

Prosecutorial Predicament: An Examination of Psychological Processes Influencing Decision-Making in Plea Bargains

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ABSTRACT: Much research has focused on factors that may influence prosecutors' decision-making in plea negotiations and the effects of said negotiations. However, few studies have explicitly focused on the psychological processes that guide prosecutorial discretion about plea bargains. The present literature review comprehensively examines three specific psychological factors influencing prosecutors: the certainty effect, confirmatory information processing, and compliance. These three psychological processes suggest prosecutors' willingness to offer a plea and the level of lenience a plea grants are often influenced by similar, separate psychological processes. Additionally, this article highlights gaps in existing research, proposing options for future studies.

KEYWORDS: Behavioral and Social Sciences; Sociology and Social Psychology; Plea Bargaining; Prosecutorial Discretion; Psychological Processes.

■ Introduction

Today, an estimated 98% of trials end in a guilty plea before they reach a trial in court.¹ In a 2012 opinion piece, the United States Supreme Court officially recognized the prominence of plea bargaining in the modern-day legal system, acknowledging that "criminal justice today is, for the most part, a system of pleas, not a system of trials".² Plea bargains are an alternative to the traditional jury trial in which a case is negotiated outside of court. They often involve a defendant pleading guilty in exchange for decreased charges, dropped charges, or other factors that the defense attorney and the prosecution negotiate. However, plea bargaining as a trial alternative has not always been as prevalent as today.

Historically, courts have discouraged plea bargaining, viewing litigation as "the safest test of justice".^{3,4} As a result, plea bargaining as an alternative to a trial was relatively unknown until it increased in prevalence during the 19th and 20th centuries.⁵ One explanation for this increase is that, in many cities, the reported crime rate and criminal caseload have more than doubled; however, the capacity of the criminal bench has remained relatively unchanged.³ This meant that courts had to depend on guilty pleas to process large caseloads while guaranteeing defendants their Sixth Amendment right to a speedy trial. As the necessity of guilty pleas increased, attitudes towards pleas also changed. Less than a half-century ago, most academics opposed plea negotiations; today, most defend plea bargaining as a necessary alternative to trial.³ Even those who remain critical of the modern-day plea-bargaining system typically do not argue for the complete abolition of plea bargaining.⁶ Because society has come to accept plea bargaining, plea bargaining has been able to increase even more rapidly.

Another factor contributing to the increase in plea bargains is increasing prosecutorial power. According to Alschuler (1968), prosecutors act in a combination of four separate roles in plea bargaining. For example, prosecutors must function as administrators by disposing of cases in the most efficient

manner feasible. Prosecutors must also serve as advocates by maximizing convictions and sentence severity. Additionally, prosecutors must function as judges.³ As Alschuler (1968) explains, the prosecutor's goal may be "to do the 'right thing' for the defendant given the defendant's [...] circumstances" (p. 53). However, there is a caveat as prosecutors often view doing the "right thing" to be possible only when the defendant accepts a guilty plea. Finally, prosecutors must function as legislators through compromising when necessary. Scholars argue these responsibilities place prosecutors in a position of undue power.^{7,8} As Rakoff (2014), a District Judge for the Southern District of New York, explains, the "prosecutor-dictated plea bargain system [creates] such inordinate pressures to enter into plea bargains" (p. 8) that defendants often feel that pleading guilty—regardless of their factual guilt—is their only choice.⁹ Defendants are further encouraged to accept a plea bargain by the explicit actions of prosecutors, who offer incentives to plead guilty. These incentives take several forms as parties can bargain over anything relevant to the defendant's case.^{10,11} The three most negotiated factors considered during a plea bargain are case facts, sentence length, and charge severity.¹² Because prosecutors can control the fate of defendants in their own hands, they can leverage their authority through plea bargains.

Although plea bargaining undoubtedly plays a vital role in maintaining the efficiency of the legal system, it no doubt also has its downfalls. For instance, innocent defendants are incentivized to plead "because of their perceptions of the risks of going to trial versus the costs of accepting a plea bargain".¹³ However, this acceptance of guilt is problematic for defendants. In accepting a plea bargain, defendants must waive many of their Constitutional liberties: their right to silence, their right to confront their accusers, their right against self-incrimination, and their right to a trial by jury, among others. These immediate losses of rights may have varying negative effects, both immediate and long-term. The former includes incarceration, fines, probation, and community service; the

latter, also called collateral consequences, consists of all other outcomes, including loss of employment, eligibility for government-funded programs, and effects on sentences imposed for future crimes.¹⁴ According to Redlich *et al.* (2017), “Recently, the American Bar Association began categorizing collateral consequences offenders can face; to date, they have noted more than 47,000” (p. 341). As a result, plea bargains have an extensive impact on defendants’ lives because, contrary to what they may promise, collateral consequences stemming from guilty pleas prevent defendants from returning to their normal lives.

As such, it is necessary to wonder whether psychology can help researchers understand the motivations behind plea bargains. Specifically, what psychological processes guide prosecutors when they offer a plea bargain? Despite the research on the psychological processes that inspire defendants to accept plea bargains, few scholars have focused on the psychological process that may guide prosecutors when they offer a plea. In this paper, I will argue that a few psychological processes influence prosecutors, including the certainty effect, confirmatory information processing, and compliance. These processes guide prosecutors’ willingness to offer a plea and the level of leniency a plea grants.

■ Discussion

Although little research has been conducted to understand precisely the psychological processes that guide prosecutors in the context of plea bargains, researchers have begun to analyze the factors prosecutors consider when offering a plea bargain. No formal federal laws currently guide a prosecutor’s decision to offer a plea. A 1992 survey of prosecutors across the United States conducted by the U.S. Bureau of Justice Statistics (BJS) found that only about 12% of surveyed offices had formal written criteria for plea bargaining. Instead, more than 25% of prosecutors’ offices reported that case-by-case review was the only way to manage plea negotiations.¹⁵ However, when offering plea bargains, researchers found that prosecutors often ask two fundamental questions: “Can I prove the case?” and “Should I prove the case?”¹⁶ The various factors involved in answering these questions reflect the rules set forth by the few criteria that exist to guide plea negotiations. These factors can be broken down into two primary categories: administrative considerations and specific facts in a case.

The former category, administrative considerations, concerns factors related to the ability of prosecutorial offices to function. This category includes caseload, available time, and manpower. One Manhattan prosecutor explained, “Our office keeps eight courtrooms extremely busy trying five percent of the cases. If even ten percent of the cases ended in a trial, the system would break down”.³ This lack of manpower and minimal court capacity increases the prosecution’s dependence on a plea bargain as it becomes their only efficient way to secure a conviction. Another factor involved in administrative considerations is financial resources.¹⁷ Because trials often involve over two hundred hours of attorney fees, paying expert witnesses to testify, court space, and other expenses, they often incur heavy costs. Death penalty cases often cost \$1.3 million, while non-death trials cost, on average, \$600 thousand.¹⁸

However, by accepting a plea bargain, all parties involved in a trial can save significant money, time, and manpower. Thus, administrative considerations significantly influence prosecutors’ plea decisions as they motivate prosecutors to offer plea deals in the first place.

The second category related to factors influencing prosecutors’ plea bargains is case-specific facts. One of the most well-known models for understanding motivations behind accepting plea bargains is the “shadow of the trial” model, which argues that a defendant is more likely to plead guilty “if the offered sentence is less than or equal to his or her expected value of the trial”.^{12, 19, 20} In other words, if a defendant believes that the most probable outcome at trial will be a worse punishment than accepting a plea bargain, he or she will be more likely to get a plea bargain in hopes of gaining a decreased punishment. Although this model is designed to reflect defendants’ motivations when accepting a plea bargain, it can also be interpreted to reflect the motivations of the prosecution. Just like defendants, prosecutors may be bound by their interpretation of the “shadow of the trial”. For instance, the prosecution might want to offer a plea with a small discount. However, if the defendant believes he has a strong chance of being acquitted at trial, he would be less likely to accept a plea offer with a small discount. To address this, the prosecution may be forced to offer a plea with a more significant discount in exchange for a higher chance of securing that guilty plea.

Other case-specific factors — including the defendant’s criminal history, behavior during negotiations, and the severity of the crime committed — influence a prosecutor’s willingness to offer a plea bargain. A study performed by Tisdale and Votruba (2021) used a new experimental paradigm to mimic the decision-making process of prosecutors.²¹ In the study, the 420 participants recruited through a Qualtrics Panel were given a case file with information about a “theft”. Although the participants were not prosecutors, the casefiles, which varied criminal history, crime severity, and motive, included a police report, the suspect’s criminal history, and witness statements. This study was designed to resemble a case file a prosecutor would receive. Ultimately, the results demonstrated that crime severity and criminal history heavily impacted participants’ plea recommendations. Participants who were told that the item stolen had an estimated value of \$400 were more than three times as likely to offer a plea bargain than participants who were told that the item stolen had an estimated value of \$2,000; participants who were told that the defendant did not have a criminal history were an estimated 2.8 times as likely to offer a plea bargain than participants who were told that the defendant had a criminal history. Motive, however, did not significantly impact plea offers.

Redlich *et al.* (2016) found that, in addition to other factors, eyewitness identification contributed to both the willingness to offer a plea bargain and the quality of the plea discount. Interestingly, Redlich *et al.* (2016) found that criminal history only influenced the plea discount and not the willingness of prosecutors to offer a plea bargain. However, as criminal history impacted plea negotiations, it remains an important factor.¹⁹ It is important to note that some factors that influence prose-

cutor plea offers, specifically the defendant's criminal history and behavior during negotiations, are not information juries are often privy to. Instead, in many instances, such information is excluded during trials because it may bias the juror's opinions on the facts of a case.

Another factor influencing a prosecutor's willingness to offer a plea bargain is the defendant's cooperation and willingness to participate in plea negotiations. The U.S. Bureau of Justice Statistics (BJS) survey of prosecutors found that 90% of prosecutors' offices surveyed reported that, in addition to the defendant's criminal history, the defendant's willingness to plead guilty influenced plea negotiations.²² More than half of prosecutors' offices also "reported that the other criteria for negotiating included strength of the case, evidentiary problems, and the victims' attitude or concerns".²³ The lack of information on the psychological processes that influence prosecutors highlights the need to develop a clearer understanding of the gaps in the literature. This literature review aims to begin this process by analyzing three of the major relevant psychological processes in the context of prosecutorial discretion: the certainty effect, confirmatory information processing, and compliance.

The Certainty Effect:

One psychological process that can be used to understand prosecutors' motivations behind offering plea bargains is the certainty effect. The certainty effect describes the tendency to "underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty".²⁴ Baumeister and Bushman (2021) cited a theoretical experiment regarding the game Russian Roulette as an example of the certainty effect. Russian Roulette involves loading only some of the chambers of a gun with a bullet. Participants must effectively risk their lives each turn by holding the gun to their head and pulling the trigger only once. Baumeister and Bushman (2021) asked, "How much would you pay to remove one bullet, assuming either that (a) there are four bullets in the six chambers and two empties, or (b) there is only one bullet and five empties" (p. 120)? While both options involved the same decrease in the number of bullets, most participants reported that they would pay substantially more to eliminate the only bullet.²⁵ This demonstrates the trade-offs involved in the certainty effect as people are more willing to pay for the effect that would guarantee their survival rather than the one that would only increase their chance of survival by a low margin.

When offering plea bargains, prosecutors must balance trade-offs to secure the most favorable result: achieving a guilty plea and attaining the harshest sentence possible. As such, prosecutors may depend significantly on the certainty effect, which leads them to have a more favorable opinion of plea bargains. This is because, although plea bargains often involve a more lenient sentence or other such compromises, they also guarantee prosecutors something that cannot be guaranteed at trial: a conviction. Redlich *et al.* (2017) explain that plea bargains favor the prosecution because they "count as a win while avoiding the risk of a trial".¹² In other words, guilty pleas enable prosecutors to achieve a favorable result without the time and expense of a trial. Prosecutors gain even more certainty

via plea negotiations for cases where the prosecution has less evidence connecting them to the crime. Specifically, plea bargains eliminate the prosecutor's burden to prove guilt beyond a reasonable doubt. In entering a plea bargain, "the prosecution gains full exemption from having to prove its incriminating case".^{26,27} This guarantee relates to the certainty effect because it eliminates the prosecution's burden of proof, thus eliminating any chance of the prosecution losing the case.

In some cases, the certainty effect also impacts a prosecutor's decision not to offer a plea bargain and instead take a case to trial. McAllister and Bregman (1986) provided two prosecutors and two defense attorneys in 47 states with hypothetical scenarios involving criminal cases. Different attorneys were provided with slightly different scenarios that varied the probability of conviction or the severity of the expected sentence if the case went to trial. Prosecutors were asked to decide whether they would offer a plea bargain with a 1-year sentence, and defense attorneys were asked to determine if they would accept a plea bargain with a 1-year sentence. The study found that prosecutors were less willing to offer a plea bargain when the sentence severity and chance of conviction increased.²⁸ The certainty effect may be used to understand the results of this study. Because prosecutors must balance securing a conviction and the harshest sentence possible, prosecutors would be less willing to relinquish the latter in cases with a high chance of securing both a conviction and a harsh sentence.

Indeed, defendants, too, are influenced by the certainty effect as they must balance trade-offs: they must balance getting the least severe sentence or punishment possible with minimizing the costs and other effects of a trial. As such, defendants may turn to plea negotiations as the option that guarantees the most effective results. Defendants gain even more certainty via plea negotiations for cases where the prosecutor has more evidence against them. Put simply, if the defendant believes he has a high chance of conviction at trial, the certainty gained from pleading guilty to a lesser sentence becomes even more appealing.

Confirmatory Information Processing:

Whereas the certainty effect significantly influences a prosecutor's willingness to offer defendants a plea bargain, confirmatory information processing influences the quality of the prosecutor's plea bargain. Confirmatory information processing is "the tendency to favor decision-consistent information over decisioninconsistent information during information evaluation and searching. [It] results in an assimilation and a selective exposure bias".²⁹⁻³² These two types of biases have many consequences for prosecutors.

Selective exposure bias is a subsection of confirmatory information processing that refers to the phenomenon in which people attempt to avoid cognitive dissonance—which is when individuals experience psychological discomfort when presented with information that is inconsistent with their beliefs—by focusing only on the information in their immediate environment that aligns with their beliefs.^{33,34} Selective exposure bias can be attributed to two primary motivations: (a) The motivation to confirm individual subjective perceptions and (b) the motivation to protect the self-image.³⁵ In one example of

selective exposure bias, Redlich *et al.* (2016) gave participants who identified as either a judge, prosecutor, or defense attorney thirty-one folders with different information about a theoretical case. For instance, some folders were labeled confession statements, the defendant's prior criminal history, and police attitude towards the proposed plea.¹⁹ The study found that, whereas defense attorneys looked at, on average, 23 of the 31 factors, prosecutors and judges both viewed fewer than 20 factors. Because prosecutors and judges possessed stronger pre-determined biases, they only looked at the few folders that supported their views. This finding demonstrates confirmatory information processing because, although participants had access to many factors, prosecutors chose to look at only a few.

Selective exposure bias has implications far beyond a psycho-legal context. Wedderhoff *et al.* (2020) studied the impact of selective exposure on health by providing participants with fictitious information about an alleged risk for heart disease. The researchers gave participants multiple pieces of conflicting information and indicated they could choose to click on whichever piece of information they wanted. The study found that the information that described the potential risks led to a preference for information that denied the risk. In other words, it found that receiving negative feedback shifted participants' behavior from viewing a balanced selection of information to viewing a biased selection in favor of information denying the risk.³⁵ This avoidance of risk in favor of confirmatory information connects to the prior study by Redlich *et al.* (2016) and prosecutorial decision-making. Because prosecutors in the prior study were faced with substantial information that may have caused them to reconsider their initial plea recommendations, perhaps many chose to look only at a limited number of facts and, therefore, already included in their initial plea.

Confirmatory information processing also results in assimilation bias. Whereas selective exposure bias refers to when individuals try to avoid cognitive dissonance, assimilation bias refers to the tendency to absorb potentially dissonant information and interpret it in a "systematically biased way in the direction of prior implicit personality theories".³⁶ Confirmatory information processing is more likely to occur when one's cognitive resources are depleted. Regarding prosecutorial decision-making, time, information, and resources limit prosecutors' capacity to bring cases to trial. These constraints may lead prosecutors to rely subconsciously or consciously on implicit biases that may influence the quality of their plea offers. For instance, inherent racial bias that exists unconsciously may influence prosecutors. As a result, prosecutors may unintentionally give different plea offers to defendants with similar cases. This disparity is reflected in a 2017 study by Carlos Berdejó, which analyzed more than 30,000 cases in Wisconsin over seven years. The study found that, even though their cases were similar, White defendants were 25 percent more likely to have their initial charges reduced to a less severe charge during plea bargaining than Black defendants. As a result, White defendants were over 25 percent more likely than Black defendants to receive a lesser sentence associated with the reduced charge.³⁷ In other words, because administrative considerations constrain prosecutors, they may often rely on

assimilation bias. The problem with this reliance is that it often negatively impacts the quality of plea bargains offered to the defendants against whom prosecutors possess inherent biases.

It is important to note that assimilation bias is not irreparable. A study performed by Anderson (1995) found that "exposure to new data produces large changes in beliefs, at least temporarily" (p. 44). This temporary change in belief occurs because people are sensitive to new data and may act accordingly to address information that does not fit their preconceived notions.³⁶ Although this reversal of confirmatory information processing may be visible in other fields of study, there is less evidence for this phenomenon in a psycho-legal context. A study by Lord (1984) evaluated the effects of exposing conflicting evidence on subjects supporting and opposing capital punishment. Findings showed that "people who hold strong opinions on complex social issues are likely to examine relevant empirical evidence in a biased manner. They can accept 'confirming' evidence at face value while subjecting 'discontinuing' evidence to critical evaluation".³⁸ Because prosecutors are pressed for time, they often cannot seek out conflicting information that may influence their decision-making regarding plea negotiations. As a result, assimilation bias may often need to be addressed.

There are other instances in which assimilation bias can be decreased. Fischer *et al.* (2010) also found that assimilation bias can be minimized when the decision-maker is distracted during decision-making.³⁹ When distracted, people are less likely to be sure about the validity of their decision and, therefore, more likely to balance relevant information even if it conflicts with their original beliefs or decisions. However, distraction too has minimal effects on prosecutorial decision-making. There is a clear difference between being distracted, as participants were in the Fischer *et al.* (2010) study, and being pressed for time, as prosecutors often are. Thus, although there is a possibility that prosecutors can minimize confirmatory information processing, the modern-day legal system's limitations on prosecutors' time limit such hopes.

Compliance:

A third psychological process that influences prosecutors is compliance. Like the certainty effect, compliance influences a prosecutor's motivation to offer a plea bargain. However, compliance focuses more on external factors and pressures than a case's specific facts. As Kelman (1958) identified in his comprehensive review of the attitude change literature, there are three forms of social influence: conformity, compliance, and obedience.⁴⁰ The first, conformity, involves a person altering their behavior without any instruction to fit in with the rest of the group; the second, compliance, involves a person changing their behavior to go along with the requests of another; and the third, obedience, involves performing actions under the orders of an authority figure. Although all three forms of social influence could arguably relate to plea bargaining, compliance may directly impact prosecutorial discretion. Indeed, conformity is less related to prosecutorial decision-making because conformity requires a person to adhere to unspoken rules. About prosecutors, expectations are often spoken aloud. Similarly, obedience requires a person to adhere to a direct order.⁴¹ Thus, obedience has less application to psychological processes that

influence prosecutors because prosecutors are not *forced* to act a certain way. Compliance, on the other hand, overtly relates to prosecutors.

Compliance is considered a type of “normative influence,” which involves individuals conforming to the norms of a group so that they can gain social acceptance.⁴² As Kelman (1958) specified, “Compliance occurs when an individual accepts influence because he hopes to achieve a favorable reaction from another person or group” (p. 53). In exchange for following induced behavior, an individual expects to either gain a reward (be it a tangible reward or achieving societal approval) or avoid the punishment of disapproval resulting from a lack of conformity. Kelman (1958) also clarified that compliance is unique in that the satisfaction from complying derives from “the *social effect* of accepting influence” (p. 53). Thus, compliance can be broken down into three primary components: (1) a request, either spoken or unspoken, for an individual to act a certain way, (2) the carrying out of the request, and (3) the expected reward or result that derives from complying with the request.

Regarding plea bargaining, prosecutors are not controlled by a direct source of authority and are, therefore, not frequently given overt requests. However, other organizations and individuals often consciously and unconsciously influence prosecutors. The prosecutor’s office is a political entity that must interact with other parties to achieve a favorable outcome at trial. To achieve a favorable outcome, the prosecutor must maintain good relations with other organizations, professionals, and the electorate.⁴³ Although politics do not always influence a prosecutor’s decision to proceed with a case, politics are inherent in plea negotiations, as political agendas may affect a prosecutor’s decision to offer a reduced charge.

Prosecutors must maintain a favorable relationship with the media and dispel information regarding a prosecutor or a case to the public. The American Bar Association’s Standards for Prosecution Function decrees that prosecutors should not allow their decisions to be influenced by personal interest in media attention.⁴⁴ However, the public’s perception of a case does influence prosecutorial behavior. This influence is partly because most prosecutors agree that the media coverage is a relatively accurate reflection of the public’s perception of a case.⁴⁵ As a result, prosecutors may act in ways that align with the media. Pritchard (1986) analyzed the police and court records of ninety homicide cases over 18 months in Milwaukee County, Wisconsin.⁴⁶ The location of the cases, Milwaukee County, was specific because, while cases were commonly processed through plea bargains, less than a quarter of the population favored plea bargaining. The study’s results suggested that the amount of space newspapers allocated for criminal cases influenced prosecutors’ agenda. Specifically, the shorter the news story and the less extensive the news coverage, the more likely a prosecutor would offer a plea.⁴⁶ Although the study also suggested that other factors contributed to the prosecutor’s willingness to provide a plea—namely, the strength of the evidence against the defendant—the media’s direct impact remains pertinent. Thus, prosecutors may comply with the media.

Prosecutors must also comply with the unspoken needs and requests of the electorate. According to a 2002 report published by the U.S. Department of Justice, Bureau of Justice Statistics, 47 states elect their chief prosecutors while the remaining three appoint them.⁴⁷ This prevalence of elected prosecutors means that voters often get information about potential candidates through the media and control whether a prosecutor is elected. As such, prosecutors must comply with the public’s general opinion to win favor and, by extension, be elected. For instance, a Cook County, Illinois prosecutor said: “I’d be crazy to bargain in any case that received a lot of news coverage. The public will demand justice, so I usually go to trial”.⁴⁸ This tendency to comply with public expectations can be explained by the role of politics about prosecutorial discretion. According to Alschuler (1968), “Political considerations may, on occasion, make it important for a prosecutor to secure a conviction for a particular crime, and plea negotiations may provide the only practical means of achieving this objective” (p. 109). These political considerations mean that “Maintaining a public image as a crime-fighter is important to the prosecutor, perhaps to the extent of stressing adversary dispositions in publicized cases, regardless of the strength of evidence against the defendant”.⁴⁶ In other words, because the general opinion is that a conviction accompanied by a long sentence is better for public interests and because the public controls prosecutors’ election, prosecutors are motivated to secure a conviction. However, while this public perception may influence a prosecutor’s tendency to take a case to trial, at times, it may also influence a prosecutor’s offer or plea negotiation. When evidence is weak or when there are other constraints, such as time or manpower, public perception, and subsequent prosecutorial compliance, large plea offers are the only means to secure a conviction.

Since first being identified, compliance has been studied across fields, and its influence has been demonstrated to extend beyond the realm of psycho-legal analysis. One of the most infamous examples of compliance was the 1971 Stanford Prison Experiment performed by Philip Zimbardo, in which participants were assigned the role of either a prisoner or a guard and sent to live in a basement that had been remodeled to look like a prison.⁴⁸ Originally slated to last two weeks, the experiment had to end only six days after the guards abused the prisoners by, among other things, breaking into their cells, removing their beds, and strip-searching.⁴⁹ The study demonstrated that people are influenced to comply with the expectations associated with specific roles. In this case, both the “guards” and the “prisoners” complied with societal expectations: the “guards” exhibited stereotypically harsh behavior, and the “prisoners” exhibited stereotypically rebellious behavior. Furthermore, just as the prisoners and guards complied with stereotypes, so do prosecutors. In other words, compliance may result in prosecutors trying to achieve the harshest sentence possible to fit in with the normative influences of society.

■ Conclusion

The early 20th century saw a rapid increase in the prominence of plea negotiations as an alternative to the traditional

trial.⁵⁰ This increase can largely be attributed to the increase in arrests and subsequent indictments that forced prosecutors to turn to plea bargaining as a reliable method for disposing of cases. Between 1926 and 1940, the prison population increased by 67% before remaining relatively constant until 1972.⁵¹ Then, starting in 1972, the prison population began an unprecedented increase such that, by 2007, the rate of imprisonment was almost five times what it had been in 1972.⁵² This increase in incarceration rates was not met with an unprecedented increase in attorneys and court availability. Instead, prosecutors' offices have struggled to recruit and retain new staff to alleviate their overloaded caseload.

Overworked and underpaid, prosecutors have been forced to turn to plea bargaining, as reflected in the rapid increase in plea bargains. A 1984 Bureau of Justice Statistics report found that the plea bargain-to-trial ratio averaged about 10 to 1. However, today, the ratio of plea bargains to trials is closer to 49:1, as an estimated 98% of cases end in a guilty plea each year.^{53, 54} However, the actual trial rate may be even lower. A study performed by the Pew Research Center shows that "of nearly 80,000 defendants who faced charges in the federal system in fiscal year 2018, fewer than 2% went to trial, and only 320 of those that did [won] an acquittal".⁵³⁻⁵⁵ In Santa Cruz County, Arizona, no single trial existed between 2010 and 2012.⁵⁴ As the American Bar Association Task Force said, "Trials have become rare legal artifacts in most U.S. jurisdictions, and even nonexistent in others."⁵³

The decline of the American jury trial statistics has many implications, which warrant several potential courses of action. First, it is necessary to perform further studies to gain a broader understanding of the psychological processes that guide prosecutors. Although the research presented in this article identifies some psychological processes, it needs to be more conclusive and would benefit from further studies. As it would be beneficial for these future studies to focus more on the actual decision-making process rather than merely the outcome, studies should be performed in a contained lab environment rather than being performed online. Although this format would no doubt hinder the study's sample size, it is necessary to enable researchers to understand the decision-making process of prosecutors. For instance, future researchers could replicate Redlich *et al.*'s 2016 study (in which prosecutors, defense attorneys, and judges were given access to information about a case and asked to view the information they felt would contribute to their plea offer) in a lab environment so that participants' decision-making process can be analyzed in real-time.

Secondly, it would be beneficial to perform a comprehensive study of environmental factors influencing prosecutors to understand their psychological motivations further. It is widely known that prosecutors, like any other person, are influenced by implicit biases that may affect their decisions.^{36, 56, 57} These biases may stem from prosecutors' personal lives, which are heavily influenced by environmental considerations. As such, a study on specific environmental factors would help researchers identify the roots of the implicit biases that may contribute to the psychological processes that impact prosecutorial decisions. One suggestion might be a study on the relationship between

geographic location and prosecutorial discretion. The primary differences between rural and urban areas are that, in the former, prosecutors often either know of or personally know the defendant. In urban areas, on the other hand, defendants are commonly strangers to prosecutors.⁴³ However, more research would be necessary to understand how this difference influences prosecutors.

Until better empirical answers exist, it is necessary to consider possibilities for scaling back the rate of plea negotiations. The complete abolition of our plea bargains would not be in the best interests of defendants who are truly guilty and who, therefore, depend on plea bargains to get a more lenient sentence. It would also slow the criminal justice system and prevent cases from being heard promptly. However, at the same time, an uncritical acceptance of plea negotiations as a "necessary evil" can negatively impact the truth-finding function of the legal system, which takes away from the value of the legal system. Instead, until we gain the tools necessary to establish an alternative to plea negotiations, it seems judicious that we return to the recommendations of Alschuler (1983) for methods to possibly decrease the rate of plea bargains. For instance, it would be prudent to simplify the trial process to increase trial availability.⁵⁸ It would also be beneficial to find alternatives to plea bargaining. As nearly all cases that enter the legal system are determined by plea negotiations, learning more about the factors that influence these decisions is critical to help protect the integrity of American justice.

■ Acknowledgments

I want to thank my mentor, Dr. Jacqueline Katzman from John Jay College of Criminal Justice at the City University of New York (CUNY), for guiding me throughout the process of writing this literature review. I would also like to thank my family for their continued support.

■ References

1. Kennedy, A. M. & Supreme Court of The United States. 2011. *US Reports: Lafler v. Cooper*, 566 U.S. 156. [Periodical] Retrieved from the Library of Congress, <https://www.loc.gov/item/usrep566156/>
2. Carrizales, A., & Schultz, T. Lafler v. Cooper. *Legal Information Institute*. n.d. <https://www.law.cornell.edu/supct/cert/10-209>
3. Alschuler, A. W. The prosecutor's role in plea bargaining. *The University of Chicago Law Review* 1968, 36(1), 50-112. <https://doi.org/10.2307/1598832>
4. Wight v. Rindskopf, 43 Wis. 344, 357 (1877)
5. Dervan, L. Bargained justice: plea-bargaining's innocence problem and the Brady safety-valve. *Utah Law Review*, 2012, 1, 51-97
6. Blumberg, A. *Criminal justice: Issues & ironies* (2nd ed.). New Viewpoints. 1979.
7. Davis, A. J. The power and discretion of the American prosecutor. *Droit et Cultures: Cahiers Du Centre de Recherche de l'U.E.R. de Sciences Juridiques*, 2005, 49(49), 55-66. <https://doi.org/10.4000/droitcultures.1580>
8. Tonry, M. Prosecutors and politics in comparative perspective. *Crime and Justice*, 2012, 41(1), 1-33. <https://doi.org/10.1086/666975>
9. Rakoff, J.S. Why Innocent People Plead Guilty. *New York Review of Books*. July 23, 2020. <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>

10. Helm, R. K., Cognition and incentives in plea decisions: Categorical differences in outcomes as the tipping point for innocent defendants. *Psychology, Public Policy, and Law*, 2022, 28(3), 344–355. <https://doi.org/10.1037/law0000321>
11. Helm, R. K., Reyna, V. F., Franz, A. A., Novick, R. Z., Dincin, S., & Cort, A. E. Limitations on the ability to negotiate justice: Attorney perspectives on guilt, innocence, and legal advice in the current plea system. *Psychology, Crime & Law*, 2018, 24(9), 915–934. <https://doi.org/10.1080/1068316X.2018.1457672>
12. Redlich, A. D., Bibas, S., Edkins, V. A., & Madon, S. The psychology of defendant plea decision making. *The American Psychologist*, 2017, 72(4), 339–352. <https://doi.org/10.1037/a0040436>
13. Henderson, K. S., & Levett, L. M. Investigating predictors of true and false guilty pleas. *Law and Human Behavior*, 2018, 42(5), 427–441. <https://doi.org/10.1037/lhb0000297>
14. Bibas, S. Plea bargaining outside the shadow of trial. *Harvard Law Review*, 2004, 117(8), 2463–2547. <https://doi.org/10.2307/4093404>
15. Bureau of Justice Statistics. *The Prevalence of Guilty Pleas*. Bureau of Justice Statistics, 1984. <https://bjs.ojp.gov/content/pub/pdf/pgp.pdf> (accessed 2023-11-25).
16. Frederick, B., & Stemen, D. The anatomy of discretion: An analysis of prosecutorial decision-making for cases processed by offices in one northern county and one southern county, 2007–2010. *Inter-university Consortium for Political and Social Research*, 2015, 32542, 1–429.
17. Furbish, L. K. *Prosecutor plea bargaining guidelines*. Office of Legislative Research. 1995.
18. National Association for Legal Gun Defense <https://www.selfdefensefund.com/wp-content/uploads/2018/12/Cost-Court-Trial-Booklet.pdf> (accessed 2023-11-25)
19. Redlich, A. D., Bushway, S. D., & Norris, R. J. Plea decision-making by attorneys and judges. *Journal of Experimental Criminology*, 2016, 12(4), 537–561. <https://doi.org/10.1007/s11292-016-9264-0>
20. Mnookin, R. H., & Kornhauser, L. Bargaining in the shadow of the law: the case of divorce. *Yale Law Journal*, 1979, 88, 950–997.
21. Votruba, A. M., & Tisdale, C. N. Examining prosecutorial decision-making in plea bargaining: An experimental paradigm in a community sample. *Analyses of Social Issues and Public Policy*, 2021, 21(1), 595–620. <https://doi.org/10.1111/asap.12234>
22. Bureau of Justice Statistics Home Page. <https://bjs.ojp.gov/topics/courts/prosecution#recent-faqs-what-is-the-primary-problem-prosecutors-offices> (accessed 2023-02-21).
23. Dawson, J. M., Smith, S. K. & DeFrances, C. J. *Prosecutors in State Courts*, 1992. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. 1993, <https://bjs.ojp.gov/content/pub/pdf/psc92.pdf>
24. Kahneman, D., & Tversky, A. Prospect theory: An analysis of decision under risk. *Econometrica*, 1979, 47(2), 263–291. <https://doi.org/10.2307/1914185>
25. Baumeister, R. F., & Bushman, B. (2020). *Social psychology and human nature* (5th ed.). Wadsworth Publishing.
26. Fisher, T. The boundaries of plea bargaining: Negotiating the standard of proof. *The Journal of Criminal Law & Criminology*, 2007, 97(4), 943–1007.
27. Alschuler, A. W. Plea bargaining and its history. *Columbia Law Review*, 1979, 79(1), 1–43. <https://doi.org/10.2307/1122051>
28. McAllister, H. A. & Bregman, N. J. Plea bargaining by prosecutors and defense attorneys: A decision theory approach. *Journal of Applied Psychology*, 1986, 71(4), 686–690. <https://doi.org/10.1037/0021-9010.71.4.686>
29. Esnard, C., & Dumas, R. Jurors' verdicts based on their intimate conviction: Influence of magistrate's opinion on confirmatory information processing. *Cogent Psychology*, 2019, 6(1), 1–15. <https://doi.org/10.1080/23311908.2019.600633>
30. Fischer, P. & Greitemeyer, T. A new look at selective-exposure effects: An integrative model. *Current Directions in Psychological Science*, 2010, 19(6), 384–389. <https://doi.org/10.1177/0963721410391246>
31. Frey, D. Recent research on selective exposure. *Advances in Experimental Social Psychology*, 1986, 19, 41–80.
32. Hart, W., Albarraci, D., Eagly, A. H., Brechan, I., Lindberg, M. J., Merrill, L. Feeling validated versus being correct: a meta-analysis of selective exposure to information. *Psychological Bulletin*, 2009, 135(4), 555–588. <https://doi.org/10.1037/a0015701>
33. Festinger. *A theory of cognitive dissonance*. Stanford University Press. 1962.
34. Bran, A. & Vaidis, D. On the characteristics of the cognitive dissonance state: Exploration within the pleasure arousal dominance model. *Psychologica Belgica*, 2020, 60(1), 86–102. <https://doi.org/10.5334/pb.517>
35. Wedderhoff, O., Chasiotis, A., & Rosman, T. When freedom of choice leads to bias: How threat fosters selective exposure to health information. *Frontiers in Psychology*, 2022, 13, 937699–937699. <https://doi.org/10.3389/fpsyg.2022.937699>
36. Anderson, C. A. Implicit personality theories and empirical data: Biased assimilation, belief perseverance and change, and covariation detection sensitivity. *Social Cognition*, 1995, 13(1), 25–48. <https://doi.org/10.1521/soco.1995.13.1.25>
37. Berdejó, C. Criminalizing race: Racial disparities in plea-bargaining. *Boston College Law Review*, 2018, 59(4), 1188–1249.
38. Lord, C. G., Ross, L., & Lepper, M. R. Biased assimilation and attitude polarization: The effects of prior theories on subsequently considered evidence. *Journal of Personality and Social Psychology*, 1979, 37(11), 2098–2109. <https://doi.org/10.1037/0022-3514.37.11.2098>
39. Fischer, P., Fischer, J., Weisweiler, S., & Frey, D. Selective exposure to information: How different modes of decision-making affect subsequent confirmatory information processing. *British Journal of Social Psychology*, 2010, 49(4), 871–881. <https://doi.org/10.1348/014466610X499668>
40. Kelman, H. Compliance, identification, and internalization: Three processes of attitude change. *The Journal of Conflict Resolution*, 1958, 2(1), 51–60. <https://doi.org/10.1177/002200275800200106>
41. Milgram, S. Behavioral study of obedience. *The Journal of Abnormal and Social Psychology*, 1963, 67(4), 371–378. <https://doi.org/10.1037/h0040525>
42. Deutsch, M., & Gerard, H. B. A study of normative and informational social influences upon individual judgment. *The Journal of Abnormal and Social Psychology*, 1955, 51(3), 629–636. <https://doi.org/10.1037/h0046408>
43. Cole, G. F. The decision to prosecute. *Law & Society Review*, 1970, 4(3), 331–344. <https://doi.org/10.2307/3053090>
44. American Bar Association. *How courts work: Plea bargaining*. November 2021, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/
45. Drechsel, R. E. *News making in the trial courts*. Longman. 1983.
46. Pritchard, D. Homicide and bargained justice: The agenda-setting effect of crime news on prosecutors. *Public Opinion Quarterly*, 1986, 50(2), 143–159. <https://doi.org/10.1086/268971>
47. Coppola, G. *States That Elect Their Chief Prosecutors*. Office of Legislative Research. 2003, <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm>

48. Mcleod, S. (2023, May 18). Stanford prison experiment: Zimbardo's famous study. Simply Psychology. <https://www.simplypsychology.org/zimbardo.html>
49. Haney, C., Banks, C., & Zimbardo, P. Interpersonal dynamics in a simulated prison. *International Journal of Criminology & Penology*, 1973, 1(1), 69–97.
50. McConville, M., & Mirsky, C. The rise of guilty pleas: New York, 1800–1865. *Journal of Law and Society*, 1995, 22(4), 443–474. <http://doi.org/10.2307/1410610>
51. Delaney, R., Subramanian, R., Shames, A., & Turner, N. *American history, race and prison*. Vera Institute of Justice. n.d. <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison#:~:text=Between%201926%20and%201940%2C%20state,23%20percent%20among%20black%20people>
52. Zimring, F. E. The scale of imprisonment in the United States: Twentieth century patterns and twenty-first century prospects. *The Journal of Criminal Law and Criminology*, 2010, 100(3), 1225–1246.
53. Johnson, T. *Criminal justice service plea bargain task force report*. American Bar Association. 2023, <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>
54. Johnson, C. *The vast majority of criminal cases end in plea bargains, a new report finds*. National Public Radio. 2023, <https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice>
55. Gramlich, J. *Only 2% of federal criminal defendants went to trial in 2018, and most who did were found guilty*. Pew Research Center. 2023, <https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>
56. Smith, R., & Levinson, J. The impact of implicit racial bias on the exercise of prosecutorial discretion. *Seattle University School of Law*, 2012, 35(3), 795–826.
57. Sah, S., Robertson, C. T., & Baughman, S. B. Blinding prosecutors to defendants' race: A policy proposal to reduce unconscious bias in the criminal justice system. *Behavioral Science & Policy*, 2015, 1(2), 69–76. <https://doi.org/10.1353/bsp.2015.0013>
58. Alschuler, A. W. Implementing the criminal defendant's right to trial: Alternatives to the plea bargaining system. *The University of Chicago Law Review*, 1983, 50(3), 931–1050. <https://doi.org/10.2307/1599531>

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