

Trial Ambivalence

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ABSTRACT

Much of the rhetoric about criminal justice reform posits that trials are good and pleas are bad. Trials provide full, public adversarial process, while plea bargaining is secretive, coercive, and unfair. As such, a thread of reform has emerged calling for more trials and fewer pleas. As this Article argues, underlying these reform efforts is an unspoken ambivalence about trials among the very reformers who clamor for more of them. This ambivalence stems from the often unacknowledged reality that many of the common harms associated with plea bargaining are frequently benefits when viewed through the lens of trial avoidance.

This ambivalence is not new. Indeed, in its plea bargaining jurisprudence the Supreme Court has long demonstrated its own ambivalence about the American trial system, even while romanticizing the trial. Modern-day criminal justice reformers often wax poetically about trials, while simultaneously resisting efforts to actually require more trials. The ambivalence unearthed here demonstrates how little legal stakeholders—lawyers, judges and reformers—trust the American jury process to produce just results. As long as the romantic narrative of trials persists in tandem with this ambivalence, reform efforts may actually more deeply entrench plea bargaining.

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INTRODUCTION

Plea bargaining has been maligned by nearly every stakeholder in the criminal legal system. Defense advocates, perhaps the most common voice of critique, talk about the ways in which plea bargaining is used to coerce defendants into guilty pleas.¹ Academics (including myself) have directed plenty of vitriol towards plea bargaining.² Think tanks and advocacy organizations are similarly critical.³ Victims' advocates protest the way victims are often excluded from the process.⁴ Some judges feel plea bargaining unfairly ties their hands, leads to innocent people condemning themselves, and otherwise distorts the justice system.⁵ Legislators, often responding to public views of plea bargaining,⁶ fear that plea bargaining lets repeat offenders

¹ NAT'L ASS'N OF CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 17 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/4HQC-V58M].

² For some of the most extreme examples of this critique, see, e.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 82–83 (2011); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 979 (1992); John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Thea Johnson, *Crisis and Coercive Pleas*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2020).

³ Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU: NEWS & COMMENT. (Jan. 13, 2020), <https://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out/> [https://perma.cc/64QJ-Q9EL]; Clark Neily, *Overcriminalization and Plea Bargaining Make Criminal Justice Like Shooting Fish in a Barrel*, CATO UNBOUND: A J. OF DEBATE (July 20, 2020), <https://www.cato-unbound.org/2020/07/20/clark-neily/overcriminalization-plea-bargaining-make-criminal-justice-shooting-fish> [https://perma.cc/5SWU-GCZ5].

⁴ Meg Garvin & Elizabeth Well, Opinion, *'Baseless' Plea Bargains Deny Ohio Rape Victims Justice, Erase Their Voices*, COLUMBUS DISPATCH (Apr. 12, 2022), <https://www.dispatch.com/story/opinion/columns/guest/2022/04/12/opinion-victims-must-included-offenders-plea-bargaining-process/7264985001/> [https://perma.cc/Y8LZ-NBZQ].

⁵ JED. S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM 19–34 (2021); Justice Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423, 427 (2020). But see, Robert Swartz & Michael M. Baylson, *Plea Bargains and Prosecutors: An Exchange*, N. Y. REV. BOOKS (Dec. 18, 2014), <https://www.nybooks.com/articles/2014/12/18/plea-bargains-prosecutors-exchange/> [https://perma.cc/C2MQ-DA62] (In response to an essay in The New York Review of Books by Judge Jed Rakoff entitled *Why Innocent People Plead Guilty*, a federal district judge in Philadelphia and former federal prosecutor, Judge Michael M. Baylson, defended plea and sentencing practices in federal court, writing “[p]retending that plea bargains or sentencing guidelines have led to the imprisonment of the innocent is not just incorrect, but impugns the honesty of prosecutors and the diligence of judges.”).

⁶ Many of the studies on the public perceptions of plea bargaining tend to skew negative. Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 147–48 (2019).

off the hook.⁷ Even among prosecutors, who arguably have benefited the most from the near complete takeover of the criminal system by plea bargaining, you can find plenty of critics of the practice.⁸

At the same time, judges, scholars, and lawyers bemoan the death of the trial and the loss of all that goes with it, including, among other things, clear appellate records for review, the atrophy of attorney cross-examination skills, and—more critically—the constitutional protections that are attached to the defendant’s right to trial.⁹ In response to this, attorneys and various advocacy organizations have encouraged a revival of the defendant’s right to trial.¹⁰

The question, then, of course, is—if so many stakeholders hate plea bargaining, why is it so pervasive? (To be clear, it *is* pervasive. Some jurisdictions have not held a trial in years.¹¹) As this Article argues, although the critics are right—plea bargaining imposes profound harms—it remains pervasive because even the most vocal critics fear trial and all that goes with it, including mandatory minimum sentences, collateral consequences, and biased juries, to name a few. Plea bargaining helps stakeholders avoid the worst of the criminal system, including the many risks of trial. As Jeffrey Bellin observes in his work on plea bargaining, the common critiques of plea bargaining are actually *not* about plea bargaining but about other parts of the criminal system.¹² For instance, critics often link plea bargaining and the trial penalty, the large differential between the plea-offer sentence and the post-trial sentence, arguing that plea bargaining is coercive because of this penalty.¹³ But, of course, defendants only receive the extreme punishment—or penalty—if they go to trial. So, one might also view the penalty as a problem with the trial, and plea bargaining as a way to avoid that problem.

This dynamic plays out with many other critiques of the system. What critics point to as the “bad” parts of plea bargaining can as frequently be “good” when

⁷ See, e.g., *Anti-Plea Bargaining Laws and Other Law Related to Deferred Prosecution in Impaired Driving Cases*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 16, 2017), <https://www.ncsl.org/research/transportation/anti-plea-bargaining-laws-and-other-laws-related-to-impaired-driving.aspx> [https://perma.cc/R5DB-YGA4] (outlining statutes that prohibit and limit the ability of prosecutors to plea bargain in drunk driving cases).

⁸ FAIR AND JUST PROSECUTION, ISSUES AT A GLANCE: PLEA BARGAINING 4–6 (2022) <https://fairandjustprosecution.org/wp-content/uploads/2022/02/Plea-Bargaining-Issue-Brief.pdf> [https://perma.cc/7MF7-UTPF] (Fair and Just Prosecution is an organization that brings together elected district attorneys to strategize about reform measures. One issue on their radar is reforming the coercive aspects of the plea system.).

⁹ The Honorable Robert J. Conrad & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 157–166 (2018).

¹⁰ *Id.* at 119–21.

¹¹ For instance, there were no criminal trials in Santa Cruz, Arizona from 2010 until at least 2012. Marisa Gerber, *No Criminal Trials Held in Santa Cruz County Since 2010*, NOGALES INT’L (Feb. 8, 2012), https://www.nogalesinternational.com/santa_cruz_valley_sun/news/no-criminal-trials-held-in-santa-cruz-county-since-2010/article_2651fbdc-5269-11e1-b903-0019bb2963f4.html [https://perma.cc/NR99-ZBVE].

¹² Jeffrey Bellin, *Plea Bargaining’s Uncertainty Problem*, 110 TEXAS L. REV. 539 (2023).

¹³ *Id.* at 554.

viewed through the lens of avoiding a future trial. And as this Article argues, courts, lawyers, and scholars often have conflicting feelings about plea bargaining that represent how much the practice functions as a harm in some contexts and a benefit in others. As a result, running through the embrace and support of trials is also an ambivalence about trials that exists in both caselaw and reform efforts alike. This ambivalence means that trials are often discouraged in ways both big and small, even by legal actors that claim to want more trials.

This Article unearths the trial ambivalence among two disparate groups—the courts and reformers. I first consider the Supreme Court jurisprudence on plea bargaining, particularly its ineffective assistance of counsel cases, to show how the Court understands that plea bargaining is often the only way to avoid the harms that may be associated with a full, fair and constitutionally sound trial. For the most part, a full and fair trial—the seeming gold standard of criminal process—has been the remedy for harms experienced by a defendant during a criminal case. One can find lots of flowery language about the fundamental value of a jury trial in Supreme Court cases.¹⁴ And yet in *Lafler v. Cooper*, the Supreme Court granted a remedy to a defendant who turned down a decent plea deal on his lawyer’s bad advice and proceeded to a fair trial.¹⁵ The Court in *Lafler* recognized, even if it did not explicitly acknowledge, that a constitutionally sound trial still produces great harm to defendants—harm that none of the stakeholders think those defendants necessarily deserve. The Court then encourages defendants and prosecutors to work together to come up with favorable plea deals, at least in part, because it understands the harms of trial.

Similarly, in reform efforts across the country, reformers call for an increase in trials (and a corresponding decrease in guilty pleas), while failing to push for, or even opposing, measures that would require more trials and fewer pleas. This is not because those calls are made in bad faith, but rather because trials can’t solve many of the most serious problems with the criminal system. Indeed, plea bargaining, in the system as it exists now, is often protecting defendants, victims, and other stakeholders from the harms of trial—a reality that conflicts with a demand for more of them. This conflict is embedded in much of the advocacy around the trial penalty and the vanishing trial, and produces an ambivalence about trials that runs through the literature and activism. Although modern reformers have roundly rejected and criticized the Supreme Court’s plea bargaining jurisprudence, the ambivalence in the Court’s decisions tracks, in significant ways, the trial ambivalence lurking in reform efforts.

As this Article argues, much of this ambivalence stems from two threads of tension rooted in the critique of pleas and embrace of trials. First, the conflict between process and outcomes, and second, the conflict between an idealized criminal justice system and the real-world in which plea bargaining and trials live. The two conflicts layer onto each other: constitutionally sound trials represent the

¹⁴ See *infra* Part II.

¹⁵ *Lafler v. Cooper*, 566 U.S. 156, 174–75 (2012).

benchmark of process in an ideal adversarial model. But in the real (non-ideal) world, trials produce a lot of severe and often unfair outcomes, like deportation or the trial penalty. Plea bargains are a means of escaping some of these bad outcomes. And yet, pleas almost totally lack meaningful process and are therefore deeply problematic and worthy of critique. From this cycle springs trial ambivalence.

Identifying this trial ambivalence is critical in a moment where so much attention is focused on how to reform the criminal legal system. There is, of course, a robust abolition movement, which calls for the dismantling and reimagining of the administration of justice. Abolitionists tend not to lionize trials or suffer from trial ambivalence. The core of the movement is to confront the structural problems that make not just trials, but the entire criminal apparatus, harmful.¹⁶ But my attention here is on “traditional” reformers—mostly advocacy organizations and lawyers—who focus on the trial as a solution to many of the ills of the criminal system.¹⁷ Identifying their trial ambivalence is important to understanding the limits of their vision and proposals.

It is, for instance, a different thing to want fairer outcomes for defendants (and victims) than to want more trials. These are often incompatible goals in the system as it stands now. Because of this, these goals are achieved by different reform efforts. When reformers fail to acknowledge this reality they enter the realm of trial ambivalence, often without recognizing it. The result is a surface level demand for more trials, while resisting any efforts that would *require* more trials. Of course, what many reformers want is fewer cases pulsing through the veins of the system altogether, but even this goal is often lost in the focus on trials. The result of this ambivalence can be inconsistent attempts at reform that stymie efforts to observe and respond to larger structural issue that cannot be solved merely by reducing pleas and increasing trials. I note here that I am deeply involved in plea reform efforts and much of this article is a way for me to explore the limitations and conflicts embedded in my own advocacy and scholarship on plea bargaining.

Part I of this Article describes the “what’s bad-is-good and what’s good-is-bad” dichotomy between pleas and trials. It expands on recent work by Jeffrey Bellin to examine the ways in which critiques of plea bargaining, when viewed through the lens of trial avoidance, can look very much like benefits. It also explores how this dynamic plays out within stakeholder groups, between stakeholders and between individuals and the broader system. These conflicts plant the seeds of trial ambivalence. Part II identifies trial ambivalence in court opinions, with a focus on the Supreme Court’s jurisprudence on ineffective assistance of counsel cases in the plea context, and also in recent advocacy and scholarship around plea bargaining. It shows how even those most committed to increasing trials, discourage trials in clear and less clear ways. Finally, Part III explores what this ambivalence tells us about the persistence of plea bargaining. It identifies two deeply embedded conflicts in the

¹⁶ See generally, Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 25–32, 33–41 (2022) (discussing the guiding principles of abolition and how they can be applied to reimagining the criminal court system).

¹⁷ See *infra* Part II.

dialogue about pleas and trials: the conflict between outcomes and process, and between an idealized criminal model and the one we actually have.

I. WHAT'S BAD-IS-GOOD: PLEA HARMS IN THE SHADOW OF TRIAL

Lawyers and reformers often express a hidden ambivalence about trials that helps explain their attitude towards plea bargaining. This ambivalence is “hidden” because much of the public discourse on trials is generally positive. The slow death of trials has produced many loving eulogies to the trial as a space that promotes transparency, accountability and democracy.¹⁸ Pleas, on the other hand, have been critiqued for lacking transparency,¹⁹ coercing defendants to plead guilty,²⁰ incentivizing legislators to endlessly ratchet up sentences and enhancements,²¹ and

¹⁸ Among the most compelling scholarly tributes to the American jury trial is *The Death of the American Trial* by Robert Burns, which makes a strong case that the trial must be revived because it stands as “one of our greatest cultural achievements.” ROBERT BURNS, *THE DEATH OF THE AMERICAN TRIAL* 1 (2009). Among lawyers and judges there is also significant writing about the value of the jury trial. The Federal Sentencing Reporter produced an entire issue devoted to the topic of the trial penalty and, as I explore in more depth in Part II. B., much of the language in the issue lionizes the trial. *See, e.g.*, Norman L. Reimer & Martin A. Sabelli, *The Tyranny of The Trial Penalty: The Consensus That Coercive Plea Practices Must End*, 31 FED. SENT. R. 215, 215 (2019) (“The diminished power of the jury and the rise of plea bargaining is dangerous to liberty.”); Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 FED. SENT. R. 316, 316 (describing the “devotion to trial by jury” by the Founders as a foundational aspect of democracy); John Gleeson, *Foreword* to NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 3 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> [https://perma.cc/DRR2-BUGZ] (“Our system is too opaque and too severe, and everyone in it—judges, prosecutors, and defense attorneys—is losing the edge that trials once gave them. Most important of all, a system without a critical mass of trials cannot deliver on our constitutional promises.”); JED RAKOFF, *WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE* 19 (“To the Founding Fathers, the critical element in the system was the jury trial, which served not only as a truth-seeking mechanism and a means of achieving fairness but also as a shield against tyranny.”).

¹⁹ Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 444 (2019).

²⁰ Caldwell, *supra* note 2, at 63; Langbein, *supra* note 2, at 8–10; *See also* United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (“To coerce guilty pleas . . . prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”).

²¹ Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 N.Y.U. ANN. SURV. AM. L. 205, 205–06 (2021).

allowing bad behavior by police.²² Indeed, I have made many of these critiques in my own work.²³

Despite the seemingly clear line between trials and pleas in many of the public narratives about the criminal justice system,²⁴ the reality is that it is much harder to actually define the harms and benefits of both guilty pleas and trials because, as this Article discusses in more depth below, they are frequently just two sides of the same coin. As Jeffrey Bellin argues in his article, *Plea Bargaining's Uncertainty Problem*, critiques of plea bargaining are often, when viewed in a slightly different light, actually powerful arguments *in favor* of plea bargaining and case resolution by guilty pleas. Bellin observes that the harms of plea bargaining that critics condemn can be easily viewed as benefits when viewed in light of the system we currently have. As he notes, “plea bargaining endures precisely because there are so many flaws in the alternative (delayed resolutions via formal, often-overly punitive trials).”²⁵ Indeed, the reality is that outcomes achieved through plea bargaining are often better than those achieved through trials, even though that cuts against the romantic view of trials put forth by many courts and reformers.

In this section, I build on Bellin’s work to show how many of the harms of plea bargaining function as benefits and vice versa. Identifying this what’s-good-is-bad-and-what’s-bad-is-good dynamic about plea bargaining is essential to understanding the trial ambivalence by courts and other stakeholders explored in Part II. I note here that when I discuss harms in this paper, I am not referring to formal legal or constitutional errors during the lifecycle of a case;²⁶ rather, I mean wrongs or problems that may or may not be addressable by the law. In general, though, a harm in one place serves as a benefit in another. For this reason, I also frequently use the term “benefit” to describe the flip side of harm. Throughout the Article I will refer to parts of plea practice that may be advantageous to particular actors or institutions as benefits, even while they are identified as harms in different contexts.

²² Martín A. Sabelli, *From the President: Police Brutality and Coercive Plea Bargaining – The Long Shadow of the Trial Penalty*, *National Association of Criminal Defense Lawyers*, THE CHAMPION (Nov. 2021), <https://nacdl.medium.com/from-the-president-police-brutality-and-coercive-plea-bargaining-the-long-shadow-of-the-trial-ce358d448851> [<https://perma.cc/7Q5Q-5KPL>].

²³ Thea Johnson, *The Efficiency Mindset and Mass Incarceration*, 75 OKLA. L. REV. 115, 125–28 (2022) (discussing the ways that plea bargaining contributes to mass incarceration); Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673, 687–709 (2022) (identifying the many common forms of plea bargaining in which lying is a feature); Johnson, *supra* note 2, at 1–3 (arguing that the already coercive plea system would become more so during the pandemic).

²⁴ For a discussion of competing narratives on plea bargaining among scholars, courts, and the public, see Johnson, *supra* note 6.

²⁵ Bellin, *supra* note 12, at 553; Or, as he puts it more colorfully, plea bargaining is “the ultimate contrast gainer. The only thing plea bargaining has going for it is all the flaws in the alternative. Plea bargaining is like the picnicker in the woods who, seeing an angry bear approaching from a distance, puts on running shoes and begins stretching. The picnicker’s companion (trials) says, ‘are you crazy, you can’t outrun a bear.’ The picnicker responds, ‘I don’t need to outrun the bear, I just need to outrun you.’” *Id.*

²⁶ Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 997–1007 (2015) (reviewing the various tests for harm in criminal cases).

With plea bargaining, it is often entirely fact- and stakeholder-dependent whether something is a harm or a benefit in a particular moment. In fact, even within the same stakeholder group, certain regular features of our plea system might be viewed favorably by one defendant, while another defendant might find the same practice operates as a great injustice. In addition, parts of plea practice may work in the favor of individual stakeholders, while harming broader institutional goals.

I begin here, though, with how plea bargaining harms and benefits defendants since most of the common critiques of plea bargaining focus on defendants. Here are just some of the regular complaints one hears about plea bargaining: Defendants are hurt because plea bargaining is a coercive practice—it pressures and cajoles both the guilty and the innocent into giving up their right to trial. This coercion has many sources, but one major factor are mandatory minimums—and the trial penalty that results from them—if defendants take their chances at trial.²⁷ The harm of the trial penalty, then, has been particularly linked to the practice of plea bargaining.

Other complaints focus on the process. Plea bargaining moves quickly. Especially in misdemeanor court, defendants often spend just minutes with a defense attorney, who presents them a plea deal that they have to accept or reject on the spot. Prosecutors often make what are known as “exploding offers” at this point in the case—offers that will disappear if the defendant fails to accept them within a short period.²⁸ Sometimes prosecutors will make time-served offers to move the case along but threaten to request bail if the defendant refuses. In addition, defendants are often forced to decide on a plea without the benefit of reviewing any discovery or otherwise learning anything other than the charges and a quick summary of the allegations. In this fast-paced environment, defendants make decisions in the dark.

But court can also move slowly. The now infamous and tragic story of Kalief Browder makes that clear. Browder was a teenager when he was accused of stealing a backpack. He was held for three years while he fought his case.²⁹ During that time, he was held in solitary confinement and beaten by guards and other incarcerated youth.³⁰ Eventually Browder’s case was dismissed, and, tragically, Browder committed suicide shortly after his release. Browder’s case makes clear a reality of criminal practice: it takes a long time to get to trial and the waiting can be misery.³¹ As a result, unlike Browder, most defendants will plead guilty rather than sit in and wait for a trial, even if they have good defenses. The impact of the COVID-19 crisis on criminal courts is a reminder of the coercive power of delay. During the pandemic, many courts put a stop to the speedy trial clock that requires the

²⁷ Reimer & Sabelli, *supra* note 18, at 215.

²⁸ Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L. J. 401, 407–08 (2017).

²⁹ Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [https://perma.cc/7A3P-N5WH].

³⁰ *Id.*

³¹ CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 107–116 (2021).

prosecutor to move the case towards trial.³² That meant that defendants were sitting in limbo, either in or out of jail, waiting for a day in court that was indefinitely delayed. And because the system is set up with the primary purpose to plead out cases rather than take them to trial, there are no systemic incentives to move the case along. Preliminary research indicates that the pandemic increased the likelihood of false pleas.³³

In addition, as scholars and advocates have pointed out, the plea system lacks transparency and so the public is often shut out from understanding what is happening to individual defendants.³⁴ Even judges may not understand what's actually happening in their courtrooms.³⁵ Defendants, too, are often excluded from plea negotiations. Indeed, the lack of transparency means that the only people who really understand how a plea bargain was negotiated and settled on are the two lawyers in the room. The plea colloquy is supposed to be a statement for the record of the facts of the case and the resolution that the parties reached, but mostly the colloquy represents a bare-bones reflection of some reality that the parties agreed to.

But, almost all of the harms to defendants I have described above are also frequently benefits for defendants *in the system as it exists*. So how might these harms be benefits? Let's start with the trial penalty. Yes, many defendants are essentially punished with a huge sentence for taking their chance at trial. The Innocence Movement literature makes clear that some portion of those defendants are innocent.³⁶ That's a profound harm to those defendants. But, as long as huge sentences are on the books, the trial penalty mostly flows to the benefit of defendants in the form of a plea discount. The reality is that it is good for defendants that prosecutors are willing to go so much lower than the authorized sentence on the books for most crimes. As Jeffrey Bellin notes, this reality is made clear by how much the plea discount is a tool of progressive prosecutors to lessen the impact of unfair sentencing laws.³⁷ Those unfair sentences are only administered after a trial. In this sense, "the inevitability of the trial penalty coexists awkwardly with the defendant's constitutional right to go to trial."³⁸

Many defendants are harmed by the trial penalty either from getting a huge sentence after trial or being coerced into an unfair sentence before trial; but it is likely that many more defendants get the benefit of a system that regularly undercuts the sentencing laws significantly. And so, the trial penalty in the system as it exists

³² Johnson, *supra* note 2, at 7–12; Miko M. Wilford et al., *Innocence in the Shadow of COVID-19: Plea Decision Making During a Pandemic*, J. OF EXPERIMENTAL PSYCH.: APPLIED (2021), <https://doi.apa.org/fulltext/2021-55856-001.html> [<https://perma.cc/5AHX-DBRM>].

³³ Wilford et al., *supra* note 32, at 745.

³⁴ Schneider & Alkon, *supra* note 19, at 444–45; Jenia Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 978–82 (2021).

³⁵ Thea Johnson, *Fictional Pleas*, 94 IND. L. J. 855, 877–78.

³⁶ Glinda S. Cooper, Vanessa Meterok & Prahelika Gadtula, *Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases*, 31 FED. SENT. REP. 234, 234 (2019) (noting that a study of DNA exonerations recorded by the Innocence Project found that 11% had pleaded guilty).

³⁷ Bellin, *supra* note 12, at 541–42.

³⁸ *Id.* at 557.

is both a very bad thing and a very good thing—depending on the defendant, the prosecutor, the judge and the potential sentence on the table, among other factors.

The same goes for how quickly the early plea process moves. One need only observe a misdemeanor arraignment court to understand that there is a real potential harm to defendants in a system that relies on things moving quickly and without much thought. There are, however, many instances where the swiftness of the process benefits defendants. Particularly for guilty defendants, “exploding offers” are often very good offers made by prosecutors who want to move cases off their dockets quickly and haven’t done much investigation themselves. There are times where further investigation would result in increased charges or the threat of higher sentences. Certainly, a trial would be very bad for these defendants and so the early speed of the process is, for many, a benefit.

So too for the slowing of the process later in the case. Trial delays are obviously bad for defendants that want their day in court, but such delays also benefit many defendants. Delays may mean that witnesses move and evidence grows stale, making cases harder to prove at trial. Delays can make prosecutors dig in their heels on harsh offers, but they can also soften offers if prosecutors begin to worry about their ability to win the case. In some jurisdictions, defense attorneys reported that COVID delays resulted in better offers for defendants in a system that was on hold and looking to get rid of cases.³⁹ Indeed, in *Barker v. Wingo*, the Supreme Court acknowledged that part of the difficulty in determining whether a defendant was denied the right to a speedy trial is that, while many defendants want a speedy trial, many others welcome delay.⁴⁰

Finally, a lack of transparency, although bad in many instances, generally benefits the defendant.⁴¹ It is easier for prosecutors to be more sympathetic and lenient towards defendants when no one is looking. Attempts to make the system more transparent are often opposed by both prosecutors and defense attorneys acting together. In Michigan, the state Supreme Court proposed a rule that would require the parties to develop an accurate factual record for the crime for which the defendant was pleading guilty.⁴² Both prosecutors and defense advocates were vehement that such a rule would harm defendants (and, interestingly, victims).⁴³ Or, to put it another way, defendants regularly benefit from the fact that plea records are unclear and undeveloped. They benefit from the shadowy nature of plea bargaining.

It is worth noting that this conflict within the defendant stakeholder group applies to other stakeholders as well, particularly victims of crime, who are also

³⁹ Cynthia Alkon, *Criminal Court System Failures During COVID-19: An Empirical Study*, 37 OHIO ST. J. ON DISP. RESOL. 453, 500–502 (2022).

⁴⁰ *Barker v. Wingo*, 407 U.S. 514, 526 (1972).

⁴¹ For more on how transparency often can function as a double-edge sword, *see generally*, Turner, *supra* note 34, at 987–1000; Andrew Keane Woods, *The Transparency Tax*, 71 VAND. L. REV. 1, 16–38 (2018).

⁴² Thea Johnson, *The Efficiency Mindset and Mass Incarceration*, *supra* note 23 (discussing in detail the debates regarding the proposed amendments to Michigan Criminal Rule 6.302 & 6.610).

⁴³ *Id.*

harmed and benefit from plea bargaining. The case of Jeffrey Epstein exploded the issue of victims and plea bargaining into mainstream consciousness. Despite raping dozens of young women, many of whom were willing to come forward during a trial, Epstein received a plea deal for a single count of soliciting prostitution in state court and a non-prosecution agreement with federal prosecutors.⁴⁴ It was the shrouded nature of plea bargaining that made this deal possible. The prosecutors hid the actual nature of the original charges by manipulating the factual record during the plea to make sure it did not represent the true facts.⁴⁵ And, as with many plea bargains, the victims were entirely excluded from the process. They weren't even aware what day Epstein would be in court to accept his plea or be sentenced.⁴⁶ If the case had gone to trial, this simply would not be possible. The victims—as the complainants—would have had to be in court.

But, the impenetrability of the plea process also benefits victims. Indeed, one of the most frequent justifications for plea bargaining by prosecutors and legislators is that it allows victims to escape the trauma of having to face the defendant in open court.⁴⁷ In a case like Epstein's, where there are many victims, a plea on just one serious sex assault charge could have the benefit of providing justice to many victims who might, for legitimate reasons, prefer not to be named or identified in public documents. Further, not all victims want their perpetrators to be punished to the full extent of the law.⁴⁸ Plea bargaining allows victims to give prosecutors input on what might be the most appropriate charges given the harm the defendant caused, even if those charges do not reflect the full scope of the defendant's actions. A sexual assault case may end in less serious charges that allows the victim some measure of justice without over-punishing—in the victim's view—the defendant. We see, then, that something like a lack of transparency, in much the same way it does with defendants, can function as both a harm and benefit to victims, as well.

Finally, as there is conflict about whether something should be defined as a harm or benefit within stakeholder groups, such conflict exists between stakeholder groups. It makes sense that if something benefits defendants, it might harm victims. Certainly, we can understand the Epstein plea as representing exactly this conflict. Epstein, the defendant, benefited profoundly from the plea, while his victims suffered.

⁴⁴ JULIE K. BROWN, *PERVERSION OF JUSTICE: THE JEFFREY EPSTEIN STORY* 160–61 (2021).

⁴⁵ *Id.* at 242, 245–47.

⁴⁶ *Id.* at 245–47.

⁴⁷ See generally Kimberly D. Bailey, *The Aftermath of Crawford and Davis: Deconstructing the Sound of Silence*, 2009 BYU L. REV. 1, 43–54 (2009) (discussing the many ways that victims of domestic violence are deterred from testifying against their abusers at trial including the threat of retaliation and a lack of support services).

⁴⁸ See e.g., Andrew Cohen, *When Victims Speak Up in Court—in Defense of Criminals*, ATLANTIC MAG. (Jan. 28, 2014), <https://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345/> [https://perma.cc/DHT9-42WN] (discussing cases in which victims' families spoke out in favor of a more lenient sentence than the prosecutor sought after the conviction of a criminal defendant).

What further complicates the distinction between harms and benefits to individuals is the ways in which they may be at odds with the harms and benefits accrued to the public and the institutions that make up the criminal system. Society benefits, at least in some respect, from an efficient system of justice that relies more on guilty pleas than trials. Attempting to avoid jury duty is almost an American pastime.⁴⁹ People want to avoid jury duty because it is indeed a hassle to serve. (Although, to be clear, this is an observation and not an endorsement of this view of jury duty). By opting to delegate the business of justice to the “experts”—police, prosecutors and judges—many Americans are relieved of their citizen responsibility to monitor their justice system.

Mostly critics, though, have identified the harms of plea bargaining that impact the system as a whole and the public it serves. While many people may want to avoid jury duty, the criminal justice system is harmed when citizens no longer play an active role through jury service. In addition, plea bargaining stunts the development of the law since so few pleas involve any developed factual or legal record. It also lets police escape accountability for violating the Constitution, or just generally behaving badly, because that behavior does not become public through pre-trial hearings, public testimony or cross-examination at trial.⁵⁰

Finally, let’s return yet again to the lack of transparency as harm/benefit and apply it to the public and the system more broadly. As noted above, a lack of transparency can be understood as both a harm and benefit to individuals, and it can also serve as a benefit to society as a whole by turning over authority of the criminal system to professionals. But a lack of transparency also means that the public is denied an opportunity to see what’s happening in the criminal system. Beyond a lack of jury service, when most cases are resolved through pleas, the public has trouble obtaining a basic understanding of how the criminal justice system functions. This is true even for defendants, who often play little to no role in the actual negotiation of plea bargains in their own case. This lack of understanding means the public has limited information when voting for a local district attorney or a candidate for state or federal office who has power to make criminal laws. Even relatively new efforts to inject the public into the criminal courtroom through court-watching programs

⁴⁹ See, e.g., *30 Rock: The Fun Cooker* (NBC television broadcast Mar. 12, 2009) (in which the character of Liz Lemon is so desperate to avoid jury duty that among affectations, she dresses as Princess Leia from “Star Wars”).

⁵⁰ See e.g. Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1452 (2000) (noting that the exclusionary rule under the Fourth Amendment is a limited deterrence to police misconduct because faced with the prospect of losing at trial with suppressed evidence will simply “offer large concessions in plea bargains[.]”); H. Mitchell Caldwell et al., *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 675 (1998) (noting that “the overwhelming majority of criminal prosecutions result in a guilty plea, a fact that is well-known to police officers. Although there is some evidence that the exclusionary rule has led to a decline in the percentage of cases resulting in guilty pleas, police officers know that a plea of guilty is the most likely case disposition, and so the issue of police misconduct or evidence suppression will never come to light. The doubt that a penalty will be imposed substantially lessens the rule’s deterrent effect.”).

are inherently limited since the observers really only see the final product of negotiations—the guilty plea—and sentencing. So we see, yet again, that opacity of plea bargaining, like so many other features of the criminal system, cuts both ways.

II. IDENTIFYING TRIAL AMBIVALENCE

Despite common narratives around plea bargaining and trial that pit the two practices against each other as bad vs. good, as the previous section explored, it is often much more complicated than that. Instead, it's frequently the case with plea bargaining that what's-good-is-bad and what's-bad-is-good. Because of this conflict between narrative and reality, courts and other legal actors can find themselves in a bind when trying to identify or remedy the harms of plea bargaining. As I argue here, this conflict about plea bargaining can manifest itself as an ambivalence about trials.

In this section, I focus on the trial ambivalence of two disparate groups. In the first section, I look at Supreme Court decisions, focusing mostly on ineffective assistance of counsel (IAC) cases that address how to remedy the harm caused when defendants get bad advice during a plea that impacts their decision about trial. In these cases, the Court is grappling with the negative realities of full, fair and constitutionally sound trials. The Court's opinions make clear that it has no stake in reforming the plea system. And yet, it is precisely because they have no stake in creating a "better" system that their trial ambivalence is telling. Even without a clear normative goal, the Court cannot quite figure out how to identify the harms and benefits of pleas and trials.

An exploration of the Court's trial ambivalence tees up my discussion of the second group I focus on, (mostly defense) lawyers and advocates. Although much more overtly committed to plea reform and reviving trials, this second group also struggles to separate out harms from benefits in the context of pleas and trials, and ends up, in surprising ways, in much the same position as the Court.

I trace the ways that this group publicly clamors for more trials, even while they hesitate to put reforms in place that would force the issue. What they want instead is to create a system that naturally tends towards more trials and fewer pleas. This strategy for reform reveals an ambivalence about trials in the system as it now functions. To put it another way, for these reformers, trials are only a viable alternative to pleas if the U.S. adversarial system revolutionizes the way it does business. In that sense, they do not necessarily want more trials, but a fairer system overall in which trials are a meaningful test of the law and facts.

A. *In the Supreme Court*

This section highlights Supreme Court decisions for several reasons. First, the Supreme Court has been the source of some of the most glowing praise for adversarial trials, and so identifying trial ambivalence in its decisions is critical to seeing where the fault lines are in that praise. Second, although the Court has always been a major cheerleader for plea bargaining, putting its stamp of approval on even

the most coercive aspects of plea practice,⁵¹ some more recent opinions have acknowledged the harms of plea bargaining.⁵² Indeed, many of the IAC cases arrive at the Court to remedy the harms of plea bargaining, and these opinions grapple with important issues of how to weigh the decision to proceed to trial versus the decision to plea. And that grappling implicates many of the issues raised in this paper. Third, although the Supreme Court is often (correctly) cast as the villain in the story of the ascendance of plea bargaining, as we will see later, there is not as much daylight between the Court and reformers as we might assume. Although the Court's embrace of plea bargaining might stem from their deference to the government, the Court and reformers come to surprisingly similar conclusions about plea bargaining and trials.

In *Duncan v. Louisiana*, the case that established that states were obligated to provide a jury trial in non-petty offenses, the Court said the following about trials: "The guarantees of jury trial . . . reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."⁵³ Not surprisingly, in establishing that the right to a jury trial was fundamental, the Court offered extended praise for the jury trial.⁵⁴ While it acknowledged that not everyone might want their case decided by a jury rather than a judge, the Court made clear that the jury served an important and historical purpose in protecting the defendant from zealous prosecutors and unfair judges.⁵⁵ This rhetoric was reflected in other cases as well, including those establishing a fair-cross section in jury venires and the Court's decisions on the role of juries in establishing the elements of the offense.⁵⁶

But even while praising the jury as a protector and safeguard against government overreach, the Court has also consistently acknowledged that the jury trial carries risks that can, and sometimes should, be avoided by plea bargaining. In *Alford v. North Carolina*, the case that established that a defendant may claim innocence while taking a plea, the Court acknowledged that a judge should not force

⁵¹ *Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1978) (holding as constitutional a prosecutor's threat to dramatically increase the defendant's sentence if the defendant refused a plea offer).

⁵² See, e.g., *Cooper*, 556 U.S. at 185–86 (Scalia, J., dissenting) (citing Albert Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 38 (1979)) ("In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because *many believe* that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.").

⁵³ *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

⁵⁴ *Id.* at 148–58.

⁵⁵ *Id.* at 158.

⁵⁶ *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975) ("The purpose of the jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps . . . biased response of the judge."). *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000) (calling the jury "an indispensable part of our criminal justice system").

a defendant to trial simply because he refused to confess guilt because the outcome at trial might “end in disaster.”⁵⁷ The Court seemingly only allowed “Alford pleas” if the trial court could satisfy itself that the defendant was actually guilty of the crime, but the case stands for the proposition that a rational person can proclaim innocence and accept a guilty plea because they understand the alternative is so much worse. The Court in *Alford* is not (unlike the reformers described in the next section) offended by such a disparity. But it is, at times, solicitous to the defendants who must navigate the system in which this disparity exists.

Before launching into the ambivalence that lies at the heart of the Court’s ineffective assistance of counsel (IAC) jurisprudence around plea bargaining, it is critical to note that the Court, unlike reformers, has control over both procedures and outcomes. As Rachel Barkow has recently argued, the Supreme Court, through its relentlessly pro-government interpretation of the Constitution in criminal cases, has been a proximate cause of the death of the American jury trial.⁵⁸ But Barkow’s point can be correct and consistent with my view that the Court is ambivalent about trials. The Court is trying to both prop up plea bargaining and maintain some idealized vision of the American jury trial. This hypocrisy is common among courts, who often “invoke high ideals while implicitly rationalizing the failure to achieve those ideals.”⁵⁹ But keeping such ideals alive, “maintain [them] as a legal source for subsequent cases in an imperfect world.”⁶⁰ In the IAC cases below, the Court is grappling with the reality of how to address the harms of trials in a system that they created. That they fail to acknowledge that they created the system does not necessarily make them less ambivalent about it.

Much of the IAC jurisprudence prior to the court wading into plea bargaining focuses on the ways in which a defendant is denied a fair trial when her lawyer performs poorly. The formal prejudice question in IAC cases hinges on whether there was a reasonable probability that the outcome would have been different if the defendant had adequate counsel.⁶¹ This question focuses on the decision-making of others, namely the judge or jury, whose final decision is examined in light of the defense attorney’s mistakes.⁶²

In IAC cases involving incompetent attorney performance during plea bargaining the central question is not about how the fact-finder would have made a decision, but rather how the defendant’s decision-making might have been different with adequate counsel. For instance, in *Padilla v. Kentucky* the Court held that defense counsel is required to inform a defendant about the possible deportation consequences of a guilty plea.⁶³ Later, in *Lee v. United States*, the Court asked

⁵⁷ North Carolina v. Alford, 400 U.S. 25, 33 (1970) (citation omitted).

⁵⁸ Rachel E. Barkow, *The Court of Mass Incarceration*, 2022 CATO SUP. CT. REV. 11, 17 (2022).

⁵⁹ Burns, *supra* note 18, at 81.

⁶⁰ *Id.* (citing Boyd White, *From Expectation to Experience: Essays on Law and Legal Education* (1999)).

⁶¹ Strickland v. Washington, 466 U.S. 668, 691–96 (1984).

⁶² *Id.*

⁶³ Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010).

whether the defendant would have opted for a trial instead of a plea deal if he had understood the plea entailed near-certain deportation from the country.⁶⁴ *Lee* applied the test from *Hill v. Lockhart*, which held that to demonstrate prejudice a defendant must show that, had she been correctly informed by her lawyer of the relevant consequences of the plea, she would have made a different decision and proceeded to trial.⁶⁵ The question in IAC cases involving plea bargaining, then, asks whether the defendant understood the risks of taking the plea versus going to trial rather than whether the final outcome would have been different, and by extension, better.

This shift is subtle, but important. In the original IAC jurisprudence, it matters whether the lawyer's poor performance cost the defendant a better outcome at trial or sentencing. In the plea bargain cases, although the Court seemingly ties the prejudice inquiry to whether the defendant was denied a better outcome, the Court's remedy in these cases makes clear that the real question is not whether the defendant got a better or worse outcome, but whether she understood the choices. This turn, as I argue below, is at least in part a result of the Court's own trial ambivalence.

Let's take the decision in *Padilla v. Kentucky*. There, the Court found that a lawyer, as a matter of adequate performance, is obligated to inform a client of the deportation consequences of a plea. At first blush, the harm—or worse outcome—in *Padilla* was seemingly the risk of deportation, or actual deportation from the country, that resulted because of the defendant's uninformed plea. But, as noted, in *Lee*, the Court stuck to the *Hill* test for prejudice, which meant that the defendant had to show he would have proceeded to trial with the right advice. In this sense, the defendant must demonstrate that the outcome he was denied was the benefit of a full and fair trial, where evading deportation was a potential (even if unlikely) option. But a trial, of course, could result in a significantly worse outcome for a non-citizen defendant, like Mr. Padilla, because if he loses he faces not only deportation, but also the sentence he avoided through the plea bargain. This means the remedy for a *Padilla* violation could be a greatly increased sentence *and* deportation following a trial. The Court affirmed this understanding of *Padilla* in the *Lee* case.⁶⁶

Embedded, though, in *Padilla* and *Lee* is an understanding that although the remedy for a lawyer's failure to give correct immigration advice should be the opportunity to proceed to trial, the defendant would be better served by avoiding the trial altogether. The Court in *Padilla* explicitly noted that lawyers really ought to negotiate around the deportation consequences, so as to avoid the trial.⁶⁷ This makes sense given the potential outcomes after trial, but it's also a remarkable concession

⁶⁴ *Lee v. United States*, 137 S.Ct. 1958, 1963–64 (2017).

⁶⁵ *Id.* at 1965–66; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (finding no performance failure for an attorney who misinformed a client about when he would be eligible for parole, but the Court also found that the defendant would not have been prejudiced).

⁶⁶ *Lee*, 137 S. Ct. at 1968.

⁶⁷ *Padilla*, 559 U.S. at 373; see also Jenny Roberts, *Proving Prejudice Post Padilla*, 54 How. L. J. 693, 719–29 (2011) (discussing the myriad of factors involving sentencing and collateral consequences that defense attorneys must consider in counseling a client to take a plea deal or go to trial).

from the Supreme Court that avoiding trial should be a goal for non-citizen defendants, regardless of guilt or innocence. It differs from the acknowledgement in *Alford* that a defendant might claim innocence while pleading guilty because *Alford* envisioned a clearly guilty defendant; *Padilla* does not. This acknowledgement indicates trial ambivalence: the Court proclaims a right to trial as the remedy for harm, even while it nudges stakeholders away from trial and towards plea bargaining, promising that it will provide a better outcome for all.

Of course, one could also argue that this nudge indicates the Court's embrace of plea bargaining and the *other* benefits it provides, like finality and a quick resolution of the case. The Court has certainly in other cases put its thumb on the scale in favor of plea bargaining. But if the Court wanted to encourage plea bargaining over trials, it could have easily found in favor of the government in both *Padilla* and *Lee*, cases where, putting aside the deportation consequences, both defendants received advantageous plea deals on paper. Instead, the Court granted the defendants an opportunity at trial, but with the proviso that both sides—defense attorneys and prosecutors—should avoid the remedy that it made possible.

The Court's trial ambivalence, though, is more fully on display in the companion cases of *Lafler v. Cooper* and *Missouri v. Frye*. In *Frye*, the defendant was never informed that a decent plea offer was on the table.⁶⁸ The uncommunicated offer lapsed and the defendant committed the same offense again. When the prosecutor made another offer, it was worse than the first one. At that point, the first offer was off the table. Defendant took the second offer rather than take a risk at trial. In *Lafler*, the bad advice played out in a somewhat different way. There, the defendant got (really) bad advice about his chances at trial⁶⁹ and, because of the advice, opted to proceed to trial rather than take the much more favorable offer on the table. He lost at trial and faced a sentence many magnitudes greater than the plea offer. In both cases, the court found that the defense attorney had failed to perform adequately under the IAC standard.

The Court then turned to prejudice, establishing a new test in which the defendant must show a reasonable probability that 1) he would have accepted the initial plea, 2) that neither the prosecution nor the trial court would have prevented the offer from being accepted, and 3) that the outcome from the initial plea offer would have been favorable to him (for instance, a lower sentence, lower charge or both).⁷⁰ And the remedy for a successful IAC claim under these circumstances is a doozy. The judge may use her discretion to sentence the defendant consistently with the initial offer, the final sentence or something in between. Essentially there may be a remedy or no remedy at all.

⁶⁸ *Frye*, 566 U.S. at 138–39.

⁶⁹ Defense counsel told the defendant, Cooper, that he could not be convicted of attempted murder because he had shot the victim “below the waist.” *Lafler*, 566 U.S. at 161. As William Ortman pointed out, “Note for first-year law students and bar takers: this is *not* a legal defense to attempted murder.” William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 465 (2021).

⁷⁰ *Frye*, 566 U.S. at 147; *Lafler*, 566 U.S. at 163–64.

Frye seems to align with the Court's initial IAC jurisprudence since it asked if the defendant was denied an opportunity to avoid a bad thing (later worse offers; trial) when a good thing (the initial offer) was on the table. But, *Lafler* paints a more complicated picture of how the Court views plea bargains and trials. There the defendant rejected a plea and then got the benefit of a full and fair trial. After the trial, the defendant was found guilty (which, by all indications, he was).⁷¹ In *Lafler*, the seeming harm was the sentence the defendant received after trial, which was, at a minimum, eight years higher than the original offer on the table (and potentially twenty-three years higher). The Court then offered a remedy for this harm—an unusual step since the gold-standard remedy for most criminal procedure harms is a full and fair trial. Indeed, in *Padilla* and *Lee*, the opportunity for a trial remedies the harm *even if* the defendant ends up with an extreme sentence and deportation after such trial. In those cases, the harm was actually being denied the chance to take a risk at trial. Whereas the harm to the defendant in *Lafler* was taking the risk when he should not have.

Padilla and *Lafler* are actually consistent in this way: they both ask if defendants understood the risk calculation of taking a plea or going to trial, what decision would they have made? Understanding risk calculation as harm helps us appreciate that, for the Court, the harm of plea bargaining is not about the trial penalty, the sentence or potential deportation, otherwise the remedies in these cases would not make sense. Rather, it's about the ability to make a knowing and voluntary decision about one's options, even if all the options are terrible.

But, this explanation does not fully capture the conflicting narratives about trials embedded in these cases. Did the lawyer merely deny the defendant the chance to accept a plea knowingly and voluntarily (in which case, the defendant could make that claim separately), or did the lawyer block the defendant from a better outcome? These are separate questions and the second question—whether defendant would have gotten a better outcome with a better lawyer—necessarily compares the results of a trial and those of plea bargain. In the IAC cases involving plea bargaining, the Court cannot quite decide what to make of the fact that a constitutionally-sound trial might produce myriad terrible outcomes that, seemingly, the Court does not think are just. The idea of trial producing unjust results is not explicitly mentioned in any of the cases, but it explains the Court's decision in *Padilla*, which essentially says—the defendant deserved to go to trial, but what he really deserved was a lawyer who would help him avoid both deportation *and* a trial. It also explains *Lafler*, where the Court granted the defendant a remedy for receiving that rarest of legal gems, a trial, because the trial carried with it a much worse outcome that seemed unjust in light of the significantly lower pre-trial offer.

⁷¹ *Lafler*, 566 U.S. at 161.

B. *By Lawyers and Advocates*

This section tackles how trial ambivalence manifests itself among reformers—scholars, lawyers and advocacy groups—who advocate for a world with more trials and fewer pleas. Many national criminal justice reform organizations have embraced a call for more trials, a theme that has also run through a substantial body of scholarship. In this Section, I focus much of my attention on a special issue of the Federal Sentencing Reporter on the trial penalty, which contained articles by representatives from several of the leading criminal justice reform organizations, including the National Association of Criminal Defense Lawyers (NACDL), the ACLU, CATO Institute, the Innocence Project, and the Koch Institute, among others. Many of the articles in the special issue focus on the benefits of the jury trial and how we can revive it. In addition, I highlight in this Section the sorts of reform efforts that we do *not* see from reformers interested in more trials.

Before launching into an exploration of pro-trial advocacy and the internal conflicts it contains, I want to make clear at the outset that none of this is to imply there is any bad faith among these reformers, or that these efforts should not be pursued. Advocates suggesting a turn to trials are addressing meaningful problems with plea bargaining and the system more generally; and these reforms are often thoughtfully developed to address a particular type of coercion inherent in the plea process. I also note that I am deeply involved in plea reform efforts and so this critique is aimed as much at me as any other reformer.⁷² As I note throughout this Article, the purpose of this piece is to offer advocates—myself included—some food for thought about the harms and benefits of trials. I do that by highlighting some of the internal conflicts with plea reform that show why plea bargaining is so intractable, even in the midst of many good-faith critiques and suggested reforms of the practice. Put another way, this Article in no way suggests that more trials do not offer some solution to the problems of the modern criminal system; only that those solutions are limited in ways that are often overlooked in the discussion of trials versus pleas.

The call for more trials is based on many of the claims about trials that are explored at the start of Part I: trials are public, transparent and democratic spaces that allow the defendant the benefit of the full adversarial process. This stands in contrast to the plea process, which is opaque and often coercive. Both defendants

⁷² I am the Reporter for the American Bar Association's Criminal Justice Section Plea Bargain Task Force, which focuses on how to improve plea bargaining, including by reviving trials. The Task Force Report was published at the start of 2023. . As part of this work, I have collaborated and worked with many of the advocates and reformers I cite in this Article, who I have great admiration for. As I note throughout the Article, the purpose of this piece is to offer advocates—myself included—some food for thought about the harms and benefits of trials. For more on the Task Force, see *2023 Plea Bargain Task Force Report*, AM. BAR ASS'N CRIM. JUST. SECTION 13 (2023), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>. [https://perma.cc/A88H-W4RV] (last visited June 23, 2022). In addition, in my scholarly work, I have written about my own recommendations for how to make plea bargaining fairer and more transparent. See Thea Johnson, *Lying at Plea Bargaining*, *supra* note 23, at 729–31.

and society are harmed when we lose trials. If we care about a fairer criminal system, then we should care about having more trials.

Much of this advocacy for restoring the American trial system is bound up with another set of goals. The first is get rid of mandatory minimums. The second, which, in theory, will follow from the first, is to eliminate the trial penalty, the large differential between the pre-trial plea offer and the post-trial sentence that defendants receive when they take their chances at trial. NACDL has been on the forefront of the movement to end the trial penalty. The organization has produced several important reports on the topic and hosted events to bring together leaders in the field to strategize about how to end the trial penalty.⁷³ In the Introduction to a special issue of the Federal Sentencing Reporter on the trial penalty, the authors note: “There is something fundamentally abhorrent about being a cog in a system that has seen the virtual elimination of trials. Yet, with data showing less than three percent of criminal prosecutions resolved by a trial, and no stakeholder willing to break the tyrannical cycle of institutional coercion that is the hallmark of the trial penalty, the nation’s criminal defense bar decided that silence is no longer an option.”⁷⁴

The thread of these reform efforts is essentially this: We need more trials because they are public, democratic and adversarial. Mandatory minimums coerce defendants into taking plea deals because the threat of huge post-trial sentences makes going to trial nearly irrational, even for innocent defendants. If you eliminate mandatory minimums (and other coercive practices), then defendants are more likely to opt for trials, unburdened by the fear that their potential sentence will be so much higher than what is on the table. More trials will benefit defendants, but also the criminal system and society more broadly.

This argument makes sense. As NACDL has persuasively shown, the trial penalty exists at both the federal and state level. It really *is* risky to go to trial in the modern American criminal system, and a large part of that risk stems from harsh sentencing laws, including mandatory minimums. And, although it is hard to come by comprehensive data about how and why defendants make decisions, studies indicate that the trial penalty influences defendants to plead guilty rather than go to

⁷³ NAT’L ASS’N OF CRIM. DEF. LAWYERS, *supra* note 1; NEW YORK STATE ASS’N OF CRIMINAL DEFENSE LAWYERS & NAT’L ASS’N OF CRIMINAL DEFENSE LAWYERS, THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK (2021), <https://cdn.ymaws.com/nysacd.org/resource/resmgr/docs/nystpenreportupdatedfinal.pdf> [<https://perma.cc/7R4E-DXG8>]; NAT’L ASS’N OF CRIM. DEF. LAWYERS, THE CONSTITUTIONAL RIGHT TO TRIAL: ORGANIZING A NATIONAL MOVEMENT TO END THE TRIAL PENALTY AGENDA (Jan. 24, 2022), https://www.nacdl.org/document/111621_TrialPenaltySummitAgenda [<https://perma.cc/SX37-5DT9>] (National Associations of Criminal Defense Lawyers’ Presidential Summit on the topic of the movement to end the trial penalty).

⁷⁴ Reimer & Sabelli, *supra* note 18, at 216.

trial.⁷⁵ As such, advocates focus their attention on eliminating mandatory minimum sentences and the trial penalties that flow from those sentences.

But, here's the catch, even putting aside mandatory sentences, there would still be a huge number of deep flaws and inequitable outcomes associated with trials *that are now being avoided by plea bargaining*. And because reformers intuitively understand this paradox, the solutions they put forth to solve the problem of too many pleas and too few trials tend to focus on systemic issues rather than reforms that would *require* there to be more trials and fewer pleas. Herein lies the ambivalence for reformers. They want more trials, but only in an ideal system in which trials would involve the kind of truth-seeking, public, democratic process and outcomes that are embedded in our romantic notions of trials. But, as I discuss in greater detail in Part III, in the current criminal justice system, more trials might actually lead to worse outcomes for defendants.

Let's turn to some of the recommendations suggested in The Federal Sentencing Reporter issue dedicated to the trial penalty. They include the following: balancing the "information asymmetry" between defendants and prosecutors;⁷⁶ strengthening and expanding indigent defense;⁷⁷ putting plea agreements into writing and on the record;⁷⁸ developing and publicizing prosecutorial charging guidelines;⁷⁹ reforming pre-trial detention to minimize the number of defendants held before plea or trial;⁸⁰ having judges formally apply a "second look" to disproportionately long sentences;⁸¹ and empowering juries with more information about the law and trial process,⁸² to name just a few.

All of these are terrific reforms, which are meant to change the conditions under which defendants make decisions about whether to plead guilty or go to trial. They should all be implemented for a fairer and more equitable criminal justice system. And they may, if adopted as a whole, change the leverage that prosecutors have to

⁷⁵ Thea Johnson & Emily Arvizu, *Proving Prejudice After Lee v. United States: Ineffective Assistance of Counsel in the Crimmigration Context*, 25 HARV. LATIN AM. L. REV. 11, 35–42 (2022) (reviewing the literature on defendant decision-making at plea bargaining); Chris Ochoa & Carlita Salazar, *How the Threat of the Trial Penalty Coerces the Innocent to Plead Guilty: A First-Hand Account of an Exoneree*, 31 FED. SENT. REP. 299, 299 (2019).

⁷⁶ Rick Jones & Cornelius Cornelssen, *Coerced Consent: Plea Bargaining, The Trial Penalty and American Racism*, 31 FED. SENT. REP. 265, 270 (2019); Marc A. Levin, *A Plea for Reviving the Right to a Jury Trial and a Remedy for Assembly-Line Justice*, 31 FED. SENT. REP. 272, 276 (2019).

⁷⁷ Levin, *supra* note 76, at 274; Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT. REP. 284, 290–291 (2019).

⁷⁸ Brian Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT. REP. 256, 260 (2019).

⁷⁹ *Id.* at 261.

⁸⁰ Levin, *supra* note 76, at 274.

⁸¹ Jane Anne Murray, *Ameliorating the Federal Trial Penalty Through a Systemic Judicial "Second Look" Procedure*, 31 FED. SENT. REP. 279, 280–81 (2019).

⁸² Neily, *supra* note 77, at 291–93.

extract pleas and therefore will produce more trials.⁸³ But, of course, if all these reforms were adopted as a whole that would be a revolutionary transformation of our criminal system that goes much beyond the ratio of trials to pleas. The ambivalence for advocates arises when they romanticize trials without explicitly acknowledging how profoundly the *entire* system would have to change in order for trials to solve the problems they identify.

It is equally important to look at the type of reforms that are *not* being championed by mainstream criminal justice reformers. Reforms that would actually force the parties not to plea bargain and proceed to trial tend to be unpopular. For instance, efforts in Michigan to reform the rules of criminal procedure in ways that would constrain plea bargaining have been roundly rejected.⁸⁴ In Ohio, where similar efforts have been undertaken, the supporters of these plea-restricting reforms tend to be victims' rights advocates, not the advocacy groups and scholars who are pushing for more trials.⁸⁵

In addition, bans on plea bargaining are not popular among legal actors or legal reformers, although, in theory, they should lead to more trials. There have been localized attempts to ban plea bargaining over the last many decades.⁸⁶ Historically, these bans have had different intended purposes. Some have been implemented to combat prosecutorial leniency and others to decrease prosecutorial leverage. Some evidence indicates that they do increase trial rates, but most of the experiments have eventually fizzled out.⁸⁷ Part of the problem with plea bans is that lawyers are very committed to plea bargaining and likely figure out ways around such bans. But one could certainly envision legislation that imposes robust bans on certain forms of plea bargaining—for instance, in a certain class of cases that do *not* involve mandatory minimums—that would be hard for lawyers and judges to avoid. Banning plea bargaining at the misdemeanor level might disrupt our system of mass misdemeanor processing.⁸⁸ Such bans would decrease pleas and increase trials. And yet, there are no broad movements to ban plea bargaining. There has not been an active effort in this regard for several decades.

⁸³ In addition, as I have written about elsewhere, lawyers and judges are particularly dedicated to plea bargaining as a method for resolving cases. There would likely need to be a major culture shift in criminal courtrooms for professional legal stakeholders to wean themselves of their addiction to plea bargaining. Johnson, *The Efficiency Mindset and Mass Incarceration*, *supra* note 23.

⁸⁴ *Id.* at 7–11.

⁸⁵ Indeed, in Ohio, the move to restrict plea bargaining has been largely driven by victims' rights groups and opposed by defense attorney organizations. Garvin & Well, *supra* note 4; Rachel Dissell, *Should Ohio Ban Judges from Allowing Plea Deals That Are 'Lies'?* (Poll), CLEVELAND.COM (May 30, 2015), https://www.cleveland.com/court-justice/2015/05/should_ohio_change_what_plea_d.html [https://perma.cc/DL6P-WGRY].

⁸⁶ Johnson, *The Efficiency Mindset and Mass Incarceration*, *supra* note 23, at 22–23 (reviewing the literature on plea bans).

⁸⁷ *Id.*

⁸⁸ Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097 (2013).

Further, there is little broad support for renewed attempts to organize and support plea strikes. Plea strikes, like plea bans, would eliminate large swaths of plea bargaining. But unlike plea bans, plea strikes would be initiated and sustained by defendants, not lawyers. Michelle Alexander suggested such strikes in the pages of the *New York Times* a decade ago.⁸⁹ Scholars like Jenny Roberts have explored how plea strikes might revolutionize misdemeanor practice.⁹⁰ More recently, Andrew Manuel Crespo offered a blueprint for community-supported plea strikes.⁹¹ But plea strikes have received almost no formal support from reform organizations. The idea of a plea strike is still considered a fringe form of reform,⁹² even though they would inevitably lead to more trials. Part of this resistance can be explained by a concern for defendants who would be exposing themselves to the potentially long sentences at trial. But particularly under Crespo's proposal, in which plea strikes are a community-grounded activism, this concern can only explain so much of the resistance.

This lack of support for efforts that would guarantee more trials and fewer pleas seemingly presents a conflict if the goal of reform is indeed more trials and fewer pleas. This conflict makes more sense when we understand that the goal is only more trials if the broader criminal justice system is fair, transparent and democratic. If the criminal system does not improve, then, as I discuss in greater detail in Part III, more trials might actually result in worse outcomes for defendants, which reformers understand. And this conflict creates a deep ambivalence about trials that runs through the literature that promotes and romanticizes them.

III. TRIAL AMBIVALENCE AND THE RESILIENCE OF PLEA BARGAINING

The last sections have identified the trial ambivalence lurking in both court opinions and reform advocacy and scholarship. We see in these spaces a description of trials as forums of public, democratic process, while at the same time trials are discouraged in subtle and overt ways. This section explores the foundations of that ambivalence and locates the problem in two points of conflict for courts and reformers: the conflict between process and outcome, and the conflict between an idealized world and the world in the which the criminal system actually lives. These

⁸⁹ Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<https://perma.cc/D2YC-FMA4>].

⁹⁰ Roberts, *supra* note 88, at 1097.

⁹¹ Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2004–24 (2022).

⁹² To be fair, current efforts to revive the idea of plea strikes are run out of the Institute to End Mass Incarceration at Harvard. See generally *What Does the End of Mass Incarceration Look Like?*, INST. TO END MASS INCARCERATION, <https://endmassincarceration.org/what-does-the-end-of-mass-incarceration-look-like/> [<https://perma.cc/2BCF-S7GN>] (2023) (“[W]e aim to support and to help build authentic, robust, grounded community power that will enable the people most harmed by mass incarceration to author the terms of its end.”). While being promoted by an elite institution, the idea itself – as a means of reforming the system – is still far from the mainstream.

two sets of conflicts are enmeshed. There are bad outcomes in the real world and pleas often avoid those bad outcomes. But pleas provide no meaningful process and process is a foundational aspect—perhaps *the* foundational aspect—of an ideal adversarial system. To put it another way, (some) stakeholders want trials because in an ideal world they provide the gold standard of process. But trials don’t exist in an ideal world; they exist in the world we have, which is one in which the outcomes (and, often, process) associated with trials are flawed. As Robert Burns put it, trials include a tension “between adherence to ideals and acceptance of a reality that systematically falls short.”⁹³ To avoid the flaws that come with the reality of trial, stakeholders turn to pleas. But those pleas come with their own set of problems, including a near total lack of process. And so, those same stakeholders turn their eyes to trials to solve the problem. And so, the loop—and ambivalence—continues.

What drives this ambivalence even more is that many of the solutions that would, in theory, increase trial rates would not solve the myriad other problems associated with trials. Let’s take the frequent call to eliminate mandatory sentences to encourage more trials. Getting rid of mandatory minimum sentences is a good idea for lots of reasons, including that such reform would make it easier for defendants to exercise their right to trial. There is also good evidence that mandatory minimums provide little deterrent effect on crime and are used largely as a form of leverage during plea negotiations.⁹⁴ And so it makes sense that reformers encourage this fix.

But even in the absence of mandatory minimum sentences, there are a host of other bad trial outcomes. For instance, non-mandatory sentences are often also harsh. Many states employ large sentencing ranges that give wide latitude to judges at sentencing. As I have argued elsewhere, in many ineffective assistance of counsel cases involving plea bargaining, post-conviction judges often make (incorrect) guesses as to what the final sentence would have been after trial.⁹⁵ Their guessing reveals two critical things: first, the incredible range of possible sentences, and second, how little even courts understand how post-trial sentencing works. Thus, sentencing outcomes—regardless of mandatory minimums—are often confusing and unfair.

There are also thousands of collateral consequences now attached to convictions,⁹⁶ in addition to the potential of deportation for non-citizens. Some of these collateral consequences are the result of legislation—like sex offender registration and the elimination of the right to vote for people convicted of felonies. But many other collateral consequences are created and controlled by licensing boards. For instance, many state licensing boards prohibit defendants from running

⁹³ Burns, *supra* note 18, at 69.

⁹⁴ Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, *supra* note 78, at 260.

⁹⁵ Johnson & Arvizu, *supra* note 75, at 43–44.

⁹⁶ See *Collateral Consequences Inventory*, NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [https://perma.cc/5MEF-A88E] (last visited Nov. 19, 2022).

a funeral parlor or becoming a barber (to name just two of hundreds of professional restrictions) after a felony conviction.

And these are just the potential outcomes associated with what might otherwise be a full, fair, and constitutionally sound trial. Of course, trials often aren't fair or constitutionally sound. Take the case of Curtis Flowers, whose many, many trials received attention when his case was highlighted by the Podcast, *In the Dark*.⁹⁷ Flowers got *six* trials, each plagued with constitutional and other issues. For instance, the prosecutor eliminated nearly all potential black jurors over the course of the trials.⁹⁸ But that was, in some ways, just the tip of the iceberg of problems with Flowers' trials, which involved coerced witnesses, lying informants and a host of other procedural issues.⁹⁹ Although the appellate courts stepped in several times to overturn his convictions, Flowers continued to be subjected to a series of unfair, unconstitutional trials.

Flowers' trials show just how much even the trial process (putting aside outcomes) lives within a non-ideal world. An early, favorable plea would almost certainly have been a better option for Flowers than access to the trials he actually received. What's more is that a plea was better for Flowers both because of and in spite of his likely innocence.¹⁰⁰ Indeed, although critics often point to the reality that innocent people plead guilty because of the risks of trial, as Josh Bowers argues, a plea bargain can be a great benefit to an innocent person in a system where it can be grueling to get to a trial.¹⁰¹

All of this is not to say that the project of increasing trials rates is not a worthy project, particularly if it comes along with reform efforts that make both the outcomes and process fairer. Rather, I want to complicate a collective view of trials that animates certain reform efforts. Understanding that trials cannot solve all the problems identified with plea bargaining is important because there is so much discussion in the current criminal justice debate that maligns plea bargaining and praises trials. But neither practice functions in a vacuum. Rather they are both part of a real system that has many moving pieces. And plea bargaining persists partly because those responsible for its reform are ambivalent about the prospect of actually having more trials.

This trial ambivalence presents a barrier to reform because it misaligns the ends and the means of reform. If the goal is more trials, then a certain set of reforms might produce more trials, like, for instance, putting restrictions on plea bargaining or

⁹⁷ *In the Dark: Season Two*, AM. PUB. MEDIA (2020), <https://features.apmreports.org/in-the-dark/season-two/> [<https://perma.cc/6FN4-YPMS>].

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Flowers has always maintained his innocence. In addition, the podcast laid out a strong case for Flowers' innocence, or, at the very least, that the prosecutor did not have enough legitimate evidence to prove the case beyond a reasonable doubt. See Annie Han, *Curtis Flowers, Attorney Talk Justice, Death Row, Innocence and Hope for a Better Legal System*, DUKE LAW (March 1, 2021), <https://wcsj.law.duke.edu/2021/03/curtis-flowers-attorney-talk-justice-death-row-innocence-and-hope-for-a-better-legal-system/> [<https://perma.cc/6ZT3-4RD5>].

¹⁰¹ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132–34 (2008).

banning it altogether. But if the goal is actually a fairer and more equitable system, then limiting plea bargaining might not actually achieve that goal (and reformers know this). Pro-trial reformers would likely say that the goal is to have more trials in a better system. And while those goals are not incompatible, they do require us to acknowledge that trials in and of themselves will not solve the problems that many critics identify about plea bargaining.

Jeffrey Bellin made a similar point about the problems with reforming plea bargaining when you have not correctly identified what the problem with plea bargaining actually is. As he notes, “reformers often retreat to generic solutions . . . [like reducing sentence length] . . .” to combat the problems they see with plea bargaining, but many of those solutions, “mask[] an inability to diagnose the problem.”¹⁰² Bellin argues that the real problem with plea bargaining is the uncertainty with which defendants make decisions.¹⁰³ As he observes, if uncertainty is the core concern, then reform efforts should be targeted to address it.¹⁰⁴ For instance, he suggests that when a prosecutor proposes a plea deal, the prosecutor should “only present options that the prosecutor believe unequivocally make *the defendant* better off. Even if the criminal justice system has unavoidable elements of chance, the prosecutor should seek to minimize not magnify those elements.”¹⁰⁵

It is likely that a pro-trial reformer would agree with Bellin’s recommendation. And yet, we should see that Bellin’s proposal, because it is targeted at making plea offers more certain and less opaque, would not necessarily increase the number of trials. In fact, we might find that it increases the number of pleas since defendants could be certain that the plea offers *definitely* made them better off than the alternative. In this sense, the proposal can be viewed as favoring fair outcomes over full process in the system as it exists.

Christopher Slobogin has similarly suggested reforms that would focus on fair and *accurate* outcomes over an idealistic attachment to the traditional “adversarial” model, which produces so few trials anyway. In his work, Slobogin has suggested reforms that move our criminal system closer to a hybrid-inquisitorial model and outlines the many ways that inquisitorialism would improve the trial process and reduce plea bargaining.¹⁰⁶ He suggests putting more control in the hands of the judge during the adjudication phase.¹⁰⁷ But because his reforms would reimagine the criminal justice system in ways that are at odds with the romantic notions of traditional adversarial trials, where the parties control the action, they would likely

¹⁰² Bellin, *supra* note 12, at 544.

¹⁰³ *Id.* at 573–75.

¹⁰⁴ *Id.* at 575–80.

¹⁰⁵ *Id.* at 577.

¹⁰⁶ Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 716–23 (2014); Christopher Slobogin, *Plea Bargaining and The Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1519–21 (2016).

¹⁰⁷ Slobogin, *Lessons from Inquisitorialism*, *supra* note 106, at 715–16.

also face resistance from reformers. This is true even though Slobogin's suggestions would actually *increase* trial rates.

What we see then is that when reform efforts misidentify the underlying goal of reform, they may risk bolstering plea bargaining in its current form. Take, for example, fictional pleas. These pleas allow the parties to negotiate around the truth. For instance, a defendant may want to avoid sex offender registration and so he agrees to plead guilty to assault, even though the charge does not represent the reality of the crime he actually committed.¹⁰⁸ There are many critiques of this practice depending on one's perspective: it's damaging to victims, it detrimental to the integrity to the criminal system; it fails to correctly identify wrongdoers; or it discourages trials by giving prosecutors additional leverage during plea bargaining.

What complicates the debate around reform of something like fictional pleas is that while such pleas may inflict all or some of the above harms (depending on the case), they are also serving some beneficial roles, like allowing defendants to avoid collateral consequences, deportation or harsh sentences that none of the parties feel would be fair to impose.¹⁰⁹ They may also allow victims the opportunity to achieve some measure of justice without subjecting the defendant to a sex offense conviction or sex offender registration. In order to address the problem of fictional pleas, one has to weigh both the particular harm they want remedied by the reform and any benefits that the practice is providing. A reform that focuses on requiring or encouraging defendants to go to trial more frequently might result in some proposal that would restrict fictional pleas. But that could have significant negative impacts on defendants. Without acknowledging these conflicts, a reformer might actually entrench plea bargaining even more deeply by pursuing a reform that incorrectly characterizes the problem with the practice and fails to see its benefits.

Every day in criminal courts around the country plea bargaining inflicts harm and bestows benefits in a deeply flawed, unfair criminal justice system. In the same courtroom, two similarly situated defendants may experience the same "bargain" in vastly different ways; as might the victims of their crimes. Giving those defendants more access to trials may have many salutary benefits, but those benefits have limits. And understanding those limits is critical to imaging the possibilities of reform.

CONCLUSION

This Article does not suggest that reformers—and courts, for that matter—should not pursue a fairer and most just criminal system, or that part of that pursuit should not include giving more defendants the opportunity and motivation to go to trial. Rather, the primary observation here is that in the system as it stands now, trials—on their own—may not be the solution to many of the evils associated with plea bargaining. What's bad about plea bargaining is often good when viewed through the lens of a potential future trial. In light of this observation then, much of

¹⁰⁸ *Id.* at 703.

¹⁰⁹ *Id.* at 709.

the advocacy to increase the number of trials contains within it an ambivalence about those same trials. Part of addressing that ambivalence is acknowledging that in the system as it exists now, plea bargaining is protecting defendants, victims and other stakeholders *from trial*. Both reformers and courts could benefit from a more robust conversation about this reality, allowing us to better identify the real harms and benefits of plea bargaining.