FAIR AND JUST PROSECUTION

Fair Trials

ISSUES AT A GLANCE

Plea Bargaining

Fair and Just Prosecution (FJP) *brings together recently elected district attorneys[1] as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.**

FJP is pleased to partner with ***Fair Trials*** *on this "Issues at a Glance" brief. Fair Trials is a global criminal justice watchdog campaigning for fairness, equality, and justice. Fair Trials' team of experts expose threats to justice and identify practical changes to fix them. The organization campaigns for criminal justice reform, supports strategic litigation, reforms policy, and develops international standards and best practice. Fair Trials supports local movements for reform and builds partnerships with lawyers, activists, academics, and other NGOs. It is the only international NGO that campaigns exclusively on the right to a fair trial, providing a comparative perspective on how to tackle failings within criminal justice globally. In 2017, Fair Trials published "The Disappearing Trial" report, which gathers the most comprehensive information on the operation of plea-bargaining systems in 90*

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[1] The terms "District Attorney," "DA," or "elected prosecutor" are used generally to refer to any chief local prosecutor, including State's Attorneys, Prosecuting Attorneys, and Attorneys General with local jurisdiction.

"We are not going to overcharge.... We are not going to try to coerce defendants. We are going to proceed on charges that are supported by the facts in the case, period. The era of trying to get away with the highest charge regardless of the facts is over."

— PHILADELPHIA (PA) DISTRICT ATTORNEY LARRY KRASNER

international jurisdictions. Since then, Fair Trials has engaged in advocacy to improve the fairness of these practices in countries across the globe, and recently published "Efficiency over justice: Insights into trial waiver systems in Europe."

SUMMARY

This "Issues at a Glance" brief addresses the role of plea bargaining in prosecution. It outlines the current use of plea bargaining, and main concerns around the role this practice may play in driving over-incarceration. This brief also describes innovative approaches being implemented in prosecutors' offices and elsewhere that aim to limit these potential harms and strengthen procedural safeguards in the plea process.

The vast majority of criminal cases in the U.S. are resolved through guilty pleas. While negotiated plea agreements between prosecutors and defendants can be used strategically to deliver justice, make efficient use of resources, and minimize negative impact on victims and defendants alike, the way that plea bargaining is used in the criminal legal system today raises several procedural concerns. Additionally, evidence shows that the wide discretion that prosecutors have in charging decisions and plea offers can result in a "trial penalty," in which defendants who reject plea offers and exercise their constitutional right to have a trial experience significantly harsher punishment. The "trial penalty" also contributes to racial disparities in the criminal legal system.

This brief describes how prosecutors can strengthen due process and reduce coercion associated with the plea process, highlighting innovative practices in prosecutors' offices as well as other reforms that advance these objectives. Working in tandem with other criminal justice system reforms, such measures have the potential to significantly reduce procedural concerns, racial disparities, and unnecessary incarceration caused by the misuse of plea bargaining.

BACKGROUND AND DISCUSSION

A guilty plea is typically the result of a negotiated agreement whereby a defendant agrees to plead guilty and forfeit their right to a trial in exchange for some concession from the prosecution, usually involving a reduction in the amount or type of charges brought or a shorter recommended sentence. Plea dispositions are largely viewed as essential to the administration of the criminal legal system because they allow for the rapid processing of cases in a system that contains too many cases to support speedy jury trials in every case.[2] Speedy disposition through guilty pleas can benefit victims, who can achieve justice quickly without having to undergo the traumatic process of testifying, as well as benefit defendants, who are likewise able to move on with their lives sooner than a trial would allow. Plea bargaining can also be a tool to achieve cooperation – prosecutors might offer a reduced sentence in exchange for a guilty plea and agreement to testify against a third party.[3]

The use of plea bargaining has evolved in recent decades and now features in nearly all criminal cases. From 1986 to 2006, the ratio of pleas to trials in a sample of nationwide felony prosecutions

[2] Turner, J. I. (2017), *Plea Bargaining.* In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

[3] *Id.*

nearly doubled.[4] According to recent data, approximately 97%[5] of federal convictions and 94%[6] of state felony convictions are obtained through a guilty plea. The United States is the global leader in plea bargaining; while the practice has recently become more common in the international context, it is not used in other countries as frequently and with such little regulation.[7]

Because of minimal legislative, judicial, and criminal procedure oversight, plea bargaining is almost entirely subject to prosecutorial discretion.[8] The Supreme Court established that any guilty plea must be "voluntary" and "knowing" in *Brady v. United States*,[9] but has subsequently interpreted these standards expansively.[10] While judges ultimately impose the sentence, and must confirm that the defendant understands the terms to which he or she is pleading, typical practice, and often the operative rules, has sought to preserve the role of the judge as an impartial arbiter by limiting their participation in plea negotiations. In practice, judges generally conduct only a perfunctory inquiry into the factual basis and the defendant's understanding of the process, as well as rights being waived, before approving the plea.[11]

The potential for plea bargaining to undermine the rule of law, as well as its role as a driver of over-incarceration, is under increasing scrutiny, surfacing a variety of concerns. Pleas are often obtained through a negotiation process characterized by a power imbalance. Given charging discretion and unequal access to information, this imbalance typically favors the prosecution. Furthermore, plea bargaining may be used to win convictions in cases that may otherwise have ended in dismissal or acquittal due to procedural rights violations or a lack of evidence. Finally, the off-the-record nature of most plea negotiations and absence of publicly shared plea negotiation guidelines contribute to a troubling lack of transparency in prosecutorial decision-making.[12] That lack of transparency impairs the ability of communities to offer feedback on policies, hold elected prosecutors

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[4] Oppel, R. (2011), *Sentencing Shift Gives New Leverage to Prosecutors*, The New York Times, https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html.

[5] Bureau of Justice Statistics (2017), *Federal Justice Statistics, 2014 – Statistical Tables*, https://www.bjs.gov/content/pub/pdf/fjs14st.pdf.

[6] Bureau of Justice Statistics (2009), *Felony Sentences in State Courts, 2006 – Statistical Tables*, https://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

[7] Fair Trials (2017), *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, https://www.fairtrials.org/publication/disappearing-trial-report.

[8] Pfaff, J. F. (2017), *Prosecutorial Guidelines*. In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

[9] *Brady v. United States*, 397 U.S. 742 (1970).

[10] Turner, J. I. (2017), *Plea Bargaining*. In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

[11] Turner, J. I. (2006), *Judicial Participation in Plea Negotiations*, The American Journal of Comparative Law, 54(1), 199-267, https://www.jstor.org/stable/20454489.

[12] *See* Miller, M. and Wright, R. (2008), *The Black Box*, Iowa Law Review, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1264010; Vera Institute of Justice (2018), *Unlocking the Black Box of Prosecution*, https://www.vera.org/unlocking-the-black-box-of-prosecution.

"We shouldn't be filing cases unless we can prove them, and we shouldn't be using the threat of killing someone … to get a plea to first degree murder."

— DENVER (CO) DISTRICT ATTORNEY BETH MCCANN

accountable, and detect disparities in decision-making. Likewise, if prosecutors' offices fail to collect sufficient data on plea bargaining, prosecutorial leaders may find it challenging to detect and remedy disparities, address concerning practices, or advance other policy goals.

CONCERNS WITH THE CURRENT USE OF PLEA BARGAINING

A. Procedural Concerns

The minimal regulatory oversight of the plea process, coupled with other realities of how the criminal legal system functions in practice, raises several procedural problems. For example, many U.S. jurisdictions continue to allow prosecutors to require waivers of rights beyond the right to trial itself – such as the right to exculpatory evidence, to appeal, to post-conviction DNA testing, or to challenge ineffective counsel.[13] Some prosecutors also make "exploding" offers in which a deal must be accepted within a short timeframe.[14] Some of these time-limited plea offers may be informed by seemingly appropriate considerations such as addressing limited resources and avoiding undue trauma to victims and witnesses, while others are more blatantly coercive, such as sentence offers that increase arbitrarily over time or increase each time a defendant exercises an important procedural right, such as reviewing the evidence or filing pretrial motions.

Because of the often quick timeline between arraignment and initial plea offer, defendants may enter guilty pleas without receiving meaningful advice from legal counsel.[15] Particularly in misdemeanor cases, for which there may not be a right to adequate legal counsel,[16] defendants routinely agree to plead – including with critical rights waived – to obtain release from pre-trial detention without appreciating the serious impact the collateral consequences of a criminal conviction will have on them.[17] One recent analysis of hundreds of thousands of misdemeanor cases found that detained defendants were 25% more likely to plead guilty than similarly situated individuals who were released before trial.[18] Even for more serious crimes, where the right to counsel does exist, prosecutors may offer time-limited pleas before defendants have met with their lawyer or before discovery has occurred.[19]

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[13] Turner, J. I. (2017), *Plea Bargaining*. In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf; Fair Trials (2017), *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, https://www.fairtrials.org/publication/disappearing-trial-report.

[14] Zottoli, T.M. et al. (2016), *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(3), 250-259, https://www.researchgate.net/publication/306025307_Plea_discounts_time_pressures_and_false-guilty_pleas_in_youth_and_adults_who_pleaded_guilty_to_felonies_in_New_York_City.

[15] Natapoff, A. (2012), *Misdemeanors*, Southern California Law Review, 85(101), 101-163, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010826.

[16] For further guidance on the ethical duties of prosecutors negotiating plea agreements with misdemeanor defendants who do not have counsel, see ABA Standing Comm'n on Ethics and Professional Responsibility, Formal Opinion 486 (2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_486.pdf.

[17] Russell, J. and Hollander, N. (2017), *The Disappearing Trial: The global spread of incentives to encourage suspects to waive their right to a trial and plead guilty*, New Journal of European Criminal Law, 8(3), 309-322, https://journals.sagepub.com/doi/abs/10.1177/2032284417722281.

[18] Heaton, P., Mayson, S., and Stevenson, M. (2017), *The Downstream Consequences of Misdemeanor Pretrial Detention*, Stanford Law Review, 69(3), 711-794, https://www.law.upenn.edu/live/files/5693-harriscountybail.

[19] *Id.*

B. Effect on Over-Incarceration

The way plea bargaining is used today is also a significant driver of over-incarceration. As noted above, the "trial penalty" describes the significant increase in sentence length that can result when a defendant declines a plea offer and instead takes their case to trial. Among the primary drivers of the trial penalty are the practice of overcharging and the punitive use of enhancements in order to induce pleas to lesser offenses. Recent studies suggest that sentences imposed after trial are regularly three times as long as those agreed to as part of a guilty plea for the same underlying offense.[20] Moreover, research has consistently found that similarly situated defendants who go to trial are at least twice as likely to receive sentences involving incarceration than those who accept plea deals.[21]

There is also deeply troubling evidence that the trial penalty coerces innocent defendants to plead guilty: while estimates vary, the National Registry of Exonerations has reported that 15% of known exonerees pled guilty to the crime for which they were later exonerated.[22] Innocent defendants are most likely to plead guilty when there is a significant difference between the plea offer and the potential punishment after trial, either in terms of sentence length or punishment type (e.g., capital punishment versus life imprisonment, or incarceration versus probation).[23] There is also ample evidence that the trial penalty and the phenomenon of innocent defendants pleading guilty are especially problematic in the prosecution of drug crimes.[24] The prevalence of plea bargaining additionally creates incentives to codify overly harsh sentences, with the understanding that, in the vast majority of cases, the maximum possible sentence will not be applied.

While plea bargaining may be intended as a lever to streamline the criminal legal process, the high stakes created by the trial penalty and overcharging mean that it frequently has the opposite effect – it ensnares people in the justice system who otherwise may not be convicted and imposes unduly long sentences on those who exercise their constitutional right to a trial.

C. Contributions to Racial Disparities

The level of discretion afforded to prosecutors in plea negotiations also raises concerns because individual prosecutors' personal preferences, incentives, and biases may lead to disparate outcomes. For example, biases may drive prosecutors to perceive race as a proxy for criminality or

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[20] National Association of Criminal Defense Lawyers (2018), *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, http://www.nacdl.org/trialpenaltyreport.

[21] Johnson, B.D. (2019), *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, Federal Sentencing Reporter, 31(4-5), 256-264, https://online.ucpress.edu/fsr/article-abstract/31/4-5/256/109293/Plea-Trial-Differences-in-Federal-Punishment?redirectedFrom=fulltext.

[22] National Registry of Exonerations (2015), *Innocents Who Plead Guilty*, http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf.

[23] Turner, J.I. (2017), *Plea Bargaining*. In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf; Plea-Trial Differences in Federal Punishment.

[24] National Registry of Exonerations (2015), *Innocents Who Plead Guilty*, http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf; Human Rights Watch (2013), *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead.

recidivism risk, even when other factors are taken into account.[25] A recent study of misdemeanor cases in Wisconsin found that white defendants with no prior convictions were over 25% more likely to have their charges reduced than Black defendants who also had no criminal history. The analysis also found that misdemeanor cases drove this disparity, while the gap in charge reductions for felony offenses between white and Black defendants was smaller but still significant at 6%.[26] The disparities resulting from this consideration of criminal history are compounded by other inherent disparities in arrests and convictions more generally.[27]

INNOVATIONS AND PROMISING EXAMPLES

Policymakers and justice system leaders – including prosecutors – are increasingly paying attention to the need to reform, and constrain, plea practices in order to ensure that the criminal legal system functions equitably, judiciously, and transparently. While plea bargaining is still largely viewed as essential to managing caseloads, research has questioned the assumption that reducing reliance on guilty pleas and taking more cases to trial would cripple the criminal legal system.[28] Importantly, broader criminal justice reform efforts – including sentencing reform, increased funding to indigent defense, improved discovery practices, increased use of diversion, ending unnecessary pre-trial detention, and understanding and addressing racial disparities – will also play a role in making the plea negotiation process more just. The incentives that drive overreliance on plea bargaining are also closely tied to efforts to rethink how prosecutor's offices, which have traditionally tied evaluations and promotions to metrics such as conviction rates, can operate instead to reward the pursuit of justice. Ultimately, these structural and systemic reforms will help reduce the reliance on guilty pleas and also make the plea process, when used, more fair.

While pursuing and supporting such systemic reforms, DAs can also take immediate action and make changes to their offices' plea bargaining practices to strengthen due process, increase transparency, and reduce unnecessary incarceration. The following innovations and examples of promising practices highlight changes prosecutor's offices can implement and some broader reforms that state legislatures or other bodies should consider.

A. Institute Charging and Sentencing Standards that Promote Consistency and Limit any Trial Penalty

Many other countries, such as France and Germany, limit the potential coercive power of the trial penalty by capping the discount offered in a plea bargain to approximately 30% of the expected

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[25] Kutateladze, B. (2012), *Do Race and Ethnicity Matter in Prosecution?,* Vera Institute of Justice, https://www.vera.org/publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies.

[26] Berdejó, C. (2018), *Criminalizing Race: Racial Disparities in Plea-Bargaining*, Boston College Law Review, 59(4), 1187-1249, https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3659&context=bclr.

[27] Kutateladze, B., Tymas, W., and Crowley, M. (2014), *Race and Prosecution in Manhattan*, Vera Institute of Justice, https://www.vera.org/publications/race-and-prosecution-in-manhattan.

[28] Bureau of Justice Assistance (2011), *Plea and Charge Bargaining: Research Summary*, https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

"Gamesmanship should have no place in how we, as prosecutors, do our jobs."

— KINGS COUNTY (BROOKLYN), NY DISTRICT ATTORNEY ERIC GONZALEZ

sentence after trial.[29] In the U.S. context, charging and sentencing guidelines taken together offer a model for limiting the trial penalty. They can also promote fairness and consistency in plea negotiations, reduce the potential for these negotiations to be affected by biases, and increase transparency.

The **King County (Seattle, Washington) Prosecuting Attorney's** office has used written standards "to control the exercise of discretionary power in making filing and disposition decisions in criminal cases" since 1970. Under the leadership of Prosecuting Attorney Dan Satterberg, the current guidelines impose limits on overcharging, such as by defining the maximum counts and charges to be filed for specific crimes. They also define the standard sentencing range for various crimes. These guidelines build on Washington statutory standards[30] guiding prosecutorial discretion in case filing and disposition, which were enacted in 1983 along with a presumptive, determinate sentencing system.[31] Similarly, in **New Jersey**, a 1998 state supreme court decision required that the attorney general (who oversees all prosecutors in the state) develop guidelines that regulate the pleas that prosecutors can offer defendants charged with certain offenses.[32]

More recently, some prosecutor's offices have implemented sentencing guidance specifically for plea negotiations. **Philadelphia District Attorney Larry Krasner** has instructed prosecutors in his office to, for most offenses, make plea offers below the bottom end of the Pennsylvania sentencing guidelines and sentence recommendations that lower the rate of incarceration and take into consideration all benefits and costs of the sentence.[33] And **Dallas District Attorney John Creuzot** outlined presumptive terms of recommended probation terms, on a scale according to severity of charge, for prosecutors to use when in plea negotiations or at trial.[34] Some have argued that detailed plea bargaining guidelines that originate in the state legislature are ultimately preferable to internal guidelines because they are legally binding.[35] However, it is important that any such efforts recognize that such restrictions on prosecutors' discretion in plea bargaining – if not carefully designed – could increase sentence lengths. One solution, offered by Professor John Pfaff, would mitigate this effect by making the guidelines presumptive for severity and mandatory for leniency (i.e., that one "must" reduce a charge if certain factors are met, but that one "may" charge for a more severe offense).[36]

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[29] Shaeffer, R. (2019), *The Trial Penalty: An International Perspective*, Federal Sentencing Reporter, 31(4-5), 321-330, https://online.ucpress.edu/fsr/article-abstract/31/4-5/321/109302/The-Trial-Penalty-An-International-Perspective?redirectedFrom=fulltext.

[30] Washington Laws (1983), Chapter 115: Sentencing Guidelines – Prosecuting Standards, http://leg.wa.gov/CodeReviser/documents/sessionlaw/1983c115.pdf?cite=1983%20c%20115%20%C2%A7%201.

[31] King County Prosecuting Attorney's Office (2016), *Filing and Disposition Standards*, https://www.kingcounty.gov/~/media/depts/prosecutor/documents/2016/fads-may-2016.ashx?la=en.

[32] Pfaff, J.F. (2017), *Prosecutorial Guidelines*. In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

[33] Philadelphia District Attorney's Office (2018), *New Policies Announced February 15, 2018*, https://cdn.muckrock.com/outbound_composer_attachments/Lucasgsl/62919/Philadelphia-DA-Larry-Krasner-s-Memo.pdf.

[34] Rice, L. and Connelly, C. (2019), *Forget the Petty Theft Hullabaloo. Creuzot's Probation Reform Will Affect More People*, Texas Standard, https://www.texasstandard.org/stories/forget-the-petty-theft-hullabaloo-creuzots-probation-reform-will-affect-more-people/.

[35] Pfaff, J.F. (2017), *Prosecutorial Guidelines*. In Luna, E. (ed), Reforming Criminal Justice: Pretrial and Trial Processes (Vol. 3), Academy for Justice, https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

[36] *Id.*

B. Document Plea Offers

Documenting plea offers and agreements is a simple and impactful change that can help limit the potential for a trial penalty, increase transparency and information flow to the defendant, judge, and public, and enable long-term data collection to understand how the office is using the plea process. Some prosecutors – such as **Durham County (North Carolina) District Attorney Satana Deberry**[37] – require that line prosecutors document any plea offer in writing and include it in the case file. **California** courts are required to use a plea agreement that memorializes in writing the collateral consequences of a guilty plea, the minimum and maximum sentences that would be imposed at trial, and the agreed upon plea bargain, including rights to be waived.[38]

C. Assess the Need for Judicial Oversight

Most jurisdictions prohibit judges from participating in plea negotiations to preserve the judge's role of an independent "passive verifier."[39] This means that they review the agreed-upon plea to ensure that it is voluntary, knowing, and made on a solid factual basis, but they do not impose direction in negotiations that might sway the defendant.[40] In practice, judicial inquiry into these standards – especially that of the factual basis – is often minimal, allowing "fact bargaining" to occur during negotiations.[41] However, some states have adopted a stronger role for judicial participation in plea bargaining, focusing in particular on safeguards against coercion.[42]

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[37] New York University Center on the Administration of Criminal Law (2019), CACL Annual Conference, *Whither the Prosecutor?*, https://www.law.nyu.edu/centers/adminofcriminallaw/events/plea-bargaining; Former Suffolk County District Attorney Rachael Rollins implemented a similar policy in her office. *See* Suffolk County District Attorney's Office (2019), The Rachael Rollins Policy Memo, http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf.

[38] Superior Court of California (2021), *Plea Form, With Explanations and Waiver of Rights – Felony*, http://www.courts.ca.gov/documents/cr101.pdf.

[39] In Connecticut, following case law, it is common for judges to act as a moderator between prosecutor and defense counsel in plea negotiations. Crucially, if the plea offer is not taken and the case goes to trial, the judge must recuse themselves in order to insulate against judicial coercion.

[40] American Bar Association, Criminal Justice Standards Standard 14-3.1, *Responsibilities of the Prosecuting Attorney*, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_guiltypleas_blk/#3.3; Turner, J.I. (2006), *Judicial Participation in Plea Negotiations*, The American Journal of Comparative Law, 54(1), 199-267, https://www.jstor.org/stable/20454489.

[41] National Association of Criminal Defense Lawyers (2018), *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, http://www.nacdl.org/trialpenaltyreport; Turner, J.I. (2006), *Judicial Participation in Plea Negotiations*, The American Journal of Comparative Law, 54(1), 199-267, https://www.jstor.org/stable/20454489.

[42] While some commentators have suggested heightened judicial involvement in order to protect defendants from excessively high or coercive plea offers, in practice some judges have also attempted to obstruct the efforts of prosecutors to offer lower sentences. *See* Rakoff, J. S. (2014), *Why Innocent People Plead Guilty*, The New York Review, https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/. *See also* Weiner, R . (2020), *Arlington's top prosecutor, defender clash with judge*, The Washington Post, https://www.washingtonpost.com/local/legal-issues/arlington-prosecutor-public-defender-challenge-judge/2020/11/13/1adc114e-1219-11eb-ba42-ec6a580836ed_story.html.

"[W]e are going to track our decision making [in plea bargaining] and we're going to include demographic information like race, and we're going to take a hard look at ourselves to see what we are doing to perpetuate these disparities."

— BERKSHIRE COUNTY (MA) DISTRICT ATTORNEY ANDREA HARRINGTON

There are good reasons to be cautious about judicial involvement and second guessing of negotiated pleas. These concerns are particularly acute in situations where judges have sought to interject their views around the need for more harsh results after the prosecution and defense have sought to craft a resolution that advances the interests of justice. In those cases, judicial disagreement with a more lenient disposition should not be allowed to interfere with the parties' negotiated agreement. There may, however, be instances where judicial involvement and oversight is helpful, especially when coercion is a concern and/or the state lacks clear guidelines that ensure both parties understand the likely post-trial sentence.[43]

RECOMMENDATIONS

Below are policies that district attorneys should consider and adopt to ensure that plea dispositions arise from fair, transparent processes that are not coercive, are insulated from biases and do not exacerbate racial disparities, and lead to just results.

A. Institute policies to ensure that plea bargaining does not cause harsh and/or arbitrary case outcomes

1. **End, or at a minimum cap, the trial penalty.** Determine what case outcomes to seek based on the office's policy goals, and the evidence, facts, and circumstances of the case, and then seek those outcomes consistently throughout all stages of the case, from initial charging, to the plea offer, to trial. At a minimum, consider capping the increase in the expected trial result and the office's sentence recommendation at no more than 15% above the plea offer, absent special circumstances (such as additional evidence coming to light). Hold plea offers open as long as feasible, and require case-specific reasons to be given for any increase in the sentence sought and a supervisor's approval.
2. **Promote alternatives to prosecution to manage case volume.** Instead of primarily relying on plea bargaining to address overload, reduce caseloads by advocating for community-based rather than carceral responses to public health issues like substance use, decriminalizing misdemeanors that have minimal public safety implications, and prioritizing deflection and diversion at the earliest stage possible in criminal proceedings.
3. **Carefully screen cases and charges, and dismiss charges not provable beyond a reasonable doubt.** Screen cases rigorously and early to determine if evidence supports all elements of the offense so that weak cases can be declined or dismissed. Screening should be the job of experienced prosecutors who look at the accusation and evidence before charges are filed. It should be clear office policy that the appropriate and ethical remedy for the absence or insufficiency of admissible evidence should be declination or dismissal of charges, rather than a favorable plea offer. Don't make a plea offer if you can't prove the charge beyond a reasonable doubt.
4. **Make sure charges reflect the underlying facts and circumstances and promote the interests of justice.** Don't file the maximum possible charge as a matter of course. Adopt office-wide policies making clear that charges should reflect the facts and circumstances of each case and be designed to achieve a just result.

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[43] National Association of Criminal Defense Lawyers (2018), *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, http://www.nacdl.org/trialpenaltyreport; Turner, J.I. (2006), *Judicial Participation in Plea Negotiations*, The American Journal of Comparative Law, 54(1), 199-267, https://www.jstor.org/stable/20454489.

5. **Limit sentencing enhancements.** Limit the use (or threatened use) of sentencing enhancements (for example, based on criminal history or the presence of a weapon). Require case-specific reasons to be given and a supervisor's approval when a sentencing enhancement is sought. Institute a presumption that sentencing enhancements will not be sought absent special justification.
6. **Utilize clear, written standards.** Ensure that all significant decisions – including those related to intake and case screening, bail, initial charges, plea offers, deflection and diversion, and which charges to pursue at trial – are governed by clear and rigorous written standards that further community wellbeing, decarceration, and racial justice.
7. **Maintain and do not withdraw plea offers.** Absent extenuating circumstances (like the need to protect a vulnerable witness), don't withdraw a plea offer simply because a defendant exercises rights including awaiting the grand jury's return of an indictment, pursuing pre-trial motions, or challenging the government's case at trial. Similarly, the offer of a charging or sentencing benefit should remain the same throughout proceedings in most cases and should not become more severe merely because defendants take time to consider their options or exercise their rights (such as the right to *Brady* disclosure, advice of counsel, or to file other pre-trial motions). Require case-specific reasons and a supervisor's approval for changes in offers.
8. **Don't threaten harsh penalties or enhanced charges to leverage a guilty plea.** Don't seek or threaten to seek the death penalty, life without parole, habitual offender (three strikes) charges, or the transfer of a case from juvenile to adult court as a way to leverage a guilty plea.
9. **Consider collateral consequences.** Take collateral consequences into account in plea discussions, such as impacts on immigration status.[44]

B. Increase transparency and procedural safeguards

1. Require all plea offers, as well as the conditions under which an offer was made and accepted or refused (i.e., whether the defendant is in custody, is represented by counsel, etc.), to be **memorialized in writing and maintained in the case file**.
2. **Provide access to all available evidence, especially any potentially exculpatory material, to defendants before requiring them to accept a plea offer**. Provide evidence on misconduct by police officers involved in the case prior to making an offer or before requiring a defendant to accept a guilty plea.
3. **Do not seek waivers of key rights as part of a plea bargain**. Don't condition plea offers on the waiver of a defendant's right to seek pretrial release or discovery, to litigate constitutional violations, or to seek relief following later changes in the law.
4. Pro-actively **notify defense of newly discovered *Brady* material on an ongoing basis**.

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[44] Fair and Just Prosecution (2017), *Addressing Immigration Issues*, https://www.fairandjustprosecution.org/staging/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf.

"We cannot address the deep-seated racial disparities in our criminal legal system without scrutinizing how plea offers are formed and negotiated. As prosecutors, the plea process is our biggest opportunity to use our discretion to create a more equitable system."

— DURHAM COUNTY (NC) DISTRICT ATTORNEY SATANA DEBERRY

5. In all felony and misdemeanor cases in jurisdictions where legal representation is guaranteed at the misdemeanor stage, **ensure that defendants have had time and access to a lawyer** sufficient to receive meaningful legal advice prior to accepting a guilty plea. Promote access to counsel more broadly, and in situations where legal counsel is not guaranteed provide defendants with sufficient time to seek representation if they want to do so.
6. Proactively **provide information to defense counsel on the collateral consequences** of any conviction that would follow a guilty plea, particularly in relation to immigration consequences.
7. **Develop and publish guidelines on charging decisions**, and on the reduction of charges and sentencing discounts that can be offered in the plea process, especially for the more common types of cases, so that these are applied more equitably and transparently.
8. **Collect and publish data on the use of plea bargaining**, including:
   a. Percentage of convictions obtained through a guilty plea, disaggregated by type of charge and demographics (e.g., gender, age, race) of the defendant;
   b. Average length of pre-trial detention in cases resolved by guilty plea versus those which proceed to trial;
   c. Percentage of defendants in pre-trial detention who waive their right to trial, versus the percentage of defendants not in pre-trial detention who do so;
   d. Average sentences imposed on defendants who waive their right to trial versus those who proceed to trial (disaggregated by offense charged);
   e. Percentage or number of cases concluded through a guilty plea in which an appeal against conviction is later made, and the success rate of these appeals;
   f. Percentage of people who waive their right to a trial who are subsequently exonerated; and
   g. Percentage of defendants who waive their right to a trial without legal representation.
9. Make the de-identified data described above **available to external experts for analysis**.

C. Promote and protect avenues for justice and mercy

1. **Create procedures for defense attorneys to appeal to a supervising prosecutor** if they think a charge or plea offer is unfair.
2. **Ensure integrity of convictions** secured via guilty plea by including them in the purview of post-justice integrity/review units.[45]
3. **Do not condition pleas on a waiver of appeal or post-conviction challenge, including on the basis of newly discovered evidence or other claims that go to the integrity of the process**. Ensure that clemency, mitigation, and other avenues for reducing the harshness of sentences are available and that the office presumptively supports, rather than reflexively opposes, those requests so that a guilty plea does not undermine substantive fairness.

CONCLUSION

Prosecutorial discretion must, at all times, be exercised with full recognition of the prosecutor's obligation to pursue justice. And there are few areas where a prosecutor's role as a "minister of justice" is more significant or impactful than in the context of plea bargaining.

Amid growing concern around the consequences and potential abuses of plea bargaining,

[45] Fair and Just Prosecution (2019), *Conviction Integrity and Review*, https://www.fairandjustprosecution.org/staging/wp-content/uploads/2019/08/Conviction-Integrity-Statement-of-Principles.pdf.

prosecutors have an opportunity to lead and support institutional and systemic reforms to this practice. An important part of doing so will involve enhancing transparency, fortifying oversight and consistency, and using data to generate long overdue insights on how plea bargaining authority is used. In doing so, more targeted reforms might be developed that can further strengthen due process and equitable outcomes in plea bargaining.

RESOURCES

- Fair Trials (2017), *The Disappearing Trial: Towards a rights-based approach to trial waiver systems*, https://www.fairtrials.org/publication/disappearing-trial-report.
- The National Association of Criminal Defense Lawyers (2018), *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, https://www.nacdl.org/trialpenaltyreport/.
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- Cynthia Alkon (2017), *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, Nevada Law Journal, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994581.
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- Jenia I. Turner (2021), *Transparency in Plea Bargaining*, Notre Dame Law Review, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3545536.

FOR MORE INFORMATION: Contact FJP at info@fairandjustprosecution.org

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