Fairly Pricing Guilty Pleas

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Fairly Pricing Guilty Pleas

ANNE R. TRAUM*

I. INTRODUCTION

How do we ensure that guilty plea outcomes are fair? This article considers how the late Professor Andrew Taslitz's work on Fair Price Theory sheds light on this question. Professor Taslitz was deeply concerned about the impact of the criminal justice system on the poor and minorities, and looked to other disciplines for ideas that could assist in understanding and reforming our legal system. Increasingly, Professor Taslitz turned his attention to what he called "The Guilty Plea State," in which prosecutors and defense counsel privately negotiate plea deals with little judicial oversight and no public involvement. In the guilty plea state, prosecutors set the "price" for plea-bargaining through charging decisions. And as Professor Taslitz argued in *Judging Jena's D.A.: The Prosecutor and Racial Esteem,* those pricing decisions affect the defendant's and the community's perception of whether our criminal justice system is fair.

At the time of his death, Professor Taslitz had in the hopper a manuscript, "Plea Bargaining and Fair Price Theory." True to his style, Professor Taslitz likely would have explored in this unfinished piece how Fair Price Theory, a branch of behavioral economics, can help us better understand and regulate fairness in the guilty plea context. Fair price theory helps us understand what makes a price fair,

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3. *Id.* at 428–29.
and Professor Taslitz harnessed the theory to examine fairness in the criminal justice system.

Building on Professor Taslitz’s work, this article explores how Fair Price Theory can help us analyze the fairness of guilty pleas. In *Judging Jena’s D.A.*, Professor Taslitz used Fair Price Theory to explore how prosecutors could strive to achieve fairness and reduce the perception of racial stigma. He used Fair Price Theory to propose a system of prosecutorial ethics that takes into account racial stigma. This article considers how Fair Price Theory challenges courts to analyze guilty pleas differently, by focusing on price without relying on the agency of prosecutors. Under current doctrine, a court examines whether the defendant’s decision to plead guilty is voluntary, informed, and factually supported. Courts do not assess whether the defendant is getting a fair deal or fair price. Fair Price Theory could help define and assess what makes a deal (or price) fair. And that analysis, with its related questions, challenges the status quo by making price and fairness a central inquiry.

Fair Price Theory is useful for conceptualizing fairness in the guilty plea context. The theory is attractive because it is comes from the marketplace and is based on marketplace behavior. Though contract law, which involves bargaining and pricing, has been an important ingredient in the law governing guilty pleas, Fair Price Theory adds an important behavioral dimension. It recognizes that fairness is based on both process and result (or outcome). Fair Price Theory reinforces the common-sense notion that fairness reflects procedural and substantive values.

Fair Price Theory poses a challenge to the status quo because it asks courts to think about procedure and substance in somewhat unfamiliar ways. Courts currently leave the job of charging to the prosecutor and assume that the parties, especially counseled defendants, can negotiate fair results. But courts do not investigate or regulate the process used to generate the price, and, understandably, might worry such scrutiny could tread on the prosecutor’s charging authority or violate rules forbidding court-involvement in plea negotiations. Regulating that pricing process, which typically occurs off-the-record and behind closed doors, is new territory. Additionally, plea-pricing touches on the discrete stages of charging, guilt adjudication and sen-

4. *Id.* at 395–96, 398.
tencing, which get blended into a single plea-bargaining negotiation. Parties negotiate the charge with sentencing in mind, and may lock in sentencing certainty through charge-bargaining or prosecutor recommendations. Fair Price Theory provides an attractive, market-based reason for courts to focus on price. That shift in focus could be significant.

This essay revisits how Fair Price Theory informed Professor Taslitz’s critique of prosecutorial charging decisions, especially in the Jena Six case, and explores how Fair Price Theory, by focusing on price, might challenge us to rethink how guilty pleas are regulated, with fairness in mind.

II. THE PROBLEM: REGULATING FAIRNESS IN THE GUILTY PLEA STATE

A. The Guilty Plea State

Professor Taslitz echoed the concerns of so many others in describing our system of guilty pleas. In the forward to an ABA symposium on plea-bargaining, Professor Taslitz described our traditional trial-adjudication system as the “Due Process State,” and labeled our current system as the “Guilty Plea State.” More recently the Supreme Court described the current system, in which over 94% of convictions result from guilty pleas, as “our system of pleas.” Though guilty plea adjudication has been the dominant mode of conviction for nearly a century, it is less regulated and thus less developed compared to the dominant trial-based adjudication model.

The Due Process State, as Professor Taslitz and others have recognized, is loaded with constitutional, statutory, and institutional protections designed to ensure adversarial testing, community participation, judicial oversight, and accurate and fair results. Justice Scalia referred to this model, with its elaborate procedural protections, as “the gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory” protections. The reality is that few cases proceed to trial, nearly all convictions result from guilty pleas, and virtually every defendant engages in plea negotiations before conviction. The Guilty Plea State, in contrast to

8. Lafler, 132 S.Ct. at 1398 (Scalia, J., dissenting).

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the Due Process State, does not fully embody the same set of constitutional values.

The problem, in Professor Taslitz’s view, was not pleading guilty, but rather the opaque, secretive, pressurized environment in which plea-bargaining takes place, without public participation or much judicial oversight. As he wrote, “[i]n the Guilty Plea State, negotiations take place largely in secret. The parties must persuade one another but not any representatives of the people. No judge supervises the proceedings. No transcript is made of the discussions. Moreover, few constitutional or statutory rights apply, and most of those that do can readily be waived.” The real problem, Professor Taslitz argued, is “the nearly unregulated status of the system, a consequence of pretending that we still live in the fictional Due Process State when it long ago withered away.” Of course, Professor Taslitz was not alone in critiquing the laissez-faire market of plea-bargaining and recognizing the need for regulation and oversight.

Compared to the Due Process State, there is a dearth of regulation in the Guilty Plea State. The elaborate trial-based model, though imperfect, embodies dearly held notions of community participation, predictability, oversight, and accuracy. Prosecutors charge and marshal evidence, defense counsel test and counter the prosecution’s case, the jury weighs the evidence and determines guilt, and the judge referees the trial and later imposes sentence. The Guilty Plea State, in stark contrast, is largely unregulated and exists as a market model in which prosecutors (sellers) have monopoly power, defendants (consumers) have few protections, the community is not involved, and judges play a largely perfunctory role.

Reforming the Guilty Plea State is a challenging task. Scholars advocate different approaches, reflecting their views about what needs

11. Guilty Plea State, supra note 1, at 5.
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to be fixed. Some reformers seek to improve the current market-based system. Others strive to inject into guilty plea adjudication more meaningful constitutional or institutional checks, like increased judicial oversight and community participation, which mirror or adapt trial-based procedural protections. Professor Taslitz urged courts to be more involved in policing guilty plea agreements, encouraged prosecutors to temper their offers based on ethical concerns, and insisted on greater protection of defendants. Such process controls could yield more accurate results and faith in the process. Professor Taslitz’s work on Fair Price Theory further supports his call for reforms that would make the Guilty Plea State more transparent and just.

B. Fair Price Theory and the Jena Six

Professor Taslitz drew on Fair Price Theory to critique prosecutorial charging decisions that perpetuate racial stigma. He relied on the theory to explore the themes of racial injustice surrounding the 2006 “Jena Six” case, in which six African-American high school students were convicted of assaulting a white classmate at Jena High School in Jena, Louisiana. The black students were treated more harshly than whites students and adults at every stage of the criminal justice process, from charging to bail to sentencing. Relying on Fair Price Theory, Professor Taslitz argued that prosecutors should take into account racial harm to avoid the kind of racial stigma and community resentment sparked in the Jena Six case.

For Professor Taslitz, the Jena Six case illustrated how racial harm can (or should) impact prosecutorial charging decisions. The facts, retold by Professor Taslitz in his article, underscore how a prosecutor’s charging decisions can lead to results that, though legally defensible, appear racially skewed. The Jena Six were six African-American teenagers who were expelled from school and criminally charged for their alleged assault of a white student named Justin Barker. The assault of Barker stemmed from a dispute about the “white tree,” a

15. Id. at 864.
17. Judging Jena’s D.A., supra note 2, at 442–44.
large tree under which only white students sat.\textsuperscript{20} One of the black students received permission from the school to sit under the tree.\textsuperscript{21} Shortly thereafter, three hangman’s nooses hung from the tree.\textsuperscript{22} After several black students sat under the tree,\textsuperscript{23} the district attorney warned, “I can end your lives with the stroke of a pen.”\textsuperscript{24} In the same community, a black student named Robert Bailey was attacked by a white student outside a party and, the following day,\textsuperscript{25} was threatened outside a store by a white man, who grabbed a shotgun from his truck, purportedly to use on Bailey. After Bailey and some friends wrestled the gun away from the man, they took it to police to report the incident. The local prosecutor charged the white student who assaulted Bailey with simple battery, did not charge the white man who grabbed his gun from his truck,\textsuperscript{26} and charged Bailey and his friends with robbery for the theft of the firearm.\textsuperscript{27}

Two days later at Jena High, a white student named Justin Barker was injured in a schoolyard brawl and six black teens were arrested and charged with second-degree assault, which was later increased to attempted second-degree murder. One of the teens, Mychal Bell, was initially prosecuted as an adult.\textsuperscript{28} Barker, the white victim, was charged with a firearm offense and released on $5,000 bail.\textsuperscript{29} For the Jena Six, bail ranged from $70,000 to $138,000.\textsuperscript{30}

As Professor Taslitz observed, the white defendants received more lenient treatment than the black students in terms of the seriousness of charges, size of the bond, length of sentences sought, arrest versus intra-school discipline, and adult versus juvenile court.\textsuperscript{31} Two of the prosecutor’s decisions garnered particular criticism. First, by charging Mychal Bell with attempted second-degree murder, the prosecutor was able to transfer the case to adult court, exposing Bell to higher criminal penalties. Although the prosecutor later reduced the charge, observers suspected that the prosecutor increased the charges

\begin{thebibliography}{99}
\item 20. Taslitz \& Steiker, \textit{supra} note 19, at 276.
\item 21. Taslitz \& Steiker, \textit{supra} note 19, at 276–77.
\item 22. Taslitz \& Steiker, \textit{supra} note 19, at 277.
\item 23. Taslitz \& Steiker, \textit{supra} note 19, at 277.
\item 24. Taslitz \& Steiker, \textit{supra} note 19, at 277.
\item 25. Taslitz \& Steiker, \textit{supra} note 19, at 277.
\item 26. Taslitz \& Steiker, \textit{supra} note 19, at 277-78.
\item 27. Taslitz \& Steiker, \textit{supra} note 19, at 277-78.
\item 28. See Taslitz \& Steiker, \textit{supra} note 19, at 275–76, 279.
\item 29. Taslitz \& Steiker, \textit{supra} note 19, at 278.
\item 30. Taslitz \& Steiker, \textit{supra} note 19, at 278.
\item 31. See Taslitz \& Steiker, \textit{supra} note 19, at 278–80.
\end{thebibliography}
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in order to secure harsher penalties.\textsuperscript{32} Second, the prosecutor did not charge the noose-incident as a hate crime, which would have exposed the white defendants to longer sentences.\textsuperscript{33} The prosecutor defended his charging decisions as legally required, but critics observed that the charging decisions were highly discretionary.\textsuperscript{34}

Professor Taslitz drew on Fair Price Theory to argue that prosecutors should temper their charging decisions to avoid reinforcing racial stigma.\textsuperscript{35} Professor Taslitz described Fair Price Theory as a branch of behavioral economics that "addresses the emotional reaction of buyers to prices that they perceive to be unfair."\textsuperscript{36} First, prices that violate social norms of equity, equality, and need will be perceived as distributively unfair.\textsuperscript{37} In this context, equity means getting what you paid for, equality means being treated the same as others similarly situated, and need means making special allowance for the disadvantaged.\textsuperscript{38}

Second, a buyer will perceive a price as procedurally unfair if the process for determining the price lacks transparency or reflects favoritism.\textsuperscript{39} Hence the buyer will perceive greater fairness in the price if they have some voice and control in setting the price, the process for determining the price is clear and rational, and favoritism doesn’t play a role.\textsuperscript{40} Imbalances in the marketplace, Professor Taslitz argued, can lead to a sense of procedural unfairness.\textsuperscript{41} Common sources of imbalance in the criminal justice marketplace include lack of information and resources that are so critical to making a fully informed decision.\textsuperscript{42} The plea-bargaining process lacks transparency because defendants often plea-bargain based on incomplete information, are not privy to negotiations between the prosecutor and defense counsel, and

\textsuperscript{32} Taslitz & Steiker, supra note 19, at 279–80 (explaining that after conviction the appellate court remanded the case to juvenile court where Bell pled guilty to simple battery).

\textsuperscript{33} Taslitz & Steiker, supra note 19, at 280.

\textsuperscript{34} Taslitz & Steiker, supra note 19, at 281–83 (referring to the N.Y. Times article the prosecutor wrote in defense of his prosecutorial discretion). See Reed Walters, Op-Ed, Justice in Jena, N.Y. Times, Sept. 26, 2007, at A27 (rebutting descriptions of the events by commentators as "‘a schoolyard fight,’ as it has been commonly described in the news media and by critics").

\textsuperscript{35} Judging Jena’s D.A., supra note 2, at 428–30.

\textsuperscript{36} Judging Jena’s D.A., supra note 2, at 428 & n.261–62.

\textsuperscript{37} Judging Jena’s D.A., supra note 2, at 428.

\textsuperscript{38} Judging Jena’s D.A., supra note 2, at 428.

\textsuperscript{39} See Judging Jena’s D.A., supra note 2, at 428.

\textsuperscript{40} See Judging Jena’s D.A., supra note 2, at 428–29.

\textsuperscript{41} See Judging Jena’s D.A., supra note 2, at 429–30.

\textsuperscript{42} Judging Jena’s D.A., supra note 2, at 431.
may feel that momentous and complex decisions are rushed or rote.Prosecutors are far better resourced and enjoy broad power to set the price for a guilty plea, demand waivers of important rights—including access to relevant information and judicial review, and coerce a plea by increasing the trial penalty.

Third, an unfair price will trigger retaliatory behavior sparked by anger, which Professor Taslitz called "retributive anger." This anger, Professor Taslitz wrote, stems from the perception of being treated as less worthy than you are. It is this perceived sense of unfairness—which stems from a lack of distributive and procedural fairness—that can lead to frustration and different forms of "retributive anger." For the defendant, this resentment can impede his own rehabilitation and lead to recidivism. A community that perceives such unfairness may be less law-abiding, less willing to cooperate, which can lead to higher crime and other ill effects. Professor Taslitz argued that charging and plea-bargaining, the key "pricing decision" are two prosecutorial decisions that can contribute to race-stigmatization.

Thus, summarizing the three key aspects of Fair Price Theory, Professor Taslitz argued that a prosecutor’s unfair pricing reinforces racial stigma, leads to anger and resentment, and sends a message to individuals and communities that the system is unfair.

Reflecting on the Jena Six, Professor Taslitz proposed that prosecutors could incorporate racial justice concerns into their charging or “pricing” decisions. The current “Do-justice Adversarialism,” Professor Taslitz wrote, assumes that the prosecutor and represented defendants are equal adversaries on a level playing field. In that model, the prosecutor’s adversarial zeal is tempered by an ethical, public duty to “do justice.” But the model permitted what happened in Jena.

44. Judging Jena’s D.A., supra note 2, at 432.
47. Judging Jena’s D.A., supra note 2, at 429.
48. Judging Jena’s D.A., supra note 2, at 429 (citing JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, URBAN INST., FROM PRISON TO HOME 10–13 (2001)).
52. Judging Jena’s D.A., supra note 2, at 442.
when ostensibly racially-neutral prosecutorial decisions led to harsher treatment of the black students.\textsuperscript{53}

Professor Taslitz proposed that instead of the flawed and narrow “do-justice” model, a model of ethics for prosecutors should mimic the model of ethics for medical practitioners, which embraces core principles of prevention, “do no harm,” and holistic treatment.\textsuperscript{54} This model would encourage prosecutors to take into account and avoid the racial stigma and harm, what Professor Taslitz termed “racial dis-esteem,” that can flow from individual charging decisions.\textsuperscript{55} A single charge may be legally justified, but does not occur in a vacuum and may not be justifiable when balanced against countervailing concerns about fairness. Prosecutors, Professor Taslitz wrote, are the “regulators of the market for racial disesteem, reinforcing pre-existing market biases working against racial minorities.”\textsuperscript{56} Fair Price Theory provides a framework to define fairness in a way that incorporates these broader concerns and factors them into the pricing calculus.\textsuperscript{57}

Beyond prosecutorial ethics, Fair Price Theory provides useful insights on plea pricing, the aspect of the criminal justice system that actually operates as a market place of sellers (prosecutors) and buyers (defendants). Here the theory can help define what makes a guilty plea fair. And that inquiry, it turns out, poses a significant challenge to the status quo.

\textbf{III. REORIENTING GUILTY PLEA REGULATION TO FOCUS ON FAIR RESULTS}

Fair Price Theory, by focusing on price, offers a model for thinking about fairness in the guilty plea context.\textsuperscript{58} The theory helps to identify what qualities make a price fair. The answer is that fairness is an amalgam of different components: there are the components that result in the price or result (distributive fairness) and the components that make up the process used to generate that result (procedural fairness). While Fair Price Theory has much to offer in terms of understanding and regulating the plea-bargaining marketplace and guilty plea process, two key insights are fundamental. First, fairness is both...
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substantive and procedural, meaning that results, not just process, really matter. Second, procedural fairness in this context refers to the process used to generate the price. These two insights are important because they pose a challenge to our current system, which neither regulates substantive results at the plea stage, nor regulates the process for generating plea prices. Fair Price Theory provides a market-based framework for courts to regulate the fairness of guilty pleas. This challenges the status quo by reorienting courts to think about what is most important to the parties and society: getting a fair deal and having a system that produces fair deals.

A. A Market-based Framework for Testing Fairness

Fair Price Theory is a market-based model for exploring what makes a price fair. The theory is developed in Dr. Sarah Maxwell’s work The Price is Wrong, which explores fair pricing as a mix of cultural norms, power dynamics, and emotional responses that inform one’s sense of what is fair. Her work on fair pricing provides important insights for regulating plea-bargaining because it offers a vocabulary for assessing fairness in a buyer-seller marketplace of negotiated outcomes, and thus provides a market-based, instead of a trial-based, model for assessing the fairness of guilty pleas. Dr. Maxwell’s approach is potentially useful because plea-bargaining is mostly unregulated, courts do not analyze whether each pleas achieves a fair result, and market imbalances can distort plea results. Dr. Maxwell explores whether just pricing can ensure personal and social fairness. Importantly, Dr. Maxwell has illustrated a two-step model (price first, process second) that evaluates the fairness of price.

In criminal law, the fairness of plea deals is largely unregulated territory. Criminal procedure doctrine is shaped around trial being the “main event,” and changes in trial procedure are implemented in the courtroom. The system of pleas, by contrast, plays out mostly outside the courtroom, in private negotiations between the prosecutor and defense counsel, and with minimal judicial oversight. Plea-bar-

60. Judging Jena’s D.A., supra note 2, at 428 (citing MAXWELL, supra note 61, at 76-80).
62. Bibas, supra note 13, at 1119.
63. See, e.g., McFarland v. Scott, 512 U.S 1256, 1264 (Blackmun, J., dissenting from denial of certiorari) (“The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result.”).
64. Traum, supra note 14.
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gaining blends three key phases of the criminal process — charging, guilt adjudication, and sentencing — into a single negotiation. The prosecutor decides which charges to bring, and can add, dismiss, or reduce charges during plea-bargaining.65 The court, which is not involved in plea-bargaining, accepts the plea and later imposes sentence. Looking at a court docket sheet in a guilty plea case, these discrete proceedings — charging, pleading guilty, and sentencing — would appear as a distinct phases. But practically, for the parties, these phases are fully integrated into a plea negotiation, which fixes the charge and conviction, and predicts, or even mandates, a specific sentence.

The court, in accepting a guilty plea, performs a ritualized due process inquiry, but it is not about the fairness of the plea deal. To accept a guilty plea, a court must adhere to a few constitutional rules: the defendant must understand the rights he’s waiving by giving up his right to trial, as well as the terms and consequences of the plea.66 The defendant must admit facts that satisfy the elements of the offense.67 Though a coerced plea violates due process, it is widely acknowledged that defendants plead guilty under extreme pressure to avoid harsher sentencing consequences after a trial conviction.68 Guilty plea adjudication can be rote and formal, and does not require the court to learn much about the case or the defendant.69 The Supreme Court has acknowledged that guilty pleas, not trial-convictions, are the norm, and that plea-bargaining determines the conviction and the sentence.70

Traditionally, courts have not asked, before accepting a guilty plea, whether the defendant received a fair deal. This is because the fairness questions that the court examines primarily go to the voluntariness of the plea, admitted elements, and waiver of rights, not the substance of the deal and how it compares with others. The Supreme Court has intimated, however, a general expectation that similar de-

65. Traum, supra note 14, at 835.
66. Traum, supra note 14, at 828.
68. Traum, supra note 14, at 833 (discussing Brady v. United States, 397 U.S. (1963)) (observing that many defendants plead guilty to get a more lenient sentence, to get reduced or dismissed charges, to gain certainty, and avoid the “agony and expense” of trial).
69. Traum, supra note 14, at 832 (citing Laura I. Appleman, The Plea Jury, 85 IND. L.J. 731, 733 (2010) (“Guilty pleas, although indispensible to the smooth processing of criminal justice, have become hasty and rote.”).
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fendants get similar results.71 In Lafler and Frye, the Court recognized that ineffective assistance of counsel during the plea-bargaining phase could lead to a more serious conviction and a longer sentence.72 Ineffective assistance can contribute to uneven results, but it is not the only factor that can distort the plea market. Other market imbalances include the outsized power of the prosecutor, lack of transparency about the plea bargaining process, lack of relevant case information, and lack of judicial oversight.73 How does a defendant, or defense counsel, or the trial judge, know if a plea deal is fair? Fair pricing theory can help answer that question.

Several key concepts inform our perception of what makes a price “fair.” A fair price is one that is both “acceptable” and “just,” terms that Dr. Maxwell assigns distinct meanings in evaluating fairness.74 An acceptable price is satisfactory, favorable or reflects expected value.75 A “just” price is consistent with social norms, rules and logic, in that it is free of favoritism or bias, just to all parties, and equitable.76 The difference between an acceptable price and a just price is the difference between what Dr. Maxwell terms “personal” and “social” fairness. A personally fair price is one that is low enough to meet your expectations.77 A socially fair price is one that is the same for everyone, not exploitative of consumer demand, and doesn’t result in outsized profit or benefit to the seller.78

Both personal and social fairness reflect social norms about pricing, including who sets the price, what’s included in the price, and how much information is available about pricing.79 Social norms affecting personal fairness might reflect what has been charged for the same thing in the past, for example, including tires in the price of a car.80 Social norms affecting social fairness reflect societal values on how

71. Lafler, 132 S. Ct. at 1376; Frye, 132 S. Ct. at 1388.
72. See Frye, 132 S. Ct. at 1407; Lafler, 132 S. Ct. at 1387 (“The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel.”). “The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain.” Id. (quoting Bibas, supra note 13, at 1138) (internal quotation marks omitted).
73. Judging Jena’s D.A., supra note 2, at 430–33.
74. MAXWELL, supra note 61, at 6–7.
75. MAXWELL, supra note 61, at 6.
76. MAXWELL, supra note 61, at 6.
77. MAXWELL, supra note 61, at 7.
78. MAXWELL, supra note 61, at 7.
79. MAXWELL, supra note 61, at 8 (referring to Table 1.1).
80. MAXWELL, supra note 61, at 8.
people should behave, such as charging all customers the same price, and not sneaking in hidden surcharges. Violating those social norms is socially unfair because we as a society expect goods to be priced in a particular way and are offended when they are not.\textsuperscript{81}

Fairness is the emotional part of economic decision making, as Professor Taslitz observed in his work critiquing prosecutorial “pricing” or charging decisions.\textsuperscript{82} Unfair pricing prompts an emotional response and, not surprisingly, social unfairness prompts a stronger emotional response like “retributive anger.”\textsuperscript{83} Charging restaurant patrons extra for bread is a minor annoyance that is unlikely to provoke a strong response. But consumers will react more strongly if a store engages in unfair pricing, by misleading customers on price, hiding extra costs that should be included, or other deviations from socially accepted price terms.\textsuperscript{84} Consumers’ emotional sense of fairness is a powerful component of economic decision making because it generates a fast, convincing belief about whether a price is good or bad.\textsuperscript{85} Without this emotional guidance, consumers have trouble making a decision to buy. Fairness, Dr. Maxwell argues, is the emotional “yes” or “no.”\textsuperscript{86}

Socially fair pricing turns on the fairness of the outcome and the fairness of the process that led to that outcome.\textsuperscript{87} This insight, taken directly from Dr. Maxwell’s work on fair pricing, seems directly applicable to plea-bargaining. Dr. Maxwell’s model starts with personal fairness and escalates to a broader inquiry about social fairness. Dr. Maxwell uses the example of an advertised sports car to illustrate this two-step inquiry for investigating the fairness of the price. The example underscores how Fair Price Theory, which starts with results and then examines the process that generated those results, could alter our approach to evaluating plea deals.

Dr. Maxwell considers a hypothetical consumer, who is intrigued by an advertisement for a new sports car priced at $35,000. When this consumer arrives at the dealership, she is told the price is actually $45,000. The consumer certainly would view this change as personally unfair (annoying, expensive, not what she expected), and this feeling

\begin{align*}
\text{\textsuperscript{81} Maxwell, supra note 61, at 8.} \\
\text{\textsuperscript{82} Maxwell, supra note 61, at 9; Judging Jena’s D.A., supra note 2, at 428.} \\
\text{\textsuperscript{83} Maxwell, supra note 61, at 9.} \\
\text{\textsuperscript{84} Maxwell, supra note 61, at 9–10.} \\
\text{\textsuperscript{85} Maxwell, supra note 61, at 9–10.} \\
\text{\textsuperscript{86} Maxwell, supra note 61, at 9–10.} \\
\text{\textsuperscript{87} Maxwell, supra note 61, at 26.} 
\end{align*}
would prompt her to query whether the price is also socially unfair. Determining social unfairness begins with determining the fairness of the outcome, and if that’s concerning, the fairness of the process that led to that outcome. The first is a question of substantive, or distributive fairness, which tests whether the result, the price, is acceptable. The second issue, which examined the process that led to this result, is a question of procedural fairness. Here, the consumer’s decision will depend on whether she concludes the price increase violates social norms. Is the dealership being sneaky, or is the price increase justified for legitimate reasons? If the price violates social norms, the consumer will not agree to pay it and may be angry at the dealership. If the price increase is consistent with social norms, the consumer will conclude that the price is just, and might agree to pay it.

B. Results First Analysis of Guilty Pleas Would Challenge the Status Quo

Dr. Maxwell’s two-step process for querying the fairness of a price (price first, process second) offers important insights for how courts might regulate the fairness of guilty pleas. This approach challenges traditional doctrine and reframes the courts’ job in some specific and more general ways. First, putting results first, procedure second, is the opposite of how courts tend to analyze legal challenges to guilty pleas and sentences. Second, what do we mean by procedure? Fair Price Theory is very clear on this point: procedural fairness refers to the process that generated the price. This, too, challenges the way courts analyze guilty pleas. In adjudicating a guilty plea, courts ask certain questions, but not others. Courts focus on whether a guilty plea is knowing and voluntary, with the right to a jury trial providing the conceptual backdrop for that inquiry. Fair Price Theory would reorient that inquiry to examine a different procedural issue, specifically, the process used to generate the price. Hence, price is center stage, and process questions play a supporting role in generating and testing fair results.

1. Making Results Central

Results are what defendants and prosecutors care about most: the conviction and sentence. Though courts also care about results, they play a limited role in the substantive result of a case, and legal analysis

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usually requires courts to consider procedure first, results second. This is because courts primarily regulate procedure, and review results that are connected or caused by a procedural violation. Putting results first flips the traditional order of operations. A results-first analysis would shift the court's focus from deciding whether there was a procedural violation, to deciding whether the plea procedure led to a substantively fair result. Although this may seem foreign at the plea stage, courts routinely evaluate results at the sentencing stage and have great familiarity with the charging, plea, and sentencing practices in their courts. Assessing results at the plea stage poses a challenge to the status quo in that it reorients the court's focus with intent to ensure substantive fairness. That shift in focus might also cause courts to think harder about whether the pre-plea procedure is designed to yield substantively fair results.

Generally, judicial attention in criminal cases is aimed at ensuring procedural, not substantive, regularity. Courts primarily regulate criminal procedure consistent with deeply ingrained institutional roles. Before sentencing, courts act as referees in a process that is party-driven and litigated against the backdrop of an impending jury trial. Before trial, prosecutors charge and defense counsel seek to dismiss unsubstantiated charges and litigate procedural defects, such as illegal search and seizure. At trial, the prosecutor has the burden of proof, the court ensures that the trial is fair, and the jury determines whether the defendant is guilty. After the trial, the court switches gears when it imposes sentence, and impacts the case result.

The court's role is not that different in a guilty plea case. Trial adjudication remains the default. Key procedural protections, like the right to Miranda warnings before custodial interrogation, and the right to exculpatory evidence under Brady v. Maryland, are tethered to constitutional trial rights. The process for accepting a guilty plea operates as a substitute for the trial itself, with the court ensuring that the defendant understands the process he is giving up by pleading guilty, and the consequences of pleading guilty. The court is not in-

volved and does not regulate the private, out-of-court negotiation that establishes the charges of conviction and the likely sentence.

Because courts primarily regulate procedure, results are a secondary concern. Whether at the trial, appellate, or collateral level, courts first consider whether there was a procedural error in the underlying case, and then consider whether that error made a difference in the outcome of the case.\textsuperscript{90} Sentencing review, if any, typically focuses on procedural aspects of the sentence, not whether the imposed sentence was fair.\textsuperscript{91} When a sentencing court acts within its legal authority and complies with sentencing rules, the sentence will not be second-guessed by a reviewing court. To successfully challenge a guilty plea, a defendant must point to some procedural defect. An unfair result, on its own, is not enough.

The Supreme Court has recognized that plea-sentences, not trial-sentences, are the norm and that, for the parties, it is all about the result. Ours “is for the most part a system of pleas, not a system of trials,”\textsuperscript{92} the Supreme Court acknowledged in \textit{Lafler}. The Supreme Court traditionally has assumed that the parties would negotiate to a fair result.\textsuperscript{93} The Court’s recent decisions illustrate how that give-and-take can be hobbled by ineffective counsel’s failure to inform the defendant of immigration consequences of the plea, to communicate the government’s plea offer, or to correctly evaluate the charged offense.\textsuperscript{94} In doctrinal terms, \textit{Padilla}, \textit{Frye}, and \textit{Lafler} broke new ground in terms of applying \textit{Strickland} during the plea-bargaining stage. These cases also illustrate the “process first” model: to get re-

\textsuperscript{90} A court considers whether an error was harmless, meaning that the error did not make a difference in the outcome of the case. \textsc{Fed. R. Crim. P.} 52 (describing harmless and plain error). Most constitutional errors are reviewed under harmless beyond a reasonable doubt standard, but a few, like denial of counsel or retained counsel of choice, are deemed “structural error,” meaning that the court cannot evaluate the prejudicial impact of the error, and thus must order a new proceeding. United States v. Gonzalez-Lopez, 548 U.S. 140, 149 (2006).


\textsuperscript{93} See Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978) (assuming that in the “give-and-take negotiation common in plea bargaining . . . the prosecution and defense . . . arguably possess relatively equal bargaining power”).

\textsuperscript{94} \textit{Lafler}, 132 S. Ct. at 1387 (holding that the trial counsel was ineffective when, based on incorrect legal advice, he advised the defendant to reject a favorable plea); \textit{Frye}, 132 S. Ct. at 1408 (holding that counsel was deficient for failing to timely communicate a plea offer that would have resulted in a shorter sentence and lesser offense); Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that counsel was deficient in failing to accurately advise the defendant about the certainty deportation after pleading guilty to a drug trafficking offense).
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A defendant must prove a procedural defect (such as deficient counsel).

Results-first analysis would evaluate and compare plea pricing. Under the process-first analysis, a defendant would have no basis, absent a procedural defect, to complain, "my sentence was twice as long as his." Results-first analysis would reframe that claim in terms of the fairness of plea pricing: Why did Defendant A, similarly situated to Defendant B, get twice as much time? This inquiry leads ineluctably to a number of other comparative and case-specific questions that may touch on sentencing questions (like culpability or disparities) and procedural factors, like the quality of defense counsel, variability in prosecutors, whether the defendant pled early or later in the case timeline, etc. Results-first analysis leads inevitably to an explication and investigation of how and why the parties reached this result.

Though procedural defects are the gateway to relief, courts understand that plea-bargaining is about results and that just results are paramount.\(^95\) The Court has tested prejudice under *Strickland* by evaluating whether counsel's deficient performance led to a longer sentence.\(^96\) The Court recognizes that plea-sentences are the norm, and that defendants should expect results that are on par with what similarly positioned defendants receive in other cases. This last point, that similar defendants get similar results, is a bedrock principle of sentencing laws, with which courts are also familiar. Modern sentencing laws have aspired to reduce disparate treatment among similarly situated defendants, and reinforce predictable results. So while courts primarily regulate and remedy procedural violations, they understand the importance of just and fair results.

2. Redefining Procedure

Fair Price Theory could reorient courts to focus on the process that generated the guilty plea. This is a significant change in direction for courts, which do not regulate charging or plea-bargaining.\(^97\) In

\(^95\) *Lafler*, 132 S. Ct. at 1388 ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.").

\(^96\) Id. ("That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas . . . . It is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.").

\(^97\) *Frye*, 132 S. Ct. at 1407 ("This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions

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guilty plea adjudication, courts ask certain questions, but not others. Courts focus on whether the plea is knowing and voluntary, with the right to jury trial providing the conceptual backdrop for that inquiry.98 Fair Price Theory would redirect courts to examine a different kind of procedural fairness, specifically, the process used to generate the price. The previous examples illustrate how this inquiry flows naturally from results-first analysis: With the price of a guilty plea occupying center stage, the process questions play a supporting role in generating and testing fair results. Fair Price Theory creates a framework for courts to develop and apply procedural rules to generate and ensure fair pleas.

Every court, including the Supreme Court, understands that horse-trading transpires between the parties during plea negotiations.99 For decades, the Court has presumed that the prosecutor and defense counsel operate as equals on a level playing field. The legal standard is that prosecutors are free to charge any offense supported by probable cause, and can increase or decrease the charges during plea-bargaining.100 The Court has approved prosecutors’ use of coercive threats and charge-bargaining to induce defendants to plead guilty, arguing that such tactics were lawful so long as the charges are supported by probable cause.101 One justification for this hands-off approach is separation of powers.102 Because charging, and thus charge-bargaining is a prosecutorial function, courts have stayed out. Settlement negotiations are usually privileged, and in some jurisdictions, local rules prohibit court involvement in plea-negotiations. It was convenient for courts that this hands-off approach produced a steady stream of guilty pleas.103

More recently, however, the Court has questioned the fairness of aggressive charge-bargaining and the distorted results it can yield. In Lafler, the defendant rejected a plea offer based on counsel’s incorrect legal advice, and received a sentence after a jury conviction that was three and one half times longer than the plea offer would have
yielded. The Court recognized that the defendant should have gotten a sentence closer to the norm, and that in our system of pleas, trial-based sentences are exceptional. “The expected post-trial sentence is imposed in only a few percent of cases” the Court stated, “[i]t is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain.”

The Court has repeatedly expressed concern about prosecutorial overcharging as a means to induce guilty pleas. The Court in Frye acknowledged that prosecutors use harsh statutes as negotiating tools, without regard to culpability or uneven results. The Court is wary of prosecutors overcharging, even in relatively minor cases, to induce defendants to plead guilty. In recent arguments this term, the Court circled back to this theme. The Court questioned why a prosecutor would charge an offense carrying a twenty-year maximum instead of a similar offense with a five-year maximum, and referenced a prosecutorial charging manual that instructs prosecutors to seek the most serious charges available. The Court expressed concern about prosecutors exercising such broad discretion, and intimated that it might affect the Court’s interpretation of the criminal statute at issue.

None of the cases specifically address plea-bargaining, but they are telling indications of the Court’s skepticism about how prosecutors deploy statutes to extract guilty pleas, and whether that practice leads to just results.

As Professor Taslitz and other scholars have argued, there is much room to improve the process for generating pleas so that it is

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105. See Bibas, supra note 13, at 1138.
106. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (citing Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 STAN. L. REV. 989, 1034 (2006) (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.”)).
107. Amy Howe, Justices Take the Measure of Fish Case: In Plain English, SCOTUSBLOG (Nov. 5, 2014, 10:28 PM), http://www.scotusblog.com/2014/11/justices-take-the-measure-of-fish-case-in-plain-english/ (questioning why prosecutors would charge the defendant with an offense carrying a twenty-year maximum, when a similar statute carrying a five-year maximum was also available).
108. Id. (referring to a Department of Justice Manual that “instructs federal prosecutors to bring the charges that are most severe.”) (statement of Justice Scalia) (“[I]f that’s going to be the Department of Justice’s position, we’re going to have to be very careful about interpreting the scope [of laws like these].”).
more transparent, understandable to defendants, predictable, and designed to yield measured, accurate guilty pleas. Prosecutors could be required to disclose exculpatory and impeachment evidence to help defendants better assess the strength of the case against them. Prosecutors could disclose their internal plea pricing policies so that defense counsel can better understand how the flow of offers, and what factors contribute to those incremental decisions.

The parties could be required to memorialize the history of plea offers in the case, so that defendants (and the court) are fully aware of earlier offers, in case there was a misunderstanding or miscommunication. Defendants could be educated on the plea market so that they have a firm understanding of trial risks, sentencing consequences, how similar defendants have been treated, or why certain options are available, but not others. In short, there is no shortage of ideas about ways to improve what is mostly unregulated territory.

Reorienting courts to ensure fair results and to oversee a process that is designed to yield fair results would be a significant change. Courts are masters of ensuring fair process, and Fair Price Theory creates an opportunity for courts to rethink the purpose of the process for evaluating guilty pleas. Most importantly, getting courts to care about guilty plea results aligns them with the parties, whose negotiations are results driven. The parties see plea-bargaining as a blending of charging, guilt, and sentencing. Courts understand that, too, but do not have a guilty plea adjudication process that reflects that reality. By probing the fairness of guilty pleas, and managing the procedure that generates those guilty pleas, courts can play a meaningful role in the process.

IV. CONCLUSION

Professor Taslitz reached to Fair Price Theory to explore the racial stigma and harm that flows from prosecutorial charging decisions. This is because Fair Price Theory offers a broad framework for thinking about fairness that links an individual transaction between the seller (prosecutor) and buyer (defendant), to a broader social context based on societal norms, distributive fairness, equity and emotions. In the plea-bargaining market, Fair Price Theory is especially relevant because it draws on market-place behavior. In subtle and obvious ways, the theory would pose a challenge to the status quo, especially for courts, by making price fairness the central focus. The parties are already there.
For prosecutors and defendants, plea-bargaining blends into one seamless negotiation the charging, conviction and sentence. But courts continue to operate a procedure against the backdrop of an impending trial, taking a hands-off approach to plea-bargaining, and, often, a checklist approach to accepting a guilty plea. Fair Price Theory would support courts redirecting their focus, in alignment with the parties, to focus on results and the procedure that generated those results. While moving in this direction would represent a significant change, it would give courts a meaningful role in ensuring that our plea system is designed to yield fair results.