In the Shadows: A Review of the Research on Plea Bargaining

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From the Director

When most people think of the American justice system, they likely picture a courtroom with lawyers, a judge, and a jury waiting to determine the facts of the case and provide a just outcome. But the majority of people "found guilty" in America never stand trial: their fate is determined in a courthouse hallway or prosecutor's office via a quick conversation between attorneys.

Plea bargaining is more a part of the American justice system than the formal trial and, in fact, makes up the vast majority of criminal justice transactions today. Only 2 percent of federal criminal cases—and a similar number of state cases—are brought to trial. More than 90 percent of convictions, at both federal and state levels, are the result of guilty pleas. Plea bargaining is so fundamental to the system that even in 1970, Chief Justice Warren Burger of the U.S. Supreme Court estimated that a 10 percent reduction in guilty pleas would require doubling the amount of judicial capacity in the system. Scholars in recent years have suggested that the criminal legal system could be brought to a halt by a mass refusal to plead guilty.

And yet little is known about plea bargaining. Pleas are offered and retracted at the unfettered discretion of prosecutors. Bargains themselves are undocumented and largely unchallenged, save for a few formal questions meant to establish that the plea is "voluntary, intelligent, and knowing." To understand plea bargaining, then, we must depend on a small but growing body of research. Through interviews, data gathered by courts, and other means, scholars are attempting to understand the factors that influence plea bargaining as well as whether a plea bargain is a "bargain" at all.

These studies are vital to understanding a process that is so central to how the criminal legal system currently operates, but they remain woefully inadequate and incomplete. The sheer lack of trials, for example, means that it is difficult to find analogous cases to compare to those that end in pleas. In addition, the dynamic and recursive nature of bargaining is difficult to isolate into discrete questions for study. Finally, the most important voices—the people subject to these bargains—are largely absent from these studies. Instead, data is provided by police, courts, prosecutors, and jails. This one-sided understanding of the bargain explains a good deal about how the legal characteristics of a case, or pressures such as increasing caseloads, drive prosecutorial bargaining, but it offers little insight into the reasons that people trade their right to a trial for a faster and more certain conviction.

But why does it matter?

The history of the American justice system is a history of mass incarceration, with wildly disparate consequences for Black and white people. We are faced with substantial evidence that people are put in untenable positions after arrest. They are kept in jails away from their families and communities if they cannot afford cash bail or an attorney to argue

for them. And although representation is guaranteed, the tremendous caseload borne by public defenders means that "representation" before trial is likely to be perfunctory and impersonal. Pretrial incarceration has been definitively linked to the likelihood of conviction, and most convictions are obtained via plea. And although the Supreme Court has indicated that even knowing you may be put to death if you face trial is not "coercive" pressure to plead guilty, it is difficult to say that an incarcerated person faced with the loss of their income, housing, family, and community is truly free to make a choice. Even after people return to their communities, a conviction—whether it stems from a guilty plea or a jury verdict—carries collateral consequences that will follow them for years, if not the rest of their lives.

Today, the American justice system is in crisis, but it is also in a moment of unique opportunity. This review and analysis of the available literature on plea bargaining—released by Vera and the Safety and Justice Challenge—represents decades of work by dozens of scholars. It brings light to the shadowed hallways where the majority of justice is transacted and new attention to the ways the criminal legal system has become an ad hoc administrative process.

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About this report

This report is one of a series that the Vera Institute of Justice (Vera) is releasing with the Safety and Justice Challenge—the John D. and Catherine T. MacArthur Foundation's initiative to reduce overincarceration by changing the way America thinks about and uses jails. The initiative is supporting a network of competitively selected local jurisdictions committed to finding ways to safely reduce jail incarceration. Other publications in the series to date include:

- *Incarceration's Front Door: The Misuse of Jails in America*;
- *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*;
- *Overlooked: Women and Jails in an Era of Reform*;
- *Out of Sight: The Growth of Jails in Rural America*;
- *Divided Justice: Trends in Black and White Incarceration 1990-2013;*
- *The New Dynamics of Mass Incarceration*;
- *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention;*
- *Gatekeepers: The Role of Police in Ending Mass Incarceration*;
- *Broken Ground: Why America Keeps Building More Jails and What It Can Do Instead*; and
- the multimedia storytelling project, *The Human Toll of Jail*.

Through the Safety and Justice Challenge, Vera's offices in Los Angeles and New Orleans, and direct partnerships with jurisdictions nationwide, Vera is providing expert information and technical assistance to support local efforts to stem the flow of people into jail, including using alternatives to arrest and prosecution for minor offenses, recalibrating the use of bail, and addressing fines and fees that trap people in jail. For more information about Vera's work to reduce the use of jails, contact Elizabeth Swavola, acting project director, at eswavola@vera.org. For more information about the Safety and Justice Challenge, visit www.safetyandjusticechallenge.org.

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Introduction

The common narrative in popular culture is that criminal justice is meted out in courtrooms around the country. Facts about a particular case inevitably emerge from adversarial proceedings in which prosecutors and defense attorneys go to battle in open court over matters of fact and law, juries decide whether people are guilty or not guilty, and judges determine appropriate punishments.[1] People have their days in court, and the public—including victims, if there are any—witness whether justice is done.[2]

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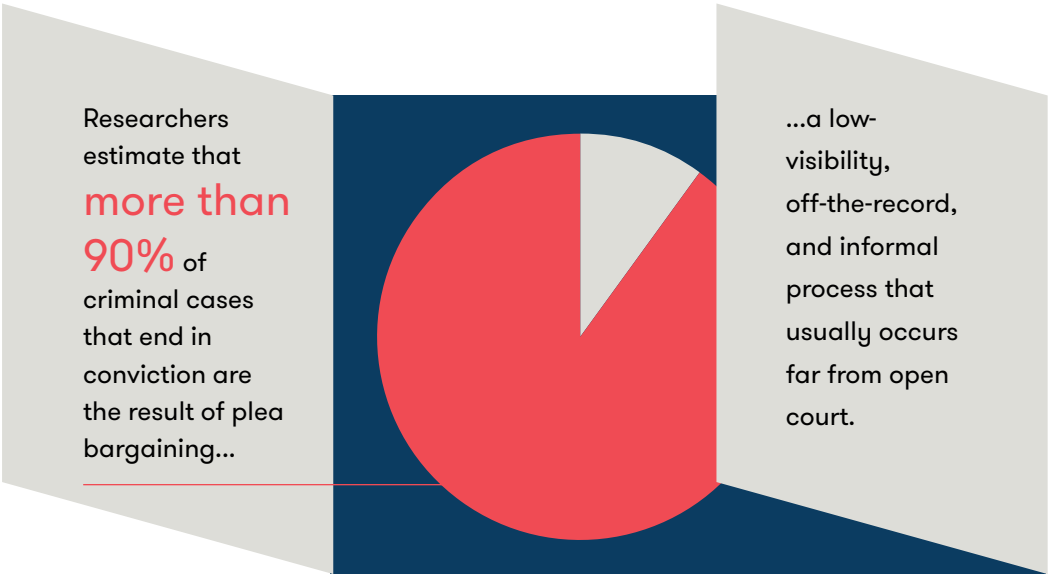
In fact, criminal trials are rare.[3] Instead, most criminal cases that result in conviction—97 percent in large urban state courts in 2009, and 90 percent in federal court in 2014—are adjudicated through guilty pleas.[4] Of these, researchers estimate that more than 90 percent are a result of plea bargaining—an informal and unregulated process by which prosecutors and defense counsel negotiate charging and sentencing concessions in exchange for guilty pleas and waivers of constitutionally guaranteed trial rights.[5] Indeed, by one estimate, a criminal case is disposed of by plea bargaining every two seconds during a typical work day in America.[6] Negotiated deals to resolve criminal cases are so ubiquitous that Justice

Anthony Kennedy of the U.S. Supreme Court stated in 2012 that "criminal justice today is for the most part a system of pleas, not a system of trials."[7]

Plea deals—which are entirely within the discretion of a prosecutor to offer (or accept)—typically include one or more of the following:

- the dismissal of one or more charges, and/or agreement to a conviction to a lesser offense (known as "charge bargaining");
- an agreement to a more lenient sentence, which can cover both type of sanction—custodial or community-based—and length (known as "sentence bargaining"); and
- an agreement to stipulate to a version of events that omits certain facts that would statutorily expose a person to harsher penalties (known as "fact bargaining").[8]

Most criminal cases are resolved by plea bargaining.



A system of plea bargaining.

Plea negotiations can be quick and straightforward or long and complicated—or anywhere in between.[9] When there are no legal issues in dispute, or in cases in which it is likely that the prosecution will prevail, plea negotiations can be superficial—with people taking given deals without any negotiation or counteroffer.[10] This is especially so in cases of misdemeanors, infractions, and other lesser offenses for which there are often standard dispositions routinely offered and accepted with little, if any, actual deliberation. (See "Misdemeanor justice and plea bargains" on page 16.) Often, in more complex cases where available evidence is subject to conflicting interpretations, and/or where sentencing stakes are higher, negotiations can be lengthier—potentially occurring over many weeks and months.[11] In a smaller proportion of cases, no actual offer or negotiation occurs, and people plead guilty without any specific promises or assurances from the prosecution—called variously taking an "open plea," taking a "blind plea," or "pleading to the sheet."[12]

In whatever form it takes, plea bargaining remains a low-visibility, off-the-record, and informal process that usually occurs in conference rooms and courtroom hallways—or through private telephone calls or e-mails—far away from the prying eyes and ears of open court.[13] Bargains are usually struck with no witnesses present and made without investigation,

testimony, impartial fact-finding, or adherence to the required burden of proof.[14] Moreover, little to no documentation exists of the bargaining process that takes place between initial charge and a person's formal admission of guilt in open court, and final plea deals that close out cases are themselves rarely written down or otherwise recorded.[15] As such, plea deals, and the process that produces them, are largely unreviewable and subject to little public scrutiny.[16] Thus, despite the high frequency with which plea deals are used, most people—aside from the usual courtroom actors—understand neither the mechanics of plea bargaining nor the reasons so many people decide to plead guilty.

In recent years, mounting concerns about plea bargaining's role in encouraging the widespread forfeiture of constitutionally guaranteed trial rights and associated procedural protections—and its critical role in fueling mass incarceration—has stimulated further urgency in understanding how the process works.

Plea bargaining has, however, become the central focus of a growing, but still small, body of empirical research. In recent years, mounting concerns about plea bargaining's role in encouraging the widespread forfeiture of constitutionally guaranteed trial rights and associated procedural protections—and its critical role in fueling mass incarceration—has stimulated further urgency in understanding how the process works. Indeed, an array of questions regarding its fairness have emerged. Over the

last few decades, prosecutorial leverage in plea negotiations has increased exponentially as changes in substantive law have bolstered criminal penalties and given prosecutors a wider range of choices to use when filing charges (such as mandatory penalties, sentencing enhancements, and more serious yet duplicative crimes already well covered by existing law). But increased exposure to harsher penalties has not been matched with increased procedural protections for defendants. Prosecutors' wide powers in plea bargaining still go largely unchecked, and there are no meaningful oversight mechanisms or procedural safeguards to protect against unfair or coercive practices, raising fears about arbitrariness and inequality. Given this lack of regulation, concern has also grown over the extent to which innocent people are regularly being induced to plead guilty, as well as plea bargaining's role in perpetuating racial and ethnic disparities in criminal case outcomes—for example, plea bargaining practices that send more Black people to prison or jail than similarly situated white people.[17]

Plea bargaining's full impact on the legal system and justice-involved people remains unknown, but empirical research on this little understood yet immensely influential practice has begun to emerge. In order to provide an accessible summary of existing research to policymakers and the public, the Vera Institute of Justice (Vera) examined a body of empirical studies that has developed around plea bargaining. Although this review is not exhaustive, it provides a picture not only of the current state of scholarship on plea bargaining, but also of the gaps in knowledge that must be filled.

As this report will discuss, studies appear to fall into seven main focus areas, primarily examining either of two broad questions: (1) which factors most influence the plea bargaining decision-making process?; and (2) what is the impact of plea bargaining on case outcomes? The seven focus areas covered by this report include the following.

- **Coercive factors.** A number of studies examine whether the punishing circumstances of pretrial detention or the threat of onerous sentences—specifically, the death penalty—play an outsized role in inducing and expediting guilty pleas.
- **Legal case characteristics.** Another extensive body of work looks at how legal case characteristics—severity of charge, prior record, evidentiary factors—influence the type of plea offers that are made.

- **Systemic inequities.** There is a growing body of research that considers the influence of demographic characteristics in determining plea outcomes. These studies primarily look at the potential existence of conscious or unconscious biases that may create disadvantage and inequality across race, ethnicity, gender, or age.
- **The criminal law.** Another body of work looks at the organization, structure, and content of the criminal code to understand how the criminal law—including the existence and type of structured sentencing schemes—can affect the likelihood and substance of a plea deal.
- **Caseloads.** Some studies have tested the common assumption that the frequent use of plea deals is, at least partly, a function of heavy caseloads among prosecutors and a resultant pressure to hasten the disposal of as many cases as possible. (No research considered the impact of defenders' caseloads on plea bargaining.)
- **Trial penalty.** A substantial body of the literature explores the so-called "trial penalty" (or "plea discount")—that is, the difference between a criminal sentence produced by guilty plea versus by trial. Much of this work is narrowly based on the assumption that plea decisions rely on anticipated trial outcomes, such that the higher the penalty (or larger the discount) the higher the likelihood of a guilty plea.
- **Innocence.** Finally, given the potential benefits to people of accepting a plea deal, a small body of research has considered the extent to which innocent people may be coerced into pleading guilty to avoid receiving a "trial penalty" if they fail to prove their cases at trial.

Whether people are charged with serious crimes or low-level misdemeanors, whether they are before busy city courts or slower-paced rural ones, they will likely resolve their cases by negotiated pleas. Plea bargaining is the de facto system of justice in America. But despite decades of scholarship, little is ultimately known about how it works or why people plead. This review of contemporary scholarship only offers mixed clues about the criminal legal system's primary dispositional process. Although

there is evidence that most people receive more favorable sentencing outcomes through plea bargaining than they would if they had taken their cases to trial, the exact contours of how such bargains are reached, and the factors—whether individual, legal, institutional, or demographic—that ultimately play a key role in influencing plea outcomes remain both ambiguous and opaque. What exists instead is a mix of complicated, nuanced, and sometimes contradictory research findings.

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In order to bring plea bargaining out of the shadows and ensure its equitable use, more transparency is needed about the process by which most cases are concluded so that safeguards can be put in place to protect people from its misuse.

Law of plea bargaining: An overview

Plea bargaining emerged in the early years of the Republic as a localized legal innovation that would eventually grow to become—by the early 20th century—this country's primary method of criminal conviction.[a] But despite plea bargaining's long history at the center of American criminal justice, a set of coherent rules governing its use has never emerged. Indeed, for much of its history, plea bargaining remained a largely unregulated and informal form of pretrial negotiation.

Although courts acknowledge plea bargaining as an "essential component of the administration of justice"—or, more recently, recognized that "it *is* the criminal justice system"—courts have generally taken a hands-off approach in regulating its use, leaving much discretion with prosecutors and defense attorneys in shaping plea bargaining processes and outcomes.[b] This reticence is in part due to the approach that courts have taken to analogize plea bargains to contracts in private law—describing them as the same as "any other bargained-for exchange" between autonomous actors who proceed from a "mutuality of advantage"—even though prosecutor and defendant have inherently unequal levels of power, particularly when the accused is being held in jail pretrial.[c] Placing substantive limits on bargaining tactics, according to this line of thought, could potentially cast a chilling effect that might foreclose plea negotiations altogether.[d] In only a few cases have courts attempted to define plea bargaining's contours or set its outer bounds. Moreover, the few statutes and procedural rules governing plea bargaining processes exert minimal control over the direction and process of how plea bargains are made and are largely silent regarding the actual substance of plea bargains themselves.[e] However, in recent years, courts have begun to fill the gaps in procedural rules with case law clarifying the limits of prosecutorial discretion.

The constitutional law of plea bargaining

At the heart of plea bargaining law is the 1970 seminal case of *Brady v. United States*. Long after plea bargaining had become the norm in resolving the vast majority of criminal cases, the *Brady* court formally recognized plea bargaining as a constitutional method of criminal adjudication and set out its minimum requirements.[f] To be constitutionally valid, guilty pleas must be both "voluntary" and "knowing, intelligent acts."[g] However, courts have since defined both "voluntary" and "knowing" in manners that are significantly different from what the average person might suppose those terms to mean.

Voluntary. Although the voluntariness requirement supposedly ensures that people are not misled, tricked, or otherwise coerced into forgoing their constitutional right to trial by pleading guilty, courts have still regularly avoided reckoning with the inherent pressures of "the give-and-take of [the] plea bargaining" process on people, including the inherently coercive nature of pretrial detention.[h] Instead, they have concluded that "the imposition of difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[i] As a result, courts have decided that few actions will likely amount to "improper pressure that would . . . overbear the will of some innocent persons" such as to render a guilty plea involuntary.[j] Prosecutors have been afforded wide latitude in using every bargaining chip that is permissible by law when trying to extract guilty pleas from people—including the threat of indefinite pretrial detention—so long as the tactics do not involve illegal fraud (such as threatening to use false testimony) or outright physical harm, and so long as the bargain is upheld.[k] These include promises of leniency if a plea is accepted and threats of worse punishment, additional charges, or even the prosecution and punishment of family members if a plea deal is declined.[l]

Knowing. Although courts have been clear that people must possess several critical pieces of information in order to validly plead guilty—the nature of the charges, the rights waived by pleading guilty, and the sentence that will, or is likely to be, imposed—the level of actual understanding that is required is very minimal in practice.[m] Usually, a superficial judicial inquiry—the "plea colloquy"—probes whether a person's plea bargaining choices are sufficiently informed; these are typically highly scripted proceedings that are outlined in state and federal procedural rules governing the formal entrance of guilty pleas on the record in open court.[n] For the guilty plea to pass constitutional muster, people typically need only to provide short, often perfunctory, affirmative responses and a basic explanation of the offense to which they are admitting.[o] Courts rarely conduct a deeper inquiry into whether people fully comprehend the consequences of pleading guilty beyond what is minimally required by the governing standard set out in *Brady* and codified in the rules of criminal procedure.[p]

There are also other larger structural curbs on what people *can* know during the plea bargaining process. For example, people do not have a right to know the full extent of the evidence, or lack thereof, against them, because there is no constitutional right to discovery in criminal cases.[q] The state is not required to turn over evidence that may establish a person's guilt and, under *United States v. Ruiz*, it need not share material evidence favorable to the defendant—a due process right established under *Brady v. Maryland* and successor cases that only attaches if a case goes to trial.[r]

Recent developments in plea bargaining law

In recent years, the Supreme Court has become incrementally more active in regulating the plea bargaining process—particularly regarding the responsibilities of defense counsel. This is in part due to an apparent change in approach. Previously, the court viewed criminal trials as the normative "touchstone" guiding its decisions around criminal law and procedure—many of which centered on elaborating procedural protections regarding the jury trial guarantee and attendant rights.[s] But since 2010, in decidedly acknowledging plea bargaining's centrality to the criminal legal system, the court has sought to extend legal protections to better ensure that people receive competent legal advice and thus effective bargaining by defense counsel during plea negotiations. For example, in four cases decided from 2010 to 2017, the court consistently held that people have a constitutional right to effective legal counsel during the client counseling phase of the plea bargaining process—a right that is normally associated with criminal trials rather than a process that sits wholly apart from trial proceedings.[t]

In another area of development, courts have begun to reconsider the scope of appeal rights that are waived when people plead guilty. Generally, people forfeit a number of rights simply by choosing to plead instead of going to trial. (For example, people forfeit rights that would operate during the trial, such as the right against self-incrimination or to confront accusers, as well as certain claims that could have been raised pretrial, such as the racial composition of the grand jury or the credibility of prosecution witnesses.)[u] People can also waive other rights through express waiver provisions that may accompany a plea offer—although there may be some rights that are not waivable.[v] The definitive scope of which rights are impliedly waived by a guilty plea, as well as which rights one can expressly waive, remains an open area of debate. But in two recent cases, the Supreme Court held that:

- a guilty plea alone—absent an express waiver—does not bar people from challenging the constitutionality of their convictions on direct appeal; and
- people who suffer ineffective assistance of counsel retain a right to appeal, even if their plea agreements specifically waive that right.[w]

In a separate development, echoing civil contract law, the U.S. Second Circuit Court of Appeals nullified an appellate waiver in 2018 after finding that the plea agreement was not supported by "consideration"—the benefit that each party gets or expects as the part of an agreement. The defendant had been sentenced to the statutory maximum and given no benefit of sentence reductions that were available due to his acceptance of responsibility and timely guilty plea, effectively giving him nothing in exchange for waiving his right to appeal.[x]

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* Box notes at end of report.

Factors that influence plea bargaining

Given how central plea bargaining is to the functioning of the American criminal legal system, understanding how plea deals are reached is deeply important. As explained in this section, researchers have investigated the extent to which plea deals are shaped by coercive factors (such as a person's pretrial detention status or the possibility of a death penalty sentence), the legal characteristics of a case (such as the strength of the evidence, or the severity of the charges), and the differential treatment of people based on their demographic characteristics such as race, age, and gender.

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Coercive factors

Of great concern to advocates, researchers, and defense counsel is the inherently uneven playing field between accused and prosecutor in plea bargaining situations—especially given the wide arsenal of tools, particularly around charging, that prosecutors can use to increase their

leverage in negotiations. Researchers have looked at how two coercive factors in particular influence plea bargaining outcomes: pretrial detention and the potential for a death sentence. These studies have concluded that these factors likely play a significant role in inducing guilty pleas so that people can obtain their liberty—or even sustain their life.

Pretrial detention

The vast majority of people in local jails are detained pretrial, meaning that they have not been convicted of any crime, are legally presumed innocent, and are awaiting resolution of their criminal cases behind bars—most often because they cannot pay the bail set in their cases.[18] Pretrial detention status has far-reaching consequences for justice-involved people. Concern about this population—and the potential negative impacts of detention on their criminal justice outcomes—has spawned a growing body of research that has established a strong correlation between pretrial detention and an increased likelihood of conviction, longer custodial sentences, and future system involvement.[19] While it has long been assumed that the pressure and isolating circumstances of incarceration induce people to plead guilty more readily during the pretrial phase—potentially explaining why people in pretrial detention are more likely to be convicted than those who are released—researchers have attempted only recently to specifically examine the influence of pretrial detention on a person's plea bargaining behavior.[20]

Using a variety of different methods, this small body of scholarship has established a strong association between pretrial detention and pleading guilty. For example, in a 2012 study examining 634 criminal cases in New Jersey courts, researchers found that people who were detained pretrial reached faster case dispositions, usually during the pre-indictment phase, than people who were released, primarily because, as an interviewee described it, "defendants plead guilty to get out of jail . . . get time served or to get it over with."[21] In a 2018 study looking at nearly 76,000 arrests in Delaware, researchers similarly uncovered that pretrial detention increased a person's likelihood of pleading guilty by 46 percent—although there were differences depending on the person's race.[22] Similar to previous research, the study found that Black people were 10 percent less likely than white people to enter into guilty pleas.[23] To explain this finding, researchers

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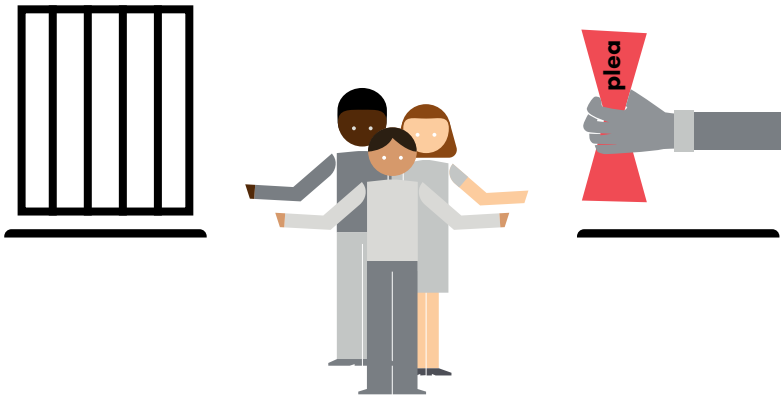


have postulated that plea bargaining may be less common among Black people because they may receive less favorable guilty plea agreements from prosecutors than do white people. Another reason may be that Black people may be more distrustful of a legal system that disproportionately and unfairly impacts them and, thus, less likely to strike a bargain.[24]

Both the New Jersey and Delaware studies employed regression analyses—a statistical method of measuring the relationship between multiple variables—with only a limited set of controls based on data that was available (for example, current charge aggregated into broader offense categories, criminal history, and demographic information). This means that they did not account for a number of unobservable confounding factors that may have also influenced people's decisions to plead guilty (such as strength of evidence, quality of defense, individual cognitive biases, or wealth). To correct for this potential bias and better estimate the causal effect of pretrial detention on a person's propensity to plead guilty, four recent studies conducted natural experiments—non-controlled observational studies that exploit random assignment that occurs in "nature" and which provide social scientists with a stronger inferential tool to potentially improve the quality of their empirical inferences, particularly when trying to infer causation.[25] These studies exploited the random or rotating assignment of bail judges and either variations in judicial punitiveness in bail decisions or variations in people's access to money bail by day of the week.[26]

Consistent with other empirical research, all four studies confirmed that a person's odds of conviction via guilty plea increased when they were held in pretrial detention—often resulting in worse criminal justice outcomes. For example, one study that looked at 331,971 criminal cases in Philadelphia from 2006 to 2013 found that pretrial detention resulted in a 4.7 percentage point increase in the likelihood of pleading guilty among people who probably would otherwise have been acquitted, diverted,

Four studies confirmed that a person's odds of conviction via guilty plea increased when they were held in pretrial detention—often resulting in worse criminal justice outcomes.

or had their charges dropped.[27] Similarly, a second study that examined nearly one million criminal cases over five years in New York City found that detained people charged with felonies were 10 percent—and detained people charged with misdemeanors were just over 7 percent—more likely to plead guilty compared to similarly-situated people who were released.[28] Again, not only did pretrial detention increase the odds of pleading guilty, but the study also found evidence that plea offers were less favorable for people detained on felony charges in particular.[29] Plea deals for this group were 10 percent less likely to include a charge reduction. The study also found that pretrial detention may induce people to plead guilty in cases that would have been dismissed if those people had been released: 34 percent of released cases were dismissed, compared to only 19 percent of cases among those detained.[30]

The two other contemporaneous studies came to similar conclusions. In a Harris County (Houston), Texas, study focusing only on misdemeanor cases resolved from 2008 to 2013, researchers found that people who were detained pretrial pleaded guilty at a 25 percent higher rate than people who were released and that data suggested that 17 percent of the detained people would likely not have been convicted at all had they been released pretrial.[31] Conversely, the fourth study found that *pretrial release* reduced a person's odds of pleading guilty and improved plea outcomes. After examining 420,000 felony and misdemeanor cases from Philadelphia and Miami-Dade counties covering an eight-year study period, researchers found that people who were released pretrial were nearly 11 percent *less* likely to plead guilty—although these estimates varied across race.[32] Released white people were nearly 20 percentage points less likely to plead guilty, while released Black people were only 12.2 percentage points less likely to plead guilty.[33] Of those who took a plea offer in the pretrial phase, outcomes were still more favorable for people who had been released. They were more likely to be convicted of fewer offenses or convicted of a lesser charge, suggesting that release can improve a person's bargaining power in plea negotiations.[34]

In explaining their results, the researchers speculated that release may enable people to engage in certain "prophylactic measures"—such as preparing a more robust defense, engaging in treatment (for mental illness, substance use disorder, or other behavioral health issues), or providing restitution—that can help lead to charges being dismissed or encourage more lenient treatment by prosecutors.[35]

Some of these studies also found that the observed impacts of pretrial detention—or release—on a person's plea bargaining propensity increased in magnitude for two particular types of people: those with no or limited criminal justice histories and those charged with lower-level offenses. For example, researchers in Harris County found that pretrial detention more than doubled the likelihood of conviction for people charged with first-time misdemeanors—the vast majority of whom had pleaded guilty.[36] Similarly, the Philadelphia study found that pretrial detention among people charged with misdemeanors led to statistically significant increases in all observed negative outcomes, including conviction and guilty pleas, larger than those observed with felonies.[37] The Philadelphia/Miami study also found that released people charged with misdemeanors were nearly

19 percent *less likely* to plead guilty, while released people charged with felonies were only 1.2 percent less likely to plead guilty.[38] The study also found that released people who did not have a recent prior offense were more than 14 percent less likely to plead guilty than similarly situated people who were detained pretrial.[39]

Detained people have strong incentives to cut a quick deal in order to resolve their cases as soon as possible.

Put together, these findings are consistent with the theory that detained people, who may have limited knowledge of the criminal legal system and/or who are being detained for the first time, have strong incentives to cut a quick deal in order to resolve their cases as soon as possible—especially when it involves lower-stakes petty offenses. As was noted earlier, this is because a plea deal is often less "painful" in the short term because it can get people out of jail if they are detained, purchase certainty in what can be a long and unpredictable criminal legal process, or sidestep the possibility of harsher punishment that could result from trial. In line with these observations about the long and painful process of justice system involvement and detention—even for low-level offenses—the New York City study found that people detained on misdemeanor charges pleaded guilty not only more frequently but also *faster* than people detained on felony charges.[40] For incarcerated people charged with misdemeanors whose cases continued beyond their first court appearance, the median time between arraignment and case disposition was less than three weeks at every predicted sentence length, but almost 50 days for people charged with felonies in the shortest predicted sentence length category, growing larger for groups with longer predicted sentence lengths.[41]

Misdemeanor justice and plea bargains

More serious crimes—rape, murder, aggravated assault, etc.—may be more likely to capture media and public attention, but the American criminal legal system is, in fact, dominated by the enforcement of a vast array of minor offenses located both in a state's criminal code and in local ordinances.[a] This enforcement is both wide and deep, and it is the point of contact through which most Americans experience the criminal legal system.[b] It touches everything from low-level crimes (such as disorderly conduct, simple assault, petty theft, low-level fraud, illegal trespass, prostitution, driving under the influence or on a suspended license, and drug possession) to commonplace behaviors deemed undesirable or "anti-social" that may either be designated "civil" or "criminal" infractions (such as public urination, public intoxication, unlicensed vending, littering, graffiti, panhandling, jaywalking, and loitering).[c] Misdemeanors can involve small harms, or no harms at all, and many are often symptoms of larger social problems with which communities grapple—including substance use disorders, mental illness, domestic violence, and poverty.[d]

Given the breadth of issues covered by minor offenses, it is unsurprising that the national misdemeanor caseload volume is large. According to a recent estimate, there were 13.2 million misdemeanor cases filed in the United States in 2016—or 4,261 misdemeanor cases filed per 100,000 people; accounting for 76 percent of statewide criminal caseloads in 31 states.[e] It also appears that the proportion of such cases among all criminal prosecutions has remained relatively stable over the last several decades.[f] Thus, the majority of plea bargains in America are products of the country's diverse and sprawling network of lower criminal courts where minor charges are typically adjudicated.[g]

Despite the preponderance of minor charges in the criminal legal system, a substantial proportion of empirical research on plea bargaining either focuses on people charged (and convicted) of felony offenses or comingles felonies and misdemeanors, assuming that plea bargains operate with similar goals—or under similar conditions and pressures—across all types of offenses. But a small body of research—mainly descriptive in nature—that has explored the real-life operation of the lower courts suggests that guilty pleas in misdemeanor and other petty cases are products of a process that may be qualitatively different from that of most serious offenses in ways that prevent aggregation in analysis, particularly when trying to extend a generalizable explanation of how plea bargains work.[h]

This body of work confirms, for example, that in the world of misdemeanors, infractions, and other lesser offenses, there are often standard "deals"—baseline offers set to specific offense types—that are routinely proposed and accepted that involve little actual bargaining between parties.[i] For the accused, these offers are hard-to-refuse dispositional deals that can effectively end cases quickly, often as early as their first court appearance.[j] These include:

- case dismissal;
- unconditional or conditional discharge;
- a conviction of a civil (rather than criminal) infraction;
- a sentence to time served (accounting for any time spent in custody leading up to the court appearance); or
- a community-based sentence of minimal length.[k]

Thus, contrary to the notion that prosecutors and defendants/defense counsel "bargain toward settlement in the shadow of expected trial outcomes," in these cases, initial charging decisions—which are in the prosecutor's discretion—determine the type of plea deal that settles a particular matter under established court practices, prosecutor office policies, or defense bar customs around similar cases in a particular jurisdiction.[l]

Researchers have proposed two main explanations of why cases related to petty offenses are resolved quickly:

- **Process costs.** Prosecutors, defense counsel, defendants, and judges all put a premium on speed because of the enormous scale of misdemeanor dockets across the country and the high process costs that misdemeanor trials present to all parties when compared to the low-stakes nature of the offenses.[m] With a criminal legal process that is both slow and unpredictable, costs for the accused include uncertainty of outcome and a protracted pretrial and trial process that can span many days, weeks, or even months—one that may be experienced in part, or wholly, behind bars and away from their families, jobs, and community responsibilities.[n] Thus, paying the price of a guilty plea may be, counterintuitively, the most "rational" option whether a person is guilty or not.[o]

- **Managerial justice.** Another body of scholarly work suggests that prosecutors are not actually trying to maximize punishment or even secure a conviction when offering standard plea deals to quickly resolve misdemeanor and other petty cases.[p] Instead, prosecutors use various adjudicatory tools that avoid formal punishment but enable them to document a person's criminal justice encounters and track behavior over time (such as conditional discharge or an adjournment in contemplation of a dismissal) so that law enforcement agencies (such as police, prosecutors, and courts) have a record to use in calibrating future responses.[q]

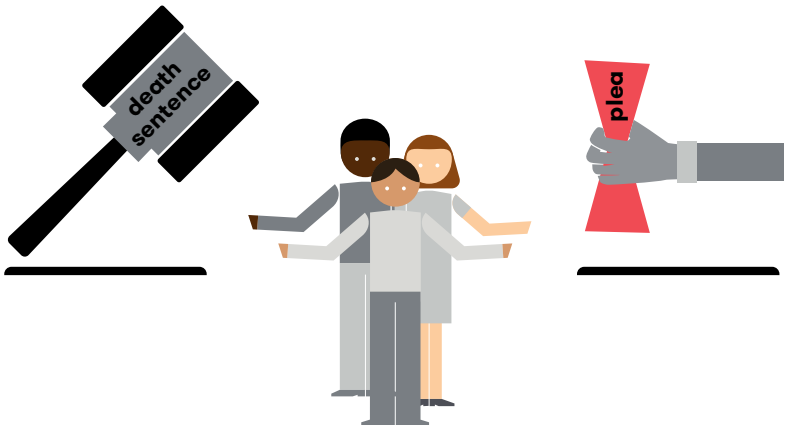
The impact of death penalty sentences

Fears about the coercive nature of plea bargaining are perhaps most pronounced in cases in which prosecutors have the option to pursue a death penalty conviction. Critics note that when taking cases to trial that may result in a sentence to death, people may be more likely to accept a plea deal that they would otherwise have rejected—due either to the harsh terms of the sentence and/or their factual innocence.[42] The threat of the death penalty is used as leverage by prosecutors in bargaining, and both prosecutors and defense lawyers agree that the specter of a death penalty puts prosecutors in a uniquely strong position.[43] Although analysis of actual cases is hampered by a relatively small sample to draw from, the quantitative studies suggest that the option to pursue a death penalty has a significant effect on plea bargaining.

Prosecutors and defense lawyers agree that the specter of a death penalty puts prosecutors in a uniquely strong position.

One such study conducted a natural experiment capitalizing on the 1995 reinstatement of the death penalty in New York State to analyze changes in case outcomes before and after the law change.[44] The study found that people charged in murder cases were 25 percent more likely to plead guilty to their charges following the law change, regardless of whether the prosecutor had explicitly filed a notice to pursue the death penalty in the case.[45] The reintroduction of the death penalty, the researchers concluded, made people less likely to be offered a charge reduction (typically the more advantageous type of plea offer) and more likely to take a sentence deal—suggesting that prosecutors did indeed have—and use—greater power in plea bargaining.[46] A study from Georgia

People are 25 percentage points more likely to plead guilty when faced with the death penalty.



produced similar results.[47] The study looked at eight years of murder cases from across the state that met the criteria necessary to be tried as capital cases. The researcher compared the outcomes of cases in which prosecutors pursued the death penalty with those in which they did not, using sophisticated statistical techniques to control for a variety of case characteristics. They found that, all else being equal, people charged in murder cases were approximately 20 to 25 percentage points more likely to plead guilty when faced with the death penalty.[48] Put another way, the study suggests that when prosecutors actively pursue a death penalty, people in an additional two out of every 10 cases are deterred from going to trial.[49]

These findings have been supported nationally. A comparison of 33 counties—some with the death penalty, some without—found that, when the death penalty was available, 19 percent of first degree murder cases were resolved with a guilty plea leading to a prison sentence of more than 20 years; in counties without the death penalty, this was true for only 5 percent of cases.[50] This large difference in outcomes remained statistically significant even when controlling for other case characteristics. In pleading guilty to a life sentence, people are relinquishing their right to appeal, the chance of an acquittal, and the possibility of a shorter sentence; avoiding the death penalty is used as a "substantial incentive" to encourage people to make this otherwise unappealing decision.[51]

Legal characteristics

Researchers have looked at how the application of plea bargaining, and the potential associated discount in punishment, might vary in relation to the legal characteristics of a case. Of these, the strength of the evidence, the severity of the charges, and the accused's criminal history have garnered most attention.

Strength of evidence

The strength of the evidence against a person charged with a crime is perhaps the most salient factor prosecutors say they consider when deciding whether a plea deal should be extended. Interviews and surveys conducted with prosecutors have attempted to shed light on the relationship between the strength of the evidence in a case and the plea bargaining process, often testing the general assumption that prosecutors will offer more lenient deals when the evidence is weaker or harsher deals when the evidence is stronger. In a survey of 166 prosecutors in three southern states, 82 percent of respondents indicated that they would reduce the harshness of the plea if the evidence was weak, and 38 percent indicated that they would increase the harshness of the plea if the evidence was strong.[52]

However, a different survey study asked nearly 400 prosecutors to respond to hypothetical legal cases and found that the presence or absence of evidence had very little effect on prosecutors' likelihood to recommend a plea deal, with plea offers being extended in nearly all cases.[53] Again, the presence of evidence decreased the leniency of offers recommended by prosecutors, but only by a small amount.[54] The authors noted, however, that findings from hypothetical cases such as these—with the absence of real-life court and caseload pressures—may not easily generalize to actual practice.[55] As such, a number of studies have attempted to examine the relationship between plea bargaining and evidence strength in *real* cases.

An analysis of cases relating to person and property offenses (misdemeanor and felony) filed in one jurisdiction across multiple years sought to determine the relationship between evidence strength and plea bargaining using quantitative analysis.[56] As a proxy for evidence

strength, the research considered the total number of pieces of evidence listed in a case and the number of pieces of evidence per intake charge.[57] While controlling for a number of other case and defendant variables, the researchers found a significant relationship between strength of evidence and plea offers—but not on all metrics. The strength of the evidence was unrelated to both the seriousness of the top plea offer charge made by prosecutors and the length of sentence attached to it. Stronger evidence was, however, associated with increases in the number of charges included in the plea offer, the total sentence possible if convicted for all charges, and the likelihood that the prosecutor would recommend incarceration.[58] A 2015 study of felony drug cases in New York City similarly assessed the relationship between evidence and plea bargain outcomes while controlling for other legal and extralegal factors.[59] The researchers found that when factors indicating strong evidence were present, the accused were less likely to receive reduced plea charge offers and more likely to receive custodial, rather than noncustodial, sentence recommendations.[60] However, while significant, the size of these relationships was smaller than the researchers had expected.[61]

Confession evidence is considered extremely persuasive at trial, which could make it an important factor during plea bargaining.[62] An analysis of more than 500 felony cases from two New York counties showed that people who confessed (either fully or partially) overwhelmingly pled guilty (more than 97 percent), but received lower plea discounts than others (people not interviewed by police and people who denied guilt).[63] As a further analysis, researchers in this study coded the apparent strength of the evidence in each case. Contrary to expectations—and to findings from earlier studies—cases with stronger evidence received greater plea discounts than cases with weaker evidence.[64] The researchers proposed that, because in the county they studied the prosecutor's office had a known policy stating that no offer would be better than the initial offer, people with strong cases against them who knew about the policy were more likely to accept the first plea deal offered.[65]

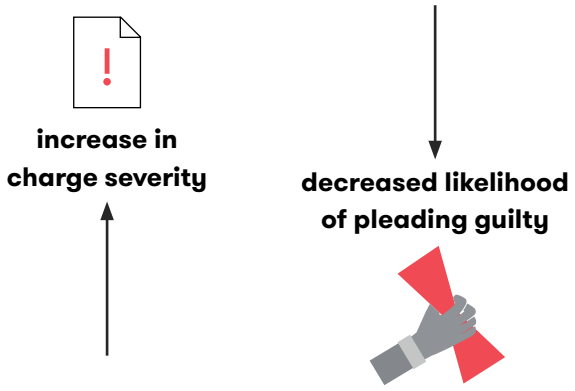
Researching the relationship between plea bargaining and the strength of the evidence in real cases presents specific and significant challenges: the strength of evidence is unlikely to be recorded in ways that are amenable to large scale analysis and is difficult to quantify in a meaningful way.[66] There are nuances to evidence that are difficult to assess and

combine in the aggregate. For example, eyewitness testimony may vary in its persuasiveness if it comes from an undercover police officer or a witness to the incident, and witnesses may be afforded different levels of credibility based on their demographics and relationship to the accused.[67] Furthermore, the strength of a specific piece of evidence is not necessarily static and may decay over time as witnesses fall away or forget important details or an investigation throws doubt on what first appeared to be important evidence.[68]

Charge severity

The seriousness of the current offense is a key consideration when contemplating plea agreements. Research suggests that the likelihood of a person pleading guilty and the leniency of the plea deal offered to them by prosecutors may both be influenced by the severity of the charges the person faces.[69] A study of 200 cases of drunk driving in a southern California county in 1993, for example, analyzed the relationship between multiple legal and extralegal case characteristics and case outcomes and found that charge severity was the largest predictor of pleas; people with more severe charges were less likely to plead guilty.[70] The researchers suggested that when the stakes of conviction are higher, there is greater incentive to take one's chances in court.[71] Another study of 464 felony

The relationship between charge severity and plea likelihood.



cases from Virginia in the late 1970s, which also controlled for many demographic and case characteristics, similarly found that when charged with offenses that could result in longer sentences, people became less likely to plead guilty.[72]

Studies of *whether* a deal is reached, however, say nothing of the leniency (or lack thereof) in the plea offers made by prosecutors. A large-scale study of federal cases that resulted in conviction in 2001 (excluding cases resolved through trial) found that more serious charges were associated with a greater likelihood of charge reductions.[73] The researchers theorized that this may be, at least in part, because more serious crimes—and those with more filing charges—allow more opportunities for reduction than do lower-level crimes.[74]

Criminal history

People's conviction histories are often used to guide sentencing decisions and are sometimes explicitly included in prosecutors' plea deal guidelines.[75] As such, it would make sense that criminal histories might exert a significant influence on the plea bargaining process. Although researchers frequently control for criminal history when examining the relationship of other legal and extralegal factors with plea bargaining outcomes, it is less frequently the subject of direct investigation itself.

Research conducted in county criminal courts in Pennsylvania (using data from 1997 through 2000) and, in a separate study, federal criminal courts (using data from 2000 through 2002) found that people with more substantial criminal histories are penalized less for going to trial than those without.[76] That is to say, the difference between sentences resulting from a jury trial compared to those imposed through plea bargaining becomes smaller as people's criminal histories increase. Researchers offer several plausible explanations for this relationship. First, a jury trial may provide an opportunity for defense counsel to argue that a person's criminal history is less serious or meaningful than it may seem on paper and to present evidence of the accused's good character.[77] Second, it is possible that, for those with longer criminal histories, prosecutors offer less lenient plea deals or encourage people to plead to the charges set at arraignment. The sentence they receive as a result is unlikely to differ markedly from

a sentence they might receive at trial. Although the first explanation is difficult to quantify and study, research has lent some support to the second—although, as elsewhere, the findings have been mixed.

When evaluating the association between people's criminal histories and the likelihood of receiving a plea deal—or the harshness or leniency of that deal—it is important to keep in mind that criminal histories themselves are subject to deep rooted racial biases within the criminal legal system.

A large study of people who were sentenced in federal cases in 2001 found that criminal history had no influence on the reduction of charges during plea bargaining.[78] However, other studies—which similarly analyze the relationship between criminal history and plea bargaining (while controlling for other important variables)—have found that more substantial criminal histories are associated with harsher plea deals, at least for some charge types. For example, a study of nearly 160,000 misdemeanor cases prosecuted by the District Attorney of New York County found that, holding other case and defendant characteristics constant, people with longer criminal histories were more likely than people with shorter histories to receive a plea offer that included incarceration.[79] Similarly, statistical analysis conducted in one unnamed jurisdiction found that—for all charge types studied (property, personal, and drug)—more serious criminal histories were associated with an

increased likelihood that the plea deal would include incarceration and with smaller reductions in the total possible sentence a person might serve.[80] However, more serious criminal histories were only found to be associated with smaller reductions in the seriousness of the top charges and smaller reductions in the total number of charges for drug offenses.[81]

Criminal histories are, of course, not a neutral factor, but rather one rooted in the nation's historic and continuing systemic racism. When evaluating the association between people's criminal histories and the likelihood of receiving a plea deal—or the harshness or leniency of that deal—it is important to keep in mind that criminal histories themselves are not created with objective neutrality and are subject to deep rooted racial biases within the criminal legal system.[82] Indeed, research conducted in New York City found that people with longer criminal histories were more likely to have their cases dismissed, the result of a dynamic in which police will more readily arrest people—especially Black and Latinx people—whether or not they have sufficient evidence for a prosecutor to file charges.[83]

Systemic inequities

As described below, the complete lack of transparency and scrutiny inherent in America's reliance on plea bargaining—combined with the U.S. justice system's long history of prejudicial operations—leaves the administration of plea deals open to bias. Relatedly, people may have widely diverging levels of trust in the system, which influence their willingness to accept a plea deal or face trial. As such, researchers have investigated the degree to which plea offers are affected by demographic factors, notably the race, gender, and age of the accused.

Racism and race inequity

Consistent with the experiences of Black and Latinx people throughout the criminal legal system, several studies have found that people of color are often treated less favorably than white people during the plea bargain process. For example, two studies of data from the New York County District Attorney's office found that Black people were significantly less

Challenges in researching plea bargaining

Guilty pleas constitute the main mechanism for case resolution in American criminal courts. Researching the role and administration of plea bargaining in this process has, however, proved remarkably difficult.

The process of plea bargaining is rarely recorded in any formal documentation and, when it is, these records are often not made available to researchers.[a] Simply asking prosecutors about the plea bargaining process undoubtedly has some value, but researchers have found that there can be substantial differences between lawyers' perceptions of their work, their values, and their actual behavior in plea negotiations.[b] More importantly, asking prosecutors about plea bargaining ignores the voice of the person most affected by the bargain, and few studies focus on the perspective of the person pleading guilty.[c]

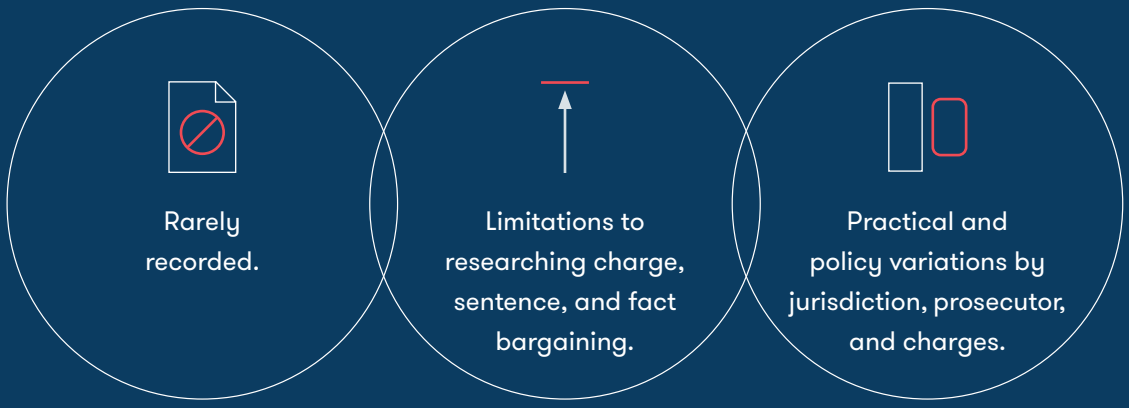
With scant records and limited trust in the validity of self-reported behavior, researchers have attempted to infer details of the plea bargaining process by looking at case outcomes. Although there are many variations in methodology, researchers commonly seek evidence of *charge bargaining* by comparing the initial charges a person faced with those to which they ultimately pled guilty. Evidence of *sentence bargaining* is often inferred by comparing the punishments given following a plea with those given following a trial for the same charges.[d] There are limitations to both approaches.

Inferring that charge bargaining has occurred on the basis of a reduction in charges (either number or seriousness) is problematic because charges may be reduced prior to case disposition for a number of reasons not necessarily related to plea bargaining.[e] For example, charges could be reduced to compensate for mistakes or biases that led to initial overcharging or in light of new evidence collected during an investigation and not because of any plea deal.[f] Quantifying the presence and impact of sentence bargaining is also problematic. Cases that go to trial differ in significant, hard-to-measure ways from cases that result in a plea, and researchers are inconsistent in how they actually measure sentences—disagreeing on whether to include noncustodial punishments as "zero-length" sentences, sometimes counting acquittals in a similar way, and differing in whether to account for time served in pretrial detention.[g]

As prosecutors may employ different bargaining strategies in different circumstances, it is preferable that research studies attempt to measure both charge bargaining and sentence bargaining, but this does not always happen.[h] Furthermore, researchers have also noted that, at least in the federal court system, there is an additional common form of plea bargaining in which the prosecutor and defense may reach a deal over the key "sentencing facts" of a case—agreeing to omit certain facts about a case that would statutorily expose a person to harsher sentences. This process is perhaps even harder to record, identify, or measure than charge or sentence bargaining, and it has received even less research attention as a result.[i]

Perhaps the most confounding aspect of plea bargaining, next to the lack of available records, is its granularity: the type of plea bargain favored (charge, sentence, or fact), the frequency with which it occurs, and the degree of impact it has on sentencing outcomes can *all* vary by the specific jurisdiction, prosecutor, and charges associated with a case.[j] Studies that aggregate data across charge types, courts, or type of plea bargaining may, therefore, dilute any evidence of plea bargaining and its impact, hiding any important associations; conversely, studies that focus on specific charges, courts, or metrics are likely to be limited in their generalizability.[k]

A number of issues complicate research into plea bargaining.



likely than white people to receive reduced charges and more likely to receive custodial sentence offers, after controlling for various demographic and case factors.[84]

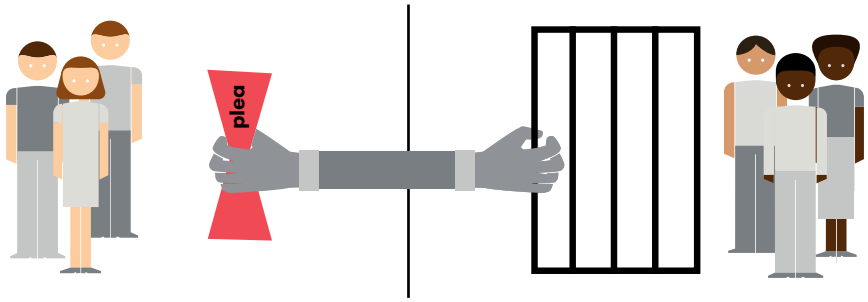
More punitive plea deals for Black and Latinx people, as compared to white people, may partly be explained as the result of worse treatment during other stages of case processing. Most notably, they are more likely to be held in jail pretrial than similarly situated white people, which can lead to a range of worse case outcomes.[85] People held in pretrial detention are more likely to plead guilty—in part to hasten their release—and to face harsher sentencing decisions. In this way, people of color, and especially Black and Latinx people, face "cumulative disadvantage" in the criminal legal system, and their increased vulnerability to pretrial detention in turn

Consistent with the experiences of Black and Latinx people throughout the criminal legal system, several studies have found that people of color are treated less favorably than white people during the plea bargain process.

increases the likelihood that they will receive a worse plea deal than white people (while controlling for other factors such as charge severity and criminal histories).[86]

Several studies suggest that harsher plea deals for Black people are not simply a byproduct of pretrial detention, however. Researchers have found evidence to support the hypothesis that prosecutors' biases may lead them to use a person's race as a proxy for criminality or risk.[87] A study of misdemeanor and felony cases in Wisconsin from 1999 to 2006 found that white people were 25 percent more likely than Black people to have

The odds of receiving a plea offer that includes incarceration are almost 70 percent greater for Black people than white people.



their initial charges reduced, but only in cases where the accused did not have a criminal history; when people had a prior record, this disparity disappeared.[88] Similarly, white people were found to receive preferential plea bargaining treatment over Black people in cases of low-level offenses, but not for more serious charges.[89] The researchers propose that when people are accused of serious crimes or have criminal histories, they have already proven the risk they pose and are treated equally harshly.[90] Absent this information, prosecutors may find their perceptions influenced by a person's race. Other studies have found a similar difference in treatment favoring white people over people of color, and especially Black and Latinx people, to be most pronounced for misdemeanor and lower-level felony charges.[91] In misdemeanor cases in New York City, for example, the odds of receiving a custodial plea offer were almost 70 percent greater for Black people than white people.[92]

It is difficult to tell how and to what extent race influences plea offers because of inconsistencies in study design. One study of felony cases from Cook County (Chicago) in the early 1990s did not find evidence of racial bias in plea bargaining; however, the study only measured reductions in the *number* of charges people faced when pleading guilty—a narrow definition of plea bargaining.[93] Other studies have only found an association between race and plea bargaining for specific charge categories.[94] For example, Black and Latinx people have been found to be significantly less likely than white people to receive charge reductions for

weapons offenses.[95] Research that aggregates different types of cases—combining misdemeanor and felony cases, or multiple offense types—in analysis may miss these important relationships, masking significant associations between race and the plea deals people are offered.[96]

Research into biases in plea bargaining will be hampered if it does not take into consideration biases in initial charging.

Other variables that may not be easily recorded or analyzed—such as the race of the alleged victim—may mediate the relationship between race and the plea offers people receive. For example, research conducted in Rhode Island reinforces the importance of social context, which many studies are not able to meaningfully consider.[97] This study of plea offers in drunk driving cases found that the harshness with which people of color were treated relative to white people was most pronounced when the alleged crime was committed in "advantaged" (wealthy and racially homogeneous white) areas, such as suburbs.[98]

Adding further complexity, a recent study of nearly 180,000 misdemeanor and felony cases in New York City found that, although Black people were only slightly less likely than white people to receive reductions in their charges, the timing of these reductions were notably different, with important implications.[99] For white people, charge reductions happened most often at disposition—likely reflecting leniency on the part of court actors and the negotiation of a plea deal; for Black people, charge reductions happened most frequently at initial case screening, suggesting that this was corrective action to perceived bias in overcharging by the police and not part of a plea deal.[100] This provides an important reminder that, having already faced discrimination by the police, people of color often enter the court system at a disadvantage—one for

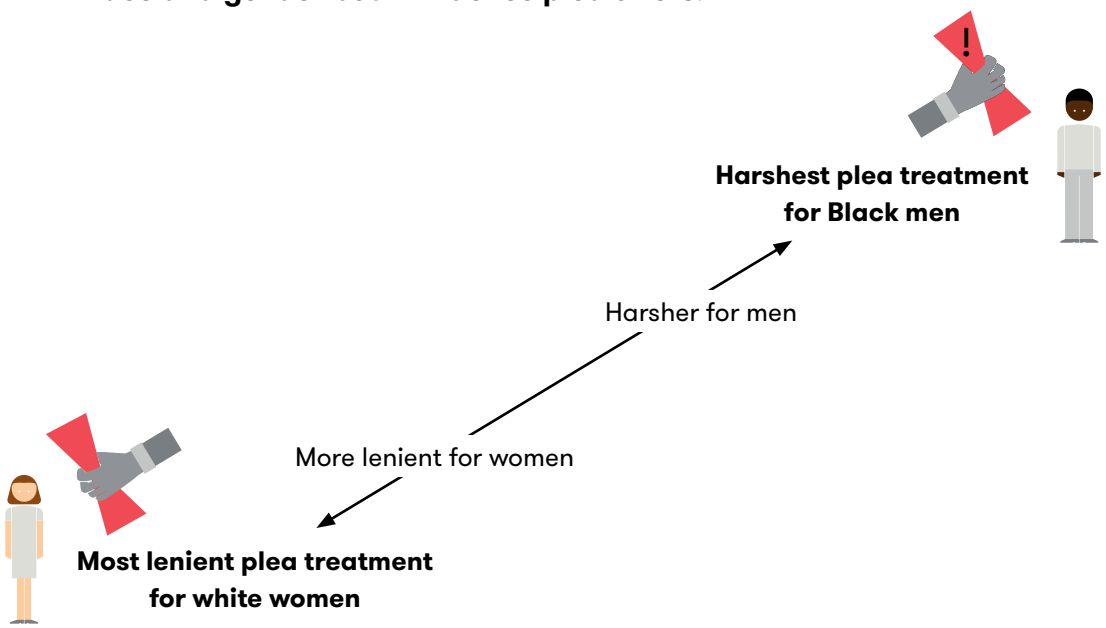
which equitable treatment during plea bargaining, were it to exist, would not correct.[101] In short, research into biases in plea bargaining will be hampered if it does not take into consideration biases in initial charging.[102]

Disparate treatment by gender

Research has also examined possible gender-based outcomes in plea negotiations. Attempts to study the relationship between gender and the use of plea bargains have faced methodological challenges in finding sufficiently large and directly comparable samples of men and women, as women are arrested less frequently than men and typically for different, less violent, charges.[103] When researchers have managed to overcome these specific challenges, the results have been mixed. Several studies conducted using data from the 1970s through the 1990s failed to find any significant relationship between gender and the use of plea bargaining.[104]

More recently, researchers have published several studies that suggest some association may exist, with women receiving more lenient treatment than men.[105] A study examining felony and misdemeanor data from 2000

Race and gender both influence plea offers.



through 2006 in Wisconsin, for example, found that women were more likely than men to have their top charges reduced or dismissed and that this disparity was greatest for people with no prior convictions and in cases where the top charge was a misdemeanor or low-level felony.[106] The researchers hypothesize that, in these cases, with little information to guide them, prosecutors may be falling back on gendered assumptions about "risk" and "criminality" and treating men more harshly as a result.[107] The researchers also looked to see how gender interacted with race and found that white women were afforded the most lenient treatment through plea bargaining while Black men received the harshest.[108] A study of federal court sentencing data for cases terminating in 2001 (nearly 46,000 cases) similarly found that, overall, men were more than 30 percent less likely than women to receive a charge reduction, although the study did not review the data for evidence of a race/gender interaction and instead focused on which individual factor looked more significant across all transactions.[109]

Several explanations have been posited to account for relatively preferential treatment of women: prosecutors may hold gendered stereotypes that view women as less culpable and as less of a risk to society, or women may invoke "selective sympathy" among court actors.[110] Researchers have noted, however, that many of the reasons invoked for more lenient treatment of women—such as consideration of their mental health or parental status—could equally be applied to men and, instead of questioning why women are seemingly treated more leniently, the more pertinent question should be "why are men treated so harshly. . . ?"[111]

Differential plea bargaining experiences by age

Research into the relationship between a person's age and the use of plea bargains has often focused on the different ways in which young people may approach and respond to plea deals compared to their older counterparts; qualitative and experimental studies find that younger people may be more likely than older people to accept a plea offer and give less consideration to the potential negative consequences of the decision.[112] Gaps in young people's understanding of a plea offer may not be adequately addressed by their attorneys, and they may not receive important information about alternatives to pleading guilty.[113] Interviews

conducted with 18 attorneys in one jurisdiction asked respondents about their most recent juvenile client.[114] Nearly all attorneys believed that their clients understood that they were giving up a trial, but fewer than half reported that they had explicitly discussed this with their clients. Many of the attorneys waited to discuss waivers of rights until after their client had stated that they would accept a plea, and only about a quarter of the attorneys surveyed discussed collateral consequences—a vast array of post-sentence civil penalties, disqualifications, or disabilities that flow from criminal convictions—with their clients.[115] Interviews conducted with adolescent and adult participants in an alternative to incarceration program in New York City found that, based on self-reports, adolescents had less time to make their plea decisions than adults (frequently as little as an hour) and that juveniles met with their attorneys fewer times than adults did.[116]

Although there are reasons to believe that young people differ in their understanding of and responses to plea offers, the small number of attempts made to quantitatively measure differences in plea bargain outcomes between older and younger people have yielded mixed results—potentially due to methodological issues. (See "Challenges in researching plea bargaining" on page 25.) A study of misdemeanor and felony cases from one jurisdiction across multiple years found mixed results and illustrates the complexity of the issue: the relationship between age and the favorability of the plea deal reached varied by charge type (person, property, or drug) and by the measure of plea deal (changes in the statutory rank of the top charge, changes in the possible sentence length of the top charge, changes in the possible sentence length of all charges combined, and prosecutor sentence recommendations).[117] For some charge types in some measures, increased defendant age was associated with greater plea discounts and, for other types, lesser.[118] Possible relationships between age and plea bargaining may, therefore, be too nuanced and fine-grained to identify using aggregated datasets. And unlike the studies of juveniles, this study did not focus on the people affected by the bargain or their motivations for making it, but instead on prosecutorial decisions.

The criminal law

In addition to the significant influence of legal case characteristics; systemic biases associated with race, age, and gender; and pretrial detention status on plea bargaining practices, the law itself also plays a critical role in what agreement can be reached. Although prosecutors' charging authority arguably concentrates a significant amount of adjudicative power into their hands—through their ability to control and manipulate a person's sentencing exposure by way of the charges they pursue and then revise as a result of plea bargaining—this power is neither subject to any consistently identifiable standards or rules, nor after-the-fact review.[119] (See "Law of plea bargaining: An overview" on page 8.) As a result, plea bargaining is often regarded as an unwritten, latent body of law or, at its worst, a practice that inhabits a "lawless" space, where the risk of capricious and arbitrary prosecutorial decision making—including invidious discrimination—remains ever present.[120] This may be, in part, why critics of plea bargaining often refer to it as a practice operating "beyond the shadow of the law"—both driven and governed by the vast, opaque, and unregulated exercise of prosecutorial discretion.[121]

Given this, the studies discussed below demonstrate that prosecutorial decisions in the plea bargaining context do not operate in a vacuum. Rather, prosecutors' plea bargaining decisions remain contingent on both the architecture and substance of the criminal code. The law provides the essential framework for plea negotiations. These studies, therefore, stand for the proposition that established legal rules still matter in defining the contours of plea bargaining behavior.

The criminal code

In two companion descriptive studies that looked at charge bargaining practices in North Carolina in 1999 and 2000—one conducted in 2006 and another in 2007—researchers confirmed that the substantive criminal law still matters in determining plea bargaining outcomes.[122] In the first study, the researchers not only found that charge reduction was a frequent occurrence, but they also discovered that both charge reduction rate and magnitude increased where the criminal code offered prosecutors and

defense lawyers a deeper set of plausible charges as landing spots in plea negotiations.[123] At the same time, the researchers also uncovered that parties were *less likely* to agree on a particular charge reduction—thus minimizing the rate of overall charge movement in plea negotiations—when there were greater differences between the potential sentences that attached to available charging options.[124]

While these two main findings held true across both serious and nonserious charges, charge reductions were found to be more common among serious cases than in less serious ones—with the highest rates observed among the highest felony categories for which prison sentences were presumptively attached.[125] However, the frequency with which cases moved from the original charge to a lesser one—and the distance in charge and sentence severity between them—varied by the specific charge types examined by the study (assault, robbery, burglary, kidnapping, and cocaine-related).[126] For example, the kidnapping group had fewer charge bargains because the criminal code contained few charging options, while the large sentencing gap between potential sentences across the felony-misdemeanor line for the burglary group inhibited the number of plea deals despite the wide availability of many charging options.[127]

The researchers also found that even when circumstances were most conducive to charge reductions, other factors (such as prosecutor office policies or drug weight) outside the code could reduce the likelihood of charge reductions—as was the case with the cocaine cases they examined.[128] In addition, when many charging options existed across the felony-misdemeanor dividing line, the researchers found that more available felony options made it less likely that felony charges would be reduced to a misdemeanor, resulting in a higher percentage of charge reductions that still yielded a felony conviction.[129] This was the case for both serious and less serious felonies—a result the researchers confirmed was independent of the seriousness of the original felony charge filed.[130]

The substance of particular criminal offenses

It is not only the architecture of the criminal code and its sentencing provisions that are influential in plea bargaining, but, as a 2012 descriptive study found, also the specific content of a particular charged offense.

After examining more than 620,000 criminal cases that terminated in federal district court from 2002 to 2009, researchers showed that a crime's "essential elements, the proof required to establish the offense, and the basic gravamen of the crime" affect the frequency and composition of plea bargains in those cases.[131]

- Charges that were secondary to the crux of the prosecution's case (such as witness tampering) or that threatened added punishment but remained outside the core prosecuted offense (such as use of a firearm in the commission of a federal felony) had high dismissal rates pursuant to plea agreements.[132] Both of these types of charges often presume the existence of, and are related to, other often more serious crimes. Prosecutors may be willing to discard these charges in order to facilitate a guilty plea because they are viewed as superfluous to the central allegations in the case.[133]
- Crimes that were easiest to prove (such as escape, reentry of a deported person, failure to appear, or misprision—deliberate concealment—of a felony) had the lowest frequency of charge bargains, but high rates of guilty pleas, suggesting that people likely accepted plea deals with little bargaining involved.[134] Some of these charges are also common enough (such as reentry of a deported person, failure to appear, misprision of a felony) that they are easily "commoditized" such that parties will likely recognize and agree to the understood "going-rate" for a guilty plea in that particular case.[135]
- Prosecutors in certain higher-stakes cases (such as deprivation of civil rights) frequently went to trial, despite a high likelihood of acquittal.[136] This was in part because sentencing cliffs between charging options (for example, within the different gradations of aggravated assault categories) made charge reductions pursuant to a plea deal difficult.[137] In other instances, political and institutional pressures, combined with few attractive plea options, likely drove cases to trial despite the difficulty prosecutors faced in proving their case.[138] Similarly, people were more likely to prefer trial despite low acquittal rates in other types of cases (such as tax evasion or possession of child pornography) either out of a belief they held in principle (such as "federal taxation is unconstitutional") or because the perceived costs of conviction (such as stigma of sex offenses) related to the alleged offense were deemed too high to agree to a

plea deal.[139] These findings demonstrate that the likelihood of a plea deal is not always driven by parties' perceptions of the odds of a particular trial outcome, but sometimes on a risk-benefit calculus.

Findings related to specific offenses argue against trying to generalize plea bargaining behavior and practice across broad categories of charges such as "property offenses" or "violent offenses." Doing so may hide significant variations between specific charges within each offense category (for example, under violent offenses, the distinction between simple assault and murder). This, in turn, risks masking variations in offense-specific plea bargaining behavior and outcomes in practice. This suggests more broadly that any effort to reform plea bargaining practices and outcomes must incorporate legal reform, both substantive and procedural.

Caseloads

Beyond the structure of the criminal code, other system-level elements factor into the use of plea bargaining. There has long been a common assumption that the high use of plea bargaining in U.S. criminal courts is, at least in part, a result of the high caseloads many courts, prosecutors, and defense counsel must process.[140] Indeed, it appears undeniable that if even a fraction of the people who currently plead guilty were to instead demand their right to a trial, courts and their staff would quickly be overwhelmed. The continued functioning of the U.S. justice system is dependent on the high number of guilty pleas that are entered every year.[141]

With this in mind, a small body of research has sought to understand how variations in caseloads might influence individual cases. Researchers have asked to what extent plea deals are influenced by the case volumes of the specific court or prosecutor to which the case is assigned. (Research has tended to ignore the caseload pressures faced by defense counsel.) Studies conducted during the past 40 years have found little evidence of a significant relationship.[142] Observational and interview-based research published almost half a century ago in 1978 compared several low- and high-volume criminal courts and found no noticeable differences in the ways in which prosecutors approached and applied plea bargaining to their cases.[143] Quantitative analysis of courts in Chicago published around

Displaced sentencing discretion? The impact of sentencing guidelines on charge bargaining practices

To help protect against the risk of judges relying on improper factors in sentencing—such as race, gender, or personal beliefs—and better ensure that similarly situated people receive comparable sentences, at least 20 state jurisdictions, the District of Columbia, and the federal government have promulgated sentencing guidelines to both guide and curb judicial discretion at sentencing.[a] Some jurisdictions have enacted presumptive guidelines, meaning that judges are required to impose a recommended sentence within the prescribed range or provide compelling and substantial reasons for deviating from them.[b] Other jurisdictions put in place voluntary guidelines, which do not require judges to impose a recommended sentence.[c] Even within these two broad categories, there are wide variations in the degree to which guidelines curb judicial discretion.[d]

One enduring concern, however, is the extent to which sentencing guidelines shift the locus of sentencing discretion to prosecutors—and how this may perpetuate the very disparities that sentencing guidelines were supposed to eliminate.[e] Under these systems, prosecutors can achieve their preferred sentences (or avoid those with which they disagree) through the manipulation of the charges they pursue (by choosing the types and number of charges filed, the types of charges they are willing to drop, or the types of charge and/or sentence reductions they are willing to offer), using this as leverage in plea negotiations. Five studies that looked at the impact of sentencing guidelines on plea bargaining practices are examined here, providing mixed results on whether sentencing guidelines, or different types of guidelines, increase charge bargaining among prosecutors.

In four of the five studies, researchers examined the effect of sentencing guidelines enactment and found little or no evidence that sentencing guidelines substantially altered prosecutorial charge bargaining practices. For example, a 1987 study looking at the effect of Minnesota's presumptive sentencing guidelines on prosecutors' plea bargaining practices—comparing cases from 1978 (pre-guidelines) and cases from 1981 and 1982 (post-guidelines)—found that prosecutorial charging practices (average severity of the initial charge, rate of charge dismissal, rate of charge reduction, and rate of sentence negotiation) were largely the same before and after the guidelines went into effect.[f] In particular, it found no proof during the post-guidelines period that prosecutors had started overcharging cases in order to better facilitate guilty pleas.[g] A 2005 study conducting a comparable analysis of Ohio's 1996 enactment of presumptive sentencing guidelines came to a similar conclusion.[h] It found no significant changes across most measures (the likelihoods of indictment on a first- or second-degree felony, all charges being dropped after indictment, pleading guilty with prosecutorial agreement, and some dropped charges), although it did uncover a modest 4 percent increase post-guidelines in the likelihood of charge reductions among people who pled guilty.[i] Significantly, it found that racial disparities persisted, even worsened, after guidelines implementation—for example, finding that for Black people, charges were less likely to be dropped under the guidelines system than prior.[j]

Two further pre-/post-guidelines studies using different methodologies analyzed the implementation of Washington, DC's voluntary sentencing guidelines and found similar results.[k] In 2014, researchers found little statistically significant impact on prosecutors' charge bargaining practices (for example, rate and extent of charge bargaining and extralegal effects on charge bargaining outcomes) after guideline adoption, other than a small observed increase in the number of felony charges dismissed or reduced for initial charges in the most severe charge category.[l] In 2019, after comparing differences in the *value* of charge bargains—as evidenced by the magnitude of sentence reductions that flow from them—researchers again found only minimal changes. Prior to sentencing guidelines, people accepting charge-bargained pleas received more than 30 percent shorter sentences than if they had been sentenced on their arraignment charge; after guidelines enactment, people accepting charge-bargained pleas received sentences that were nearly 36 percent shorter.[m]

Although the small differences observed in both Washington, DC, studies suggest that prosecutors may have filed more serious charges in certain cases in the post-guidelines period to expedite the plea bargaining process, the relative stability of all other outcomes between the pre- and post-guidelines periods in both studies points to little interaction effect between sentencing guidelines and charge bargaining practices and outcomes.[n] For all four studies discussed above, one potential explanation for the lack of change across the comparison periods may be the relatively narrow time range under examination after guidelines were implemented. Indeed, looking only six months out after guidelines implementation in Ohio—or one to two years out after implementation in Washington, DC, and Minnesota, respectively—may not have allowed enough time for practitioners to fully understand and use the new rules.[o] (Another possible explanation is that while prosecutors may not have changed their charging practices after implementation of sentencing guidelines, it is possible that they had already been overcharging before the guidelines were implemented.)

A fifth study examined whether the *type* of sentencing guidelines—presumptive or voluntary—makes a difference to prosecutors' charge bargaining practices and resulting sentencing outcomes. After comparing data from one county in one state with presumptive guidelines (Washington State) with data from two counties in a state with voluntary guidelines (Maryland), the 2007 study found that the county under more rigid sentencing guidelines saw greater charge bargaining impacts, demonstrated by larger observed reductions in sentence lengths and in declines in the probability of prison sentences.[p] However, the study used a predictive model that tested what would happen if Washington State cases were adjudicated in Maryland, and vice versa. This potentially minimizes the extent to which the research's findings can be applied more generally, given its hypothetical nature.[q] Future research should investigate the appropriateness of the strong assumptions underlying this approach.

the same time supported this conclusion.[144] More recent analyses found that cases tried in courts with higher caseloads are subject to slightly harsher trial penalties than those tried in lower-volume courts.[145] This may indicate that charge and sentencing decisions are influenced, in part, by considerations relating to organizational efficiency—where higher caseload courts adjust their practices in order to see fewer cases go to trial.[146] However, research that has sought to measure the caseload pressures on the people directly responsible for plea offers—the prosecutors assigned to each case—has offered less support for this hypothesis, finding little relationship between case volume and the use of plea bargaining.

If even a fraction of the people who currently plead guilty were to instead demand their right to a trial, courts and their staff would quickly be overwhelmed. The continued functioning of the U.S. justice system is dependent on the high number of guilty pleas that are entered every year.

Two studies statistically analyzed drug cases in the office of the New York County District Attorney that were disposed of in 2010 and 2011—one looking at approximately 1,200 felony drug cases and the other at a similar number of misdemeanor marijuana cases.[147] While controlling for multiple case and defendant characteristics, the studies considered the active caseload size of the prosecutors assigned to each case.[148] The study of felony cases found no relationship between the size of each prosecutor's

caseload and the charge or sentence offers (the measures of plea bargaining) made in their cases.[149] The researchers noted, however, that prosecutors working in New York City may be accustomed to high case volumes and that the results may not be generalizable to jurisdictions that traditionally process fewer cases.[150] The analysis of misdemeanor marijuana cases similarly revealed that caseload pressure was unrelated to the charge offers made, but the study did find that the likelihood of being offered a plea deal that included a custodial sentence increased marginally as prosecutors' caseloads increased.[151]

Another study of 318,750 felony and misdemeanor cases filed in Wisconsin from 2009 to 2013 similarly analyzed the relationship between prosecutor characteristics—including the size and make-up of their caseloads—and case outcomes, while controlling for numerous defendant and case variables.[152] The researchers found a large range in the number of cases the prosecutors worked on—from fewer than 100 in a five-year period to several thousand.[153] However, there was no relationship between the size of prosecutors' caseloads and either their case dismissal rate or the plea bargain outcomes of their cases (in other words, the likelihood of guilty pleas to lesser charges or of pleas resulting in noncustodial sentences).[154]

Although there was no evidence that caseload size influenced prosecutors' plea bargaining behavior, the composition of prosecutors' caseloads was found to be somewhat predictive of case outcomes. The same study of cases in Wisconsin found that prosecutors with a higher proportion of violent cases in their caseloads were more likely to dismiss cases and more likely to agree to a guilty plea to a lesser charge.[155] They were, however, less likely to accept a noncustodial sentence than other prosecutors; the researchers hypothesize that this may reflect a greater willingness to engage in charge bargaining, but less willingness to engage in sentence bargaining among these prosecutors.[156]

Conversely, prosecutors with high felony caseloads were *less* likely to dismiss a case and *less* likely to agree to a plea to a lesser charge than prosecutors with lower felony caseloads.[157] The researchers propose that prosecutors who handle more felony cases may come to view all cases more seriously and place greater value on securing a more serious criminal record.[158] It is notable that the findings of this study led the researchers to conclude that prosecutors' caseloads do not incentivize their plea bargaining behavior with the motivation of "clearing their plates" or as

a concession to limited resources, but rather that the *type* of cases that prosecutors routinely try will influence how they evaluate plea bargaining in *all* of their cases.[159]

Although the research presented here suggests that variation in prosecutorial caseload size has little notable impact on plea bargaining at the case level, cases are not processed in a vacuum, and differences in the working styles of prosecutors—and in the situational contexts of the district attorney offices they work in—are likely to be influential.[160] Mixed methods research combining focus groups, surveys, and quantitative analysis of cases finds that, despite putting great emphasis on the value of consistency in practice, prosecutors employ a wide range of styles in plea bargaining, meaning plea offers can differ markedly simply as a function of the prosecutor assigned to the case.[161] However, earlier research conducted in the 1980s suggests that this variation can be constrained, to a degree, by the level of control the local district attorney places on the plea bargaining practices of their staff.[162]

Plea bargaining outcomes

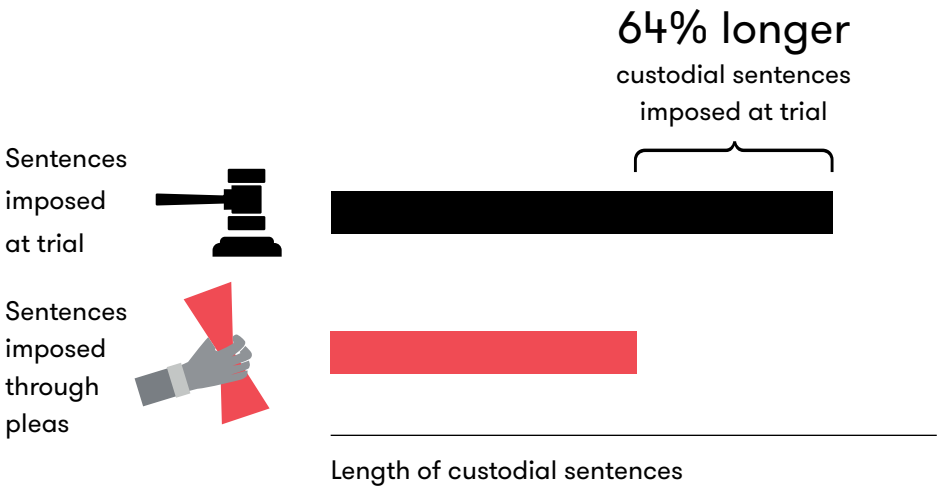
Given the centrality of guilty pleas to the day-to-day functioning of the courts and to the vast majority of people's experiences of the justice system, it is important to understand the impact that plea bargaining has on case outcomes. Specifically, researchers have attempted to discern just how much of a bargain people may receive when they plead guilty (or, conversely, how much worse their punishment may be if they go to trial). A related question also arises: are the benefits of plea bargaining large enough to coerce innocent people to plead guilty? And if so, how often does this happen? As described below, studies that have sought to address these questions have, in the process, revealed how complex and opaque the system truly is.

How much of a bargain is a plea bargain?

The process of plea bargaining is predicated on the contention that prosecutors can offer people the opportunity for more favorable outcomes if they plead guilty rather than take their cases to trial. (Whether this more favorable outcome is best characterized as a "plea discount" or a "trial penalty" is the subject of some debate.)[163] However, the typical magnitude of this disparity in punishment is uncertain. Some researchers have found evidence of a large difference in sentencing outcomes.[164] Others have suggested that the difference may be minimal (or even, as in one study, nonexistent)—although, as discussed below, these studies have been critiqued on methodological and conceptual bases.[165]

One study does provide evidence of a substantial trial penalty. Researchers looked at serious violent felonies resolved in Pennsylvania trial courts in the late 1990s using regression models to measure the relationship between plea bargaining and sentencing while accounting for other important factors (such as the severity of the offense and the defendant's characteristics).[166] They found that the odds of incarceration were 2.7 times greater for people tried by a jury than for those who pled guilty.[167] In addition, sentence lengths were 57 percent longer for people convicted by trial jury compared to those who pled guilty.[168]

The trial penalty.



Research has found, however, considerable variation in the magnitude of plea discounts both between and within jurisdictions.[169] This is perhaps unsurprising given the varying levels of constraint in the use of plea bargaining that prosecutors work under in different states: jurisdictions vary in the use of, and adherence to, plea bargaining guidelines, and district attorneys maintain varying levels of oversight and control over assistant attorneys' plea deal offers.[170] One analysis of sentencing data from five states from 1997 to 2004 used regression analyses to compare the sentence lengths received following pleas, bench trials, and jury trials, while controlling for case and defendant characteristics.[171] In each state and for most offenses, sentences received after jury trial were significantly longer than those received following a plea; there was, however, notable variation by jurisdiction and offense.[172] In Maryland, at one end of the spectrum, jury trials for heroin distribution cases resulted in incarceration sentences that were 350 percent longer than those given following a plea.[173] Similarly, cocaine distribution cases disposed of by jury trial were seven times more likely to result in incarceration than those settled through a plea.[174] In Washington State, however, there was no significant difference in sentence length among cases resolved through plea, bench trial, or jury trial for five of the 12 offenses studied.[175] Still, despite the variation, the researchers concluded that "judges and prosecutors are imposing more lenient sentences for defendants who plead guilty."[176] This is, in essence, the "bargain" underlying the entire plea bargaining process.

In federal criminal courts, plea discounts are baked into the system, with sentencing guidelines allowing for sentence reductions when a person "accepts responsibility" for the alleged crime—a condition that a guilty plea can satisfy.[177] A study looking at 207,000 federal cases from 2006 to 2008 demonstrates the potential impact of these guidelines.[178] The study used regression analysis to control for a range of case and defendant characteristics, including offense severity, and found that the average custodial sentence imposed at trial was 64 percent longer than sentences reached through pleas.[179] As in state courts, the researchers found substantial variation by crime type—with firearms trial sentences being 29 percent longer than pled sentences, while larceny and theft offenses were associated with a 137 percent trial penalty.[180]

A similar study of 115,000 federal convictions from 2000 to 2002 (in which 5 percent of cases were resolved at trial, and 95 percent through

a guilty plea) found that, after accounting for various case and defendant characteristics, including offense severity, incarceration sentence lengths were 45 percent longer for people convicted at trial than those convicted through a plea.[181] (The slightly lower trial penalty detected here may be because this study excluded cases that resulted in a probation sentence, whereas the previous study included these as zero-length sentences of incarceration).[182] However, trial penalties were not solely a product of sentencing guidelines; after guideline-based sentencing changes were controlled for, people convicted at trial were still found to receive sentences 16 percent longer than people who pled guilty.[183]

Two recent studies have attempted to cast doubt on the potential "benefits" of pleading guilty (such as reduced sentences), both claiming that people may, on average, experience better outcomes by choosing to go to trial due to the possibility of acquittal.[184] The first, a study of more than 91,000 misdemeanor cases accepted for prosecution in 2010 and 2011 in New York City, partially corroborated the results of previous research, finding that people convicted at trial were more likely to be incarcerated, faced longer probation sentences, and received larger fines than people who pled guilty—and that these differences remained after controlling for case and defendant characteristics.[185] (The researchers were unable to control for the effects of pretrial detention on case outcomes due to missing data.)[186] However, the study also found that two cases out of every five that went to trial resulted in acquittals—a far higher acquittal rate than expected.[187] This, the researchers concluded, suggests that more people may benefit from taking a case to trial than currently do so.[188]

There are, however, significant caveats to this conclusion. Importantly, fewer than 0.5 percent of cases in the study's sample actually went to trial—and those that resulted in conviction, on average, had more severe sentences than cases in which a person pled guilty.[189] With such a tiny fraction of cases going to trial, it is possible that these are exceptional cases that differ from the average case in unmeasured ways—in fact, the study found that people represented by private attorneys, who presumably had more resources and who may have had cases deemed more 'winnable,' were more likely to go to trial—and that the high acquittal rate would not be sustained should more people choose not to plead guilty.[190] The researchers also do not consider the length of time people may spend in jail awaiting an eventual acquittal and the harms that such pretrial detention

precipitates. However, the finding that 99.6 percent of these misdemeanor cases were resolved through a guilty plea suggests that the plea bargaining process is substantially different for misdemeanor cases than it is for felonies.[191] (See "Misdemeanor justice and plea bargains" at page 16.)

The second study, a contentious examination of more than 40,000 felony cases resolved before 2004 in Cook County (Chicago), Illinois, went further by concluding that not only is there no real trial penalty, but there is, in fact, a "trial discount."[192] The researcher found that, if all sentences were averaged with acquittals counted as "zero-year" sentence lengths, trials resulted in sentences 14 months shorter than guilty pleas.[193] (However, when acquittals were not counted, people who were convicted at trial were found, as in other studies, to be more likely to receive a custodial sentence and to receive longer sentences than those who pled guilty.)[194] The results and methodology of this study have been heavily criticized, however. The analysis assumes that people who pled guilty would have the same chances of acquittal as those who went to trial—which is unlikely to be true.[195] Furthermore, the study categorizes a large number of cases as acquittals that were, in fact, other forms of case termination—such as cases that were terminated when a person failed to return to court, cases transferred to other jurisdictions, or cases transferred to immigration enforcement—thus substantially inflating the likelihood of "acquittal" even though the people involved were likely to have been convicted later or in another court.[196] Finally, the study does not consider people who were held in pretrial detention but then acquitted at trial to have been incarcerated, despite the fact that they may have experienced a significant amount of time in custody.

The studies reviewed here demonstrate that the magnitude of the average plea discount, or trial penalty, differs between jurisdictions and offenses. Furthermore, the methodological and conceptual choices researchers make in studying sentencing outcomes can also create large disparities in findings. Despite this disagreement, there is a consensus that, if a person is to be convicted and sentenced, it will be better for them if this happens following a plea, not a trial.[197]

Are innocent people induced to plead guilty?

The incentives offered through plea bargaining, or the penalties associated with going to trial, may be substantial enough to induce people who are innocent of a crime to plead guilty.[198] This is perhaps especially true for lower-level cases in which a guilty plea may hasten case disposal and secure a person's release from custody. (See "Misdemeanor justice and plea bargains" at page 16.) Innocent people charged with more serious crimes may still be induced to plead guilty, either to avoid a harsher punishment at conviction or, if they are already incarcerated but likely to win their case (and exoneration) on appeal, to secure an immediate release from prison on a sentence of time served rather than wait out a lengthy appeal process.[199]

Estimating the frequency with which this happens is, however, challenging; researchers have primarily approached the question using defendant interviews and analyses of exonerations, both of which, as described below, come with significant limitations. Such challenges mean that little research has been conducted specifically on guilty pleas. Research into false admissions of guilt has tended to focus more on false confessions to the police—and the coercive tactics used in interrogation—and less on false guilty pleas made to prosecutors or the conditions that make them more likely.[200] Researchers hypothesize that false guilty pleas may be more common than false confessions because promises of leniency (via reduced charges or at sentencing), which may be very compelling to people, are not permitted during police interrogations.[201] Despite these limitations, research does appear to confirm that, among the millions of cases that are settled through guilty pleas each year, a meaningful number of people are actually innocent of the crimes with which they were charged. For example, in a 2018 study of 166 attorneys, 148 of the participants said that they had been involved in at least one case in which their client chose to plead guilty despite maintaining their innocence.[202]

Self-reported innocence

Interviews with justice-involved people suggest that false guilty pleas may be disturbingly common—at least among people who might be considered

especially vulnerable, such as young people or those with mental illnesses. A survey of more than 1,200 people with mental illnesses who were currently in jail or facing criminal charges in court found that more than one-third—37 percent—reported having falsely pled guilty at some point in their lives.[203] In making these false guilty pleas, the majority stated that they were motivated to do so by the desire "to end the questioning, get [out] of jail, or go home."[204] In an interview study of nearly 200 incarcerated boys between the ages of 14 and 17 years old, nearly one-fifth of participants reported having made false guilty pleas during their lives.[205] In 51 percent of these cases, the young people reported that they had made a false guilty plea in order to avoid more severe consequences and lessen the punishment they received.[206] The likelihood that a young person reported a false guilty plea increased with the number of high pressure tactics they said they had been exposed to by lawyers (such as threats of greater punishment or the use of deception).[207]

Exonerations

Another way of studying innocence among people who plead guilty is to look at cases that were subsequently overturned in court—often through the discovery of new evidence, such as DNA. Exonerations following guilty pleas are not common for several reasons: first, guilty pleas are often given in exchange for a reduced sentence or release from jail, diminishing the perceived urgency or necessity of proving someone's factual innocence; second, if someone has pled guilty, it is more difficult to convince others of their innocence or that it is appropriate to invest the resources needed to investigate and secure an exoneration; and third, by pleading guilty, people may lose access to mechanisms of appeal and due process that would facilitate the exoneration process.[208] Nevertheless, a small number of studies have shown that innocent people can be compelled to plead guilty.

One study looked at 466 felony convictions, spanning from 1989 through 2011, in which the accused were later proven to be factually innocent and were exonerated.[209] The researchers found that in approximately 8 percent of these cases, the person was convicted following a guilty plea.[210] Similarly, research conducted by the Innocence Project into 362 convictions that were overturned through DNA evidence found

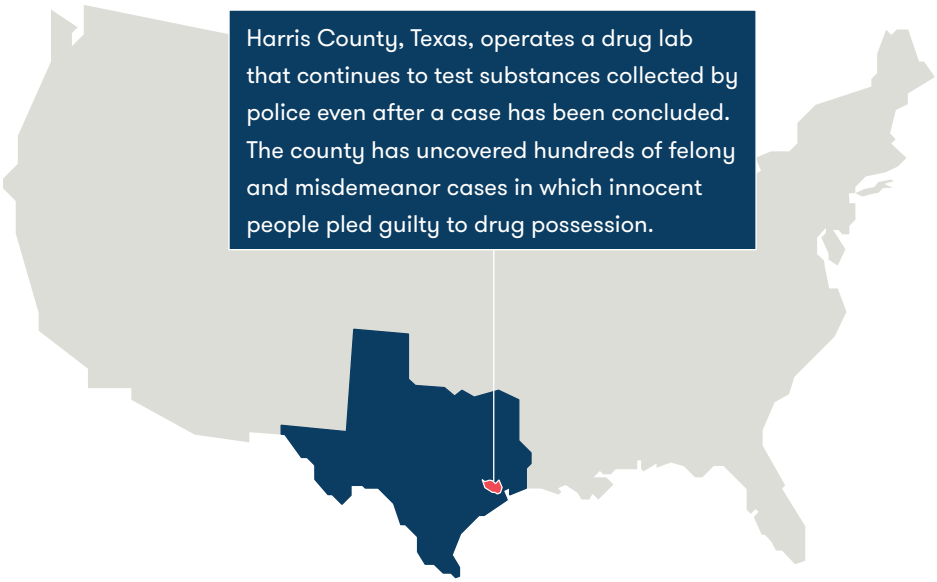
that people in 11 percent of these cases had pled guilty.[211] Researchers in studies such as these are unable to estimate the frequency of false guilty pleas more generally because the sample they are drawn from—cases overturned through exoneration—do not reflect the typical case. They are also limited in their generalizability because they focus on felony cases,

> Research shows what is known intuitively—that cases exist in which the plea offer made, and the opportunity to be released from jail, effectively coerce people who are factually innocent into pleading guilty.

with the majority of convictions in the samples being for homicide and sex offenses.[212] The results of these studies do not, therefore, indicate the frequency of false guilty pleas in lower-level felony or misdemeanor cases. Indeed, exonerations for lower-level cases—in which exculpatory scientific evidence might not exist and in which people are less motivated to spend time and resources proving someone's innocence—almost never happen.[213] Academics theorize, however, that it is for lower-level charges, where the stakes of pleading guilty are lower and the benefits of a faster case resolution are higher, that false guilty pleas may be most common.[214]

Much of what has been learned through exonerations about innocent people being compelled to plead guilty to misdemeanors comes from Harris County (Houston), Texas.[215] Indeed, while only 4 percent of exonerations in the United States from 1989 to 2011 were for misdemeanor cases (85 out of 2,145 cases), 67 percent of these cases come from Harris County.[216] Unlike most other parts of the country, Harris County operates

False guilty pleas in Harris County, Texas.



a drug lab that continues to test substances collected by the police even after the case has concluded.[217] The county has uncovered hundreds of felony and misdemeanor cases in which innocent people pled guilty to drug possession.[218] A review of the misdemeanor cases found that the majority of people pled guilty in order to be released from jail as they were otherwise unable to afford bail; pleading not guilty would likely have resulted in several more months in jail, with the prospect of years in prison if found guilty at trial.[219] (See "Misdemeanor justice and plea bargains," on page 16.) Indeed, researchers have hypothesized that, at least for lower-level charges, factually innocent people may feel the greatest pressure to plead guilty as it is to these people that prosecutors, faced with little compelling evidence of their guilt, will make their most generous plea offers in order to secure a conviction.[220]

Ultimately, research shows what is known intuitively—that cases exist in which the plea offer made, and the opportunity to be released from jail, effectively coerce people who are factually innocent into pleading guilty. The scale of this problem, however, remains difficult to determine.[221]

Conclusion: Limitations and future directions

Admittedly, the dynamic and iterative nature of plea bargaining—a largely undocumented process that permeates the entire life of a criminal case, long or short—presents significant challenges to researchers trying to identify and isolate relationships between key variables and plea bargaining practices or outcomes. Plea bargaining neither occurs at a single moment in time, nor is it a definitive quantifiable product that remains constant. Rather, it is a complex, interactive dialogue involving multiple people and various considerations, many of which are beyond the purview of current criminal justice data collection capabilities (such as transaction costs, financial access, or psychological and cognitive biases) and, therefore, remain largely untested and unaccounted for in current research.

As a result, pathways to a negotiated plea deal are not likely straightforward, nor as easily predictable as some research, given limited datasets, may suggest. For example, reducing a person's choice whether to accept a plea offer to a single factor—the hypothetical case outcome if the case were to go to trial—is perhaps too simplistic a frame. It not only ignores the inherently coercive nature of pretrial detention, but also structural factors (poor lawyering, agency costs, and lawyers' self-interest) and individual psychological or behavioral ones (such as overconfidence, self-serving biases, denial mechanisms, and risk preference) that shape people's actions and motives in ways that can heavily influence plea bargaining processes, behavior, and outcomes.[222] Given this complex nature, it is understandable why existing studies fail to satisfactorily describe, explain, or prove the full suite of factors that influence plea bargaining behavior and outcomes—and why definitive answers are difficult to discern.[223]

The result is a mix of complicated, nuanced, and sometimes contradictory research findings. For example, when researchers have compared bargained-for sentences and sentences that would have resulted from trial, only some researchers found evidence of a large difference.

Nor, evidently, has it been easy for researchers to estimate the true scale of innocent people induced to plead guilty, as data and sampling issues limit studies to only those cases in which people had been exonerated—the tiniest subset of total cases and likely not representative of the typical American criminal case. Although these mixed results are likely due to differences in methodological approaches and sample types, it would be unwise to underestimate the inherent difficulty of putting together the various pieces of the "plea-bargaining puzzle."[224] And only a handful of researchers have managed to design studies that attempted to capture the motivations and factors influencing the people pleading guilty or the bargaining power and resources of their defense counsel.

Only by recording plea bargaining processes and decisions and by making these records available can U.S. courts and prosecutors begin to be held accountable.

Ultimately, the lack of clarity regarding the administration and impacts of plea bargaining is perhaps the most important thing that research has revealed. Guilty pleas account for the vast majority of criminal case outcomes and, as such, form the bedrock of the U.S. criminal legal system. That plea bargaining should remain so obscured, that its biases and injustices should prove so impervious to being seen and understood, is beyond problematic. Fixing the major failings of America's justice system—including mass incarceration and systemic racism—is made exponentially more difficult when the most common and most fundamental of court operations is largely invisible. It is therefore incumbent upon court actors, legislators, advocates, researchers, and the community to demand a system that embraces greater transparency. Only by recording plea bargaining processes and decisions and by making these records available can U.S. courts and prosecutors begin to be held accountable.

Box notes

"Law of plea bargaining: An overview" p. 8

a Mary Vogel, "The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860," *Law & Society Review* 33, no. 1 (1999), 161-246 (explaining that plea bargaining came about as a legal innovation in response to local political and social forces of the time—a time marked by a perceived rise in crime, increased immigration and thus ethnic diversity, and the erosion of social cohesion and cultural consensus); and Albert Alschuler, "Plea Bargaining and Its History," *Columbia Law Review* 79, no. 1 (1979), 24-32 (describing the growth of plea bargaining and extent of its use in the early 20th century), https://perma.cc/BK4N-ZFR9. See also Mark H. Haller, "Plea Bargaining: The Nineteenth Century Context," *Law & Society Review* 13, no. 2 (1979), 273-79, 273 ("[P]lea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century").

b *Santobello v. New York*, 404 U.S. 257, 261 (1971), https://perma.cc/Z7RT-S9MT; and *Missouri v. Frye*, 566 U.S. 134 (2012), https://perma.cc/5RAT-SCZ8. Also see *Lafler v. Cooper*, 566 U.S. 156 (2012) ("The criminal justice system for the most part is a system of pleas, not a system of trials"), https://perma.cc/WQH6-TETJ.

c *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) ("Because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange"), https://perma.cc/JS5J-BAPT; and *Brady v. United States*, 397 U.S. 742, 752 (1970) ("It is this mutuality of advantage that perhaps explains the fact that, at present, well over three-fourths of the criminal convictions in this country rest on pleas of guilty. . ."), https://perma.cc/D5R9-L4FQ. For other cases where courts have used the contract analogy, see *Puckett v. United States*, 556 U.S. 129, 136 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts"), https://perma.cc/7MYG-FXXX/; and *Frye*, 566 U.S. at 8 ("Bargaining is, by its nature, defined to a substantial degree by personal style . . . it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the [plea bargaining] process.").

d *United States v. Mezzanatto*, 513 U.S. 196, 206 (1995), https://perma.cc/Z62E-PRJM.

e For example, while California defines plea bargaining by statute as "any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant," that section of the code does not contain standards for those negotiations. Cal. Penal Code § 1192.7, https://perma.cc/VBG5-5CWA. The legislature later added a separate law that "requires that a defendant's guilty plea be knowing, intelligent, and voluntary" and defines those terms. Cal. Penal Code § 1016.8, https://perma.cc/GR2F-7YZA. Also see Wash. Rev. Code § 9.94A.421, https://perma.cc/W39A-PLZF; and Wash. Rev. Code § 9.94A.431 https://perma.cc/C8Y7-AU5Z. Other states have chosen to promulgate administrative rules or court rules rather than statutes to govern the process of plea bargaining. See for example MD Rules, Rule 4-243, https://perma.cc/GS44-SZKN; Mass. Rules of Criminal Procedure, Rule 12, https://perma.cc/3WML-ACVU; and Ohio Rules of Criminal Procedure, Rule 11, https://perma.cc/G9JZ-PBTQ.

f See *Brady v. United States*, 397 U.S. 742 (1970). By 1970, almost 90 percent of cases were resolved by guilty plea. Although data collected in 20 states in 1978 suggests that guilty plea rates varied between jurisdictions, it nevertheless confirms the wide use of guilty pleas to resolve cases. See Herbert Miller, William McDonald, and James Cramer, *Plea Bargaining in the United States* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, 1978), xii, https://perma.cc/2MYW-MPEJ. See also Herbert Miller, William McDonald, and James Cramer, "Plea Bargaining in the United States," database (Ann Arbor, MI: Inter-university Consortium for Political and Social Research, 1978), https://perma.cc/S2GW-FZWJ.

g *Brady*, 397 U.S. at 748.

h *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment nor retaliation so long as the accused is free to accept or reject the prosecution's offer"), https://perma.cc/P5DW-KG8B.

i *Brady*, 397 U.S. at 750, 755; and *Corbitt v. New Jersey*, 439 U.S. 212, 218-219 (1978) ("[T]here is no per se rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea."), https://perma.cc/5F73-N4HS. Also see *Mezzanatto*, 513 U.S. at 209-210 (1995) ("The plea bargaining process necessarily exerts pressure on people to plead guilty and to abandon a series of fundamental rights. . . ."). In addition to giving up their right to trial by pleading guilty, people also give up accompanying guarantees—including their right of confrontation and cross-examination of witnesses, right to a jury, right against self-incrimination, and the right only to be convicted on proof beyond a reasonable doubt. See for example H.M. Emory, "The Guilty Plea as a Waiver of Rights and as an Admission of Guilt," *Temple Law Quarterly* 44 (1970).

j *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992), https://perma.cc/UV77-F49X. However, guilty pleas may be voidable (subject to annulment by a court at the request of a party) when the prosecution has threatened physical harm, threatened to use false testimony, or threatened additional prosecutions. *Santobello*,

404 U.S. at 265-66 (Douglas, J., concurring). For the definition of voidable, see Steven H. Gifis, *Law Dictionary* (3d ed.) (New York: Barron's Educational Series, Inc., 1991), 521.

k In *Santobello*, the Court held that a prosecutor may not trick a person into pleading guilty. It also held that, once a binding plea agreement has been entered into, prosecutors may not renege on their promises. *Santobello*, 404 U.S. at 266-267. In *Santobello*, the original prosecutor for the case had agreed to make no recommendation as to sentencing. However, by the time the plea was entered, a new prosecutor had been assigned to the case and recommended the maximum sentence. The judgment (and sentence) was vacated and the case remanded to the state courts to decide whether the guilty plea should be accepted on its original terms (and the petitioner re-sentenced by a different judge) or allowed to be withdrawn.

l See for example *Corbitt*, 439 U.S. at 218-219 (promise of leniency); *Brady*, 397 U.S. at 752 (threatening the death penalty); and *Bordenkircher*, 434 U.S. 357 (threatening to prosecute under a different charge with a mandatory life sentence). See also *United States v. Goodwin*, 457 U.S. 368, 380-383 (1982) (no presumption of vindictiveness although harsher charges were not filed until after accused claimed his right to jury trial), https://perma.cc/95VP-6QLG; *United States v. Usher*, 703 F.2d 956, 958 (6th Cir. 1983) (concluding that the person's guilty plea was not coerced when he was required to plead guilty in order for his wife to get a reduced term), https://perma.cc/9D3E-AMCT; and *Harman v. Mohn*, 683 F.2d 834, 836-838 (4th Cir. 1982) (holding that the person's guilty plea was not coerced when the government agreed not to prosecute his wife in exchange for a plea), https://perma.cc/QK9D-3WC5.

m *Henderson v. Morgan*, 426 U.S. 637, 647 (1976) (holding that a person must understand the nature of the charges against him but need not comprehend every element of the charged offense(s), only those elements considered critical), https://perma.cc/T5UZ-4KAA; *Bousley v. United States*, 523 U.S. 614, 618-619 (1998) (establishing that if the accused is misinformed about the elements of the offense, the plea is constitutionally invalid), https://perma.cc/Y8LZ-T4KS; and *Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969), (holding that people must understand the constitutional rights waived by pleading guilty and that this understanding cannot be presumed from silence), https://perma.cc/S6Z2-S9S4.

n See Fed. R. Crim. P. 11, https://perma.cc/P2X3-WJC6. For examples of comparable state rules, see N.Y. Crim. Proc. Law § 220, https://perma.cc/J3T7-8LQN; Tex. Crim. Pro. Code Ann. § 27, https://perma.cc/YSN8-UCXG; and Cal. Penal Code § 1002-12. Also see Julian Cook III, "Federal Guilty Pleas: Inequities, Indigence and the Rule 11 Process," *Boston College Law Review*, 60, no. 4 (2019), 1074 (discussing the plea colloquies in *Lee v. United States* and *Class v. United States*). In general, the court also has the responsibility not to enter judgment before determining that there is a factual basis for the plea. However, the factual basis of a plea need not be accurate or complete. See Fed. R. Crim. P. 11. The evidentiary support for a plea's factual basis can come from a variety of sources—from the prosecution's recitation of facts, a pre-sentence report, witnesses, admissions from defendants, or even preliminary hearings. See Brandon Garrett, "Why Plea Bargains Are Not Confessions," *William & Mary Law Review* 57, no. 4 (2016), 1415, 1428-1431, https://perma.cc/SZS6-TXUE. People can also plead guilty while simultaneously protesting their innocence—these guilty pleas are known as "Alford pleas," after the case of *North Carolina v. Alford*, 400 U.S. 25, 36 n.8 (1970) (accused agreed to plead guilty and accept the maximum sentence that could be imposed judicially—a term of 30 years' imprisonment—rather than face a jury trial, which had the option of imposing a death sentence; the court held that this was a valid choice among his options and that the plea was valid despite containing a statement that the person had not committed the crime to which he pled guilty), https://perma.cc/DH8V-BET8.

o Cook, "Federal Guilty Pleas," (2019), 1074, 1107 and 1109 (discussing the plea colloquies in *Lee v. United States* and *Class v. United States*). Also see Stephanos Bibas, "Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops," *William & Mary Law Review* 57, no. 4 (2016), 1055-1081, 1059, 1065, 1074. Silence has been held to be inadequate to waive constitutional rights. *Boykin*, 395 U.S. at 243 & n.5 (holding that people must understand the constitutional rights waived by pleading guilty and that this understanding cannot be presumed from silence). However, only a brief affirmative is required under *United States v. Gardner*, 417 F.3d 541 (6th Cir. 2005) (rejecting the defendant's claim that the mode of inquiry employed by the court during the Rule 11 hearing—which "required only a yes-or-no answer" to most questions—did not satisfy the "core concerns" of Rule 11), https://perma.cc/9HZA-GLWK. The court reiterated its ruling in *United States v. Walker* that, "[T]here is no requirement that in order to rely on a defendant's answer in a guilty-plea colloquy to conclude that the defendant pleaded guilty knowingly and voluntarily, those answers must be lengthy and all-encompassing; a straightforward and simple 'Yes, your Honor' is sufficient to bind a defendant to its consequences." 160 F.3d 1078, 1096 (6th Cir. 1998), https://perma.cc/2YBK-VRGR.

p But see *Burdick v. Quarterman*, 504 F.3d 545, 547 (5th Cir. 2007) (observing that due process requires a person's understanding of the maximum punishment that could be imposed), https://perma.cc/ECR7-PP6S. The lack of clarity as to the sentence to be imposed led the Second Circuit to conclude more recently that a guilty plea failed to meet the "knowing" standard as well. See *United States v. Johnson*, No. 15-3498-cr (2d. Cir. 2017), https://perma.cc/MM4N-T5KQ. In *Padilla v. Kentucky*, the Supreme Court explicitly extended the scope of the understanding required to the collateral consequences of the plea. *Padilla v. Kentucky*, 559 U.S. 356 (2010) (petitioner was entitled to be advised that a conviction was likely to result in his deportation before pleading guilty), https://perma.cc/8B37-BVE3.

q *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), https://supreme.justia.com/cases/federal/us/429/545/.

r See *United States v. Ruiz*, 536 U.S. 622, 629-633 (2002) (rejecting a constitutional right to impeachment or affirmative-defense evidence in advance of a guilty plea), https://perma.cc/NAL9-BK5T. Impeachment evidence raises questions about the credibility of a witness while affirmative defense evidence is evidence that could negate liability even if a crime was committed. Compare the fact that civil litigants enjoy broad pretrial discovery from witness depositions to interrogatories to document discovery. See Fed. R. Civ. P. 26-37, https://perma.cc/TE29-VEAS. The holding in *Ruiz* seems to run counter to that in *Brady v. Maryland*, 373 U.S. 83 (1963) (the prosecution in a criminal trial has a duty to disclose evidence that is favorable to the defense (exculpatory) and material to guilt or sentencing), https://perma.cc/X8JP-AFZC.

For cases following *Brady*, see *United States v. Agurs*, 427 U.S. 97 (1976) (holding that disclosure of material described in *Brady* must occur even absent specific request), https://perma.cc/D786-BAU7; *United States v. Bagley*, 473 U.S. 667 (1985) (evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different), https://perma.cc/E5GH-F35X; *Giglio v. United States*, 405 U.S. 150 (1972) (exculpatory evidence includes "evidence affecting" witness "credibility," where the witness' "reliability" is likely "determinative of guilt or innocence"), https://perma.cc/Z42S-XNGZ; and *United States. v. Clark*, No. 05-80810 (E.D. Mich. 2006) (recognizing that although there is no constitutional right to broad discovery in a criminal case, limited disclosures are required in criminal cases as a result of *Brady*), https://perma.cc/FDD5-ASUF.

It is unclear whether in *Ruiz* the Court meant to include all material exculpatory evidence referenced in *Brady*. See *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (reasoning that "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence" that makes it "highly likely the Supreme Court would find a violation of the Due Process Clause if prosecutors . . . have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea."), https://perma.cc/74TW-9Z3G. The Second and Fifth Circuits, on the other hand, have found that *Ruiz* precludes all *Brady* challenges to guilty pleas. See *Friedman v. Rehal*, 618 F.3d 142 (2d Cir. 2010), https://perma.cc/W4LM-X354; and *United States v. Conroy*, 567 F.3d 174 (5th Cir. 2009), https://perma.cc/QPW4-LRJW, respectively.

s Stephanos Bibas, "Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection," *California Law Review* 99, no. 4 (2011), 1117-1161, https://perma.cc/HS2T-BLNG.

t These are: *Padilla v. Kentucky*, 559 U.S. 356 (2010), https://perma.cc/M9QC-6Z6K; *Missouri v. Frye*, 566 U.S. 134 (2012), https://perma.cc/2SXR-BW8L; *Lafler v. Cooper*, 566 U.S. 156 (2012), https://perma.cc/59CN-MFDK; and *Lee v. United States*, 582 U.S. ___ (2017), https://perma.cc/AX9M-L56Y. Also see *Hill v. Lockhart*, 474 U.S. 52 (1985) (establishing that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)), https://perma.cc/64UN-C3C7. However, there is a circuit split as to whether this right to counsel applies during "informal" plea offers. In *Frye*, the Court used the word "formal;" in *Lafler*, it did not. Some lower courts are now applying the right to effective legal counsel only to "formal" plea offers. See for example *Johnson v. United States*, 860 F. Supp. 2d 663, 789-90 (N.D. Iowa 2012) (establishing the requirement of a formal plea offer from the prosecution to be a bright line test governing whether a claim of prejudice arising from counsel's deficient performance in plea negotiations can be made), https://perma.cc/K3VK-96HB; and *DeFilippo v. United States*, No. 09-CV-4153 (NGG) (E.D.N.Y. Mar. 1, 2013) ("Thus, the lack of a formal plea offer strongly weighs against a finding that [but for the ineffective assistance of counsel] DeFilippo would have pled guilty"), https://perma.cc/4R3N-4PTG.

u "[A] valid guilty plea "forgoes not only a fair trial, but also other accompanying constitutional guarantees. . . . includ[ing] the privilege against compulsory self-incrimination, the jury trial right, and the right to confront accusers. . . . A valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered. Neither can the defendant later complain that the indicting grand jury was unconstitutionally selected." *Class v. United States*, 583 U.S. ___ (2018) (citations omitted), https://perma.cc/77XF-R8XB. For trial rights relinquished, see *Boykin v. Alabama*, 395 U.S. 238, 242-244 (1969) (a guilty plea involves relinquishing the rights to a jury trial, to the assistance of trial counsel, to raise a defense, and to confront accusers, and against self-incrimination). For antecedent rights relinquished, see *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (entry of a guilty plea forfeits an accused's right to raise claims of constitutional deprivation that occurred prior to the entry of the guilty plea), https://perma.cc/S7GV-QU4H. For rights that are not impliedly waived by a plea deal, see *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975) (holding that the accused did not waive his double jeopardy claim when he entered the plea because his claim was that the State could not convict him regardless of whether his factual guilt was established), https://perma.cc/3SQH-3WKJ. Also see *Blackledge v. Perry*, 417 U.S. 21 (1974), https://perma.cc/Z98V-3MFC.

v For a discussion of express waiver provisions, see Alexandra W. Reimelt, "An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal," *Boston College Law Review* 51, no. 3 (2010), 871, 876-879, https://perma.cc/Y682-QYJ3. For rights that may not be waived, see for example *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (suggesting that there are rights, such as the right to conflict-free counsel, that are so integral to the fact-finding process that they cannot be waived), https://perma.cc/LJ8F-3G7B.

w See *Class v. United States*, 583 U.S. ___ (2018) (a guilty plea alone does not bar people from challenging the constitutionality of the statute under which they were convicted on direct appeal), https://perma.cc/5S6S-EAUW; and *Garza v. Idaho*, 586 U.S. ___ (2019)

(people have a constitutional right to an appeal even if they have purportedly waived that right because some claims such as whether the waiver is valid are unwaivable), https://perma.cc/U9LV-XTM2.

x *United States v. Lutchman*, No. 17-291 (2d Cir. Dec. 6, 2018) (a person's appellate waiver in his plea agreement was not supported by consideration and thus did not bar his challenge to his sentence on appeal), https://perma.cc/J5DS-X2T4.

"Misdemeanor justice and plea bargains" p. 16

a Robert C. Boruchowitz, Malia N. Brink, and Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (Washington, DC: National Association of Criminal Defense Lawyers, 2009), 10-11 & 25-26, https://perma.cc/U8RN-AV5T; and Jenny Roberts, "Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts," *UC Davis Law Review* 45 (2011), 277, 280-281, https://perma.cc/W5JG-WMGV.

b Ian Weinstein, "The Adjudication of Minor Offenses in New York City," *Fordham Urban Law Journal* 31, no. 4 (2004), 1157, 1159-1160, https://perma.cc/NNG3-ZM9S.

c Designations vary widely from jurisdiction to jurisdiction and are largely a product of a particular jurisdiction's labeling choices. See Megan Stevenson and Sandra Mayson, "The Scale of Misdemeanor Justice," *Boston University Law Review* 98 (2018), 731, 739-740, https://perma.cc/2YSR-8NAZ. Also see Roberts, "Why Misdemeanors Matter," 2011, 277, 291-292; and Ian Weinstein, "The Adjudication of Minor Offenses," 2004, 1157, 1164-1166 (discussing the wide breadth of minor criminal statutes in New York).

d Ram Subramanian, Ruth Delaney, Stephen Roberts et al., *Incarceration's Front Door: The Misuse of Jails in America* (New York: Vera Institute of Justice, 2015), https://perma.cc/K6UV-F45J. Also see John Irwin, *The Jail: Managing the Underclass in American Society* (Berkeley, CA: University of California Press, 1985), 2 (describing jail as an institution of control meant to "manage society's rabble").

e Stevenson and Mayson, "The Scale of Misdemeanor Justice," 2018, 731, 737. The authors note that between 2009 and the publication of their study most people used a national estimate calculated by the National Association of Criminal Defense Lawyers (NACDL) in a 2009 study about misdemeanors. Extrapolating from 2006 data from 12 states, NACDL estimated that there were 10.5 million misdemeanor cases nationally. Stevenson and Mayson suggest that the discrepancy between their number and NACDL's estimate may be due to the fact that the 12 states used in the 2009 analysis could have had misdemeanor filing rates lower than the national average, creating a downward bias to the estimate. Ibid., 733 and 763-764. For NACDL's estimate, see Boruchowitz, Brink, and Dimino, *Minor Crimes, Massive Waste*, 2009, 11. For the statewide breakdown, see National Center for State Courts, "Statewide Criminal Caseload Composition in 31 States, 2016," https://perma.cc/8AEX-SPVY. This number has not changed substantially over the last decade. See Robert LaFountain, Richard Schauffler, Shauna Strickland et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* (Washington, DC: National Center for State Courts, 2010), 24 (finding that in 11 state courts, 79 percent of all cases in which a district attorney filed charges involved people accused of misdemeanor crimes), https://perma.cc/92VU-2KLK. Also see Preeti Chauhan, Adam G. Fera, Megan B. Welsh et al., *Trends in Misdemeanor Arrests in New York* (New York: John Jay College of Criminal Justice, 2018), 16 (reporting that in New York City, misdemeanor arrests numbered 179,427, and 271,205 criminal summonses were issued in 2016), https://perma.cc/MA8M-FUDX.

f Compare Malcolm Feeley, *The Process is Punishment* (New York: Russell Sage Foundation, 1979), 5 (stating that 80 to 90 percent of all criminal prosecutions begin and end in the lower courts); Josh Bowers, "Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute," *Columbia Law Review* 110, no. 7 (2010), 1655, 1717 and table 3 (demonstrating that in 2008, misdemeanors in Iowa outnumbered felonies five to one [126,246 to 25,077]); and Victor Eugene Flango, "Judicial Roles for Modern Courts," National Center for State Courts, 2013, https://perma.cc/9XFM-63AE (noting that "approximately 80 percent of criminal cases are misdemeanors, and more than 70 percent of them are handled by municipal judges, justices of the peace, or magistrates in limited-jurisdiction courts"). Also see Stevenson and Mayson, "The Scale of Misdemeanor Justice," 2018, 746-747, (reporting that NCSC confirmed that the three-to-one ratio between misdemeanor and felony caseloads remained stable between 2007 and 2016).

g Alexandra Natapoff, "Misdemeanors," *Annual Review of Law and Social Science* 11 (2015), 255, 256 (stating that "the lowly misdemeanor—not homicide or rape—is the paradigmatic American crime and the paradigmatic product of the American criminal system"). Most misdemeanor cases—95 percent—are resolved by guilty plea. Ibid., 255-267, 259. This is also borne out when looking at specific jurisdictions. For example, in 2014, only 0.2 percent of misdemeanor cases in New York City went to trial. See Michael Rempel, Ashmini Kerodal, Joseph Spadafore, and Chris Mai, *Jail in New York City: Evidence-Based Opportunities for Reform* (New York: Center for Court Innovation and Vera Institute of Justice, 2017), 70, Table 5.5, https://perma.cc/JTY9-CRAC.

h See for example Issa Kohler-Hausmann, "Managerial Justice and Mass Misdemeanors," *Stanford Law Review* 66, no. 3 (2014), 611, 624, n.27 (arguing that misdemeanor justice in New York City is not particularly interested in evidence or guilt, but rather in exercising social control through marking, procedural hassle, and performance), https://perma.cc/ND67-MAWV.

i Alexandra Natapoff, "Aggregation and Urban Misdemeanors," *Fordham Urban Law Journal* 40, no. 3 (2016), 1043, 1070-1071, https://perma.cc/Q3NU-JGCY. Also see Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton, NJ: Princeton University Press, 2018), 125 (noting that two DA's offices had "standard offers printed

on a sheet that listed the office policy for arraignment offers by charge type and number of prior arrests") and 656-657 (discussion about standard deals).

j Alisa Smith and Sean Maddan, *Three-Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*, (Washington, DC: National Association of Criminal Defense Lawyers, 2011), 14-15 (of 1,649 misdemeanor adjudications in 21 Florida counties, "[a]lmost 70 percent of defendants observed entered a guilty or no contest plea at arraignment"), https://perma.cc/883L-FSDW. In New York City, more than 57 percent of all misdemeanor and violation cases reach a disposition at arraignment. See Kohler-Hausmann, "Managerial Justice," (2014), 611, 654. Also see Boruchowitz, Brink, and Dimino, *Minor Crimes, Massive Waste*, 2009, 31-32 (discussing how in many jurisdictions defense lawyers are expected to "meet and plead" their clients in order to resolve cases as soon as first appearance, with cases taking a total of five minutes in certain jurisdictions); and Feeley, *The Process is Punishment*, 1979, 9-11 ("While a few cases took up as much as a minute or two of the court's time . . . the overwhelming majority of cases took just a few seconds").

k For examples of hard-to-refuse deals, see Kohler-Hausmann, "Managerial Justice," 2014, 645 (in New York City, "[t]he largest misdemeanor disposition category, the adjournment in contemplation of dismissal (ACD), is a conditional dismissal [and] . . . [t]he largest conviction category resulting from misdemeanor arrests is the noncriminal violation or infraction"). For both ACDs and noncriminal convictions, cases are sealed after a certain specified period. Ibid., 649 and 651. Also see Josh Bowers, "Punishing the Innocent," *University of Pennsylvania Law Review* 156, no. 5 (2008), 1117, 1144 (noting that in New York City in 1998, 52 percent of all misdemeanor charges that ended in conviction were reduced to pleas to noncriminal violations and that for defendants with no criminal convictions, the rate of reduction was 86 percent. Even for people with both prior felony and misdemeanor convictions, the rate of that type of reduction was more than 25 percent. Also, more than 50 percent of all misdemeanor charges that ended in conviction resulted in non-jail dispositions. Of jail sentences, 57 percent were for sentences of time served.)

l Josh Bowers, "Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute," *Columbia Law Review* 110 (2010), 1655, 1701-1702 and 1709. Indeed, Bowers found that in both Iowa and New York, prosecutors almost never declined to charge misdemeanor offenses largely because they expected to procure quick guilty pleas in these cases. Ibid., 1716-1720. Also see Ibid., 1709 (in which the author discusses how "disposable" cases are where prosecutors' initial decisions are "dispositive on the question of whether the defendant will ultimately end up with some type of conviction."). Also see Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," *Harvard Law Review* 117, no. 8 (2004), 2463, 2464-2465 (discussing the "shadow of a trial" theory of plea bargaining, in which bargains are struck in anticipation of likely trial outcomes and are affected by procedural safeguards inherent in trial practice).

m Bowers, "Punishing the Innocent," 2008, 1139-1140 (discussing process costs in low-stakes cases for prosecutors, defense attorneys, and judges) and 1132-1134 (discussing defendants' process costs in low-stakes cases). Also see Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys*, (Chicago: University of Chicago Press, 1978), 103 (finding that the "central concern [for prosecutors] with . . . nonserious cases is to dispose of them quickly). Heumann also noted that people "in relatively minor cases . . . simply want to 'get it over with.'" Ibid. at 69. Also see Alexandra Natapoff, "Misdemeanors," *Southern California Law Review* 85, no. 5 (2012), 1313, 1343-1347 (discussing why people feel pressure to plead guilty in low stakes misdemeanor cases), https://perma.cc/Q3SF-NV8V; Issa Kohler-Hausmann, "Managerial Justice and Mass Misdemeanors," *Stanford Law Review* 66, no. 3 (2014), 611, 655 and 691; Weinstein, "Adjudication of Minor Offenses," 2004, 1157, 1162-1163; and Feeley, *The Process is Punishment*, 1979, 31-33.

n See note m. It can also include the stigma associated with having been arrested and a multitude of process costs related to mounting a defense—including attorney's fees, the inconvenience and procedural hassle of multiple court appearances, and pecuniary loss due to missed work or unanticipated cost outlays such as those associated with transport or standby childcare. Bowers also notes that the "lead up to even a misdemeanor trial may take weeks or months," some or all of which may be spent in jail. See Bowers, "Punishing the Innocent," 2008, 1133. Also see Heumann, *Plea Bargaining*, 1978, 70 (discussing how people in minor cases compare the cost of pleading guilty with the costs of fighting their case and decide more often than not that pleading guilty is less costly).

o Feeley, *The Process is Punishment*, 1979, 13 (describing some of the reasons why it may be "rational" for people to plead guilty in petty offense cases). Also see Bowers, "Punishing the Innocent," 2008, 1139-1140.

p See for example Bowers, "Legal Guilt, Normative Innocence," 2010, 1655; and Kohler-Hausmann, "Managerial Justice," (2014), 611.

q Kohler-Hausmann, "Managerial Justice," 2014, 611, 643 and 656 ("As the courts shifted away from the adjudicative model toward the managerial model, criminal justice actors increasingly used the misdemeanor process to mark, classify, and supervise people, often without securing a conviction or imposing a sentence").

"Challenges in researching plea bargaining" p. 25

a Besiki L. Kutateladze, Victoria Z. Lawson, and Nancy R. Andiloro, "Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in Felony Drug Cases," *Law and Human Behavior* 39, no. 5 (2015), 431-442, 431.

b Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?," 2015, 432. See generally Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report* (New York: Vera Institute of Justice,

2012), https://perma.cc/E6PW-YCWR, in which the researchers found several discrepancies between how prosecutors viewed their work and statistical analysis of actual case outcomes.

c See for example Allison D. Redlich, Alicia Summers, and Steven Hoover, "Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness," *Law and Human Behavior* 34, no. 1 (2010), 79-90, 79 and 89.

d See for example Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 434.

e See Besiki Kutateladze, "Tracing Charge Trajectories: A Study of the Influence of Race in Charge Changes at Case Screening, Arraignment, and Disposition," *Criminology* 56, no. 1 (2018), 123-153.

f Kutateladze, "Tracing Charge Trajectories," 2018, 127.

g See Andrew Chongseh Kim, "Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study," *Mississippi Law Journal* 84, no. 5 (2015), 1195-1256.

h Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 440.

i Sonja Starr, "Estimating Gender Disparities in Federal Criminal Cases," *University of Michigan Law & Economics Working Papers* 57 (2012), 2 and 3, https://perma.cc/N5FP-JZBC.

j Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 431-432.

k Don Stemen and Gipsy Escobar, "Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin," *Justice Quarterly* 35, no. 7 (2018), 1166-1194, 1168; Anne Morrison Piehl and Shawn D. Bushway, "Measuring and Explaining Charge Bargaining," *Journal of Quantitative Criminology* 23, no. 2 (2007), 105-125; and Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 440.

"Displaced sentencing discretion? The impact of sentencing guidelines on charge bargaining practices" p. 36

a Until the late 1970s, judges had unfettered discretion to fashion sentences subject only to statutory maximums. As a result, criminal sentences were not only inconsistent and unpredictable, but also rife with unwarranted disparities between similarly situated offenders. Academic commentators highlighted a "gross disparity in sentencing, with different sentences imposed upon similar offenders who have committed similar offenses by the same judge on different days, different judges on different days, different judges on the same day, and different judges in different jurisdictions." See Richard Singer, "In Favor of 'Presumptive Sentences' Set by a Sentencing Commission," *Crime & Delinquency* 24, no. 4 (1978), 401, 402. In her dissent in *Blakely v. Washington*, U.S. Supreme Court Justice Sandra Day O'Connor noted that unguided sentencing discretion "inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race." 542 U.S. 296, 315 (2004) (O'Connor, J., dissenting). Judge Marvin Frankel criticized this highly discretionary approach to sentencing as lawless and unfair in his book *Criminal Sentences: Law Without Order* (New York: Hill & Wang, 1973), 8. For additional discussion on the rationale for sentencing guidelines, see Steven Chanenson, "The Next Era of Sentencing Reform," *Emory Law Journal* 54, no. 1 (2005), 377-460, 396-397, https://perma.cc/365T-XJEX. For the most recent count of jurisdictions with sentencing guidelines, see "Jurisdictions" tab at "Sentencing Guidelines Resource Center," Robina Institute of Criminal Law and Criminal Justice, University of Minnesota, https://perma.cc/Y6G8-RMFF.

b For the definition of "presumptive" sentencing guidelines, see Chanenson, "The Next Era of Sentencing Reform," 2005, 384. Also see Jon Wool and Don Stemen, *Aggravated Sentencing: Blakely v. Washington: Practical Implications for State Sentencing Systems* (New York: Vera Institute of Justice, 2004), 2, https://perma.cc/YC6U-UQTM.

c For definitions of "voluntary" sentencing guidelines, see Chanenson, "The Next Era of Sentencing Reform," 2005, 384. Also see Wool and Stemen, *Aggravated Sentencing*, 2004, 2.

d For a discussion about these differences, see Richard Frase, "Varying Binding Effects of Guidelines: The Mandatory-to-Advisory Continuum," Robina Institute of Criminal Law and Criminal Justice, University of Minnesota, March 25, 2015, https://perma.cc/HD5X-YHP2.

e See for example Candace McCoy, "Determinate Sentencing, Plea Bargaining Bans, and Hydraulic Discretion in California," *Justice System Journal* 9, no. 3 (1984), 256-275. Also see David Boerner, "Sentencing Guidelines and Prosecutorial Discretion," *Judicature* 78, no. 4 (1995), 196, 198, https://perma.cc/CK22-8BMQ.

f Terance D. Miethe, "Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion," *Journal of Criminal Law & Criminology* 78, no. 1 (1987), 155, 165-171, https://perma.cc/S2QZ-K4LP. Miethe also found little evidence that extralegal attributes became more important predictors of dispositions (severity of initial charges, charge dismissals, charge reductions, sentence negotiations, and overall plea bargains) after the guidelines were implemented.

g Ibid., 175.

h Unlike other states with presumptive sentencing guidelines, Ohio does not have a sentencing grid. Presumptions, required findings or factors, or other guidance, including sentencing ranges, are contained in the criminal code for each criminal offense. John Wooldredge and Timothy Griffin, "Displaced Discretion Under Ohio Sentencing Guidelines," *Journal of Criminal Justice* 33 (2005), 301-316. See also John Wooldredge, Fritz Rauschenberg,

Timothy Griffin, and Travis Pratt, *Impact of Ohio's Senate Bill 2 on Sentencing Disparities* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 2002), 4, https://perma.cc/TLG8-UHU4.

i Wooldredge and Griffin, "Displaced Discretion, Ohio," 2005, 301-316. Similar to Miethe's findings, the researchers also found that any increase in levels of prosecutorial discretion that might have occurred did not result in substantive extralegal disparities in case dispositions.

j Wooldredge and Griffin, "Displaced Discretion, Ohio," 2005, 301, 310.

k Washington, DC, implemented voluntary sentencing guidelines in 2006 after a pilot period that started in 2004. Previously, the district operated under an indeterminate sentencing structure until 1999 and then a determinate system after discretionary parole was abolished in 2000. See District of Columbia Sentencing Commission, *An Evaluation of the DC Voluntary Sentencing Guidelines* (Washington, DC: District of Columbia Sentencing Commission, 2017), 5-6, https://perma.cc/G52E-S8FX.

l Stephen E. Vance and J. C. Oleson, "Displaced Discretion: The Effects of Sentencing Guidelines on Prosecutors' Charge Bargaining in the District of Columbia Superior Court," *Criminal Justice Policy Review* 25, no. 3 (2014), 347-377.

m Stephen E. Vance, Kerry M. Richmond, and J. C. Oleson, "Weighing the Value of the Bargain: Prosecutorial Discretion After Sentencing Guidelines," *Criminal Justice Policy Review* 30, no. 7 (2019).

n Vance and Oleson, "Displaced Discretion, DC," 2014, 347, 368; and Vance, Richmond and Oleson, "Weighing the Value of the Bargain," 2019.

o Wooldredge and Griffin, "Displaced Discretion, Ohio," 2005, 301, 304; Vance and Oleson, "Displaced Discretion: DC," 2014, 347, 353; Vance, Richmond and Oleson, "Weighing the Value of the Bargain," 2019; and Miethe, "Charging and Plea Bargaining Practices under Determinate Sentencing," 1987, 155, 161.

p Anne Morrison Piehl and Shawn D. Bushway, "Measuring and Explaining Charge Bargaining," *Journal of Quantitative Criminology* 23, no. 2 (2007), 105, 118-119.

q Piehl and Bushway, "Measuring and Explaining Charge Bargaining," 2007, 105 and 117.

Endnotes

1 For a description of the typical adversarial common law trial, see for example, Gerard E. Lynch, "Our Administrative System of Criminal Justice," *Fordham Law Review* 66, no. 6 (1998), 2117, 2118-2119, https://perma.cc/YKC7-8TW3. For a discussion of how this trial-centric vision of criminal justice is embedded in the popular imagination and, in particular, cultural depictions of the system, see Stephanos Bibas, *The Machinery of Criminal Justice* (New York: Oxford University Press, 2012), xv-xvi.

2 For a discussion of how trials create public accountability for both the accused and the government through the public airing of charges and evidence, see Mary Jo White, "The Importance of Trials to the Law and Public Accountability," speech, United States Securities and Exchange Commission, 5th Annual Judge A. Flannery Lecture, November 14, 2013, https://perma.cc/YH5T-JLMU.

3 In 2018, only 2 percent of criminal cases resolved in federal court went to trial. United States Courts, "U.S. District Courts—Judicial Business 2018," https://perma.cc/B33N-8DWE. The percentages for most state courts were comparable. See Nicole Waters, Kathryn Genthon, Sarah Gibson, and Diane Robinson, "Court Statistics Project DataViewer," database (Washington, DC: Court Statistics Project, 2019), http://popup.ncsc.org/CSP/CSP_Intro.aspx.

4 For example, in large urban courts in 2009, the most recent year for which data was gathered, 66 percent of people arrested on felony charges were convicted—54 percent of a felony and the remaining 12 percent of a misdemeanor; 97 percent of these convictions were the result of a plea. Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables* (Washington, DC: Bureau of Justice Statistics (BJS), 2013), 22, 24, Table 21, https://perma.cc/8PNS-WDA6. Of the 79,704 people whose criminal cases were terminated in federal court in 2018, 73,109 were convicted. 71,550 (98 percent) of them pleaded guilty. United States Courts, "U.S. District Courts—Judicial Business 2018." Also see Bibas, *The Machinery of Criminal Justice*, 2012.

5 For the proportion of guilty pleas that are a result of plea bargaining, see Lindsey Devers, *Plea and Charge Bargaining: Research Summary* (Washington, DC: Bureau of Justice Assistance, 2011), 1, https://perma.cc/TQR8-79JU. For the definition of plea bargaining see, *Black's Law Dictionary* 1270 (11th ed., 2014).

6 Joseph A. Colquitt, "Ad Hoc Plea Bargaining," *Tulane Law Review* 75, no. 3 (2001), 695, 696.

7 *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), https://perma.cc/WQH6-TETJ.

8 Wesley MacNeil Oliver, "Toward a Common Law of Plea Bargaining," *Kentucky Law Review* 102, no. 1 (2013), 1, 31-37, https://perma.cc/TE94-LAJ5 (discussing the near limitless discretion prosecutors possess when making charging and plea bargaining decisions). For definitions, see Marc Miller, Ronald Wright et al., *Criminal Procedures, Prosecutions, and Adjudications: Cases, Statutes and Executive Materials*, 6th ed. (New York: Wolters Kluwer, 2019), 309 and 363.

9 Gerard E. Lynch, "Screening Versus Plea Bargaining: Exactly What Are We Trading Off?," *Stanford Law Review* 55 (2003) 1399, 1403 (arguing that most plea negotiations are discussions of the merits of the case in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor's case, or mitigating circumstances that merit mercy), https://perma.cc/6FUH-VZVV. Also see Cynthia Alkon, "What's Law Got to Do with It? Plea Bargaining Reform after *Lafler* and *Frye*," *Arbitration Law Review* 7, no. 1 (2015), 10, https://perma.cc/X4WG-DW8L.

10 See for example John Lande, "A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation," *Cardozo Journal of Conflict Resolution* 16, no. 1 (2014) 1, 15-16 and footnote 47, https://perma.cc/2PNY-ZWMZ.

11 Alkon, "What's Law Got to Do with It?", 2015, 10.

12 For "blind plea," see LegalMatch, "Blind plea," https://perma.cc/6CG9-MSTQ. For "pleading the sheet," see Laura Berend, "Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115," *American University Law Review* 48, no. 2 (1998), 465, notes 211 and 227, https://perma.cc/SN9E-CH76. For a discussion on the varied meanings of an "open plea," see *Harper v. State*, 567 S.W.3d 450, 454-455 (Tex. App. 2019), (discussing how one of the two meanings refers to "pleas where no plea bargaining of any kind has occurred"), https://perma.cc/6LFD-UJH8.

13 Stephanos Bibas, "Transparency and Participation in Criminal Procedure," *New York University Law Review* 81, no. 3 (2006), 911, 923 ("Plea bargaining usually occurs in conference rooms, courtroom hallways, or on private telephone calls instead of open court"), https://perma.cc/2LSS-5ASD. Also see Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," *Harvard Law Review* 117, no. 8 (2004), 2463, 2547 ("plea bargaining hides within a low-visibility process"), https://perma.cc/GA76-3SQX; Robert E. Scott and William J. Stuntz, "Plea Bargaining as Contract," *Yale Law Journal* 101, no. 8 (1992), 1909, 1911-1912, ("Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present"); and Daniel S. McConkie, "Judges As Framers of Plea Bargaining," *Stanford Law and Policy Review* 26, no. 1 (2015), 61, 63, ("Plea bargaining happens with little judicial involvement—between prosecutors and defense attorneys, behind closed doors and with practically no public oversight"), https://perma.cc/QV6X-EQTS. See also Alkon, "What's Law Got to Do with It?," 2015, 1, 11 (discussing a 1984 court ethnography by Douglas Maynard, which found that plea negotiations happened in "spurts and starts" in between other conversations).

14 Scott and Stuntz, "Plea Bargaining as Contract," 1992, 1909, 1912 (discussing critiques of the illicit and hidden nature of plea bargaining: "critics emphasize the unfairness (and inaccuracy)

of determining defendants' fate without full investigation, without testimony and evidence and impartial factfinding").

15 H. Mitchell Caldwell, "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System," *Catholic University Law Review* 61, no. 1 (2011), 63, 82-83, https://perma.cc/XU2L-8L38.

16 Oliver, "Toward A Common Law," 2013, 1.

17 See for example Carlos Berdejó, "Criminalizing Race: Racial Disparities in Plea-Bargaining," *Boston College Law Review* 59, no. 4 (2018), 1187, https://perma.cc/E6D8-ZFFJ.

18 Jacob Kang-Brown and Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America* (New York: Vera Institute of Justice, 2017), 9-10, https://perma.cc/34ME-RRRT.

19 For a review of these studies and their findings, see Léon Digard and Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention* (New York: Vera Institute of Justice, 2019), 2-6, https://perma.cc/N42X-TMLK.

20 Some researchers have argued that pretrial detention weakens a person's bargaining power during the plea negotiation stage and highlight the lack of work/income, family contact, and access to social support during incarceration, plus the likelihood of immediate release using time served for sentences given for lower-level charges. See for example Will Dobbie, Jacob Goldin, and Crystal S. Yang, "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges." *American Economic Review* 108, no. 2 (2018), 201-240, https://perma.cc/Y2B7-BSN8; and Emily Leslie and Nolan G. Pope, "The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments," *Journal of Law and Economics* 60, no. 3 (2017), 529-557, https://perma.cc/C8NR-GGB8.

21 Meghan Sacks and Alissa R. Ackerman, "Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail, They Must Be Guilty," *Criminal Justice Studies* 25, no. 3, (2012), 265, 272-273.

22 Ellen A. Donnelly and John M. MacDonald, "The Downstream Effects of Bail and Pretrial Detention on Racial Disparities in Incarceration," *Journal of Criminal Law & Criminology* 108, no. 4 (2018), 775, 805, https://perma.cc/M3MF-RTKV.

23 For previous research, see for example Celesta A. Albonetti, "Race and the Probability of Pleading Guilty," *Journal of Quantitative Criminology* 6, no. 3 (1990), 315-334.

24 Albonetti, "Race and the Probability of Pleading Guilty," (1990), 315, 329-332.

25 For a definition of a natural experiment, see Thad Dunning, "Improving Causal Inference Strengths and Limitations of Natural Experiments," *Political Research Quarterly* 61, no. 2 (2008), 282-93, 282-83. Note that although two of the studies (Leslie and Pope, "Unintended Impact," (2017); and Dobbie, Goldin, and Yang, "The Effects of Pre-Trial Detention," 2018) demonstrated that a quasi-experimental design can improve estimates based on regression analysis, the other two studies (Paul Heaton, Sandra G. Mayson, and Megan Stevenson, "The Downstream Consequences of Misdemeanor Pretrial Detention," *Stanford Law Review* 69, no. 3 (2017), https://perma.cc/Y4P4-GQUY; and Megan Stevenson, "Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes," working paper (Philadelphia, PA: University of Pennsylvania Law School, November 8, 2016), https://perma.cc/W4EC-R9MW) found that the differences between the findings of their natural experiments and regression analyses were either not statistically significant or did not vary substantially. This suggests that regression analyses can produce reasonable causal estimates that link pretrial detention to a person's decision to plead guilty when sufficient controls are deployed.

26 The major assumption on which these studies are based is that the likelihood of being detained pretrial is exogenously affected by the magistrate who presides over the bail hearing.

27 Stevenson, "Distortion of Justice," 2016, 3 and 17.

28 Leslie and Pope, "Unintended Impact," 2017, 529, 543 and 547. The estimated effect of detention on pleading guilty is only about 25 percent smaller than the effect on conviction, which suggests that detention primarily affects conviction by inducing some people who would not have pled guilty if released to plead guilty after they are detained.

29 Leslie and Pope, "Unintended Impact," 2017, 529, 548.

30 Leslie and Pope, "Unintended Impact," 2017, 529, 552.

31 Heaton, Mayson, and Stevenson, "Downstream Consequences," 2017, 711, 771 and 776.

32 Dobbie, Goldin, and Yang, "The Effects of Pre-Trial Detention," 2018, 201, 225.

33 Will Dobbie, Jacob Goldin and Crystal Yang, "The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges," Working Paper No. 22511 (Cambridge, MA: National Bureau of Economic Research, 2016), 23-24, https://perma.cc/XN26-HFBJ.

34 Dobbie, Goldin, and Yang, "The Effects of Pre-Trial Detention," 2018, 201, 225 and 234.

35 Heaton, Mayson, and Stevenson, "Downstream Consequences," 2017, 711-794, 747. Also see Dobbie, Goldin, and Yang, "The Effects of Pre-Trial Detention," Working Paper No. 22511, 2016, 25-26.

36 Heaton, Mayson, and Stevenson, "Downstream Consequences," 2017, 711-794, 749.

37 Stevenson, "Distortion of Justice," 2016, 1, 21-22 and Table 7 on p. 35.

38 Dobbie, Goldin, and Yang, "The Effects of Pre-Trial Detention," Working Paper No. 22511, 2016, 23-24.

39 Dobbie, Goldin, and Yang, "The Effects of Pre-Trial Detention," 2018, 201, 230.

40 Leslie and Pope, "Unintended Impact," 2017, 529, 542, 553-54. However, the researchers found that, unlike the felony subsample, first-time offender status is not a source of substantial heterogeneity. If anything, people without a criminal history were less affected by pretrial detention. Ibid., 548, Table 10.

41 Ibid.

42 Susan Ehrhard, "Plea Bargaining and the Death Penalty: An Exploratory Study," *Justice System Journal* 29, no. 3 (2008), 313-325, 314.

43 Ehrhard, "Plea Bargaining and the Death Penalty," 2008, 313-325, 314 and 316.

44 Ilyana Kuziemko, "Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence From New York's 1995 Reinstatement of Capital Punishment," *American Law and Economics Review* 8, no. 1 (2006), 116-142.

45 Kuziemko, "Does the Threat of the Death Penalty Affect Plea Bargaining," 2006, 116-142, 126. Confidence in the assumption that this change was the result, at least in part, of changes in the death penalty law is increased by the finding that plea behavior did not change for people charged with robbery, rape, or burglary over the same time period.

46 Kuziemko, "Does the Threat of the Death Penalty Affect Plea Bargaining," 2006, 128.

47 Sherod Thaxton, "Leveraging Death," *The Journal of Criminal Law and Criminology* 103, no. 2 (2013), 475-552.

48 Thaxton, "Leveraging Death," 2013, 525.

49 Ibid., 537.

50 Kent S. Scheidegger, "The Death Penalty and Plea Bargaining to Life Sentences," Working Paper 09-01 (Sacramento, CA: Criminal Justice Legal Foundation, 2009), 10, https://perma.cc/RNM8-TAFG.

51 Scheidegger, "Plea Bargaining to Life Sentences," 2009, 13.

52 Dean J. Champion, "Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining," *Journal of Criminal Justice* 17, no. 4 (1989), 256, 257.

53 Allison D. Redlich, Shawn D. Bushway, and Robert J. Norris, "Plea Decision-Making by Attorneys and Judges," *Journal of Experimental Criminology* 12, no. 4 (2016), 537-561, 548-549.

54 Redlich, Bushway, and Norris, "Plea Decision-Making by Attorneys and Judges," 2016, 552.

55 Ibid., 556 and 557.

56 Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making – Technical Report* (New York: The Vera Institute of Justice, 2012), https://perma.cc/H6A2-ET78.

57 Ibid., 202-219.

58 Ibid., 245.

59 Besiki L. Kutateladze, Victoria Z. Lawson, and Nancy R. Andiloro, "Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in Felony Drug Cases," *Law and Human Behavior* 39, no. 5 (2015), 431-442, 440. This study was not able to quantify the strength of the evidence, merely the existence of evidence.

60 Ibid., 436.

61 Ibid., 441.

62 Allison D. Redlich, Shi Yan, Robert J. Norris, and Shawn D. Bushway, "The Influence of Confessions on Guilty Pleas and Plea Discounts," *Psychology, Public Policy, and Law* 24, no. 2 (2018), 147-157, 148.

63 Ibid., 147-157, 153. People who maintained their innocence to the police but pled guilty received the largest sentence discounts. Ibid., 155. It is possible that a proportion of these people were factually innocent or otherwise had weak cases against them, incentivizing prosecutors to offer greater discounts in order to secure a conviction. People who provided only partial confessions received worse plea deals than those who fully confessed. Ibid., 152. The researchers hypothesized that such people were seen as being less remorseful than people who gave full confessions and received less leniency as a result. Ibid., 155.

64 Ibid., 153. For earlier studies, see Redlich, Bushway, and Norris, "Plea Decision-Making by Attorneys and Judges," 2016.

65 Redlich, Yan, Norris, and Bushway, "Confessions," 2018, 155.

66 Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 431.

67 Ibid., 439.

68 Frederick and Stemen, The Anatomy of Discretion, 2012, 200-201.

69 See Albonetti, "Race and the Probability of Pleading Guilty," (1990), 315-334, 317; and Jon'a Meyer and Tara Gray, "Drunk Drivers in the Courts: Legal and Extra-Legal Factors Affecting Pleas and Sentences," *Journal of Criminal Justice* 25, no. 2 (1997), 157-160.

70 Meyer and Gray, "Drunk Drivers in the Courts," (1997), 157.

71 Ibid., 156, 161. The researchers caution, however, that the sentencing guidelines for the specific offense studied may be highly influential in this decision-making process and may, therefore, limit generalizability to other offenses or other jurisdictions.

72 Albonetti, "Race and the Probability of Pleading Guilty," 1990, 323.

73 Lauren O'Neill Shermer and Brian D. Johnson "Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts," *Justice Quarterly* 27, no. 3 (2010), 20, https://perma.cc/T6B9-VUFA. The sample consisted of 45,678 sentencing events and included felonies and class A misdemeanors.

74 Shermer and Johnson, "Prosecutorial Discretion and Charge Reductions," 2010, 27.

75 For an example of a jurisdiction that incorporates criminal history into its plea bargaining guidelines, see Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson, and Cassia C. Spohn, "Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing," *Criminology* 52, no. 3 (2014), 514-551, 523. For information about jurisdictions that incorporate criminal history into sentencing guidelines, see generally Neal B. Kauder and Brian J. Ostram, *State Sentencing Guidelines: Profiles and Continuum* (Washington, DC: National Center for State Courts, 2008), https://perma.cc/HG2G-GNCT.

76 Jeffery T. Ulmer, James Eisenstein, and Brian D. Johnson, "Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation," *Justice Quarterly* 27, no. 4 (2009), 1-33, 19, https://perma.cc/LMR4-2QCG; and Jeffery T. Ulmer and Mindy S. Bradley-Engen, "Variation in Trial Penalties Among Serious Violent Offenses," *Criminology* 44, no. 3 (2006), 631-670, 653-654.

77 Ulmer and Bradley-Engen, "Variation in Trial Penalties," 2006, 661; and Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 584-585.

78 Shermer and Johnson, "Prosecutorial Discretion and Charge Reductions," 2010, 20.

79 Kutateladze, Andiloro, Johnson, and Spohn, "Cumulative Disadvantage," 2014, 532.

80 Frederick and Stemen, *The Anatomy of Discretion*, 2012, 217.

81 Ibid., 204 and 209.

82 Kutateladze, Andiloro, Johnson, and Spohn, "Cumulative Disadvantage," (2014), 538.

83 Ibid.

84 Besiki Kutateladze, Nancy R. Andiloro, and Brian D. Johnson, "Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?" *Justice Quarterly* 33, no. 3 (2016); and Kutateladze, Andiloro, Johnson, and Spohn, "Cumulative Disadvantage," 2014.

85 Digard and Swavola, *Justice Denied*, 2019, 7.

86 Donnelly and MacDonald, "The Downstream Effects of Bail," 2018; and Kutateladze, Andiloro, Johnson, and Spohn, "Cumulative Disadvantage," 2014.

87 Carlos Berdejó, "Criminalizing Race," 2018, 1187-1249.

88 Ibid., 1222.

89 Ibid., 1226-1227.

90 Ibid., 1238.

91 Kutateladze, Andiloro, and Johnson, "Pandora's Box," 2016; and Kutateladze, Andiloro, Johnson, and Spohn, "Cumulative Disadvantage," 2014.

92 Kutateladze, Andiloro, Johnson, and Spohn, "Cumulative Disadvantage," 2014. This study found harsher treatment for Black people at all stages of prosecution, with one exception—they were significantly more likely than white people to have their cases dismissed. The authors speculate that this could be the result of a greater proportion of inappropriate arrests for Black people, which then lack sufficient evidentiary strength to continue. Alternatively, the authors also pose the possibility that victims of or witnesses to crimes in which the arrests were made may be less willing to cooperate with an investigation due to mistrust of the police. See ibid., 538, for more information.

93 Jeremy D. Ball, "Is it a Prosecutor's World? Determinants of Count Bargaining Decisions," *Journal of Contemporary Criminal Justice* 22, no. 3 (2006), 241-260, 256.

94 Shermer and Johnson, "Prosecutorial Discretion and Charge Reductions," 2010, 394-430. Although this study did not find proof of racial bias across all cases in the aggregate, it did uncover systematically poorer treatment of Black and Latinx people in plea bargaining for specific offenses. A later study examined a variety of metrics of treatment by prosecutors, including whether prosecutors recommended a custodial sentence and reductions in the seriousness of the top charge or the sentence length this charge could lead to. The researchers found evidence of harsher treatment towards Black and Latinx people for some offense types using some metrics of treatment, but not all. Frederick and Stemen, *The Anatomy of Discretion*, 2012.

95 Shermer and Johnson, "Criminal Prosecutions," 2010, 415.

96 Berdejó, "Criminalizing Race," 2018, 1187; and Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 439.

97 Danielle Rousseau and Gerald Pezzullo, "Race and Context in the Criminal Labeling of Drunk Driving Offenders: A Multilevel Examination of Extralegal Variables on Discretionary Plea Decisions," *Criminal Justice Policy Review* 25, no. 6 (2014), https://perma.cc/H4DK-RX2F.

98 Rousseau and Pezzullo, "Drunk Driving Offenders," 2014, 696.

99 Besiki Kutateladze, "Tracing Charge Trajectories: A Study of the Influence of Race in Charge Changes at Case Screening, Arraignment, and Disposition," *Criminology* 56, no. 1 (2018), 123-153.

100 Kutateladze, "Tracing Charge Trajectories," 2018, 127 and 145-146. Furthermore, Black and Latinx people were more likely than white people to see their charges increased at screening—perhaps, the researchers theorize, due to a greater perceived threat to public safety posed by them or as a tactical move by prosecutors to create a charging baseline that will make someone more likely to accept a plea deal.

101 Kutateladze, "Tracing Charge Trajectories," 2018, 145.

102 Sonja Starr, "Estimating Gender Disparities in Federal Criminal Cases," *University of Michigan Law & Economics Working Papers* 57 (2012), 3, https://perma.cc/25J2-CEMQ.

103 See for example Donna Bishop and Charles Frazier, "The Effects of Gender on Charge Reduction," *Sociological Quarterly* 25, no. 3 (1984), 385-396. A second wave of data collection was needed to secure a large enough sample of cases with female defendants.

104 Celesta A. Albonetti, "Charge Reduction: An Analysis of Prosecutorial Discretion in Burglary and Robbery Cases," *Journal of Quantitative Criminology* 8 (1992), 317-333; Bishop and Frazier, "The Effects of Gender on Charge Reduction," 1984; Ball, "Is it a Prosecutor's World?" 2006; and Jeffrey W. Spears and Cassia C. Spohn, "The Effect of Evidence Factors and Victim Characteristics on Prosecutors' Charging Decisions in Sexual Assault Cases," *Justice Quarterly* 14, no. 3 (1997), 501-524. Spears and Spohn used data from the 1970s collected in Michigan and focused on violent felonies. Although initial analysis showed women to be more likely to receive a reduction in their charges, this was not found to be significant when modeled with other variables (see pages 42 and 43). See also Erika Davis Frenzel and Jeremy D. Ball, "Effects of Individual Characteristics on Plea Negotiations Under Sentencing Guidelines," *Journal of Ethnicity in Criminal Justice* 5, no. 4 (2008), 59-82. This sample of 1998 data from Pennsylvania showed that men were more likely to go to trial than women, but the researchers did not find a significant relationship between people's demographic characteristics and prosecutors' plea bargaining decisions. Ibid., 75. However, the researchers noted that the analysis was unable to distinguish "true" plea bargains (which can be expected to have a measurable effect on sentencing) and "symbolic" plea bargains (in which charges are reduced in ways that ultimately provide little meaningful benefit to the accused). The researchers hypothesized that disentangling these two could reveal disparities in the treatment of different groups of people. Ibid., 77.

105 See Carlos Berdejó, "Gender Disparities in Plea Bargaining," *Indiana Law Journal* 94, no. 4 (2019), https://perma.cc/7N7C-RA93; Shermer and Johnson, "Criminal Prosecutions," 2010; Frederick and Stemen, *The Anatomy of Discretion*, 2012; and Starr, "Estimating Gender Disparities," 2012. Whether this general shift is the result of changes in court practice or deepening nuance in how plea bargaining is understood and researched is unclear.

106 Berdejó, "Gender Disparities," 2019, 1272, 1279, and 1283.

107 Ibid., 1260-61.

108 Ibid., 1265-66.

109 Shermer and Johnson, "Criminal Prosecutions," 2010, 20.

110 See Starr, "Estimating Gender Disparities," 2012, 12-16; and Berdejó, "Gender Disparities," 2019, 1259-1260.

111 Starr, "Estimating Gender Disparities," 2012, 17.

112 Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz, and Rachel Z. Novick, "Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents," *Psychology, Public Policy, and Law* 24, no. 2 (2018), 180-191, 187. In another study, interviews conducted with 40 juveniles who had either accepted a guilty plea or were currently considering a plea offer shed more light on this issue. They had an incomplete understanding of what a plea bargain is. Although participants understood that accepting a plea was considered an admission of guilt and could lead to a reduction in charges or lesser punishment, they frequently did not understand that they were also waiving their right to trial and appeal. In explaining the factors that influenced their decisions to plead guilty or not, the majority of participants mentioned short-term consequences (wanting to go home, being tired of the legal process, etc.) and only 17 percent mentioned any long-term consequences (such as the impact of having a criminal history). Tarika Daftary-Kapur and Tina M. Zottoli, "A First Look at the Plea Deal Experiences of Juveniles Tried in Adult Court," *International Journal of Forensic Mental Health* 13, no. 4 (2014), 323-336, 328-33.

113 Ibid., 333.

114 Erika N. Fountain and Jennifer L. Woolard, "How Defense Attorneys Consult with Juvenile Clients About Plea Bargains," *Psychology, Public Policy, and Law* 24, no. 2 (2018), 192-203.

115 Fountain and Woolard, "Consult with Juvenile Clients," 2018, 197.

116 Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters, and Conor Hogan, "Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City," *Psychology, Public Policy, and Law* 22, no. 3 (2016), 250-259, 254-255.

117 Frederick and Stemen, The Anatomy of Discretion, 2012.

118 Ibid., 208, 211, 214, and 217.

119 See Rachel Barkow, "Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law," *Stanford Law Review* 61, no. 4 (2010), 869-922, https://perma.cc/MPZ3-TSWF; and Rachel Barkow, "Separation of Powers and the Criminal Law," *Stanford Law Review* 58, no.4 (2006), 989-1054, 1024-1028, https://perma.cc/CB5W-DZAP. Also see Erik Luna and Marianne Wade, "Prosecutors as Judges," *Washington and Lee Law Review* 67, no. 4 (2010), 1413, 1414-1418, https://perma.cc/G67T-WAPN.

120 For a discussion of the concept that plea bargaining is "lawless," see Andrew Crespo, "The Hidden Law of Plea Bargaining," *Columbia Law Review* 118, no. 5 (2018), 1303, 1304-1307, https://perma.cc/NDV3-4XLB. For a discussion of the effects of this decision making, see for example Berdejó, "Gender Disparities," 2019; and Berdejó, "Criminalizing Race," 2018.

121 See for example William Stuntz, "Plea Bargaining and Criminal Law's Disappearing Shadow," *Harvard Law Review* 117, no. 8 (2004) 2548-2569, 2548; Bibas, "Plea Bargaining Outside the Shadow of Trial," (2004), 2463-2547; and Tracey Meares, "Rewards for Good

Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives," *Fordham Law Review* 64, no. 3 (1995), 851, 862-865, https://perma.cc/3RUC-J5VV.

122 Ronald Wright and Rodney Engen, "The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing and Prosecutor Power," *North Carolina Law Review* 84, no. 6 (2006), 1935-1982, https://perma.cc/4AR3-QP3H; and Ronald Wright and Rodney Engen, "Charge Movement and Theories of Prosecutors," *Marquette Law Review* 91, no. 1 (2007), 9-38, https://perma.cc/EB55-USHY.

123 Wright and Engen, "The Effects of Depth and Distance," 2006, 1940.

124 Ibid.

125 Ibid., 1958.

126 Ibid.,1959-1967.

127 Ibid., 1964 and 1967.

128 Ibid., 1967.

129 Wright and Engen, "Charge Movement and Theories of Prosecutors," 2007, 25-26, https://perma.cc/EB55-USHY.

130 Ibid., 26-27.

131 Kyle Graham, "Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials," *California Law Review* 100, no. 6 (2012), 1573, 1577-1578, https://perma.cc/3XNL-HK44.

132 Ibid., 1597 and 1602-3.

133 Ibid.

134 Ibid. The study also found that prosecutors use some of these crimes, such as misprision of a felony, as a "pleading crime"—a crime that is rarely the basis for an initial arrest or the most serious charge in charging documents filed with the court (if it appears at all), but is used as the basis of a plea deal once other charges are dropped. Ibid., 1605.

135 Ibid., 1608 and 1618-1619.

136 Ibid., 1605-1613.

137 Ibid., 1582-1583 and 1613. A "sentencing cliff" occurs when the shortest sentence for one charge might still be significantly longer than the longest sentence for the next most serious charge or might mandate incarceration when the other charge does not.

138 This was also the case with civil rights deprivation cases. Ibid., 1616-1617.

139 For tax evasion, see ibid., 1625. For sexual offenses, see ibid., 1596.

140 See for example Jerold H. Israel "Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom," *Florida Law Review* 48, no. 5 (1996), 761-779, 764, https://perma.cc/5BQJ-V2JT.

141 In fact, the system is so dependent on plea bargaining over trial that recently, scholars have suggested that "crashing the courts"—insisting on right to trial for every accused person—would be an effective means of protesting incarceration by bringing the entire mechanism of the justice system to a halt. See for example Michelle Alexander, "Go to Trial: Crash the Justice System," *New York Times*, March 10, 2012, https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html. See also John H. Blume and Rebecca K. Helm, "The Unexonerated: Factually Innocent Defendants Who Plead Guilty" *Cornell Law Review* 100, no. 1 (2014), 157-191, ("More than forty years ago, then Chief Justice Warren Burger stated that 'a reduction from 90% to 80% in guilty pleas requires the assignment of twice the judicial manpower and facilities' and, 'a reduction to 70% trebles the demand.'" (citing Warren E. Burger, "The State of the Judiciary," *A.B.A. Journal* 56 (1970) 929, 931)), https://perma.cc/9AD9-TGX9.

142 Israel, "Excessive Criminal Justice Caseloads," 1996, 767.

143 See generally Heumann, *The Experiences of Prosecutors, Judges, and Defense Attorneys*, 1978.

144 Peter F. Nardulli, "The Caseload Controversy and the Study of Criminal Courts," *Journal of Criminal Law and Criminology* 70, no. 1 (1979), 89-101, 95, https://perma.cc/9JCL-DKZ4. In this study caseloads were calculated both per judge and per court, though the caseloads of individual prosecutors were not analyzed.

145 Ulmer and Bradley-Engen, "Variation in Trial Penalties," 2006, 650; and Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 579.

146 Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 588.

147 Kutateladze, Andiloro, and Johnson, "Pandora's Box," 2016; and Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 431-442.

148 Kutateladze, Andiloro, and Johnson, "Pandora's Box," 2016, 409; and Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 436.

149 Kutateladze, Lawson, and Andiloro, "Does Evidence Really Matter?" 2015, 439.

150 Ibid., 440.

151 Kutateladze, Andiloro, and Johnson, "Pandora's Box," 2016, 418.

152 Don Stemen and Gipsy Escobar, "Whither the Prosecutor? Prosecutor and County Effects on Guilty Plea Outcomes in Wisconsin," *Justice Quarterly* 35, no. 7 (2018), 1166-1194, 1175-1178.

153 Ibid., 1181.

154 Ibid., 1181 and 1182.

155 Ibid., 1182.

156 Ibid., 1184.

157 Ibid., 1181 and 1182.

158 Ibid., 1184 and 1185.

159 Ibid.

160 See for example Frederick and Stemen, *The Anatomy of Discretion*, 2012, 277-280; and Gary D. LaFree, "Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials," *Criminology* 23, no. 2 (1985), 289-312, 306.

161 Frederick and Stemen, *The Anatomy of Discretion*, 2012, 277-280.

162 LaFree, "Adversarial and Nonadversarial Justice," 1985, 306.

163 See Shi Yan and Shawn D. Bushway, "Plea Discounts or Trial Penalties? Making Sense of the Trial-Plea Sentence Disparities," *Justice Quarterly* 35, no. 7 (2018), 1226-1249. Beyond the sentence or charge reductions negotiated with prosecutors during plea bargaining, differences in outcomes may also result from sentence increases at trial; this may happen if a judge responds negatively to a defendant or a trial attracts significant attention from the public. See Nancy J. King, David A. Soulé, Sara Steen, and Robert R. Weidner, "When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States," *Columbia Law Review* 105 (2005), 959-1009, 964, https://perma.cc/K4CT-4FMR.

164 See for example King, Soulé, Steen, and Weidner, "When Process Affects Punishment," 2005, 959-1009.

165 For an example of a weak relationship between pleading guilty and sentencing outcomes, see Celesta A. Albonetti, "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992," *Law and Society Review* 31, no. 4 (1997), 789-822. For a critique of the methodology used in this and other studies, see Andrew Chongseh Kim, "Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study," *Mississippi Law Journal* 84, no. 5 (2015), 1195-1256.

166 Jeffery T. Ulmer and Mindy S. Bradley-Engen, "Variations in Trial Penalties Among Serious Violent Offenses," *Criminology* 44, no. 3 (2006), 631-670.

167 Ibid., 650.

168 Ibid., 652.

169 See King, Soulé, Steen, and Weidner, "When Process Affects Punishment," 2005, 959-1009.

170 See for example LaFree, "Adversarial and Nonadversarial Justice," 1985, 289-312, 293-294. Although the United States is not the only country to incorporate plea bargaining as part of its criminal legal system, other countries such as Germany have established laws limiting the bargaining power of prosecutors and incorporating judicial oversight in both the bargaining and sentencing phase. By contrast, few states mandate more than the de minimis judicial inquiry into whether a plea is "knowing, voluntary, and intelligent." This leaves plea bargaining largely in the discretion of and subject to the policies of individual prosecutors' offices. See for example Jenia Turner, "Judicial Participation in Plea Negotiations: A Comparative View," *American Journal of Comparative Law* 54 (2006), 501-570, https://perma.cc/JGU9-3A9W.

171 The five states were Kansas, Maryland, Minnesota, Pennsylvania, and Washington. King, Soulé, Steen, and Weidner, "When Process Affects Punishment," 2005.

172 Ibid., 975.

173 Ibid., 973.

174 Ibid.

175 Ibid., 974.

176 Ibid., 975.

177 See Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 565. The authors identified other sentencing guidelines that may especially benefit people who plead guilty, such as sentence reduction for people who render "substantial assistance" to law enforcement. Conversely, people who "obstruct justice" by presenting false testimony in court (something a person who pleads guilty is unable to do) may have their sentences increased.

178 Kim, "Underestimating the Trial Penalty," 2015, 1245.

179 Or, put another way, sentences imposed following a plea were 39 percent shorter than those given following a trial. Ibid., 1246 and 1252, Table 3.

180 Ibid., 1254, Table 5.

181 Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 575.

182 Kim, "Underestimating the Trial Penalty," 2015, 1235; and Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 570 and note 5.

183 Ulmer, Eisenstein, and Johnson, "Trial Penalties in Federal Sentencing," 2010, 575.

184 Besiki L. Kutateladze and Victoria Z. Lawson, "Is a Plea Really a Bargain? An Analysis of Plea and Trial Dispositions in New York City," *Crime and Delinquency* 64, no. 7 (2018), 856-887; and David S. Abrams, "Putting the Trial Penalty on Trial," *Duquesne Law Review* 51 (2013), 777-785, https://perma.cc/886D-M3JV.

185 Kutateladze and Lawson, "Is a Plea Really A Bargain?", 2018, 874.

186 Ibid., 866.

187 Ibid., 879.

188 Ibid.

189 Ibid., 877-878.

190 Ibid., 879.

191 Ibid.

192 Abrams, "Putting the Trial Penalty on Trial," 2013, 778. An earlier study using data from 1977 similarly found that the trial penalty disappeared when acquittals were taken into account. However, the researcher noted that this would be true only for a hypothetical "average" defendant or for cases in the aggregate, but not for any one actual case. People are faced with the choice of potentially being acquitted or receiving a more punitive sentence. LaFree, "Adversarial and Nonadversarial Justice," 1985, 307.

193 Abrams, "Putting the Trial Penalty on Trial," 2013, 782.

194 Ibid., 781. Although here it should be noted that Abrams did not include a measure of offense severity other than the number of charges each person faced. This means that the results cannot discern whether people received longer sentences because they went to trial or because they had committed more serious crimes. See Kim, "Underestimating the Trial Penalty," 2015, 1216.

195 Kim, "Underestimating the Trial Penalty," 2015, 1201.

196 Albert W. Alschuler, "Lafler and Frye: Two Small Band-Aids for a Festering Wound," *Duquesne Law Review* 51 (2013), 673-707, 690-691, https://perma.cc/PJ88-3KWD.

197 Kim, "Underestimating the Trial Penalty," 2015, 1214.

198 Jed S. Rakoff, "Why Innocent People Plead Guilty," *New York Review of Books*, November 20, 2014, https://perma.cc/33UY-7PGE.

199 Blume and Helm, "The Unexonerated," (2014), 157-191, 173.

200 Allison D. Redlich, Alicia Summers, and Steven Hoover, "Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness," *Law and Human Behavior* 34, no. 1 (2010), 79-90, 79 and 89.

201 Ibid., 80.

202 Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz et al., "Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System," *Psychology, Crime, & Law* 24, no. 9 (2018), 915-934, https://perma.cc/Q9KX-37ZS. Nearly 45 percent of the attorneys involved in the study revealed that they had advised a client to take a guilty plea despite believing that the client was innocent.

203 Redlich, Summers, and Hoover, "Self-Reported False Confessions," (2010), 79-90, 89.

204 Ibid., 87.

205 Lindsay C. Malloy, Elizabeth P. Shulman, and Elizabeth Cauffman, "Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders," *Law and Human Behavior* 38, no. 2 (2014), 181-193, 189, https://perma.cc/P7EG-DUUA.

206 Ibid., 186.

207 Ibid., 189.

208 Samuel R. Gross, "Errors in Misdemeanor Adjudication," *Boston University Law Review* 98 (2018), 999-1011, 1005, https://perma.cc/M3FX-2CR2.

209 Oren Gazal-Ayal and Avishalom Tor, "The Innocence Effect," *Duke Law Journal* 62 (2012), 339-401, 352, https://perma.cc/BZ22-NJ8D.

210 Gazal-Ayal and Tor, "The Innocence Effect," 2012, 352.

211 Glinda S. Cooper, Vanessa Meterko, and Prahelika Gadtaula, "Innocents Who Plead Guilty: An Analysis of Patterns in DNA Exoneration Cases," *Federal Sentencing Reporter* 31, no. 4-5 (2019), 234-238, 234, https://perma.cc/QV4G-B8FS.

212 Gazal-Ayal and Tor, "The Innocence Effect," 2012, 352; and Cooper, Meterko, and Gadtaula, "Innocents Who Plead Guilty," 2019, 235.

213 Gross, "Errors in Misdemeanor Adjudication," 2018, 1011.

214 Redlich, Summers, and Hoover, "Self-Reported False Confessions," 2010, 80. Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson et al., "Exonerations in the United States 1989 through 2003," *Journal of Criminal Law and Criminology* 95, no. 2 (2005), 523, 536, https://perma.cc/7LXF-7L5D; and Gross, "Errors in Misdemeanor Adjudication," 2018, 1011.

215 Gross, "Errors in Misdemeanor Adjudication," 2018, 1003.

216 Ibid., 1000 (4 percent figure) and 1003 (Harris County).

217 Ibid., 1003.

218 Ibid., 1004. The author also notes that in 46 percent of cases in which innocent people pled guilty to drug possession charges in Harris County, the accused was Black—although only 24 percent of Harris County population is Black. Ibid., 1009. This, the author suggests, reflects the targeting of Black men by police when stopping and searching people for drugs.

219 Ibid., 1004.

220 See Redlich, Summers, and Hoover, "Self-Reported False Confessions," 2010, 80.

221 Gross, "Errors in Misdemeanor Adjudication," 2018, 1005.

222 Bibas, "Plea Bargaining Outside the Shadow of Trial," 2004, 2463, 2465-2467 and 2496-2527.

223 Graham, "Crimes, Widgets, and Plea Bargaining," 2012, 1573, 1583.

224 Ibid.

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