

AMBIGUITY AVERSION
AND THE CRIMINAL PROCESS

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ABSTRACT

This Article examines the effects of ambiguity aversion on the criminal process. Ambiguity aversion is a person's rational attitude towards probability's indeterminacy. When a person is averse towards such ambiguities, he increases the probability of the unfavorable outcome to reflect that fear. This observation is particularly true about a criminal defendant who faces a jury trial. Neither the defendant nor the prosecution knows whether the jury will convict the defendant. Their best estimation relies on a highly generalized probability that attaches to a broad category of similar cases. The prosecution, as a repeat player, is predominantly interested in the conviction rate that it achieves over a long series of cases. It therefore can depend on this general probability as an adequate predictor of this rate. The defendant only cares about his individual case and cannot depend on this general probability. From the defendant's perspective, his individual probability of conviction is ambiguous. The defendant consequently increases this probability to reflect his fear of that ambiguity. Because most defendants are ambiguity-averse, while the prosecution is not, the criminal process systematically involves and is thoroughly affected by *asymmetric ambiguity-aversion*.

Asymmetric ambiguity-aversion foils criminal justice. The prosecution can exploit it by forcing defendants into plea bargains that are both inefficient and unfair. This Article provides a rigorous demonstration of this dangerous dynamic. Because plea bargain is a predominant method of case-disposition across the United States, this exploitation opportunity is particularly pernicious. The legal system ought to eliminate it.

Two Fifth Amendment doctrines — the rule against double jeopardy

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and the grand jury review of indictments — have the effect of mitigating this problem. The rule against double jeopardy sets a pro-defendant system of asymmetric rights to appeal. This system reduces the probability of conviction for all defendants, *regardless of the merits*. This probability reduction offsets — but not eliminates — the upward adjustment that an ambiguity-averse defendant introduces into his probability of conviction. Grand jury review disambiguates the defendant's probability of conviction when he is informed about the grand jurors' voting score. This disambiguation is only partial, though, because grand jurors are authorized to indict upon mere showing of a "probable cause."

The Article therefore offers to modify the prevalent constitutional doctrine by giving a defendant the right to choose between a bench trial and a trial by jury. Judges are repeat institutional players that credibly commit themselves to reasons for decisions that are evenhanded, known and institutionally approved. This commitment is induced not only by the judges' fear of reversal and other career-related repercussions, but also by the defendant's constitutional entitlement to a trial by jury. For judges, jury trial is a time-consuming and effort-intensive process with virtually no career-enhancing returns. Judges therefore strongly prefer a bench trial over a trial by jury. To actualize this preference, judges need systematically to deliver evenhanded decisions that follow the institutionally approved reasons. This makes judges' decisions predictable. The defendant's probability of being convicted by a judge in a bench trial thus becomes unambiguous, which neutralizes the prosecution's ambiguity-exploiting pressure in plea bargaining.

The Article also examines empirical data from which it deduces a solid confirmation for its findings. Specifically, it identifies three major trends. First, bench trials are prevalent in jurisdictions featuring high trial rates, generated by a non-meticulous selection of cases for prosecution. Second, the rate of acquittals in bench trials is much higher than in trials by jury. The defendants' ambiguity-aversion is the most plausible explanation of these trends. Defendants with real prospects for acquittal have much to lose and are therefore unwilling to depend upon unpredictable juries. Finally, there is a demand for jury-consulting services and no discernible market for judge-consulting services. Litigants are willing to pay for information predicting the outcomes of jury trials and are generally unwilling to pay for information predicting judges' decisions in bench trials. This leads to the conclusion that ambiguity aversion is particularly problematic in trials by jury.