

WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

Thoughts on Federal Plea Bargaining, Trials, Acquittals

As one veteran prosecutor recently put it, “trials should be the showcase for how the criminal justice system operates.”¹ But as astute analysts of, and participants in, the criminal justice system have observed, the number of trials (and acquittals) in the federal system has diminished in recent years.

Ongoing discussions among commentators raise questions whether this anti-trial culture or culture of accommodation is the result of the power imbalance between prosecutors and defense lawyers. Does the imposing combination of charging and sentencing options give federal prosecutors the power to shrink the number of federal trials? Does the drop in the rate of acquittals indicate a problem with the quality of criminal justice? Is the trial lawyer becoming an endangered species?

The number of federal criminal convictions resulting from guilty pleas continues to rise steadily. In 2004, the most recent year for which statistics currently are available, more than 17,500 individuals were charged with federal crimes. Of this number, 90 percent were convicted, an increase from 81 percent in 1990. Among these approximately 15,750 convictions, 96 percent were resolved by guilty plea. The proportion of convicted defendants who pleaded guilty has risen to an all-time high, from 87 percent in 1990 and 95.2 percent in 2002.² These statistics hold true in state courts as well.³

These facts and what they say about the efficacy of plea bargaining in American courts recently has been the focus of extended discussion among academics and practitioners. This past fall, Marquette University Law School held a symposium to discuss plea bargaining and dispute resolution in criminal law which resulted in the submission of 12 scholarly papers.⁴ The discussion raises serious questions regarding the perceived benefits, or lack thereof, of plea bargaining.

Plea Bargaining in the Federal System

An article authored by Ronald F. Wright, a law professor at Wake Forest University, raises questions about the legitimacy of the process of plea bargaining,

Elkan Abramowitz is a member of *Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer*. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York. **Barry A. Bohrer** is also a member of *Morvillo, Abramowitz* and was formerly chief appellate attorney and chief of the major crimes unit in the U.S. Attorney's Office for the Southern District of New York. **Gretchan R. Ohlig**, an attorney, assisted in the preparation of this article.



Elkan Abramowitz

Barry A. Bohrer

especially as it relates to the federal system. Giving an opinion that the current discussions about plea bargaining occur at a level either too case-specific or too general and theoretical, Mr. Wright suggests the use of a “mid-level” theory to analyze guilty pleas. Mr. Wright’s theory, which he calls the “trial distortion” theory, labels as a dysfunctional system those jurisdictions that produce too many guilty pleas that do not reflect 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.”⁵

According to Mr. Wright, the trial distortion theory focuses in particular on the number of acquittals in a given jurisdiction. When a system notices a downward trend in the number of acquittals, a warning light regarding the “truth finding function” should be triggered. “Ideally, under trial distortion theory, 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.”⁶

Mr. Wright notes that in some systems, further inquiry might reveal that the drop in acquittals is the result of appropriate changes, such as a higher quality of cases entering the system or improved evidence collecting techniques by law enforcement. In these instances, the decrease in acquittal numbers is no cause for concern. On the other hand, Mr. Wright argues that in some jurisdictions, a drop in acquittals may indicate “very real problems with the quality of criminal justice.” In these jurisdictions, prosecutors may choose to take only easy cases to trial, selling difficult cases too cheaply. Or defendants may choose to plead guilty because they are intimidated or ineffectively represented by counsel.⁷

In applying the trial distortion theory to the federal system, Mr. Wright finds cause for alarm. Noting that acquittals are “steadily disappearing from the federal system,” at a faster rate than the decrease in dismissals and trial convictions, Mr. Wright says that these changes are not the result of increased accuracy within the system. Rather, he attributes them to a number of

factors, including an increase in: i) case volume; ii) the legal complexity of cases; and iii) sentence severity and penalties for going to trial.⁸ According to Mr. Wright, however, acquittals have decreased primarily “because federal prosecutors have accumulated so much power under the sentencing laws that they can punish defendants too severely for going to trial.”⁹

Mr. Wright states that the two most significant tools used by prosecutors include “substantial assistance” departures that award defendants who cooperate with the government in developing cases against other defendants and “acceptance of responsibility” adjustments that award defendants who plead guilty early and give the government full information about their crimes.

The real power of these tools becomes clear when we notice that districts making heavy use of these techniques produced *both* higher guilty plea rates *and* lower acquittal rates. In those districts, the trial penalty, that is, the differential between the sentence after plea and sentence after trial, convinced more defendants to abandon worthwhile defenses. In short, the combination of charging and sentencing options gave federal prosecutors the power to distort trial outcomes.¹⁰

Mr. Wright suggests that sentencing reform is necessary to respond to this distorted form of plea negotiations. Specifically, he notes that judges should have the authority to override prosecutorial decisions that punish defendants who seek to go to trial. In addition, he believes sentencing rules themselves “must keep within tolerable bounds” the penalty that a defendant must pay for going to trial. In focusing on the substance of the rules and their application by prosecutors in this way, Mr. Wright states that “federal sentencing could become more a servant of truth and less a slave to efficient case disposition.”¹¹

Response to Wright’s Article

Professor Wright’s article has led to a number of thoughtful responses by other scholars and practitioners. Daniel Richman, a law professor at Columbia Law School, challenges Mr. Wright’s findings by stating that it is difficult to assess the federal courts as a “system.” Rather, Professor Richman asserts that in reality the federal structure is “an adjunct to state or, more often, local criminal justice systems.” Indeed, federal prosecutors often work with local or state law enforcement officials in developing cases. Accordingly, Mr. Richman argues that aggregate case load statistics are hard to interpret as a whole since drops in acquittal rates may be attributable to different factors in each federal district.¹²

In another response written by Michael M. O’Hear, a law professor at Marquette University Law School,

Mr. Wright's efforts are applauded as the best of the "new scholarship" seeking reform of the plea bargaining system, but still lacking.¹³ Mr. O'Hear writes that while he does not doubt the existence of trial distortion, he believes that Mr. Wright improperly focuses on one particular, small class of defendants, those who plead guilty, but who stood an excellent chance of acquittal had they gone to trial.

Rather, among Mr. O'Hear's suggestions to develop a strategy to distinguish between good and bad plea bargaining practices, is an effort to try "to bring to plea bargaining, in some form or another, those characteristics of the trial that make the trial so much more attractive in the public imagination than the deal." The majority of these perceived pro-trial characteristics are procedural in nature, including: i) allowing the parties an opportunity to tell their side of the story; ii) the observation of basic norms of civility and decorum; iii) the transparent nature of the decision making criteria, as set forth in jury instructions; and iv) a system of checks and balances between the parties involved. Professor O'Hear concludes that by making plea bargaining process look more like the trial process, "the values of voice, neutrality, and respect" will be injected into the plea bargaining process "without robbing [it] of its efficiency advantages over the trial process."¹⁴

Finally, Frank O. Bowman III, a law professor at the University of Missouri-Columbia School of Law and frequent commentator on the U.S. Sentencing Guidelines, responded to Professor Wright's article by suggesting that the decrease in acquittals can be attributed in part to the fact that "a once-common courtroom denizen—the true trial lawyer—is becoming an endangered species, particularly in U.S. Attorneys' Offices." Saying that there is a clear correlation between the increased plea rate and prosecutors' use of the added bargaining leverage afforded them in the guidelines, Mr. Bowman focuses on the "vexing question of prosecutorial motive for employing th[ose] mechanisms to continually shrink the number of federal trials year after year."¹⁵

In considering why prosecutors choose to offer pleas instead of going to trial, Mr. Bowman found no satisfactory explanation, but argued that "part of the answer lies in changing institutional values in the judiciary and Justice Department." Specifically, he notes that the Justice Department has become more concerned with measuring the volume of cases processed. Furthermore, Mr. Bowman suggests that the "anti-trial culture" and small number of trials has become so pervasive as to be self-reinforcing. As a result, he contends that the public image of federal prosecutors as "a select cadre of veteran trial lawyers" is belied by the statistics that show prosecutors engaged primarily in processing cases, but not trying them.¹⁶

Although Mr. Bowman's article focuses primarily on prosecutors, he also ponders whether the decline in federal trials similarly has created a "culture of accommodation and a generation of defense counsel readier than its predecessors to convince clients to accept pleas in triable cases."¹⁷ A similar inquiry was undertaken by Andrea K. Schneider, a law professor at Marquette University Law School. In a research paper published during the Marquette symposium on plea bargaining, Ms. Schneider studied the negotiation behavior of attorneys, classifying them in one of four groups: i) true problem-solving; ii) cautions problem-solving; iii) ethical adversarial; and iv) unethical adversarial. True problem-solvers were found to be the most effective negotiators, while unethical adversarial were the least effective.¹⁸

In applying the data specifically to criminal defense attorneys, Ms. Schneider found that the percentage of criminal defense attorneys engaged in positive problem-solving styles, 86 percent, was higher than in any other practice area and more than 20 percent higher than prosecutors. In addition, criminal lawyers were rated as one of the lowest among adversarial attorneys.¹⁹ The problem-solving profile supports the notion that criminal defense attorneys are more likely to engage in plea bargaining rather than go to trial.

In trying to interpret these results, Ms. Schneider notes a number of reasons criminal lawyers might be more problem solving than their peers in other practice areas, including: i) docket load; ii) the alternate to negotiation is clear and punitive; and iii) there are incentives to plea for both sides. However, Ms. Schneider also queries whether this proclivity to plea is the result of a spirit of cooperation or an "insidious power imbalance" between defense counsel and prosecutors.²⁰

Extended Impact

As set forth in the article written by Mr. Wright, an increase in the number of guilty pleas directly impacts other aspects of the criminal process, most specifically alternate means of "terminating" a criminal case. Statistics show that as guilty pleas increase, the number of acquittals, the number of convictions by trial and the number of dismissals decrease. Interestingly, however, "the acquittal slice of pie in the federal system has been shrinking more quickly than the slices for dismissals or trial convictions." Mr. Wright views this as a dangerous trend and specifically attributes the decrease in trials and acquittals to the increase in guilty pleas.

Prosecutors may view the correlation between increased guilty pleas and a decrease in trials differently, however. At a recent speech made by Manhattan District Attorney Robert M. Morgenthau, the prosecutor observed that a decrease in trials resulting from a lack of criminal court judges adversely affects the quality of misdemeanor guilty pleas. Noting that only 118 trials were conducted in New York County Criminal Courts in 2006, less than 0.3 percent of those cases that survived arraignment, Mr. Morgenthau stated that "[t]he lack of trial capacity has had a crippling effect on the court's ability to get appropriate dispositions in serious cases... [b]ecause defendants do not face the prospect of trial and if convicted, a significant jail sentence, the quality of guilty pleas and other dispositions is seriously diminished."²¹

Clearly, the relationship between the plea bargaining process and the quality and quantity of trials is significant. This impact may be particularly significant in white-collar cases. Statistics show that the number of federal white-collar prosecutions has decreased by 27 percent since 2000, primarily because of the federal administration's increased focus on terrorism.²² Furthermore, there is substantial evidence that this trend will continue, given that the FBI faces deep budget cuts, which likely will further impact the investigation and prosecution of white-collar cases.²³

All these facts create a vicious cycle: decreased prosecutions coupled with increased resolution by plea bargaining means only fewer chances for white-collar defense attorneys to practice their trial techniques, further endangering the species identified by Mr. Bowman as a "true trial lawyer." This, in turn, makes lawyers more likely to seek plea bargaining as a means of resolution. It also inhibits the development of the law, as legal issues receive less attention, particularly at the appellate level.

A final note of concern regarding the consequences of a system heavily reliant on plea bargaining has been raised by a recent decision from the U.S. Court of Appeals for the Ninth Circuit. In *United States v. Garcia*, the defendant sought to appeal his sentence after pleading guilty pursuant to a plea agreement with the government. The circuit court ruled that it lacked jurisdiction to review the sentence since it was imposed within the range stipulated in the plea agreement.²⁴

This decision has caused a lot of concern among defense attorneys who claim that it is contrary to well-settled circuit law and the law of other circuits that have previously ruled that plea agreements do not affect appellate jurisdiction.²⁵ Restricting appellate review of sentences imposed following plea bargaining further limits a defendant's leverage in bargaining with the government. This, too, is a troubling development that warrants great scrutiny.



1. Remarks of District Attorney Robert M. Morgenthau to the Fund for Modern Courts (Nov. 30, 2007).

2. Bureau of Justice Statistics, United States Department of Justice, Compendium of Federal Justice Statistics, 2004, p. 2 (2006).

3. Bureau of Justice Statistics, United States Department of Justice, Sourcebook of Criminal Justice Statistics 399, 450 tbl. 5.46 (2003).

4. These papers will be set forth in the 91st Volume of the Marquette Law Review. See <http://law.marquette.edu/cgi-bin/site.pl?130&pageID=1561>.

5. Ronald F. Wright, "Trial Distortion and the End of Innocence in Federal Criminal Justice," University of Pennsylvania Law Review Vol. 154 at 79, 83 (2005).

6. *Id.* at pp. 83-84.

7. *Id.* at p. 83.

8. *Id.* at pp. 117-133.

9. *Id.* at p. 84.

10. *Id.* at pp. 85-86.

11. *Id.* at p. 86.

12. Daniel Richman, "Judging Untried Cases," University of Pennsylvania Law Review, Vol. 156 at 219 (2007).

13. Mr. O'Hear opens his article by noting that "recent scholarship on plea bargaining starts with the assumption that plea bargaining is here to stay; the current agenda is thus one of reform, not abolition." Michael M. O'Hear, "What's Good About Trials?" University of Pennsylvania Law Review, Vol. 156 at 209 (2007).

14. *Id.* at pp. 217-18.

15. Frank O. Bowman III, "American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer," University of Pennsylvania Law Review, Vol. 156 at 226, 234 (2007).

16. *Id.* at pp. 236-37.

17. *Id.* at p. 239.

18. Andrea K. Schneider, "Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?" Marquette University Law School Legal Studies Research Paper Series, Research Paper No. 07-10 (October 2007) (available at <http://ssrn.com/abstract=1018499>).

19. *Id.* at pp. 8-9.

20. *Id.* at pp. 19-20; see also Andrea Schneider, "Are Defense Attorneys Shrewd or Overwhelmed?" Indisputably (ADR Blog) (Oct. 5, 2007) (<http://indisputably.org/?p=4>).

21. Remarks of District Attorney Robert M. Morgenthau to the Fund for Modern Courts (Nov. 30, 2007).

22. Paul Shukovsky, Tracy Johnson and Daniel Lathrop, "The FBI's Terrorism Trade-Off," Seattle Post-Intelligencer (April 11, 2007).

23. Scot J. Paltrow, "Justice Delayed: Budget Crunch Hits U.S. Attorneys' Offices," Wall Street Journal (Aug. 31, 2007); Paul Shukovsky and Daniel Lathrop, "FBI Faces Deep Cuts in Programs to Fight Crime," Seattle Post-Intelligencer (Sept. 27, 2007).

24. ___ F.3d ___, 2007 WL 4096184 (9th Cir. Nov. 19, 2007).

25. Pamela A. MacLean, "Mixed Signals on Plea Bargains," The National Law Journal (Dec. 17, 2007).