>200</sup> But federal prosecutors powerfully influence the larger discount for AR; until recently, the guideline language required the defendant to provide “timely” and “complete” information to the government “concerning his own involvement in the offense.” This timely notice had to be early

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<sup>199</sup> See Finkelstein & Levin, *supra* note 166.

enough to permit the government to avoid preparing for trial. For all these preconditions to the award of the extra discount, the court relied on factual representations from the government.<sup>201</sup>

As Table 2 shows, in districts where the prosecutors request this discount more often, guilty plea rates tend to be higher. Even more revealing, acquittal rates tend to be lower in districts where super AR is used heavily.

“Substantial assistance” departures also affect both the guilty plea and acquittal rates. The positive effect on guilty plea rates confirms the work of other scholars showing how prosecutors use these departures to encourage guilty pleas.<sup>202</sup> Even more dispiriting is the effect of substantial assistance departures on acquittal rates: districts with high levels of such departures also tended to show lower rates of acquittals. Prosecutors are not using their substantial assistance departures only to avoid the easy trials where a conviction was nearly inevitable.

The contrast between types of departures is instructive. The rate of judicial downward departures in a district had no significant effect either on guilty plea or acquittal rates in the district. These departure variables, when combined, give us some reason to believe that prosecutor choices matter more than judicial choices in setting the price of trials.

Another variable offers an unobstructed view of trial distortion at work: the differential between the percentage of prison sentences imposed after trial and after a guilty plea. According to Table 2, districts with a larger differential in the percentage of prison sentences imposed (that is, districts with a larger average plea discount) were likely to have lower acquittal rates and higher guilty plea rates than other districts. Even after controlling for type of crime, offense level, and other features of the caseload in a district, the prospects of receiving a prison sentence

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<sup>200</sup> See *supra* text accompanying notes \_\_\_\_.

<sup>201</sup> See U.S.S.G. § 3E1.1(b). This guideline was amended to allow the third discount level in 1992. In 2003, Congress directly amended this provision to place control of the discount completely in the hands of the prosecution.

after trial remained an important influence on the decision by defendants to give up their defenses.<sup>203</sup> For the last decade in the federal system, inducements like these were effective in the weakest cases that juries might otherwise have acquitted.

A pair of variables, when considered together, shed further light on the prosecutors' influence: the average offense level for crimes in the district, and the average criminal history points assigned to convicted defendants in the district. The outcomes here deserve special attention because they run in opposite directions, both for guilty pleas and acquittals. Higher offense levels generate lower guilty plea rates, while higher criminal history scores lead to higher guilty plea rates. Conversely, larger offense levels send acquittal rates up but higher criminal history scores drive acquittal rates down.

This pattern is meaningful because prosecutors have more control over offense levels than offender criminal history. Through the relevant conduct rules, prosecutors choose whether or not to marshal the evidence for factual findings that increase the guidelines range. The offender's criminal history, which the court is more likely to figure into a defendant's sentence regardless of the prosecutor's choices in constructing the case, has effects more consistent with the accuracy hypothesis. Districts that process defendants who present more serious criminal histories also produce lower acquittal rates, suggesting that judges and prosecutors in these districts value quality over quantity and put extra effort into avoiding acquittals for these high-priority defendants.

Just the opposite, however, holds true for offense levels. The districts with the highest average scores were also districts with the lowest guilty plea rates and highest acquittal rates. If

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<sup>202</sup> See Frank O. Bowman, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7 (1999).

<sup>203</sup> A related measure of sentence severity, the difference between the length of prison terms imposed after guilty pleas and the length of terms imposed after trial, was a significant influence on guilty pleas but not on acquittals.

## Trial Distortion and the End of Innocence in Federal Criminal Justice

prosecutors in these districts simply faced more objectively serious criminal conduct, an increasingly accurate system would require prosecutors to prioritize resources to these cases and drive the acquittal rates down. Lower offense levels produce higher guilty plea rates, suggesting that prosecutors in these districts work with defendants to reduce the offense level calculations under the guidelines to induce a guilty plea.

The criminal caseloads of prosecutors and judges mattered less over the last decade than they did over the longer period considered in Part III. After controlling for other features of the cases on the docket in a district, the prosecutors' caseloads in a district did not affect either the guilty plea or acquittal rate. Heavier judicial criminal caseloads and longer trials (a proxy for the complexity of cases in a district) both had a negative effect on guilty plea rates, but no significant effect on acquittal rates. These variables might identify districts where local attitudes are more favorable to trials (thus producing higher weighted judicial workloads and lower guilty plea rates simultaneously). There is not much evidence here to suggest that judges are driving guilty plea rates, whether out of concern for docket control or for other reasons.<sup>204</sup>

Two variables relating to defendant demographics also tip the scales towards a trial distortion theory. Black defendants were less likely than white defendants to be acquitted, and more likely to plead guilty, holding other caseload features constant. Districts with more Hispanic defendants also had higher levels of guilty pleas. Given the limited number of defendant characteristics captured in this model, the defendant's race or ethnicity might express differences of income, education, or other personal characteristics.<sup>205</sup> Still, the race and ethnicity variables do suggest that offender demographics influence plea negotiations and outcomes,

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<sup>204</sup> More pre-trial releases in a district lead to fewer acquittals (even though the defendant is available to assist with the defense). It appears that federal prosecutors, to their credit, are not taking using any tactical advantages that might arise from a defendant being detained before trial.

which is consistent with other studies that have focused more closely on how these factors distort the operation of more legally relevant factors.<sup>206</sup>

Statistics about the litigation resources and outcomes for each of the federal districts give us only a partial view of the rich reality of federal courthouses, but they do create a new vantage point to see things not easily visible from ground level. The statistics on court resources and outcomes tell us that the warning from dropping acquittal rates over the last decade in federal court is likely well-founded. The acquittal trend reveals a system that probably distorts trial outcomes and produces less reliable results than it once did. The devices available to offer defendants a large and certain sentence discount for waiving trial – particularly those devices largely in the control of prosecutors – have come to dominate the practice of criminal law in the federal courts.

### **C. The Sentencing Law Nexus**

What guidance can this survey offer about the reforms needed to prevent the distortions from expected outcomes at trial? Most conversations about plea bargains eventually come back to sentencing laws and practices, and this one is no exception. Most of the devices at work to drive down acquittal rates are grounded in sentencing laws; hence, the best strategy for improving the reliability and public legitimacy of plea bargains should focus on the nexus between plea bargains and sentencing.

These are times for taking stock in federal sentencing. The Supreme Court in *Blakely v. Washington*<sup>207</sup> overturned a state sentencing system that allowed a judge rather than a jury to

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<sup>205</sup> It would especially important to study case-level data before drawing strong inferences from a finding about race and acquittals, and this study relies on district-level data.

<sup>206</sup> See Albonetti, *supra* note 187.

<sup>207</sup> 542 U.S. \_\_\_, 124 S. Ct. 2531 (2004).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

find facts necessary to increase the authorized sentence. In *Booker v. United States*,<sup>208</sup> the Supreme applied this holding to the federal sentencing guidelines, and restructured the statutes to require district court judges to use the guidelines on an “advisory” basis, leaving the judges free to impose a sentence outside the guidelines if such an outcome would better serve the statutory purposes of sentencing. The sentence that a trial judge imposes is still subject to appellate review, and can be overturned if the sentence is “unreasonable.”

This is not the place for an analysis of *Blakely* or *Booker* as a matter of constitutional law or of sound sentencing policy.<sup>209</sup> The importance of these cases for our purposes here is the upheaval they caused. Congress is now considering fundamental changes in the federal sentencing laws, changes that the Supreme Court forced to the top of the legislative agenda.<sup>210</sup> Without such a crisis atmosphere, the goal to improve the quality of federal guilty pleas might not gain political traction, but attention to guilty pleas should now inform any wholesale revisions to federal sentencing law that occur during this unexpected effort to redesign the system.

The main threats to healthy guilty plea practices in the federal system are sentencing and charging practices that increase the size and certainty of the trial penalty. To the extent that a type of sentencing discount becomes firmly attached to the decision to plead guilty, it undercuts the power of the trial to uncover the truth. Furthermore, the best way to judge the tendency of a sentencing discount to influence the trial penalty is to check who controls the discount. The analyses in Parts III and IV support the common-sense inference that federal prosecutors in our current system affect the trial penalty more directly than judges do. Therefore, the highest

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<sup>208</sup> 542 U.S. \_\_\_\_ (2005).

<sup>209</sup> See Stephanos Bibas, *Blakely's Federal Aftermath*, 16 FED. SENTENCING REPORTER (June 2004); Nancy King & Susan Klein, *Beyond Blakely*, 16 FED. SENTENCING REPORTER (June 2004); Steven Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. \_\_\_\_ (2005).

priority for reforms in sentencing law should be features that give prosecutors monopoly power to link sentence discounts to the defendant's choice to plead guilty.

Two examples of such rules are the enhanced discount for acceptance of responsibility and downward departures based on a defendant's substantial assistance to the government in other investigations. For the latter discounts, the law grants the prosecutor sole power to award the discount,<sup>211</sup> while in the case of AR discounts, the prosecutor has always been powerfully persuasive.<sup>212</sup> Although the prosecutor's basis for awarding these discounts is often opaque, it is clear to most defendants that a guilty plea is a necessary condition. Restoring some judicial control over these sentence discounts could weaken their linkage to guilty pleas, making them available more often to some defendants with the temerity to exercise constitutional trial rights.

The remedy cobbled together by five Justices in *Booker*, while odd as a matter of severability doctrine, might be successful in policy terms. It could shift federal plea practices away from the worst dangers of trial distortion. The basic thrust of the "advisory guidelines" system is to reassert the authority of the sentencing judge and to make less certain the prosecutor's control over the means of delivering a trial penalty. Under this regime, individual judges can create different levels of uncertainty. Districts will not move uniformly, but on the whole they could move in the direction of a more balanced exercise of sentencing power.

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<sup>210</sup> See Douglas Berman, *Sentencing Law and Policy*, <http://sentencing.typepad.com> (archive for August 2004).

<sup>211</sup> U.S.S.G. § 5K1.1; *United States v. Wade*, 504 U.S. 181 (1992).

<sup>212</sup> U.S.S.G. § 3E1.1(b). The 2003 Feeney Amendment solidified prosecutor control over the three-point acceptance of responsibility discounts, already a crucial cause of displaced acquittals. See Michael M. O'Hear, *Cooperation and Accountability After the Feeney Amendment*, 16 FED. SENTENCING REP. 102 (2003) (expanded Justice Department control over acceptance of responsibility discount). Other features of the 2003 law promised further consolidation of the prosecutor's control over sentence discounts linked to guilty pleas. For instance, prosecutors can designate certain "fast-track" districts for the use of special sentence discounts that would increase the volume of guilty pleas. See PROTECT Act § 401(d)(2) (de novo appellate standard of review for downward but not for upward departures); § 401(m)(2)(A) (instructing Commission to place further limits on downward departures); § 401(l)(2)(A) (downward departures and name of sentencing judge reported to House and Senate Judiciary Committees).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

The advisory guidelines envisioned in the *Booker* case will probably not, however, create a stable platform for federal sentencing. Congress is likely to restructure the system, perhaps after only a few months under the advisory system. The options are plentiful, whether it be “guidelines without lids,” a streamlined set of aggravating facts, or a collection of mandatory minimum penalties superimposed on the advisory guidelines.<sup>213</sup>

In this article, I have not addressed the impact of mandatory minimum penalties on guilty plea practices,<sup>214</sup> but these laws invoke familiar themes regarding prosecutorial monopoly power over sentence discounts. Mandatory minimum sentence laws exert a powerful pull on plea negotiations, because a prosecutor’s promise not to file (or to dismiss) charges that carry a mandatory minimum can create enormous gaps in the sentence imposed and enormous incentives to plead guilty.<sup>215</sup> Mandatory minimum sentences might become the rule rather than the exception in the federal system as Congress reconstructs the sentencing system in the aftermath of *Blakely* and *Booker*,<sup>216</sup> but legislators who care about the accuracy in criminal justice should look to the other alternatives.

Healthy revisions to the sentencing laws should give judges the authority to second-guess the prosecutor’s desire to discount sentences and induce a guilty plea. Sentencing statutes or reconstituted sentencing guidelines might place a presumptive cap on the size of a sentence discount allowed. Yet there is a danger in proposals such as these, for they put upward pressure on federal sentences. The strategy of increasing the authority of judges to counterbalance

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<sup>213</sup> See Sentencing Law & Policy Blog, at [sentencing.typepad.com](http://sentencing.typepad.com) (archives for February 2005).

<sup>214</sup> See *infra* note \_\_\_ for an discussion of why the study in Part IV did not include mandatory minimum charging as an independent variable.

<sup>215</sup> See American Bar Association, *Final Report of the Justice Kennedy Commission* (August 2004); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003); Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199 (1993).

<sup>216</sup> See Keith Perine, “Heightened Tensions” *Fray Judicial-Legislative Relations*, CQ WEEKLY, Sept. 18, 2004, at 2148.

prosecutors means that judges will reject more sentence discounts. In a federal system that many (myself included) consider to be too severe already, this might be too high a price to pay for a more accurate system that values innocence.

At the end of the day, it may become necessary to address severe sentences directly. Legislatures often create high maximum sentences with the express intention of giving prosecutors a “bargaining chip” to produce more guilty pleas. The extra maneuvering room for prosecutors that flows from severe sentence options, rather than actual severe outcomes, is the rub. An overall reduction in the severity of authorized federal punishments would squeeze down the size of the plea discount that the prosecutor could offer. That would translate into guilty pleas that do not target the weak cases destined for dismissal or acquittal. Less room for discounting sentences during plea negotiations leaves more room for truth to prosper.

## **CONCLUSION**

Although the lessons for federal criminal justice are profound, the power of plea bargaining practices to displace acquittals and distort the truth-finding function of the trial is not strictly a federal problem. The same can and does happen in state criminal justice, where the great bulk of criminal matters get processed in the United States.<sup>217</sup> The voting public in each of the states invests huge public funds in criminal justice systems, and they expect those systems to uncover the truth.

There are reasons to think the problems of trial distortion are at least as important at the state level as in the federal courts. Lower-volume courts dealing with the most serious crimes are said to be the place where trials still matter. The federal courts are thought to epitomize this sort

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<sup>217</sup> See Marc Miller, *A Compass for Judges, A Map of Sentencing Systems*, 105 COLUM. L. REV. \_\_\_\_ (2005).

## Trial Distortion and the End of Innocence in Federal Criminal Justice

of system. The federal courts process far more felonies than misdemeanors. The caseloads for the federal prosecutors, defense attorneys and judges are less crushing than the caseloads for their counterparts in the state systems. While plea bargaining is recognized as the most important method for disposing of cases even in the federal system, the federal criminal trial is still thought to cast a long shadow.

On the other hand, in higher-volume courts at the lowest levels of the state court systems, trials almost never happen. The cases almost always result in pleas of guilty, and there is only limited conversation between the attorneys about how to resolve the case. The “going rate” for this crime, committed by a defendant with this criminal record, is well established.<sup>218</sup> Given the huge volume of cases involved and the limited scrutiny each one receives, there is little reason to hope that the outcomes of plea negotiations come close to replicating the outcomes that would occur after trial. The federal system, for all its problems, is probably not alone in punishing trials so severely that the results do not deserve public confidence.

The relationship between acquittal rates and guilty plea rates is especially relevant for those who still hope to blunt the power of the plea bargain and to give force instead to the public’s negative views on bargain justice. Some forms of bargain justice are more harmful than others, and the critical task is to find economical ways of targeting the greatest harms.

In the absence of sorting techniques such as the one developed here, we can only speak in bromides about the coercion inherent in plea negotiations, but we cannot easily differentiate among concrete plea practices in specific times and places. When no shorthand method of evaluation is available, we are left waiting for exhaustive case-by case studies, based on the

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<sup>218</sup> See Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC’Y REV. 461 (1979).

knowledge of local insiders, and we must suspend moral judgment in the meantime.<sup>219</sup>

Accessible but non-definitive measures, such as the warning signals from acquittals, cure this paralysis. Such a warning gives voice to those willing to speak against likely injustice, even if the definitive proof of injustice in specific cases never arrives.

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<sup>219</sup> One of the few examples of detailed evaluations of plea bargaining practices, based on rare levels of cooperation from prosecutors, appears in Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. UNIV. L. REV. 1284 (1997).

APPENDIX  
REGRESSION OF ANNUAL GUILTY PLEA AND ACQUITTAL RATES,  
ON FACTORS RELATED TO CASELOAD AND CRIME TYPES  
IN FEDERAL CRIMINAL CASES, 1945-2002

	Guilty Plea %			Acquittal %		
	Coefficient	Standardized	t	Coefficient	Standardized	t
Number of AUSAs	5.411E-05	<b>2.001**</b>	7.176	-1.22E-05	<b>-1.855**</b>	-7.001
Number of District Judges	-3.30E-04	<b>-1.163**</b>	-3.032	7.818E-05	<b>1.131**</b>	3.100
Criminal Case Volume	1.845E-07	0.056	0.259	2.525E-07	0.313	1.531
Civil and Criminal Cases per Judge	-8.51E-06	-0.017	-0.190	-3.52E-05	<b>-0.285**</b>	-3.399
Average Days per Trial	2.38E-02	0.339	1.327	-4.90E-03	-0.287	-1.179
Narcotics Case %	-0.173	-0.501	-1.346	1.188E-02	0.141	0.400
Immigration Case %	0.251	<b>0.520**</b>	4.915	-5.11E-02	<b>-0.434**</b>	-4.318
Fraud-Theft Case %	6.656E-02	0.108	0.964	-7.92E-03	-0.053	-0.495
Constant	0.792		19.341	5.031E-02		5.304
Adjusted R Square	0.793			0.813		

N = 58, \*\* p < 0.01, \* p < 0.05. The model relies on estimates for the number of Assistant U.S. Attorneys for the years 1945-1957, when the Department of Justice annual reports do not publish the number. Assuming some modest growth over time, the model sets the number at 500 for 1945-1950, and at 540 for 1951-1957. "Civil and criminal cases per AUSA" was calculated by adding the number of criminal cases terminated in a year to the number of civil cases terminated in which the United States appeared as a party, and dividing the total by the number of prosecutors. "Civil and criminal cases per Judge" was calculated by adding the total number of criminal cases and civil cases terminated, and dividing by the number of district court judges on the bench for that year.