Adding Value to Conversations about Criminal Reform

New York task force investigates why innocent people plead guilty

By Elayne E. Greenberg

In February 2018, the Justice Center of the New York County Lawyers Association (NYCLA) established a Plea Bargaining Task Force. The task force was charged with examining why factually innocent defendants in the New York metropolitan area plead guilty and with prescribing viable recommendations to remedy this injustice.

Criminologists estimate that between two and eight percent of convicted felons have pled guilty even though they are innocent. Yet this estimate fails to capture the full scope of the problem. This number does not include all those innocent people who have still opted to plead guilty to a misdemeanor.

Those unfamiliar with how the criminal justice system works may wonder why innocent defendants would take such seemingly illogical action. Criminal justice reform scholars explain that for many innocent defendants who suffer through the burdens and intimidations of the criminal justice system, pleading guilty can be a logical choice. Some innocent defendants may see such a plea as an immediate way to end an arduous process that compels them to make numerous court appearances before they get a final determination, often at the risk of jeopardizing their jobs. Others may fear that if they don’t plead guilty and accept the charges before them, they will receive even more draconian sentences. Some innocent defendants may believe that a guilty plea, especially one involving a misdemeanor, will end their ordeal, not understanding the long-term effect a guilty plea can have on securing future employment, housing,

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and government benefits. Finally, a guilty plea may be the only way an innocent defendant might qualify for a diversion program, which many people consider a much more appealing alternative than imprisonment or other punishment. With these multiple realities in mind, task force members were asked to identify how the current processes in the New York criminal justice system incentivize innocent defendants to plead guilty and then to suggest viable reforms.

The NYCLA Justice Center Plea Bargaining Task Force took a page out of the dispute system designer’s playbook and structured a work process that advanced the task force’s charge as much as its final report. In short, process matters. This article, written from the dual vantage point of a task force member and a dispute system designer, reports on the group’s contribution to criminal justice reform, focusing on how the task force’s structure enhanced members’ engagement, deepened their understanding of the problem, and galvanized them to propose reforms. It also summarizes the task force’s final recommendations.

Diversity matters

Lewis Tesser, the Task Force Chair, has been practicing law in New York City for more than 30 years. He has served in numerous leadership positions, including President of the New York County Lawyers Association and founder and Director of the Ethics Institute at the New York County Lawyers Association. Because of this depth of experience and range of associations, he was able to assemble a task force that represents a broad and diverse group of professionals in the criminal justice system. The task force’s 70 members include public defenders, prosecutors, former appellate court and criminal court judges, bar leaders, academics, and criminologists. The professionals vary in age, gender, ethnicity, and experience, working in the federal and state courts based in the five boroughs that make up New York City. This breadth of members’ experience, professional affiliations, and backgrounds allowed everyone involved to move beyond individual perspectives and develop a broad understanding of why innocent people might choose to plead guilty.

Task force members prepared by reviewing the relevant scholarship. It was the in-person meetings, however, in which members shared their different perspectives, that really allowed them to shape a more nuanced understanding of the problem, provided unforeseen opportunities for learning, and stimulated realistic reform possibilities. As one example, task force members began to realize that although they all worked in the criminal justice system, each office in each region, in federal and state courts, had different rules and procedures that shaped its work. Through discussions, members began to appreciate how this patchwork quilt of rules and procedures in the five boroughs complicated the task force’s work — and how, from the perspective of defendants who were trying to make sense of the system and how it applied to them, the different rules could be crazy-making. This same complexity also added to the challenge of devising any recommendations that would be applicable across the board.

The discussions between legal actors in the federal and state plea bargaining process are another clear example of why diversity matters. Both federal and state task force members confessed that they never have the opportunity to speak with each other. Thus, many involved in the group’s efforts found great value in listening to someone who works in a different system. In the federal plea bargaining system, for example, a full investigatory phase, including a grand jury inquiry, comes before a defendant is indicted and charged. The state system, however, applies a much quicker guilt assessment after individuals are arrested and charged. Such a rapid decision-making process, which increases the probability of error and the likelihood that the defendant will be presumed guilty, might make defendants believe that they have been pre-judged, that they have no chance to defend themselves, and that a guilty plea is their only option. Through discussions such as this, task force members from the state system began to consider changes in the information-gathering stage that would reduce the pressure for innocent defendants to give up all hope of proving their innocence.

Strategic design maximizes reform possibilities

The task force convened on January 22, 2019, with an inspiring keynote address by Jed S. Rakoff,
a judge of the United States District Court for the Southern District of New York who spoke about the severity of the problem and the importance of the task force’s mission. Throughout the following spring, task force members continued their work in six focus groups organized around the topics of how charges are filed; the role of defense counsel; bail reform; judicial involvement in the plea bargaining process; New York legislation; and sentencing. The purpose of each two-hour focus group was to examine different aspects of the criminal and plea bargaining process and brainstorm about options for possible reform. Task force members could participate in all the focus groups or just those that caught their interest.

I had the privilege of attending several focus group meetings, co-chairing the charging focus group, and facilitating a discussion on one of the options being considered. I was surprised and pleased by how task force members engaged in the discussions with a humbleness and desire for a greater understanding of why innocent people plead guilty. In the focus groups, task force members experienced the power and value of brainstorming and the commitment to effect meaningful reform. This process helped members focus on viable options instead of feeling overwhelmed by the enormity of the problem. Each focus group generated a minimum of 25 options to resolve the problem.

For me, the richness of the discussions was not only about points of agreement but points of disagreement. There were ongoing tensions between the competing ideals of aspiration and pragmatism. During one riveting exchange, participants disagreed about whether to identify and address the root causes of the problem or recommend procedural fixes. Despite their idealistic fervor, members soon had to confront the limitations of what they could realistically achieve in the short run. I can still hear the frustrated voice of one member who protested that none of the final recommendations dealt with the systemic problems that caused many innocent people to plead guilty: the lack of opportunities in education, inadequate or unavailable housing, poverty, and racism. Although the proposed recommendations were decided by the majority, most agreed that the final recommendations did not address the core problems.

The NYCLA Justice Center Plea Bargaining Task Force’s Six Proposed Recommendations

The task force prioritized options that would decrease the pressure and intimidation that compel innocent defendants to plead guilty. For example,

The six task force report proposals

**Proposal 1**
Reduce the number of unnecessary appearances by defendants

**Proposal 2**
Facilitate the pre-trial communication between incarcerated clients and defense counsel

**Proposal 3**
Provide defendants with education resources about the criminal justice system, criminal procedure, and what to expect as their case proceeds

**Proposal 4**
Adopt recommendations of the National Association of Criminal Defense Lawyers report dealing with the trial penalty and proportionality between pre-trial and post-trial sentences

**Proposal 5**
Enhance judicial discretion in sentencing

**Proposal 6**
Reduce the volume and impact of low-level offenses in the criminal justice system
Proposal 1 recommends that the defendant be required to attend only meaningful court appearances. Implicit in this proposal is the recognition that innocent defendants might plead guilty to a misdemeanor just so they can avoid missing time from work, family, and other obligations. Proposal 6 is a recognition that some low-level and non-violent offenses should not even be resolved in the criminal justice system. Proposals 2 and 3 recognize the value of empowering innocent defendants with legal information and recommend removing barriers that interfere with pre-trial communications between incarcerated clients and their lawyers. Proposal 4 seeks to remove the threat of a longer sentence or trial penalty if a defendant decides not to accept the plea offer and instead go to trial. As a further power-balancing effort, Proposal 5 encourages judges to have sentencing discretion.

Two of the factors that contributed to the success of the Plea Bargaining Task Force are well worth consideration by others engaged in justice reform: a diverse group of collaborators is more likely to expand individual perspectives and create a more nuanced understanding of the problem, and a well-designed process is more likely to engage and incentivize collaborators to become reform agents themselves.

Next steps

As of this writing, the report has been submitted for review and approval to the multiple bar associations in New York, and task force members are optimistic that the recommendations will be positively received.

After taking an overdue look at criminal injustices, New York has now become a hub of criminal reform. Criminal justice reformers are encouraged by the groundbreaking 2019 New York State Criminal Justice Reform Legislation, which explicitly requires that prosecutors turn over to defendants all discoverable material within 15 days of arraignment and before a defendant pleads guilty. In other examples of needed court changes, the Independent Commission on New York City Criminal Justice and Incarceration Reform recommended affirmative steps to close Riker’s Island, a prison complex known for its harsh conditions. Progressive district attorneys such as Brooklyn’s Eric Gonzalez are implementing procedures to create more just outcomes for defendants.

Now that the task force has completed its work, individual members, including me, remain energized. We have been introduced to new possible collaborators who might work with us on criminal justice reform. I am continuing to develop a plea bargaining training for defense attorneys and prosecutors so that the process results in more just outcomes. (For more information about training in New Hampshire, see the article by Jennifer Reynolds on page 9 of this issue). As we go forward, we must never forget the faces of innocent defendants who inspire us to develop stronger criminal justice safeguards that ensure fairer outcomes for everyone.

Endnotes


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