

Plea Bargaining outside the Shadow of Trial

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Source: *Harvard Law Review*, Vol. 117, No. 8 (Jun., 2004), pp. 2463-2547

Published by: [The Harvard Law Review Association](#)

Stable URL: <http://www.jstor.org/stable/4093404>

Accessed: 17/01/2014 11:12

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# HARVARD LAW REVIEW

## ARTICLES

### PLEA BARGAINING OUTSIDE THE SHADOW OF TRIAL

*Stephanos Bibas*

## TABLE OF CONTENTS

I. STRUCTURAL DISTORTIONS.....	2469
A. <i>Attorneys and Agency Costs</i> .....	2470
1. Prosecutors' Pressures and Incentives.....	2470
2. Defense Attorneys' Pressures and Incentives.....	2476
B. <i>Lumpy Guidelines and Mandatory Statutory Penalties</i> .....	2486
C. <i>The Impact of Bail and Pretrial Detention</i> .....	2491
D. <i>Information Deficits</i> .....	2493
II. PSYCHOLOGICAL PITFALLS IN BARGAINING .....	2496
A. <i>Overconfidence, Optimism, and Self-Serving Biases</i> .....	2498
B. <i>Denial Mechanisms and Psychological Blocks</i> .....	2502
C. <i>Discounting of Future Costs</i> .....	2504
D. <i>Risk Taking and Loss Aversion</i> .....	2507
E. <i>Framing</i> .....	2512
F. <i>Anchoring and Adjustment</i> .....	2515
G. <i>Lawyers as Debiasers?</i> .....	2519
III. DIRECTIONS FOR THE FUTURE .....	2527
A. <i>The Structural-Psychological Perspective on Bargaining</i> .....	2528
B. <i>Possible Solutions</i> .....	2531
1. Remedies for Uncertainty .....	2531
2. Lumpiness and Rigidity in Sentencing Laws.....	2535
3. Ameliorating the Influence of Money .....	2539
4. Managing Self-Interest and Reducing Agency Costs.....	2540
5. Demographic Variations .....	2544
CONCLUSION .....	2545

# PLEA BARGAINING OUTSIDE THE SHADOW OF TRIAL

Stephanos Bibas\*

*Plea-bargaining literature predicts that parties strike plea bargains in the shadow of expected trial outcomes. In other words, parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount. This oversimplified model ignores how structural distortions skew bargaining outcomes. Agency costs; attorney competence, compensation, and workloads; resources; sentencing and bail rules; and information deficits all skew bargaining. In addition, psychological biases and heuristics warp judgments: overconfidence, denial, discounting, risk preferences, loss aversion, framing, and anchoring all affect bargaining decisions. Skilled lawyers can partly counteract some of these problems but sometimes overcompensate. The oversimplified shadow-of-trial model of plea bargaining must thus be supplemented by a structural-psychological perspective. In this perspective, uncertainty, money, self-interest, and demographic variation greatly influence plea bargains. Some of these influences can be ameliorated, others are difficult to correct, but each casts light on how civil and criminal bargaining differ in important respects.*

The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes. In this model, rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved costs of trial. For example, imagine that a tort plaintiff suffered \$100,000 in damages but that a jury is only 50% likely to find that the defendant was negligent. The plaintiff and defendant should therefore settle for \$50,000 minus some fixed discount proportional to the costs saved. This shadow-of-trial model now dominates the literature on civil settlements.<sup>1</sup>

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<sup>1</sup> The seminal article about this concept is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979), which treats the legal rights of each party as "bargaining chips" that affect settlement outcomes. *Id.* at 968. Many subsequent articles have taken up this idea in the civil context. See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

This model also looms large in recent plea-bargaining literature. Frank Easterbrook, Robert Scott, Bill Stuntz, and other scholars treat plea bargaining as just another case of bargaining in the shadow of expected trial outcomes. They endorse plea bargaining because they presume that bargains largely reflect the substantive outcomes that would have occurred at trial anyway, minus some fixed discount. Trials are not perfect, of course, but these scholars contend that plea bargains result in outcomes roughly as fair as trial outcomes.<sup>2</sup> In short, the classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains.

Proponents of the shadow-of-trial model do not deny that factors other than the merits influence settlements at the margins. In their seminal article on divorce settlements, Robert Mnookin and Lewis Kornhauser note in passing that "the preferences of the parties, . . . transaction costs, attitudes toward risk, and strategic behavior will substantially affect the negotiated outcomes."<sup>3</sup> Similarly, Easterbrook recognizes that time discounting, risk preferences, limited funds, and agency costs may affect pleas. He treats these caveats, however, as at most minor footnotes to a fundamentally rational model. Agency costs, for example, he dismisses as "true but trivial."<sup>4</sup> "Conflicts of interest (agency costs)," he argues, "are as pressing throughout the criminal process as at the time of plea."<sup>5</sup> He likewise quickly dismisses the adverse impact of poverty on bail determinations and plea bargaining.<sup>6</sup> Scott and Stuntz acknowledge that the psychology of framing, poor judgment, and risk preferences affect plea bargains. They dismiss the importance of framing, however, and barely consider variations in risk preferences.<sup>7</sup> They do recognize the significant roles

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<sup>2</sup> See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31-32 (1966) ("[A]t every stage of this informal process of pre-trial dispositions . . . decisions are in part informed by expectations of what the jury will do. Thus, the jury is not controlling merely the immediate case . . . , but the host of cases . . . which are destined to be disposed of by the pre-trial process."); Thomas W. Church, Jr., *In Defense of "Bargain Justice"*, 13 *LAW & SOC'Y REV.* 509, 512-14, 523 (1979); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 *J. LEGAL STUD.* 289, 309-17 (1983) [hereinafter Easterbrook, *Criminal Procedure*]; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *YALE L.J.* 1969, 1975 (1992) [hereinafter Easterbrook, *Plea Bargaining*]; William M. Landes, *An Economic Analysis of the Courts*, 14 *J.L. & ECON.* 61, 66-69 (1971); Edward A. Rittenburg, *Plea Bargaining Analytically — The Nash Solution to the Landes Model*, 7 *AM. J. CRIM. L.* 323, 353 (1979); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1910 (1992) (proposing reforms to counteract problems such as mistake and duress, but basically endorsing plea bargaining).

<sup>3</sup> Mnookin & Kornhauser, *supra* note 1, at 997 (limiting this observation to a single sentence in the conclusion).

<sup>4</sup> Easterbrook, *Criminal Procedure*, *supra* note 2, at 309.

<sup>5</sup> *Id.* at 309; see also *id.* at 294-95, 300-01, 314-15 & tbls.1-4.

<sup>6</sup> *Id.* at 310.

<sup>7</sup> Scott & Stuntz, *supra* note 2, at 1925-28, 1938-39.

played by lawyer quality and funding, but they argue that these inequities would be even more troubling in a world without plea bargains.<sup>8</sup> By and large, though, scholars view the shadow of trial as the overwhelming determinant of plea bargaining. Implicitly, they treat other factors as minor refinements to a basically sound model.

The shadow-of-trial argument is important for a number of reasons. First, it means there is no need to abolish plea bargains, which resolve most adjudicated criminal cases.<sup>9</sup> If highly proceduralized and regulated trials serve as a backstop to largely unregulated plea bargaining, we do not need new procedural safeguards for pleas because plea outcomes already incorporate the value of trial safeguards. Second, bargaining calibrates sentences to proof of guilt so that the people who are most clearly guilty of the worst crimes will get the longest sentences. Sentences therefore mirror levels of culpability. Third, if we assume that police and prosecutors want to get the most bang for their buck, they have incentives to go after the worst criminals who face the strongest evidence of guilt. Conversely, this incentive should steer police and prosecutors away from those who may well be innocent. Fourth, trial safeguards such as exclusionary rules and entrapment defenses are designed to deter police misconduct. If plea bargains in fact mirror trials, then these rules continue to work well in a world of guilty pleas. In short, the classical model supposes that trials set normatively desirable benchmarks and cast strong shadows. These shadows ensure that plea bargains allocate punishment fairly, both in the aggregate and in particular cases.

One might think that the shadow-of-trial model should work even better in criminal cases than in civil cases. Civil damages are largely discretionary. In contrast, sentencing guidelines in many states have made criminal sentences more predictable and therefore easier to bargain over.

The shadow-of-trial model is, however, far too simplistic. While a few articles have begun to question the link between civil trials and settlements,<sup>10</sup> hardly any have done the same for criminal trials and

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<sup>8</sup> *Id.* at 1925–28, 1933–34.

<sup>9</sup> In fiscal year 2000, of 69,283 criminal cases disposed of in federal district court by trial or plea (thus excluding dismissals), 64,939 (93.7%) were disposed of by pleas of guilty or nolo contendere. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 2002, at tbl.5.17 (Kathleen Maguire & Anne L. Pastore eds., forthcoming 2004) [hereinafter 2002 SOURCEBOOK], available at <http://www.albany.edu/sourcebook>. In 2000, of approximately 924,700 felony convictions in state courts, about 879,200 (95%) were by guilty plea. *Id.* at tbl.5.46. Though it is impossible to be sure, most of these pleas probably resulted from plea bargains.

<sup>10</sup> See, e.g., Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201, 241–54 (finding that attorneys are poor at predicting civil jury verdicts and that settlements are influenced by cognitive biases, skewed and limited information, legal uncertainty, transaction costs, and the parties' ability as litigants; and concluding that jury signals are "indis-

plea bargains.<sup>11</sup> This gap in the literature is particularly significant because the model diverges from plea-bargaining reality in two ways. First, there are many structural impediments that distort bargaining in various cases. Poor lawyering, agency costs, and lawyers' self-interest are prime examples, as are bail rules and pretrial detention. The structural skewing of bargains has grown in the last two decades with the proliferation of mandatory sentences and sentencing guidelines. Since most of the literature predates the sentencing-guidelines revolution and the spread of mandatory minima, the area is ripe for a fresh look. Second, the shadow-of-trial model assumes that the actors are fundamentally rational. Recent scholarship on negotiation and behavioral law and economics, however, undercuts this strong assumption of rationality. Instead, overconfidence, self-serving biases, framing, denial mechanisms, anchoring, discount rates, and risk preferences all skew bargains.

My thesis is that many plea bargains diverge from the shadows of trials. By "the shadows of trials," I mean the influence exerted by the strength of the evidence and the expected punishment after trial. Structural forces and psychological biases sometimes inefficiently prevent mutually beneficial bargains or induce harmful ones. Even when they do not harm efficiency, these legally irrelevant factors sometimes skew the fair allocation of punishment. As a result, some defendants strike skewed bargains. Other defendants plead when they would oth-

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tinct and distorted"); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109-11 (1994); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 995-98 (1998); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 70-74 (1997); see also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. PA. L. REV. 1147, 1222-23, 1243-44 (1992) (concluding that most lawyers and judges are ill-informed about actual civil jury awards).

<sup>11</sup> The one systematic effort to do so is Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 49-60 (1988) [hereinafter Schulhofer, *Criminal Justice Discretion*]. Schulhofer's article, though excellent as far as it goes, addresses only the problems of agency costs and lawyer quality and funding. It does not consider the other impediments discussed here. Other articles that explore the impact of agency costs and lawyer quality and funding on plea bargaining, albeit less systematically, are Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *The Defense Attorney's Role*]; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) [hereinafter Alschuler, *The Prosecutor's Role*]; and Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987-90 (1992) [hereinafter Schulhofer, *Disaster*]. Alschuler's work touches briefly on the influences of defendant optimism, poor judgment, and denial mechanisms. See Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 664-67 (1981) [hereinafter Alschuler, *The Changing Debate*]; Alschuler, *The Defense Attorney's Role*, *supra*, at 1287, 1304. Also, Schulhofer briefly mentions discovery deficits. See Stephen J. Schulhofer, *A Wake-Up Call from the Plea-Bargaining Trenches*, 19 LAW & SOC. INQUIRY 135, 137 (1994). These articles, however, largely predate the explosion of sentencing guidelines, mandatory minimum sentences, and behavioral law and economics, so none of them considers how determinate sentencing laws or cognitive quirks warp plea bargains.

erwise go to trial, or go to trial (and usually receive heavier sentences) when they would otherwise plead. Furthermore, some defendants' plea bargains diverge from trial shadows much more than others'. These divergent outcomes produce substantial sentencing inequities. Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence. Though trials allocate punishment imperfectly, plea bargaining adds another layer of distortions that warp the fair allocation of punishment. The shadow-of-trial model thus needs many refinements and nuances to make it more realistic. Plea-bargaining practices need many reforms to conform more closely to the shadows of trials and to iron out inequities.

Part I of this Article explores the structural influences that skew bargains, such as lawyer quality, agency costs, bail and detention rules, sentencing guidelines and statutes, and information deficits. Section I.A considers how lawyers' self-interest, caseloads, ability, reputation, connections, politics, funding, and payment methods all affect bargaining. Sentencing reform has exacerbated these problems by placing a greater premium on sentencing-guidelines expertise and on fast decisions to cooperate with the authorities. Section I.B notes that many determinate sentencing laws<sup>12</sup> are "lumpy." That is, they often set sentences in large chunks instead of in finely calibrated gradations. Unlike civil bargaining, which can adjust dollars and pennies to reflect small changes in probability, plea bargaining with these crude tools is inexact. Section I.C considers the effect of pretrial detention. The vast majority of criminal cases are small ones, in which defendants face only modest amounts of jail time. If a defendant is denied or cannot make bail, the length of pretrial detention may approach or even dwarf the likely sentence after trial. Thus, detained defendants strike bargains for time served instead of awaiting their day in court. Plea bargaining, then, often happens in the shadow not of trial but of bail decisions. Section I.D considers how information deficits harm defendants who are innocent or who were mentally ill or intoxicated during their crimes. These defendants lack personal knowledge of the

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<sup>12</sup> The term "indeterminate sentences" used to refer to broad ranges set by judges (for example, five to ten years). Within these broad ranges, parole boards often determined the ultimate release dates. Determinate sentences, in contrast, were precise sentences set by judges (for example, eight years). In more modern parlance, indeterminate sentencing allows judges to set sentences anywhere below the statutory maxima (for example, anywhere from zero to twenty years for armed robbery). Determinate sentencing, in contrast, uses sentencing guidelines or statutes (such as mandatory minima) to guide or constrain judicial discretion within the statutory ranges. This Article uses the more modern parlance. In other words, I use "indeterminate" to mean unfettered judicial discretion up to the statutory maxima and "determinate" to mean judicial discretion constrained by sentencing guidelines or mandatory minima.



evidence against them, so they must rely on discovery. Limits on criminal discovery hamper these defendants' estimates of their likelihood of success at trial, making them more susceptible to prosecutorial bluffing.

Part II moves to the psychological influences on bargains. Overconfidence, self-serving biases, denial mechanisms, discounting of future costs, loss aversion, risk preferences, framing, and anchoring all skew bargain outcomes. These psychological quirks and irrationalities lead to inequities by inducing some defendants to go to trial or to insist on better bargains even though others would settle for less. Lawyers can moderate but not eliminate many of these irrationalities, and some lawyers are much better at correcting them than are others. In addition, lawyers' self-interest may lead them to overcompensate and push clients too far toward settlement.

Part III draws the strands of Parts I and II together into a structural-psychological perspective on bargaining to supplement the classical model. Section III.A explains that, in this perspective, uncertainty, money, self-interest, and demographic variation are the main factors that explain how and why plea bargains diverge from expected trial outcomes.

Parts I and II are largely descriptive; their aim is to show that the shadow-of-trial model is greatly oversimplified. What normative proposals follow from this perspective? At this point, some authors might simply call for the abolition of plea bargaining, but I take the continued existence of plea bargaining as a given. My more modest goal in Section III.B is to propose practicable solutions that bring plea bargains more into line both with normatively desirable outcomes and with trial shadows. For example, smoothly graded sentencing guidelines and better discovery can reduce the influence of uncertainty on bargaining without creating lumpiness. As repeat players, public defenders may be better at bargaining than private counsel appointed *ad hoc* by courts. In addition, both prosecutors and defense counsel might perform better if their compensation were tied, at least in part, to their time or effort. Section III.B also shows how some popular plea-bargaining reforms, such as large fixed sentencing discounts, exacerbate the gulf between pleas and expected trial outcomes. This Article concludes with reflections on the limits of using civil settlements to model plea bargains because the stakes and actors are so different.

## I. STRUCTURAL DISTORTIONS

Plea bargains do not simply reflect expected trial outcomes minus some proportional discount. Many other structural factors influence bargains. Sometimes these factors help or hurt certain classes of defendants; in other cases, the effects are more idiosyncratic. Either way, bargains reflect much more than just the merits. These structural dis-



tortions produce inequities, overpunishing some defendants and underpunishing others based on wealth and other legally irrelevant characteristics.

### A. Attorneys and Agency Costs

1. *Prosecutors' Pressures and Incentives.* — The ideal of the adversary system presumes that prosecutors will decide whom to prosecute based on the evidence, the equities, and the justifications for punishment. In other words, prosecutors should decide to prosecute based on the likelihood of conviction and the need to deter, incapacitate, rehabilitate, reform, and inflict retribution. Of course, prosecutors are supposed to pursue justice, not just convictions. In some cases, doing so means pursuing lower sentences if the equities warrant them, or it may mean not prosecuting at all. While justice should temper the pursuit of punishment, self-interest should not.<sup>13</sup> To be sure, prosecutors may be merciful to sympathetic defendants. In addition, they may not insist on a higher sentence for one defendant when they have recently given a lower sentence to a similarly situated defendant.<sup>14</sup> They may also drive hard bargains on particular crimes to send messages, teach lessons, and deter especially harmful or prevalent crimes. Apart from these considerations, plea bargains should depend only on the severity of the crime, the strength of the evidence, and the defendant's record and need for punishment. This ideal asks prosecutors to be perfectly selfless, perfectly faithful agents of the public interest.

The reality is much more complex. The strength of the prosecution's case is the most important factor,<sup>15</sup> but other considerations come into play. Trials are much more time consuming than plea bargains, so prosecutors have incentives to negotiate deals instead of try-

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<sup>13</sup> See Transcript of Edited and Narrated Arguments, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155) (argument of Abe Fortas for the petitioner) ("[O]ur adversary system . . . means that counsel for the state will do his best within the limits of fairness and honor and decency to present the case for the state . . ."), in *MAY IT PLEASE THE COURT* 185, 187 (Peter Irons & Stephanie Guitton eds., 1993).

<sup>14</sup> See MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 120-21 (1978) (discussing how prosecutors develop "habits of disposition" that lead to like sentences in like cases (quoting a prosecutor)).

<sup>15</sup> See Alschuler, *The Prosecutor's Role*, *supra* note 11, at 58-60; see also Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253, 257 (1989) (reporting a 1989 study that found that prosecutors have "an overwhelming propensity" to cut lighter deals in weak cases); William F. McDonald et al., *The Prosecutor's Plea Bargaining Decisions*, in *THE PROSECUTOR* 151, 158 (William F. McDonald ed., 1979) (reporting that most prosecutors admit to giving the most generous deals in the weakest cases).

ing cases.<sup>16</sup> Prosecutors have personal incentives to reduce their workloads so that they can leave work early enough to dine with their families. Additionally, prosecutors are paid salaries, not by case or by outcome, so they have no direct financial stake in the outcome.<sup>17</sup> The only countervailing financial incentive is that prosecutors might jeopardize their jobs by losing a string of trials and so drawing supervisors' or voters' wrath. Self-interest, in short, may discourage prosecutors from investing enough work in plea-bargained cases, in which more work might lead to heavier sentences. Some of this plea bargaining serves the public interest by freeing up prosecutors to pursue many more cases.<sup>18</sup> Even if the public might prefer the extra work needed for trial, however, prosecutors have personal incentives to strike plea bargains.<sup>19</sup>

In addition to lightening their workloads, prosecutors want to ensure convictions. They may further their careers by racking up good win-loss records, in which every plea bargain counts as a win but trials risk being losses.<sup>20</sup> The statistic of conviction, in other words, matters much more than the sentence.<sup>21</sup> Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.<sup>22</sup> Thus, prosecutors may prefer the certainty of plea bargains even if the resulting sentence

<sup>16</sup> See Alschuler, *The Prosecutor's Role*, *supra* note 11, at 54-55; Joan E. Jacoby, *The Charging Policies of Prosecutors*, in *THE PROSECUTOR*, *supra* note 15, at 75, 89; Schulhofer, *Criminal Justice Discretion*, *supra* note 11, at 51.

<sup>17</sup> The many part-time prosecutors, however, have financial incentives to speed their dockets so that they can get back to their paying clients. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 42-44 (2003); James Eisenstein, *Research on Rural Criminal Justice: A Summary*, in *CRIMINAL JUSTICE IN RURAL AMERICA* 105, 113-14, 125 (Shanler D. Cronk et al. eds., 1982).

<sup>18</sup> See Easterbrook, *Criminal Procedure*, *supra* note 2, at 309.

<sup>19</sup> See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1495-96 (1993). As a former prosecutor, I can attest that most of the prosecutors and defense counsel with whom I worked were honorable and would not consciously shortchange their cases. Nevertheless, the human desires to relax and have a life beyond the law doubtless have an impact on even the most conscientious employee.

<sup>20</sup> See Alschuler, *The Prosecutor's Role*, *supra* note 11, at 106, 109-10; Schulhofer, *Criminal Justice Discretion*, *supra* note 11, at 51; cf. JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 174 (1978) (noting that prosecutors know their reputations will affect their later prospects in private practice, so they act with a concern for preserving these reputations).

<sup>21</sup> See FISHER, *supra* note 17, at 48-49 (noting that plea bargains inflate conviction statistics).

<sup>22</sup> See Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 291-96 (2001); see also Alschuler, *The Prosecutor's Role*, *supra* note 11, at 106-07 ("Conviction statistics seem to most prosecutors a tangible measure of their success. Statistics on sentencing do not."); *id.* at 106 n.138 ("[P]rosecutors seem to believe the scalps on their belts enter their souls." (quoting a former prosecutor)).

is much lighter than it would have been after trial.<sup>23</sup> The psychology of risk aversion and loss aversion reinforces the structural incentives to ensure good statistics and avoid risking losses.<sup>24</sup> The public also has an interest in certainty of punishment, which plea bargaining will sometimes further. At other times, the public might prefer to gamble on a trial to secure heavier punishment, while the prosecutor's fear of personal embarrassment favors a plea bargain.

Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch. Most district attorneys are elected, and many have parlayed their prosecutorial successes into political careers: witness Mayors Rudolph Giuliani and Richard Daley, Senators John Kerry and Robert Dole, Chief Justice Earl Warren, and Attorney General Edwin Meese.<sup>25</sup> Losses at trial hurt prosecutors' public images, so prosecutors have incentives to take to trial only extremely strong cases and to bargain away weak ones.<sup>26</sup> They may push strong or high-profile cases to trial to gain reputation and marketable experience.<sup>27</sup>

This dynamic is the opposite of what one might expect: strong cases should plead guilty because trial is hopeless, while weak cases have genuine disputes that merit resolution at trial. In other words,

<sup>23</sup> See HEUMANN, *supra* note 14, at 110–13.

<sup>24</sup> See *infra* section II.D (exploring the psychology of risk aversion and loss aversion).

<sup>25</sup> See BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS 1774–1996, at 951, 1329, 1376, 1861 (Joel Treese ed., 1997) (reporting that Robert Dole, John Kerry, Patrick Leahy, and Arlen Specter, among others, all served as prosecutors before election to the U.S. Senate); Michael Barone, *Back in Law Enforcement*, WASH. POST, Jan. 24, 1984, at A13 (reporting that Earl Warren served as Alameda County District Attorney and that, before being nominated to serve as Attorney General, Edwin Meese III served as an Alameda County prosecutor); Kevin Johnson, *Chicago Mayor Closes Gap*, USA TODAY, Feb. 21, 1989, at 2A (reporting that Richard Daley served as Cook County state's attorney while running for mayor); Sam Roberts, *La Guardia's Legacy Is Formidable, but It May Be Surpassed*, N.Y. TIMES, Dec. 31, 2001, at F7 (reporting that concerns regarding crime helped former prosecutor Rudolph Giuliani win the mayoral election in New York, despite his having no experience in elected office).

<sup>26</sup> See Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 103 (1928); Schulhofer, *Criminal Justice Discretion*, *supra* note 11, at 50. Perhaps in a few rare situations, even losing a high-profile celebrity trial might gain a prosecutor fame or at least notoriety: witness Marcia Clark, the prosecutor in the O.J. Simpson trial. As a rule, however, losses are painful. Prosecutors might enhance their reputations by winning tough trials, but loss aversion means that most prosecutors hate losing more than they like winning. Thus, they will play it safe by trying to rack up their wins and statistics in rock-solid cases. See *infra* section II.D (discussing risk aversion and loss aversion). This phenomenon is particularly strong if outsiders cannot easily distinguish wins in hard-fought cases from wins in slam-dunk cases; each counts equally as a conviction statistic.

<sup>27</sup> See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 787–88 & n.176 (2003) (citing RICHARD T. BOYLAN & CHERYL X. LONG, SIZE, MONITORING, AND PLEA RATE: AN EXAMINATION OF UNITED STATES ATTORNEYS 14–17 (Econometric Soc'y, World Congress 2000 Contributed Paper No. 00089, 2000), available at <http://fmwww.bc.edu/RePEc/es2000/0089.pdf>; and Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 260–61 (2000)); see also Glaeser et al., *supra*, at 272, 282–83.

the shadows of trials in strong cases are so clear and crisp that the shadow-of-trial model predicts settlement. In weak cases, however, the parties have imperfect information about the cases' weaknesses. Trial shadows in these cases may be fuzzy enough that the parties can disagree in predicting trial outcomes, and as a result bargaining may break down. The shadow-of-trial model, in short, predicts that most trials should involve weak cases. Self-interest, in contrast, pushes prosecutors toward trying the strongest cases.<sup>28</sup> Prosecutors can discourage defendants in strong cases from pleading guilty by refusing to make any concessions, while they can make irresistible offers in weak cases.<sup>29</sup>

Thus, instead of allowing juries to air and wrestle with the hard, troubling cases, prosecutors may hide them from view. If, for example, prosecutors bargain away most cases involving dubious confessions, they avert public scrutiny of police interrogation tactics. If they buy off credible claims of innocence cheaply, they cover up faulty investigations that mistakenly target innocent suspects. By pressing the easiest cases, prosecutors turn jury trials into rubber stamps or mere formalities.

Moreover, easy cases do not cast good or representative shadows. To discern trials' shadows, lawyers need to know the outcomes of

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<sup>28</sup> One famous study of the jury seems to contradict my assertion. Kalven and Zeisel thought that guilty pleas would siphon off the strongest cases, leaving only weaker, more controversial cases for jury trial. See KALVEN & ZEISEL, *supra* note 2, at 30–31. Their primary evidence was a statistical table of major crimes. The most serious crimes at the top of the table, such as murder, manslaughter, and rape, tended to have the fewest guilty pleas and the highest rates of acquittal at trial. The less serious felonies, such as burglary, auto theft, and forgery, had the most guilty pleas and the fewest acquittals. *Id.* at 20 tbl.2. Kalven and Zeisel concluded that defendants were choosing not to plead when they had significant chances of acquittal at trial. See *id.* at 21–22. But one could just as easily read the causal relationship the other way around. For less serious crimes, prosecutors siphon off the weakest cases with generous plea bargains, leaving only the strong cases for trial. This phenomenon explains the low acquittal rate. For the most serious crimes, especially murder, public scrutiny and press coverage pressure prosecutors not to offer generous plea bargains. Because prosecutors must offer less generous plea bargains, fewer defendants plead guilty. And because prosecutors must try the weaker cases instead of buying them off, more defendants win acquittals.

A further difficulty is that Kalven and Zeisel's statistics show only the charges on which defendants pleaded guilty or were tried. Charge bargaining, however, means that pleas are often misleading. For example, murder defendants often plead to manslaughter rather than murder. This relabeling of crimes partly explains why Kalven and Zeisel report a murder plea rate of 34% and a manslaughter plea rate of 52%. Without data on arrests and charges filed, one cannot compute plea rates by looking simply at the charges to which defendants pleaded guilty.

<sup>29</sup> Prosecutors may also try some strong cases in order to strengthen their bargaining hand in future negotiations. When negotiating, they can credibly bluff or threaten to go to trial if they have actually gone to trial with great success recently. See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 56 (1996). Prosecutors have a large pool of strong cases from which to choose. Out of this pool, they may choose some for trial based on the defendant's stubbornness in bargaining, on dislike of or disdain for the defendant or his lawyer, or on other factors.

hard, disputable cases rather than of slam dunks. Lawyers may thus have difficulty predicting how hard cases would come out if they were to go to trial.

Easterbrook argues that agency costs affect trials just as they affect plea bargains, so pleas are no more troubling than trials.<sup>30</sup> If indeed these pressures affected trials and pleas equally, or affected all pleas equally, each plea would still be in the shadow of trial. These pressures and incentives, however, vary depending on the case, the lawyer, and the particular prosecutor's office policies. Prosecutors offer less favorable pleas in strong, high-profile cases than in comparable low-profile cases in the hopes of winning publicized convictions.<sup>31</sup> Prosecutors who are lazy or have outside obligations offer more lenient deals to get rid of cases. Prosecutors' offices that are busy offer greater discounts than offices that are not.<sup>32</sup> Underfunded prosecutors' offices face more pressure to plea bargain than do those with adequate staffing, funding, and support personnel.<sup>33</sup> Prosecutors offer more favorable deals to dispose of complex, time-consuming cases even if conviction is likely at trial.<sup>34</sup> Some prosecutors who think certain crimes are less serious offer more favorable deals than those who think the same

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<sup>30</sup> See Easterbrook, *Criminal Procedure*, *supra* note 2, at 309 ("Lawyers may cut corners at trial too."); Easterbrook, *Plea Bargaining*, *supra* note 2, at 1975 (arguing that agency costs are a pervasive fact of life and that, if anything, agency costs would be even worse at a more complex trial).

<sup>31</sup> See Alschuler, *The Prosecutor's Role*, *supra* note 11, at 107.

<sup>32</sup> See Frank O. Bowman III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 538-39, 542-44, 552, 556 (2002) (finding significant negative correlation between federal prosecutors' workloads and the lengths of drug sentences, and interpreting the data as showing that heavy caseloads induce prosecutors to offer more generous plea bargains). Witness, for example, the extremely generous fast-track plea bargains offered by the U.S. Attorney's Office for the Southern District of California. That district, located on the border of Mexico, has an enormous immigration caseload. To dispose of this caseload, the office offers extremely generous bargains in exchange for speedy guilty pleas that are streamlined by waivers of all rights to discovery, appeal, and other procedural safeguards. See *United States v. Ruiz*, 536 U.S. 622, 625-26 (2002); *United States v. Banuelos-Rodriguez*, 215 F.3d 969, 971-72 (9th Cir. 2000) (en banc).

<sup>33</sup> See Shaila K. Dewan, *Prosecutors Say Cuts Force Plea Bargains*, N.Y. TIMES, Mar. 10, 2004, at B3 ("Deep staffing cuts and increased caseloads are forcing prosecutors to accept plea bargains they would never have considered otherwise, [New York City] district attorneys said yesterday in appealing for more money for their offices."); see also John Gibeaut, *The Good Fight Gets Harder*, A.B.A. J., Feb. 2004, at 41, 44-45 (reporting that many state and local prosecutors' offices are underfunded and that some have no litigation budgets to pay for trial exhibits, crime lab work, and the like); *id.* at 45 (quoting a Utah prosecutor as saying that litigation "[d]ecisions are being made on economics rather than on what is a just outcome," and quoting an Oregon prosecutor as saying that because Oregon could not afford to appoint counsel for nonviolent offenders, and judges were releasing them immediately, "[w]e had to make some awful choices . . . I pleaded out as many nonviolent felonies as I could. You kind of had to hold your nose." (internal quotation marks omitted)).

<sup>34</sup> See Alschuler, *The Prosecutor's Role*, *supra* note 11, at 55-57.

crimes are more grave.<sup>35</sup> New prosecutors may be systematically harsher, while veterans may mellow with time.<sup>36</sup> Prosecutors who are friendly with particular defense counsel are likely to offer more generous deals to those lawyers' clients.<sup>37</sup> In addition, some prosecutors learn charge- and sentence-bargaining tricks, such as exploiting the minutiae of the Federal Sentencing Guidelines, that they use to grant larger concessions.<sup>38</sup> Prosecutors' offices that pay poor salaries are less likely to retain experienced prosecutors,<sup>39</sup> leading to regional disparities in plea bargaining based on funding. Prosecutors' offices vary widely in evaluating defendants' cooperation with the government, which opens the door to disparities based on region and demographics. Blacks, Hispanics, males, older defendants, noncitizens, and high school dropouts receive fewer and smaller substantial-assistance discounts than whites, females, the young, citizens, and high school graduates.<sup>40</sup> These influences, in other words, warp the shadows of trials. Thus, pleas track trial results closely in some cases and much less closely in others.

Another reason why plea results diverge from likely trial outcomes is that plea bargaining is hidden from public view.<sup>41</sup> First, plea bargaining is a secret area of law, unlike trials, which have clear rules. In plea bargaining, it is easier for inexperienced lawyers to fall afoul of unwritten norms by pushing too hard, not hard enough, or not in the right way.<sup>42</sup> The paucity of hard legal rules also leaves more room for

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<sup>35</sup> See *id.* at 54 (noting that while some prosecutors openly profess that they use plea bargains to soften overly harsh penalties, others disavow this practice); see also HEUMANN, *supra* note 14, at 103, 121.

<sup>36</sup> See HEUMANN, *supra* note 14, at 95–121.

<sup>37</sup> Cf. Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 151 (1986) (arguing that, for defense lawyers, the desire to foster good working relationships with prosecutors may "lead [them] to represent their clients less vigorously").

<sup>38</sup> See *infra* pp. 2483–91.

<sup>39</sup> See Gibeaut, *supra* note 33, at 42–44 (describing the inadequate salaries paid to many state and local prosecutors, which lead some to leave in search of higher salaries elsewhere).

<sup>40</sup> See LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 31 exhib.9, 34 exhib.12 (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf>; see also Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?*, 6 FED. SENTENCING REP. 6, 6–8 (1993) (finding wide variations in prosecutors' standards for substantial assistance).

<sup>41</sup> Although civil settlements are often hidden from public view as well, many of them are now, unlike plea bargains, publicly collected in databases on the Internet. See, e.g., Big Class Action, *Settlements and Verdicts*, at <http://www.bigclassaction.com/settlements.html> (last visited May 4, 2004); Lewis Roberts PLLC, *Verdicts & Settlements*, at [http://www.lewis-roberts.com/legal\\_verdicts.html](http://www.lewis-roberts.com/legal_verdicts.html) (last visited May 4, 2004); U.S. Environmental Protection Agency, *Cases and Settlements*, at <http://cfpub.epa.gov/compliance/resources/cases/civil> (last visited May 4, 2004). I have been unable to find any comparable databases of plea bargains.

<sup>42</sup> See Alschuler, *supra* note 37, at 152–53.



favoritism, favor-seeking, and connections to operate.<sup>43</sup> Second, prosecutors who are tempted to cut corners find it easier to avoid pursuing every lead and pressing every advantage during plea bargaining.<sup>44</sup> At public trials, in contrast, concern for reputation and for avoiding acquittals checks prosecutors' desires to minimize effort. Victims' advocacy groups and other sources of political pressure can more easily monitor public trials than backroom plea bargaining. Thus, sloth and time pressure probably skew plea bargains in ways that they would not at trial. Of course, prosecutors put forth varying levels of effort at trials too: Some prosecutors care more than others about their reputations. Some cases are more closely watched than others. Victims provide more oversight of prosecutors' decisions than the general public does for victimless crimes. And, in preparing for trial, prosecutors can still find less visible ways to save time and effort by, for example, inadequately investigating or preparing witnesses. But as between trials and plea bargains, trials are more public and so are riskier places to cut corners.

2. *Defense Attorneys' Pressures and Incentives.* — Like prosecutors, defense attorneys are not ideal, perfectly selfless, perfectly faithful agents. They too are human and subject to similar failings and temptations. Some defense attorneys are more talented or more industrious than others, and some desire the fame and fortune that come from a high-profile trial. And like prosecutors, defense lawyers prefer to avoid losing cases at trial, which would harm their reputations.

In some ways, defense representation is even more variable and vulnerable to skewing than is the prosecution. One of the main culprits is funding. Many defense lawyers are public defenders, who are paid fixed salaries to represent large numbers of indigent clients. Others are private appointed lawyers, whom courts appoint and pay fixed fees or low hourly rates subject to caps.<sup>45</sup> Still others are privately retained counsel, who may receive flat fees, retainers plus hourly rates, or simply hourly rates. Some clients of private lawyers have modest means and cannot afford to pay more than a certain amount. This financial constraint may operate as a cap on representation unless the client then qualifies for and seeks court-appointed counsel. For other clients, money is no object.

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<sup>43</sup> See *id.* at 151–52.

<sup>44</sup> Cf. *id.* at 151 (discussing this problem with respect to defense counsel).

<sup>45</sup> See generally STEVEN K. SMITH & CAROL J. DEFANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE 1–2 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/id.pdf>; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10–11 (1997) (collecting statutes that authorize payment of \$30 to \$40 per hour on average to appointed private counsel, subject to a \$500 to \$1000 cap on average in noncapital cases, which means zero compensation for hours over twenty-five or so, unless the court, on finding that the case is extraordinary, waives the cap).



One obvious problem with this patchwork quilt is that it leads to inconsistent incentives. Though not all lawyers are slaves to their pocketbooks, financial incentives influence many to varying degrees.<sup>46</sup> A lawyer who receives a fixed salary or a flat fee per case has no financial incentive to try cases. On the contrary, flat fees create financial incentives to plead cases out quickly in order to handle larger volumes.<sup>47</sup> A lawyer who receives a low hourly rate or an hourly rate subject to a low cap also has little financial incentive to try cases. The desire for a lighter workload and free time may incline that lawyer toward plea bargaining.<sup>48</sup> Involuntarily appointed private lawyers are especially unlikely to push cases to trial, particularly because courts often compensate poorly.<sup>49</sup> To put it bluntly, appointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead. Encouraging pleas out of financial self-interest is part of what Abraham Blumberg famously called “[t]he [p]ractice of [l]aw as [c]onfidence [g]ame.”<sup>50</sup>

<sup>46</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1182.

<sup>47</sup> See *Jones v. Barnes*, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting) (discussing how flat fees encourage fast dispositions); *Recorder's Court Bar Ass'n v. Wayne Circuit Court*, 503 N.W.2d 885, 888 (Mich. 1993) (stating that under a fixed-fee system, “[t]he incentive, if a lawyer is not paid to spend more time with and for the client, is to put in as little time as possible for the pay allowed” and that “[u]nder [this] system, a lawyer can earn \$100 an hour for a guilty plea, whereas if he or she goes to trial the earnings may be \$15 an hour or less” (quoting the special master's findings of fact) (internal quotation marks omitted)); RICHARD KLEIN & ROBERT SPANGENBERG, AM. BAR ASS'N, *THE INDIGENT DEFENSE CRISIS* 6 (1993); Ken Armstrong et al., *Attorney Profited, but His Clients Lost*, SEATTLE TIMES, Apr. 5, 2004, at A1 (reporting that a part-time appointed defense lawyer earned large salaries for disposing of cases after little work, leaving time to earn more money in part-time private practice), 2004 WL 58931017; Ken Armstrong et al., *For Some, Free Counsel Comes at a High Cost*, SEATTLE TIMES, Apr. 4, 2004, at A1 (reporting that county's flat-fee system led appointed defense counsel to dispose of staggering caseloads through perfunctory representation, producing the highest guilty-plea rate in Washington State), 2004 WL 58930916.

<sup>48</sup> See ROBERT HERMANN ET AL., *COUNSEL FOR THE POOR* 158 (1977); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 672–73 (1986); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1757 (1993); Schulhofer, *Disaster*, *supra* note 11, at 1988–90.

<sup>49</sup> See EISENSTEIN, *supra* note 20, at 173; Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1259; Stuntz, *supra* note 45, at 10–11, 33; see also STATE BAR OF TEX. LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS COMM., PROSECUTOR SURVEY RESULTS, THE STATUS OF INDIGENT CRIMINAL DEFENSE IN TEXAS questions 18, 19, 31 [hereinafter PROSECUTOR SURVEY RESULTS] (reporting that Texas defense lawyers who handle both retained and appointed cases devote less time to their indigent clients, are less prepared to defend them, and put on less vigorous defenses; also reporting that a large minority of Texas prosecutors believe that appointed defense counsel are undercompensated), available at [www.uta.edu/pols/moore/indigent/prosecutor\\_results.htm](http://www.uta.edu/pols/moore/indigent/prosecutor_results.htm) (last visited May 4, 2004).

<sup>50</sup> Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooption of a Profession*, 1 LAW & SOC'Y REV. 15, 15 (1967); see *id.* at 24–31 (describing defense lawyers as players in a confidence game, influencing clients' choices to serve their own interests in

If a lawyer is bent on plea bargaining and does so all the time, he cannot credibly threaten to go to trial.<sup>51</sup> Prosecutors will offer fewer concessions to these lawyers' clients because they do not have to offer more.<sup>52</sup> In other words, financial conflicts of interest slant many defense attorneys toward pleas, which may mean less favorable negotiating results.<sup>53</sup>

Even if a particular appointed lawyer resists these financial pressures, clients still believe the adage that you get what you pay for.<sup>54</sup> Defendants trust appointed counsel less and so are less likely to heed their advice.<sup>55</sup> Thus, the psychology of trust exacerbates the structural problem of funding indigent defense. This mistrust may somewhat offset bad advice to plead, but it may also poison perfectly sound legal advice.

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collecting fees without doing much work; and describing defense lawyers' cooperation with prosecutors and court personnel in moving cases along).

<sup>51</sup> Thus, defense lawyers who care about their bargaining credibility might maintain it by trying the occasional case. But many defense lawyers do not care to put in the extra work to maintain their credibility, particularly because that extra work is costly, time-consuming, and could result in humiliating defeat. If they are public defenders or handle primarily court appointments, their credibility will not improve their business because their clients have almost no choice of counsel. Even if defense counsel depend on attracting private clients, few clients are well informed enough when choosing a lawyer to monitor attorneys' reputations for toughness in bargaining.

<sup>52</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1185-86; Luban, *supra* note 48, at 1744-45 (noting that "harassed and overworked" public defenders tend to engage in "perfunctory advocacy" even though "[t]he credible threat of an aggressive defense . . . may provide a bargaining chip"); McDonald et al., *supra* note 15, at 159-60 (noting the belief that attorneys who never go to trial have less plea-bargaining leverage and thus wind up with worse deals).

<sup>53</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1199-1204; *see also* Recorder's Court Bar Ass'n v. Wayne Circuit Court, 503 N.W.2d 885, 888 n.7 (Mich. 1993) (quoting the special master's finding of fact that fixed-fee compensation for defense counsel "discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial and will assent to a guilty plea to a higher charge" (internal quotation marks omitted)); *id.* at 888 (quoting the special master's finding that the reimbursement system "creates a conflict between the attorney's need to be paid fully for his services and obtaining the full panoply of rights for the client" and that "[o]nly the very conscientious will do the latter against his or her own interests" (internal quotation marks omitted)). The majority of the defense attorneys interviewed by another researcher on the subject admitted that "the energy which they devoted to a case sometimes varied with the amount of the fee they were able to collect." Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1203 (citing R. Petty, *Fee-Setting and Fee-Collection Practices Among Criminal Defense Attorneys in the State of Texas* 15 (fall 1973) (unpublished manuscript, on file with the University of Texas Law School Library)).

<sup>54</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1242.

<sup>55</sup> See Daniel W. Stiller, *Guideline Sentencing: Deepening the Distrust Between Federal Defendant and Federal Defender*, 11 FED. SENTENCING REP. 304, 304 (1999) (exploring psychosocial factors that cause defendants to distrust their appointed counsel and so hinder defense representation); *see also* Tamara Rice Lave, *Equal Before the Law*, NEWSWEEK, July 13, 1998, at 14, 14 (describing her career as a public defender and reporting that "[m]y clients often think that because I'm court-appointed, I must be incompetent[;] [i]n jailhouse parlance, I am just a 'dump truck,' a person who wants nothing more than to plead them guilty").

In contrast, privately retained lawyers who receive generous hourly rates have incentives to bill more hours and to fight matters out and go to trial if necessary. They spend more time preparing their cases and mount more vigorous defenses.<sup>56</sup> As a result, the client's plea-bargaining posture improves, particularly when the attorney has a strong reputation for trial prowess. Unlike appointed lawyers, retained lawyers have an economic incentive to fight hard enough to obtain good results so as to attract future paying clients.<sup>57</sup> Because these lawyers face less pressure to bargain, prosecutors may have to offer them more generous concessions in order to induce guilty pleas.<sup>58</sup> One would expect the same of defense lawyers who volunteer for court appointments to gain experience. If anything, these inexperienced lawyers will be too unyielding in plea bargaining because they want trial experience. The result may be the rejection of a fair plea offer and a harsher sentence after trial.<sup>59</sup>

Another problem is that many public defenders are overburdened. They handle hundreds of cases per year, far more than privately retained attorneys do.<sup>60</sup> This volume ordinarily means that pleas become the norm, making trial a less realistic threat in plea bargaining. In addition, overburdened defense attorneys cannot spend enough time to dig up all possible defenses. The result is fewer plea-bargaining chips and less favorable plea bargains. Financial incentives may also

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<sup>56</sup> PROSECUTOR SURVEY RESULTS, *supra* note 49, questions 27, 30, 31 (noting that 56.5% of Texas prosecutors reported that retained counsel spend more time preparing than appointed counsel do, and showing that 60.7% of the prosecutors saw defense lawyers mount more prepared, more vigorous defenses for their retained clients than these same lawyers do for their court-appointed clients).

<sup>57</sup> See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 116 (1995).

<sup>58</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1187. If the hourly rate is high and the lawyer does not have enough other business, the lawyer may dissuade the client from taking a plea bargain that might be in the client's interests. This possibility, however, strikes me as fairly remote.

<sup>59</sup> See *id.* at 1260-61. Of course, this analysis assumes that the lawyer has at least some influence over the client's decision to accept or reject a plea, which seems more than plausible. It also assumes that the lawyer does not care greatly about being cooperative enough to please the court in the hope of receiving future court appointments.

<sup>60</sup> See *State v. Peart*, 621 So. 2d 780, 784, 788-90 (La. 1993) (finding the New Orleans public defender system presumptively ineffective because counsel handled seventy active felony cases at a time, which amounted to 418 defendants over a seven-month period); ROBERT BURKE ET AL., NAT'L LEGAL AID & DEFENDER ASS'N, INDIGENT DEFENSE CASELOADS AND COMMON SENSE: AN UPDATE 3-5 (1992); Ken Armstrong & Justin Mayo, *Frustrated Attorney: "You Just Can't Help People"*, SEATTLE TIMES, Apr. 6, 2004, at A1 (describing staggering caseloads of public defenders in parts of Washington State), 2004 WL 58931091. Occasionally public defenders stage plea-bargaining strikes, in which they hold out for trial in all cases in an effort to extract more favorable pleas from prosecutors. Sometimes the tactic works; sometimes it does not. See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1249-53.

lead some private attorneys to take on more cases than they can handle, with similar results.<sup>61</sup>

Public defenders work closely with prosecutors and judges, developing close relationships that can influence plea bargaining. Judges and clerks put pressure on defense counsel (especially public defenders) to be pliable in bargaining. Repeat defense counsel often must yield to this pressure in order to avoid judicial reprisals against clients and perhaps to continue to receive court appointments.<sup>62</sup> Some clients benefit from this relationship of trust, particularly those whom the public defender believes are innocent. Conversely, public defenders must choose their battles wisely, which may require an implicit trade-off of some clients against others.<sup>63</sup> There are even occasional anecdotes in which a defense lawyer agrees to trade a concession in case *A* for a harsher sentence in case *B*.<sup>64</sup> The inequity is particularly troubling when a private defense lawyer cashes in favors that he is owed in order to benefit paying clients but not court-appointed clients.<sup>65</sup>

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<sup>61</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1201.

<sup>62</sup> See *id.* at 1237–39, 1240, 1261–62 & n.225; Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 812 & n.46 (2004) (explaining that courts lean toward appointing defense lawyers who dispose of cases quickly instead of making extra work for judges by filing motions, investigating, or seeking expert witnesses); see also PROSECUTOR SURVEY RESULTS, *supra* note 49, question 3 (noting that an attorney's reputation for moving cases is the single biggest factor in winning court appointments, and so implying that defense attorneys who wish to keep receiving court appointments must dispose of them efficiently); cf. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2171–73 (2003) [hereinafter Etienne, *Remorse, Responsibility, and Regulating Advocacy*] (arguing that judges have incentives to penalize defendants and their counsel for zealous advocacy, leading defense counsel to tread lightly); Margareth Etienne, *The Declining Utility of the Diminished Right to Counsel in Federal Criminal Courts: An Empirical Study on the Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 429–30 (2004) [hereinafter Etienne, *The Declining Utility of the Right to Counsel*] (same). Judges who prefer plea bargains can punish defendants who go to trial by increasing their post-trial sentences. In that sense, plea bargaining casts its own shadow on trials. Alschuler relates a case in which a judge imposed a 270-year sentence after trial and then told the public defender: "Don't you ever bring a case like this one into my court. You bargain it out first." Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1240 n.172 (internal quotation marks omitted).

<sup>63</sup> See HEUMANN, *supra* note 14, at 61–66, 69, 72, 74, 123–26; Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1210–11, 1222, 1224; see also Rodney Thaxton, *Professionalism and Life in the Trenches: The Case of the Public Defender*, 8 ST. THOMAS L. REV. 185, 187 (1995) (comparing public defenders to battlefield triage medics, who must focus their efforts on the most serious cases).

<sup>64</sup> See DAVID A. JONES, CRIME WITHOUT PUNISHMENT 120–21 (1979) (noting that defense counsel will sometimes concede that one defendant who is uncooperative or has committed a very serious crime deserves a heavier sentence in exchange for a lighter sentence for other defendants, and also noting that whites are more likely to benefit from this practice while minorities are more likely to suffer).

<sup>65</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1223.

Defense lawyers vary also in bargaining skills and knowledge. Public defenders and some private attorneys are repeat players who come to know prosecutors and judges. As a result, they develop a feel for cases and can gauge the going rate for particular types of crimes and defendants.<sup>66</sup> Public defenders have a particular institutional advantage because they can pool information about judges and prosecutors with others in their offices.<sup>67</sup> Similarly, retained counsel who are former prosecutors have not only experience, skill, and knowledge, but also close relationships with prosecutors and judges.<sup>68</sup> In contrast, inexperienced lawyers have yet to develop an intuitive sense of what a case is worth. Thus, civil lawyers who take court appointments, new defense counsel, and new prosecutors start out at a disadvantage in plea bargaining.<sup>69</sup> Somewhere in between seasoned public defenders and neophytes are both defense attorneys who receive frequent court appointments and retained criminal-defense specialists.

Repeat players understand not only bargaining, but also trials, better than neophytes do. Trials resolve such a small percentage of criminal cases that their shadows are faint and hard to discern.<sup>70</sup> Public defenders in large cities have some sense of shadows because they and their colleagues try hundreds of cases before the same judges each year. Former prosecutors and public defenders have a sense as well, though their knowledge may be dated. But most other lawyers have only a smattering of unrepresentative data points and unreliable courthouse gossip from which to extrapolate.

The most experienced, most talented defense lawyers are very marketable. After they have cut their teeth as prosecutors or public defenders, many of the best lawyers earn much more in the private sector by serving well-to-do clients.<sup>71</sup> At the other end of the spectrum,

<sup>66</sup> See JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 108 (1972); HEUMANN, *supra* note 14, at 89–91.

<sup>67</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1229–30.

<sup>68</sup> See Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 146 n.143 (1997) (noting that ex-prosecutors often become private defense lawyers and enjoy strong relationships with current prosecutors).

<sup>69</sup> See HEUMANN, *supra* note 14, at 76, 79, 96–97, 102; Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1268–70.

<sup>70</sup> I am grateful to Al Alschuler for pointing out this problem.

<sup>71</sup> Nevertheless, many zealous, public-spirited, and able lawyers work as public defenders even though they could earn more elsewhere. See LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 83–86 (1987) (reporting that many lawyers become public defenders at least in part to do public service and reporting, based on anecdotal evidence, that many senior public defenders could take more lucrative private jobs if they wanted to); Con Garretson, *Public Defenders Lauded, Despite Offices*, MARIN INDEP. J. (Cal.), May 17, 2003 (discussing a grand jury report that found that many zealous public defenders “have a passion” for the job despite low pay), LEXIS, News Library, Allnews File; Lave, *supra* note 55 (reporting that Lave, a Stanford Law School graduate, chose to become a public defender rather than work at a law firm).

many criminal defense lawyers provide poor representation. Ineptitude, sometimes combined with inexperience, huge caseloads, or sloth, harms many a defendant's case.<sup>72</sup> Needless to say, inept lawyers are disproportionately likely to represent poor defendants because those with money will be able to hire better counsel.<sup>73</sup>

The constraints on appointed attorneys' funding, time, and working relationships described above appear to influence outcomes. For example, public defenders are more likely to press their clients to plead guilty, or at least defendants perceive this to be true.<sup>74</sup> Retained counsel file more motions than do appointed counsel.<sup>75</sup> They also meet with their clients sooner and more often, getting a head start on learning the key facts and witnesses.<sup>76</sup> Clients with retained counsel plead guilty later,<sup>77</sup> so their lawyers have more time to investigate their cases and find weaknesses that could serve as plea-bargaining chips. Retained counsel may be more likely to take cases to trial, to win acquittals, to obtain dismissals, to avoid prison sentences, and to win charge reductions.<sup>78</sup>

<sup>72</sup> See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (collecting horrifying anecdotes of poor representation).

<sup>73</sup> But, as Alschuler notes, clients have difficulty determining a lawyer's quality. They may get word-of-mouth recommendations from inmates, bail bondsmen, or jailers (who may refer clients in exchange for commissions but have difficulty telling which lawyers are good). See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1188-91.

<sup>74</sup> See HERMANN ET AL., *supra* note 48, at 47, 51, 94; Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1246-47; see also Roger A. Hanson et al., *Effective Adversaries for the Poor*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 89, 102 fig.6.5 (Malcolm M. Feeley & Setsuo Miyazawa eds., 2002) (finding, in an empirical study of eleven American communities, that public defenders resolve 95% of their cases by guilty plea, compared with 94% for assigned and contract attorneys and 91% for privately retained attorneys). Indeed, many early advocates of public defender systems touted them as a way to increase guilty-plea rates. See FISHER, *supra* note 17, at 194-200.

<sup>75</sup> Pauline Houlden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 190 (1985); see also Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process — A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 805 (1995).

<sup>76</sup> See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 8 tbl.17 (2000) (reporting that 60% of state inmates and 75% of federal inmates with retained counsel met with their attorneys within the first week after arrest, compared with 37% of state inmates and 54% of federal inmates with court-appointed counsel), available at [www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf).

<sup>77</sup> See ROGER A. HANSON ET AL., NAT'L CTR. FOR STATE COURTS, INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL 43-44 (1992); Pauline Houlden & Steven Balkin, *Costs and Quality of Indigent Defense: Ad Hoc vs. Coordinated Assignment of the Private Bar Within a Mixed System*, 10 JUST. SYS. J. 159, 165 (1985); cf. Blumberg, *supra* note 50, at 37 tbl.3, 38 (suggesting that time pressure causes appointed counsel to suggest pleas during initial interviews with their clients at much higher rates than do legal-aid or privately retained counsel).

<sup>78</sup> See Stuntz, *supra* note 45, at 35 & nn.123-24 (collecting sources and noting that the effects are most notable in studies done after 1980). There is, however, much disagreement about



Another factor that warps plea outcomes is the complexity of modern sentencing law, which puts a premium on lawyers' familiarity with lengthy and intricate rules. Most of the shadow-of-trial literature predates mandatory sentences and sentencing guidelines; scholars have not yet explored how these developments exacerbate discord between plea and trial outcomes. For example, federal sentencing is now governed by a thick manual of sentencing guidelines and appendices that are updated every year.<sup>79</sup> Thousands of cases interpret these guidelines, yielding still more complexity. Complexity favors intelligent, savvy repeat players who build up expertise and who pool information. They are in the best position to master opportunities and ambiguities that are "like little prizes hidden in the guidelines."<sup>80</sup> They may learn, for example, that particular prosecutors and courts are sympathetic to downward departures for single mothers with toddlers but

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whether and how the type of counsel affects outcomes. Cf. HARLOW, *supra* note 76, at 1, 3, 5 tbl.9, 6 tbls.10–11, 8 tbl.17 (reporting that clients of privately retained lawyers were significantly more likely to plead not guilty, significantly less likely to plead guilty without plea bargains, significantly less likely to be incarcerated, and significantly less likely to be released on bail, but that overall acquittal and dismissal rates were roughly the same).

Easterbrook's response is that the funding and agency-cost problems are no different at trial. See *supra* pp. 2465, 2474; see also Easterbrook, *Plea Bargaining*, *supra* note 2, at 1975–76; cf. Church, *supra* note 2, at 516. Agency-cost problems, however, may not be as significant at trial. To preserve their reputations, prosecutors and defense lawyers must adequately prepare opening statements, witnesses, questioning, closing arguments, and jury instructions. Failure to do these tasks at trial invites questioning, disciplinary action, and possibly reversal for ineffectiveness. In contrast, an attorney who failed to do any work at all before a plea would never be noticed. Of course, there are less visible ways to cut corners at or before trial, for example by doing insufficient work on pretrial investigation or motions. Cf. p. 2476 (discussing oversight of prosecutors). In addition, not all lawyers care enough about their reputations to work hard, as evidenced by anecdotes of sloppy lawyering at trial. Nonetheless, on average, reputational concerns constrain trial performance more than they do low-visibility plea bargaining. See Alschuler, *supra* note 37, at 151; Schulhofer, *Criminal Justice Discretion*, *supra* note 11, at 58–59. Schulhofer also argues that the fixed costs of going to trial are large, so there is less room to cut corners at trial. Even a bad witness examination takes a fair amount of time, so the gains from shirking are less. See *id.* There is some truth to this point, but there is still a big difference between how much time a diligent lawyer and a lazy lawyer will invest in the same factual investigation, legal research, witness preparation, or opening statement. Cf. *supra* pp. 2474–76 (discussing how similar considerations constrain prosecutors).

A countervailing factor is that because trials are more complex than pleas, differences in lawyers' skills might matter more at trial than in plea bargaining. Those who are fearsome trial lawyers will extract better bargains in the shadow of that trial skill. Because bargaining is tempered by stable going rates for ordinary crimes, it might even out the playing field to some extent. I am indebted to George Fisher for pointing out this effect.

<sup>79</sup> U.S. SENTENCING GUIDELINES MANUAL (2003).

<sup>80</sup> Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 530 (1992); see also *id.* at 529–30 (paraphrasing one public defender as saying "there are numerous opportunities for a creative defense lawyer to find paths to a plea concession," and reporting the observation of probation officers that prosecutors are "outgunned" because of the public defenders' "commitment to the idea that knowledge [of the guidelines] is power" (internal quotation marks omitted)).



not to departures based on health or aberrant behavior.<sup>81</sup> Or they may propose package deals that involve discounts for global pleas, in which all codefendants plead guilty in exchange for an extra sentence reduction.<sup>82</sup> Guidelines neophytes, in contrast, may be ignorant of these opportunities unless they pool information with more experienced colleagues.<sup>83</sup> Knowledge of possible downward departures and adjustments can make a difference of years to a defendant's sentence.

Familiarity with mandatory minima and maxima, and with techniques for evading them, can likewise greatly affect sentences. For example, many federal drug crimes carry mandatory minimum penalties of five or ten years' imprisonment.<sup>84</sup> Knowledgeable defense lawyers who act quickly may strike early charge-bargains before a grand jury indicts. They can, for instance, suggest a plea to using a telephone in the course of drug trafficking in lieu of a substantive drug-trafficking charge. The reward for a quick plea bargain may be a four-year maximum sentence instead of a five- or ten-year minimum.<sup>85</sup> If the

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<sup>81</sup> See generally Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299 (1996) (discussing judicial trends in discretionary departures from the Guidelines); Dana L. Shoenberg, *Departures for Family Ties and Responsibilities After Koon*, 9 FED. SENTENCING REP. 292, 292-93 (1997) (noting that conservative courts such as the Fourth Circuit greatly restrict departures for family circumstances, while more liberal courts such as the Second Circuit readily allow these departures).

<sup>82</sup> See *United States v. Carrozza*, 4 F.3d 70, 86 (1st Cir. 1993) (indicating that the trial court departed downward as reward for a package-deal plea that obviated a lengthy trial); *United States v. Mosquera*, Nos. CR 92-1228 (JBW), CR 93-0036 (JBW), 1994 WL 593977, at \*13-15 (E.D.N.Y. Mar. 17, 1994) (report of coordinating counsel appointed by the court in *United States v. Mosquera*, 816 F. Supp. 168, *aff'd mem.*, 48 F.3d 1214 (2d Cir. 1994)).

Sometimes public defenders use their large caseloads to negotiate package deals of a different sort. By disposing of a large number of cases at once, they can extract larger discounts than a private lawyer with a single case could. See JONES, *supra* note 64, at 121-22; cf. *supra* note 60 (discussing strikes by defense counsel to gain bargaining leverage).

<sup>83</sup> See Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 444-57 (2002); Alan J. Chaset, *A Teacher at the Top: Another Reason To Have a Representative of the Criminal Defense Bar on the Sentencing Commission*, 11 FED. SENTENCING REP. 309, 309 (1999) (reporting that many defense lawyers in an advanced sentencing seminar were unaware of sentencing guidelines complexities that could help their clients); *id.* at 309-310 (concluding that "our current guideline system may involve too much law for the average practitioner to keep current with" and that "[e]ven experienced defense counsel must devote considerable time and energy in order to stay fully conversant"); Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 616 (1998) (asserting that defense counsel inexperience with the complexity of the Federal Guidelines impairs sentencing advocacy); Owen S. Walker, *Litigation-Enmeshed Sentencing: How the Guidelines Have Changed the Practice of Federal Criminal Law*, 25 U.C. DAVIS L. REV. 639, 640, 649 (1992) (reporting that the Guidelines' creation of myriad new rules has given defense counsel many more ways to make mistakes). The same complexity may, of course, bewilder inexperienced prosecutors and limit their bargaining tools.

<sup>84</sup> See, e.g., 21 U.S.C. § 841(a)(1), (b)(1)(A)-(B) (2000).

<sup>85</sup> Compare *id.* (mandating five- and ten-year minima for substantive drug trafficking), with *id.* § 843(b), (d) (providing a four-year maximum for using a telephone in drug trafficking). See

defense lawyer suggests this deal only after indictment, the prosecutor may have more difficulty persuading his or her supervisor to drop an already filed charge.<sup>86</sup>

The Federal Sentencing Guidelines have put a huge premium on another plea-bargaining technique: cooperating with the government. This venerable tactic has become much more important in recent years as one of the few ways around sentencing guidelines and mandatory minima. The Federal Guidelines impose stiff sentences and abolish parole. Mandatory minima often require offenders to spend five or ten years in prison before release, particularly for drug and gun convictions.<sup>87</sup> In exchange for substantially assisting the investigation or prosecution of others, defendants may earn sentences far lower than the Guidelines and even mandatory minima would otherwise provide.<sup>88</sup> Cooperation often requires swift action. For example, police may arrest a drug courier and ask the courier to wear a tape recorder the next day while completing a planned drug delivery.<sup>89</sup> Or a prosecutor may indict twenty members of a violent gang and offer cooperation agreements to the first two who will testify against the others. In other words, the first one in the door gets the deal.

A defendant's lawyer can make a big difference in the cooperation process. Experienced criminal defense attorneys understand the potential benefits of fast cooperation and may tell their clients this fact. As repeat players, they may also have developed bonds of trust with prosecutors that can facilitate negotiations over cooperation. A prosecutor who needs only one cooperator in a five-defendant case may in-

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generally Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1121-22 (2001) (explaining that pleas to "such [phone charges] are almost always Guidelines-evading plea bargains"); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 112 (1995) (advising defense counsel to intervene with prosecutors before formal charges are filed to persuade prosecutors to select lesser charges or even none at all).

<sup>86</sup> See FISHER, *supra* note 17, at 229 (noting that pre-charge bargaining "avoids awkward explanations to superiors and the public about why prosecutors are abandoning charges they once thought worth bringing").

<sup>87</sup> See, e.g., 21 U.S.C. § 841(a)(1), (b)(1)(A) (prescribing a ten-year mandatory minimum sentence for various drug offenses, with higher minima for recidivists); 18 U.S.C. § 924(c) (2000) (prescribing a five-year mandatory minimum penalty for using or carrying a firearm during and in relation to a crime of violence or drug trafficking, with a twenty-five year penalty for recidivists); see also U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81 fig.J (2002) [hereinafter SENTENCING SOURCEBOOK] (reporting that the mean federal sentences are 115 months in crack cocaine cases, 77 months in powder cocaine cases, and 88.5 months in methamphetamine cases), available at [www.ussc.gov/ANNRPT/2001/SBTOC01.htm](http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm).

<sup>88</sup> See 18 U.S.C.A. § 3553(e) (West Supp. 2003); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003); see also SENTENCING SOURCEBOOK, *supra* note 87, at 18 tbl.8 (reporting that 17.1% of federal defendants received substantial-assistance departures).

<sup>89</sup> See Stephanos Bibas, *The Right To Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 425-26 (2003).

cline toward offering the cooperation deal to the client of the experienced attorney. Some experienced attorneys, however, may resist having their clients cooperate. Their motivations range from ideological opposition to snitching, to receiving their fees from a crime boss, to fear that a reputation as a snitches' lawyer will drive away clients.<sup>90</sup> Inexperienced attorneys may not understand the benefits of quick cooperation, or they may be less skilled in persuading prosecutors to offer agreements to their clients. Indigent defendants may distrust public defenders' recommendations to cooperate because they already fear that their free lawyers are pushing pleas to get rid of cases.<sup>91</sup> Also, overburdened public defenders may not meet with their clients in time to arrange for them to cooperate. When quick cooperation is at a premium, these clients may lose out to codefendants who can afford to retain speedier private counsel.<sup>92</sup> These variations create inequities among codefendants, punishing similarly situated defendants differently based on their lawyers' skills, temperaments, and workloads.

Finally, a defense lawyer's adversarial stance may reduce the defendant's plea discount. The Federal Sentencing Guidelines significantly discount the sentences of defendants who accept responsibility in a timely manner, typically by pleading guilty. Defendants whose lawyers take extensive discovery or file many motions may suffer retaliation by judges and prosecutors and thus lose some or all of this discount.<sup>93</sup>

### B. *Lumpy Guidelines and Mandatory Statutory Penalties*

The theory of bargaining in the shadow of trial presupposes that parties can finely calibrate bargains to reflect slight gradations in probabilities. For example, if the chance of conviction drops from 100% to 95%, the prosecutor's offer would become about 5% sweeter. If the amount stolen from a bank rises from \$50,000 to \$51,000, the punishment would rise a little, as it presumably would after trial. These fine gradations would punish the worst defendants the most and would encourage prosecutors to focus on those who are most clearly

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<sup>90</sup> See Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2457-60 (1996) (noting that community defender offices may sometimes adopt blanket rules against representing clients who wish to "snitch"); see also Richman, *supra* note 57, at 117-26 (describing reasons why defense attorneys may deter cooperation).

<sup>91</sup> See Stiller, *supra* note 55, at 305.

<sup>92</sup> See HARLOW, *supra* note 76, at 8 tbl.17 (citing statistics that show that privately retained counsel meet with their clients more swiftly than do appointed counsel).

<sup>93</sup> See Etienne, *Remorse, Responsibility, and Regulating Advocacy*, *supra* note 62, at 2104; Etienne, *The Declining Utility of the Right to Counsel*, *supra* note 62, at 474-80; Stiller, *supra* note 55, at 305-06.

guilty of the worst crimes. Under classic indeterminate sentencing, the parties could theoretically calibrate sentences in this way.<sup>94</sup>

This flexibility still exists in states that use traditional indeterminate sentencing. But the federal and many state systems have replaced indeterminate sentencing with sentencing guidelines and have adopted mandatory minimum sentences by statute. For example, as mentioned above, federal law prescribes five- and ten-year minima for certain drug and gun crimes.<sup>95</sup> Both guidelines and mandatory statutory penalties turn on the severity of the offense or the offender's criminal record. Neither calibrates punishment to the strength of the evidence.

If the parties had precision sentencing tools, they could tailor bargains to reflect both the severity of the crime and the strength of the evidence. All too often, however, sentencing guidelines and statutes act as sledgehammers rather than scalpels. This is particularly true of statutory minima and maxima, which are packaged in large, discrete chunks.<sup>96</sup> The result is that many defendants reap the same, crude discount regardless of fine differences in guilt and proof.<sup>97</sup> In other words, mandatory penalties create cliffs instead of smooth slopes.

<sup>94</sup> In those sentencing systems that retain parole, bargaining takes place in the shadow of parole practices as well as prison sentences.

While sentence bargaining is smooth under indeterminate sentencing, charge bargaining is lumpy. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1144-45 (1976) [hereinafter Alschuler, *The Trial Judge's Role*] (noting that "accidents of 'spacing'" in criminal codes affect the magnitude and rationality of discounts that defendants receive in charge bargaining); see also Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 567-68 (1978) (predicting that determinate sentencing would exacerbate these "accidents of spacing" and transform smooth sentence bargaining into lumpy charge bargaining).

<sup>95</sup> See sources cited *supra* note 87.

<sup>96</sup> Compare 21 U.S.C. § 841(b)(1)(A) (2000) (prescribing a ten-year mandatory minimum penalty for trafficking in large drug quantities), with *id.* § 841(b)(1)(B) (prescribing a five-year mandatory minimum penalty for trafficking in moderate drug quantities). In New York State, to take another example, first-degree burglary and robbery carry punishments of five to twenty-five years' imprisonment. Second-degree burglary and robbery are punishable by three-and-one-half to fifteen years' imprisonment. Third-degree burglary and robbery are punishable by zero to seven years' imprisonment. N.Y. PENAL LAW §§ 60.05, 70.00, 70.02, 140.20, 140.25, 140.30, 160.05, 160.10, 160.15 (McKinney 1998).

<sup>97</sup> See Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1154 n.342 (2001) (explaining that statutory recidivism enhancements of ten years, twenty years, or life are so large that they serve as crude deterrents to trial but cannot be adjusted more precisely to influence the terms of pleas). The parties may sometimes find creative ways around statutory minima. They could, for example, negotiate for a five-year minimum but stipulate to nine-and-a-half years, shaving a few months off a ten-year minimum. Sentencing guidelines impede this kind of fine-grained sentence bargaining, however, because they key punishments to the statute of conviction and (in the federal system) to the facts. They leave little room for adjustments based on the probability of conviction.

Lumpiness is also an issue after trial, as marginal increases in drug weight may push defendants up a cliff from five to ten years' imprisonment. Nevertheless, the chance of acquittal still plays an important role in reducing the expected value of the sentence and in steering prosecutors

Sentencing guidelines also contain some cliffs.<sup>98</sup> For example, a felon faces roughly twenty-two to twenty-seven years if he pleads guilty in federal court to a third violent or drug felony with a maximum penalty of life imprisonment. If instead the prosecutor lets this defendant plead guilty to an offense with a twenty-year statutory maximum, the Guidelines' sentence drops to roughly thirteen to sixteen years.<sup>99</sup> Here, the Federal Guidelines do not create gradations between sixteen and twenty-two years because they are not designed to facilitate bargained concessions.

Likewise, the Guidelines prescribe a three-level discount (on average, 35%)<sup>100</sup> for guilty pleas in serious federal cases regardless of the chance of acquittal. Historically this discount has been automatic.<sup>101</sup>

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away from weaker cases. In plea bargaining, however, lumpiness looms even larger because it not only affects the likely post-trial sentence, but also impedes striking bargains that reflect the strength of the proof. For example, a drug law might prescribe a penalty of ten years' imprisonment. If the chance of conviction is 80%, the expected value of the trial is eight years; some defendants will get ten (atop the cliff) and others will get zero (in the valley below the cliff), but these results will average out to eight years. Thus, a plea bargain in the shadow of trial would be around eight years (minus some proportional discount to encourage plea bargaining). If the chance of conviction is 70%, the number would be around seven years (minus some proportional discount). But if the statute has a lower grade with a five-year minimum, both defendants may get the same five-year discount. In short, lumpy penalties impede adjustments that would reflect the odds of conviction and the strength of proof, as well as fine gradations of culpability. I address the normative significance of this descriptive analysis in section III.B.2. See *infra* pp. 2535–39.

<sup>98</sup> The analysis in the text assumes that the judge sentences the defendant within the Guidelines. In fiscal year 2001, federal judges sentenced 64.0% of defendants within the applicable sentencing range, departed downward based on substantial assistance in 17.1% of cases and on other grounds in 18.3% of cases, and departed upward in 0.6% of cases. SENTENCING SOURCEBOOK, *supra* note 87, at fig.G. Thus, in 36% of cases, judges departed in ways that could have ameliorated cliff effects. The large majority of these departures, however, occurred on motion of the prosecution (as with substantial-assistance and fast-track immigration departures) or with its acquiescence. Federal judges, fearing the prospect of appellate reversal, depart without prosecutorial approval in no more than about 7.3% to 12.8% of all cases. FISHER, *supra* note 17, at 218. Thus, while prosecutors may agree to smooth out cliff effects in a minority of cases, judges do not often do so over the prosecution's objection. Because they control the departures that circumvent cliffs, prosecutors have even more unilateral leverage to bargain or extract cooperation from defendants.

<sup>99</sup> See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a)–(b) (2003) (setting offense level at thirty-seven for the former offender and thirty-two for the latter, and automatically placing both defendants in Criminal History Category VI); *id.* § 3E1.1 (allowing a reduction of three levels for acceptance of responsibility); *id.* ch. 5, pt. A, sentencing tbl. (setting a sentence range of 262 to 327 months for the former defendant and 151 to 188 months for the latter defendant). The example in the text is based on a case that I handled as a prosecutor.

<sup>100</sup> Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1415 & n.274 (1997) (collecting sources for the 35% figure).

<sup>101</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2003) (authorizing a three-level reduction for acceptance of responsibility in cases in which the adjusted offense level is sixteen or higher, and providing that timely entry of a guilty plea is evidence of acceptance of responsibility); U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1987), *reprinted in* FEDERAL SENTENCING

Recent legislation adjusted this number: now, the first two levels (about 25%) are automatic and the third one is contingent on a government motion certifying that the acceptance of responsibility was timely.<sup>102</sup> It remains to be seen how routinely prosecutors will file this motion. Judges might balk if prosecutors refuse to give the third level to defendants who plead guilty quickly. Thus, a 35% discount might remain automatic for defendants who act quickly.

This fixed discount, whether it is 25% or 35%, is a cliff, not a slope. As a result, defenses that have a small chance of succeeding cast no shadows on plea bargaining; these defenses are overshadowed by the fixed discount. Defendants whose chance of conviction is 100% receive the exact same plea discount as those whose chance of conviction is 75%. If a defense is irrelevant to the eventual sentence, it will have no deterrent effect on police or prosecutors. Since prosecutors reap the same plea bargains in both cases, they have reduced incentives to steer away from cases in which there is some doubt as to guilt. To bargain in the shadow of trial, the plea discount would have to be proportional to the chance of acquittal instead of being a fixed amount.<sup>103</sup>

More often, guidelines create slopes, not cliffs. These slopes, however, are craggy rather than smooth gradations. Take, for example, an alien who pleads guilty to reentering the United States unlawfully after having been deported. If the alien had previously been convicted of

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GUIDELINES 315, 334–35 (PLI Litig. & Admin. Practice Course, Handbook Series No. 146, 1987) (indicating that one-level adjustments affect a sentence by about 12% and that six-level adjustments roughly double or halve average sentences); Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1537 (1997) (finding, in an empirical study of one district, that section 3E1.1 is "a more-or-less automatic discount for guilty pleas"); *id.* at 1539–40 (citing nationwide data showing that the reduction is awarded to 88% of defendants who plead guilty but to only 20% of those who go to trial and that the aberrant cases tend to involve unusual facts, such as when a defendant pleaded guilty while simultaneously minimizing responsibility, lied to a probation officer, or went to trial but admitted guilt at least partially).

<sup>102</sup> Prosecutorial Remedies and Other Tools To End the Exploitation of Children Act of 2003, § 401(g), Pub. L. No. 108-21, 117 Stat. 650, 671 (making the third level of reduction contingent upon the prosecution's motion that the defendant's acceptance of responsibility was timely).

<sup>103</sup> As a first approximation, one could say that defenses with less than a 35% chance of success, or sentencing adjustments worth less than 35% of the overall sentence, are overshadowed by the standard 35% discount. Even if a defense has a greater chance of succeeding (say, 40%), the shadow it casts is limited to the difference between the chance and the standard discount. On this example, 40% minus 35% creates a 5% shadow, only one-eighth of the 40% chance of acquittal. Risk aversion and discounting of future costs, as well as the saved transaction costs of trial, adjust the 35% figure upwards or downwards. See *infra* sections II.C–D. So if the saved transaction costs are worth 5% of the expected trial result, and prosecutorial risk aversion is worth another 10% discount, and the chance of acquittal on a defense is up to 20%, the total comes out to 35%, which means the defendant gets the same 35% deal that he would have gotten without any defense at all. A defense casts a shadow only to the extent that it, when coupled with saved costs, discounting, and risk aversion, creates a discount in excess of 35% (or 25%, if that becomes the standard discount).



smuggling aliens for profit, his sentence would be fifty-seven to seventy-one months. If his conviction was for an ordinary aggravated felony, however, his sentence drops to twenty-four to thirty months.<sup>104</sup> The two-year difference between the ranges is not quite a cliff, but it is a bump that impedes fine-tuned adjustments.

For some simple offenses, it is difficult to bargain. If a lone robber steals less than \$10,000 from a jewelry store, his federal sentencing range is twenty-four to thirty months after a plea.<sup>105</sup> It does not matter whether the amount stolen was \$1000 or \$9000, nor whether the chance of conviction was 100% or 65%.<sup>106</sup> The Guidelines leave no room to bargain outside of the six-month range. More complex offenses usually have some factors over which the parties can bargain, but these come packaged in large chunks rather than fine particles.<sup>107</sup>

The lumpiness of sentencing law motivates the parties to look for ways to smooth out the sharp peaks and valleys. One way around these cliffs and crags is for the parties to trade information. For example, a prosecutor may decline to charge under a three-strikes law if the defendant provides information leading to the conviction of his co-

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<sup>104</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(a), (b)(1)(A)(vii), (b)(1)(C) (2003) (setting a base offense level at eight, plus sixteen for an alien-smuggling conviction or eight for an ordinary aggravated felony); *id.* § 3E1.1 (authorizing a three-level reduction for acceptance of responsibility); *id.* ch. 5, pt. A, sentencing tbl. The hypothetical in the text assumes that the defendant falls within Criminal History Category IV. In the example, the parties could bargain over whether the previous alien smuggling had been for profit or simply to bring one's own relatives into the country.

<sup>105</sup> *Id.* § 2B3.1 (setting a base offense level of twenty). The hypothetical in the text assumes that the defendant has no criminal record, uses no weapon or explicit threats, and inflicts no injury or restraint on any victim. Ordinary robberies of businesses that sell goods that move in interstate commerce can be and are prosecuted in federal court under the Hobbs Act, 18 U.S.C. § 1951 (2000).

Charge bargaining might be a way to go below this cliff, but there are few alternative charges, particularly for simpler crimes, that might fit the facts. Perhaps prosecutors could bargain robbery down to larceny, which creates a sentencing cliff. They do not, however, have at their disposal a fine slope of many alternative charges and may be reluctant to give such a large discount. Thus, even when charge bargaining occurs, it is much lumpier than smooth sentence bargaining under indeterminate sentencing.

<sup>106</sup> There might be an advantage in not allowing infinite gradations keyed to the chance of conviction at trial. If prosecutors cannot bargain away cases in which the chance of conviction is 10% or 20%, they may be forced to dismiss them outright. The result might be to deter prosecutions of the truly marginal cases. But if prosecutors do not dismiss these cases, defendants who might well prefer to plead guilty to much lesser charges are instead stuck with going to trial, risking all or nothing. Section III.B.2 considers whether the all-or-nothing choice is normatively desirable. See *infra* pp. 2535–39.

<sup>107</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (2003) (two-, three-, or four-level increase for leadership role); *id.* § 3B1.2 (two-, three-, or four-level reduction for minor role); *id.* § 3C1.1 (two-level enhancement for obstruction of justice). At the lower end of the sentencing table, each level changes the sentencing range by zero or only a few months (often three months per level). At the high end, a level can affect the sentence by three years to life. See *id.* ch. 5, pt. A, sentencing tbl.



conspirators. Under federal law, cooperating with the government unlocks both mandatory minima and the Sentencing Guidelines, leaving the parties free to bargain over a smooth slope.<sup>108</sup> Thus, the lumpiness of the Sentencing Guidelines and mandatory minima reinforces the pressure to cooperate, and thereby turns cliff-like penalties into a bargaining slope. Cooperation may pervert distributive justice because higher-level defendants may have more information and so may be more likely to receive cooperation discounts.<sup>109</sup> Of course, information bargaining would occur even if there were no sentencing cliffs. But the cliffs may lead to more of it because they give prosecutors stronger leverage to extract more information. Many offenders, however, have no information to trade. They may have committed their crimes alone, may be too low-level to know much of value, or may be innocent. Moreover, even if defendants have information, their codefendants may preempt them by trading information first. The race to cooperate leaves some behind, and this effect may correlate poorly with offenders' culpability.

### C. *The Impact of Bail and Pretrial Detention*

Scholars often focus on the most serious felonies with the longest penalties — murders, rapes, and robberies.<sup>110</sup> Most criminal cases, however, involve misdemeanors or minor felonies, such as petty theft,<sup>111</sup> that usually carry short sentences.<sup>112</sup> Though many defen-

<sup>108</sup> See 18 U.S.C.A. § 3553(e) (West, Supp. 2003) (authorizing prosecutors to make motions on behalf of defendants who cooperate with the government, thereby permitting judges to sentence below mandatory minima); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003) (authorizing judges to depart downwards when prosecutors make motions certifying that a defendant has provided "substantial assistance in the investigation or prosecution of another person"). I am indebted to Bill Stuntz for the insights contained in the paragraph in the text.

<sup>109</sup> The data conflict on whether higher-level defendants are more likely to receive substantial-assistance discounts. Compare, e.g., U.S. Sentencing Commission Hearing, 3/19/02: Cocaine Sentencing, Testimony of Public Interest Groups and Defense Bar, in 14 FED. SENTENCING REP. 211, 213–16 (2002) (testimony of A.J. Kramer, Federal Public Defender, District of Columbia) (testifying that low-level defendants do not have enough valuable information to earn substantial-assistance sentence reductions, while higher-level defendants are reaping these discounts), with MAXFIELD & KRAMER, *supra* note 40, at 11–13 (finding, in a 1998 study, that lower-level defendants were more likely to receive substantial-assistance sentence reductions).

<sup>110</sup> On March 6, 2004, my research assistant conducted a series of searches through article titles in Westlaw's JLR database, which includes major American academic journals and law reviews. The search "TI(Murder)" found 328 articles, "TI(Rape)" found 468 articles, "TI(Death Penalty)" found 784 articles, "TI(Capital Punishment)" found 263 articles, and "TI(Felony or Felonies)" found 192 articles. In contrast, "TI(Misdemeanor)" found only 62 articles.

<sup>111</sup> 18 U.S.C. § 641 (punishing theft of up to \$1000 by up to one year's imprisonment).

<sup>112</sup> See NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002, at 55 (Brian J. Ostrom et al. eds., 2003) (reporting that in 2001 in states with unified court systems, 14% of the criminal cases filed were driving-while-intoxicated (DWI) offenses, 64% were other misdemeanors, and 21% were other felonies); *id.* at 54–55 (reporting that in two-tiered court systems, limited-jurisdiction courts handle roughly twice as many cases as do general-jurisdiction

dants make bail for these offenses, some do not have enough money or are detained without bail.<sup>113</sup> One empirical study found that roughly four times as many defendants charged with misdemeanors or lesser felonies are imprisoned before trial as are after conviction.<sup>114</sup> The pre-trial detention can approach or even exceed the punishment that a court would impose after trial.<sup>115</sup> So even an acquittal at trial can be a

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courts and that 88% of limited-jurisdiction court filings are non-DWI misdemeanors while 74% of general-jurisdiction court filings are non-DWI felonies); *see also* 2002 SOURCEBOOK, *supra* note 9, at tbl.3.1 (reporting that in 2001, there were more than three times as many property crimes as crimes against the person and that 77% of these property crimes were thefts, of which 64% involved completed thefts of less than \$250); *id.* at 351 tbl.4.6 (reporting 6,665 murders, 14,211 forcible rapes, and 55,915 robberies in 2001, compared with 639,927 larcenies, 360,905 cases of drunkenness, 315,435 cases of disorderly conduct, 146,721 cases of vandalism, and 37,245 cases of prostitution or vice).

<sup>113</sup> Though statistics for bail in misdemeanor cases are hard to come by, the anecdotes are too plentiful to ignore. *See* Tom Bower, *Bexar Jail Gets a Break from Commission: County Receives Time Extension To Fix Problems*, SAN ANTONIO EXPRESS-NEWS, Aug. 16, 2002, at 4B (reporting that jail population jumped from an average of 3500 to 3825 “when a slew of misdemeanor suspects either failed to make bail or experienced delays in the processing of their cases”), LEXIS, News Library, Allnws File; Dick Cook, *Jail Guards Strained, Chief Says: Officials Say Facility’s Design Makes Dealing with Overcrowding Difficult*, CHATTANOOGA TIMES, Dec. 23, 2002, at A1 (reporting that Hamilton County Jail, as of November 1, 2002, held sixty accused misdemeanants who could not make bail, compared with 243 accused felons), LEXIS, News Library, Allnws File; Adrienne Lu, *Crowding Plagues Johnston Jail*, NEWS & OBSERVER (Raleigh, N.C.), July 19, 2001, at B1 (“Sometimes, petty offenders are stuck in jail simply because they don’t have enough money to make bail.”), LEXIS, News Library, Allnws File; *Two Jurists Honor Senior Judge Marvin H. Shoob*, FULTON COUNTY DAILY REP. (Ga.), May 16, 2002 (reporting that Judge Shoob ordered the county to begin providing attorneys to poor misdemeanor defendants immediately because “he was ‘totally out of patience’ with a system that allowed some inmates accused of minor offenses to sit in jail for months because they couldn’t make bail”), LEXIS, News Library, Allnws File; Peyton Whitely, *Jails Drain King County Budget: Solutions Sought as Rising Costs Far Outstrip Population Growth*, SEATTLE TIMES, Mar. 4, 2002, at B1 (citing a report by two state legislative analysts that “estimated about 35 percent of all jail inmates are being held on misdemeanors — such relatively minor offenses as shoplifting or driving with a suspended license,” and noting that, on average, county jails held 385 alleged misdemeanants who could not make bail and had not yet been tried or sentenced), 2002 WL 3892469; *see also* 2002 SOURCEBOOK, *supra* note 9, at tbl.5.13 (reporting that in fiscal year 2000 for every category of offenses except migratory-bird offenses, some federal defendants were denied bail and some failed to make bail); *id.* at tbl.5.55 (reporting that for every category of felony in the nation’s seventy-five largest counties in 1998, some state defendants were denied bail and at least 14% failed to make bail).

<sup>114</sup> MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT*, at xv–xvi, 236 (1979); *cf.* Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 951–55 (1983) (describing how the process costs of pretrial detention, bail bonds, legal fees, and the time required for hearings and trials induce most misdemeanor defendants to plead guilty).

<sup>115</sup> *See* Adam Liptak, *County Says It’s Too Poor To Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1 (reporting that a man charged with resisting arrest had spent two and a half months in the county jail and had not yet seen a lawyer). In Mississippi, where this case occurred, the maximum punishment for resisting arrest is six months in jail and a \$500 fine. MISS. CODE ANN. § 97-9-73 (2004). Typically, the average sentence for a crime is far lower than the statutory maximum sentence.

hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario becomes not zero days in jail, but the length of time already served. In addition, pretrial detention hampers a defendant's ability to mount a defense. Detained defendants find it harder to meet and strategize with their lawyers and to track down witnesses, for example. Thus, pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial. In other words, the shadow of pretrial detention looms much larger over these small cases than does the shadow of trial.<sup>116</sup>

#### D. Information Deficits<sup>117</sup>

To bargain in the shadow of trial, the parties must first forecast the likely trial outcome. In civil cases, broad pretrial discovery gives the parties a relatively clear idea of the expected outcomes. Interrogatories, document discovery, and witness depositions all frame and narrow the issues, illuminating the parties' forecasts and defining the

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<sup>116</sup> See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998) ("Pleading guilty at the first opportunity in exchange for a sentence of 'time [already] served' is often an offer that cannot be refused. Accordingly, fully adjudicated cases may be too rare to serve as a meaningful check on the executive authorities."). As one criminal court found:

254 of the pleas to misdemeanors were by defendants who were incarcerated at the time of the plea of guilty. 83 of the pleas to misdemeanors were by defendants who were not incarcerated at the time of the plea. Many of the pleas of guilty to misdemeanors were by defendants who could achieve their freedom only by pleading guilty. (Plead guilty and get out, maintain your innocence and remain incarcerated in lieu of bail.) Thus if all defendants had the economic wherewithal to make bail, it is clear that many fewer than 6.8% of the defendants would plead guilty to misdemeanors.

People v. Llovet, N.Y.L.J., Apr. 24, 1998, at 29, 30 n.7 (King's Cty. Crim. Ct.); see HANS ZEISEL, *THE LIMITS OF LAW ENFORCEMENT* 48 (1982) (explaining that defendants' desire to win immediate release gives prosecutors much more leverage to extract pleas from detained defendants than from those free on bail); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 444 (1971) (same); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 85-86 (1995) (same); Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 438 & n.68 (1992) (reporting that in Cleveland County, Ohio, detained defendants often languished in jail for longer than the likely sentence and, when eventually brought to court, pleaded guilty in exchange for time served).

First offenders will be more reluctant to sully their clean records by pleading guilty. This is especially true if they have reasonable chances of acquittal and particularly if their employers, friends, and family would disapprove of a criminal conviction. Repeat offenders probably are less reluctant to add a conviction to their existing rap sheet, at least if the new conviction is not much more stigmatizing than the previous ones.

<sup>117</sup> Scott and Stuntz defend plea bargaining against the claim that information deficits make plea bargains unconscionable. Scott & Stuntz, *supra* note 2, at 1921. They limit themselves to considering the hastiness of the bargaining process, the lack of standard-form terms of adhesion, and the role of defense counsel in explaining the bargain's terms. *Id.* at 1921-23. They do not consider defendants' lack of information about the merits, which is the focus of this section.

trial's shadow.<sup>118</sup> Negotiations may begin before discovery is complete, but even then, a great deal of information is available to the parties.

Many criminal defendants have an advantage over their civil counterparts. Guilty defendants generally know that they are guilty, and are aware of the likely evidence against them,<sup>119</sup> so they can predict the probable trial outcomes. But defendants who are innocent, mentally ill, or were intoxicated during the crime may have little private information about the state's evidence. Criminal discovery does little to fix this problem; it sheds too little light and so leaves the trial's shadow fuzzy.<sup>120</sup> In most jurisdictions, the parties cannot depose witnesses in criminal cases.<sup>121</sup> In many, the parties do not learn witnesses' prior statements or even their names and addresses.<sup>122</sup> Defendants receive only their own statements and criminal records, documents and tangible objects, reports of examinations and tests, and expert witness reports gathered by the prosecution.<sup>123</sup> A defendant who requests the latter three categories of information must reciprocate by turning over the same kinds of evidence, which partially mitigates both sides' information deficits.<sup>124</sup> Defendants do not even have a right to impeachment information before plea agreements, and the same may be true of exculpatory material.<sup>125</sup> Moreover, the parties begin bargaining before discovery is complete, or even before it begins, as often happens with pre-indictment bargaining. The parties, of course, can supplement this formal discovery through informal discovery (above what the law requires)<sup>126</sup> and private investigators. And in some states, preliminary hearings reveal much of the prosecution's

<sup>118</sup> See, e.g., FED. R. CIV. P. 30 (depositions), 33 (interrogatories), 34 (document requests).

<sup>119</sup> See Scott & Stuntz, *supra* note 2, at 1936–37.

<sup>120</sup> See generally John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 450–60 (2001) (discussing the limited formal discovery and common, but not universal, informal discovery available in time for plea bargaining).

<sup>121</sup> A handful of states permit depositions of prospective witnesses for purposes of criminal discovery. See, e.g., FLA. R. CRIM. P. 3.220(h); IOWA R. CRIM. P. 2.13(1).

<sup>122</sup> For example, federal criminal defendants have no right to see prior statements of prosecution witnesses until those witnesses testify. FED. R. CRIM. P. 16(a)(2); see 18 U.S.C. § 3500 (2000).

<sup>123</sup> FED. R. CRIM. P. 16(a)(1).

<sup>124</sup> FED. R. CRIM. P. 16(b)(1).

<sup>125</sup> *United States v. Ruiz*, 536 U.S. 622, 629–33 (2002) (holding that disclosure of impeachment information before a guilty plea is not constitutionally required). While the facts of *Ruiz* involved only impeachment information and evidence supporting affirmative defenses, the Court's reasoning would apply with almost as much force to classic *Brady* exculpatory material.

<sup>126</sup> See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-6.200 (1997) (encouraging informal pretrial disclosures, in part to "enhance the prospects that the defendant will plead guilty"); John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2140–41 & n.191 (2000); H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 113–14 (1977).

evidence to defense lawyers in time for bargaining.<sup>127</sup> Nonetheless, information deficits are much greater in plea bargaining than in civil settlement negotiations.

The result of inadequate discovery is that the parties bargain blindfolded. They bargain in whatever shadow of trial they can discern, but they can easily go astray based on bluffing, puffery, fear, and doubt. Prosecutorial bluffing is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants.<sup>128</sup> In addition, the shadows are larger and fuzzier in criminal cases than in civil cases, at least in the majority of states without sentencing guidelines.<sup>129</sup> Thus, there is more room for the parties' expectations to diverge. When the defendant expects a sentence substantially below the prosecutor's expectation, negotiations are more likely to break down.<sup>130</sup> The outcome may be trials in cases that would otherwise have resulted in pleas. A trial will be particularly likely when overconfidence skews each party's expectations away from the other side's. It will also be particularly likely when one side has an especially poor picture of the other side's case. For example, defense lawyers without connections to prosecutors may be at a disadvantage in persuading prosecutors to give them informal discovery. The defendant may not have the money to hire a private investigator. Or, the defendant may be innocent and thus have no private knowledge of the evidence of guilt. The danger that bluffing, fear, or ignorance will skew innocent defendants' bargaining is one of the most palpable injustices of plea bargaining.

Information deficits also reinforce the problems already noted with defense counsel.<sup>131</sup> In an ideal world, defendants would choose de-

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<sup>127</sup> See, e.g., FLA. R. CRIM. P. 3.133(b); N.Y. CRIM. PROC. LAW § 180.60 (McKinney 1993); TEX. CODE CRIM. PROC. ANN. art. 16.01 (Vernon 1977).

<sup>128</sup> See *infra* pp. 2509–10 (explaining that criminals tend to be more risk seeking than law-abiding citizens).

<sup>129</sup> To be more precise, there are two shadows cast by trial: the shadow cast by the expected verdict on guilt and the shadow cast by the expected sentence. Information deficits mean that the guilt phase casts much fuzzier shadows in criminal cases than do liability determinations in civil cases. In indeterminate-sentencing states, sentencing remains uncertain and thus will cast fuzzy shadows as well. In the federal system and in the minority of state systems that use sentencing guidelines, however, the sentencing phase will probably be more predictable than a determination of civil damages. In comparing civil cases with criminal cases in sentencing-guidelines states, it is unclear a priori whether the greater determinacy of criminal sentencing outweighs or cancels out the unpredictability of guilt determinations resulting from information deficits. I am indebted to Russell Korobkin for this point.

<sup>130</sup> Alternatively, this divergence of expectations could lead the parties to wonder whether one side has information that the other does not. The result could be that each side does more factual investigation and adjusts its own expectations, leading to convergence and a plea bargain. But if the parties' expectations remain far apart, trial is much more likely. I am indebted to Todd Pettys for this thoughtful point.

<sup>131</sup> See *supra* section II.A.2, pp. 2476–86.

fense lawyers based on the lawyers' skill, diligence, and compatibility with the defendants' desires. Indigent defendants, however, must accept whatever lawyers are appointed for them. Even defendants who can afford to hire counsel are hampered by imperfect information about their lawyers. They sometimes rely on jailhouse rumors and other poor or biased sources of information. For example, bail bondsmen, sheriffs, jailers, and even inmates may recommend lawyers in exchange for a finder's fee or a commission.<sup>132</sup> Uninformed defendants may heed this advice and hire bad lawyers.

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The many incentives and structural impediments discussed in Part I distort the shadows of trials in plea bargaining. It is not clear a priori how these factors interact. For example, public defenders possess some advantages as repeat players, but funding and caseload woes may more than cancel these advantages out. Empirical research is necessary to assess the individual and combined effects of these problems.

## II. PSYCHOLOGICAL PITFALLS IN BARGAINING

A more basic problem with the reigning model is its assumption that actors are perfectly rational. The behavioral law and economics literature has undermined this assumption, exposing consistent irrationalities and imperfect heuristics in human decisionmaking.<sup>133</sup> Until now, however, the literature has largely ignored how these deficiencies skew plea bargaining.

This Part explores psychological pitfalls that impede rational decisionmaking during plea bargaining. Like the preceding Part, this Part is descriptive, outlining the oversimplifications of the shadow-of-trial model. Section II.A discusses how self-serving biases and overconfident optimism about trial prospects lead parties to resist or even reject beneficial bargains. Section II.B considers denial mechanisms and psychological blocks that may prevent the parties from seeing the weaknesses in their own cases. Section II.C addresses the discounting of future costs, which may lead defendants to reject lighter plea bargains in the present and to accept worse sentences in the future. Section II.D considers loss aversion and risk aversion. The former phenomenon encourages gambling to avoid suffering losses; the latter leads some people to prefer sure options to risky ones. Section II.E looks at framing and shows how it might interact with loss aversion,

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<sup>132</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1188–89.

<sup>133</sup> For a survey of the legal literature that has built upon behavioral economics and psychology, see Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).



depending on how lawyers phrase negotiating offers. Section II.F explores anchoring and adjustment, which skew the parties' evaluations of the appropriate sentence.

Many of the forces discussed in this Part cause defendants to lean against plea bargaining and toward going to trial. Yet 94% to 95% of adjudicated defendants plead guilty, leaving only 5% to 6% for trial.<sup>134</sup> This low trial rate does not mean, however, that psychological influences that encourage trial are irrelevant or ineffectual.

First, we do not know what the trial rate would be without these influences. Second, the influences affect not only the aggregate number of trials, but also the distribution of and inequities among individual defendants' sentences. If defendants were perfectly rational and there were no structural skews, the outcomes in many individual cases might be different. Some trials would be pleas, some pleas would be trials, and some pleas would remain pleas but would result from more generous or less generous plea bargains. My point is not that the overall plea rate is too high or too low in the aggregate. Rather, to oversimplify grossly, structural forces push some defendants too strongly toward pleas while psychological forces push some too strongly toward trials. For some defendants, these forces may cancel out. Other defendants are pushed one way or the other and are over- or underpunished as a result. These varying distributions of forces create inequities based on wealth, sex, age, intelligence, lawyer quality, and other characteristics irrelevant to guilt. These consequences are gravely troubling regardless of the overall trial rate.

Third, the high plea rate shows how much defense lawyers do to counteract clients' pro-trial biases and persuade them to plead. Section II.G discusses how lawyers can ameliorate these biases and how

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<sup>134</sup> See *supra* note 9. These low trial rates raise an obvious question: why do most defendants plead guilty instead of going to trial? A full discussion of that topic must await another paper. To consider the issue briefly, however, there are at least two possible explanations.

First, defendants may simply be reaping generous offers and good bargains. Prosecutors and defense counsel have strong incentives to encourage pleas, both out of self-interest and to spare their clients high transaction costs. The zone for striking mutually advantageous deals is quite wide, and each side shares in these large benefits. If the standard plea discount is 25% or 35% (at least in the federal system) and the chance of acquittal in many cases is 5%, defendants are getting extremely generous deals. See *supra* pp. 2488–89. Nevertheless, the generosity of these bargains may well be skewed and not calibrated to the chance of acquittal or the severity of the crime.

Second, defense lawyers play a large role in debiasing their clients and persuading them to plead guilty. See *infra* section II.G. Whether out of self-interest in avoiding trials, or possibly out of pessimism about their clients' prospects, defense lawyers have strong incentives to persuade their clients to plead guilty, and they do so regularly.

Thus, perhaps what needs explaining is not the 94% to 95% of defendants who plead guilty, but the 5% to 6% of defendants who go to trial. Those defendants who proceed to trial in the face of overwhelming evidence and against their lawyers' contrary advice are a particularly puzzling group.



they often fail to do so. Counsel, as repeat players, can spot and offset some of these psychological biases and heuristics. Yet the quality-of-counsel issues discussed in section I.A suggest that lawyers will vary in their responses to these problems. Skillful lawyers may largely neutralize them, while poor or overburdened ones may not. Lawyers' self-interest in promoting pleas also looms large, creating conflicts of interest and leading some defense lawyers to push pleas too strongly.

### A. Overconfidence, Optimism, and Self-Serving Biases

The rational-actor model presumes that parties evaluate options and odds dispassionately, correctly weighing pros and cons. Hundreds of psychological studies, however, show that people are consistently too optimistic and therefore overconfident in their chances of achieving favorable outcomes.<sup>135</sup>

A related problem is self-serving bias, which leads people to interpret information to fit their opinions or interests. People tend to recall selectively the information that is favorable to their preexisting views and to interpret that information in self-serving ways. In fact, the more information people have, the more room there is for bias.<sup>136</sup> This bias skews litigants' interpretations of the facts and so their evaluations of the equities. Because people's senses of fairness influence bar-

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<sup>135</sup> See, e.g., W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 150-51 (1992) (documenting optimism with respect to several areas, such as global warming and natural disasters); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 *LAW & HUM. BEHAV.* 439, 443 (1993) (divorce); David M. DeJoy, *The Optimism Bias and Traffic Accident Risk Perception*, 21 *ACCIDENT ANALYSIS & PREVENTION* 333, 336-37 & tbl.3 (1989) (auto accidents); John P. Kirscht et al., *A National Study of Health Beliefs*, 7 *J. HEALTH & HUM. BEHAV.* 248, 250-51 (1966) (diseases); Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample*, 10 *J. BEHAV. MED.* 481, 486-88 & tbl. 1 (1987) (same); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 806, 809-12 (1980) (various positive or negative events, such as losing a job); see also Neil D. Weinstein, *References on Optimistic Biases About Risk, Unrealistic Optimism, and Perceived Invulnerability* (July 27, 1998) (unpublished bibliography, on file with the Harvard Law School Library) (listing more than 260 publications on optimistic biases).

Overconfidence and self-serving biases are especially strong in those who are in good moods or have high self-esteem. See Roderick M. Kramer et al., *Self-Enhancement Biases and Negotiator Judgment: Effects of Self-Esteem and Mood*, 56 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 110, 124-25 (1993). But even those with low self-esteem suffer from self-serving distortions, though to a lesser extent. See *id.*

<sup>136</sup> See Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 176, 191, 193-94 (1992). For example, when given new information about the death penalty, both death penalty supporters and death penalty opponents interpret the same mixed evidence as largely reinforcing their own beliefs. See Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 2098, 2105, 2107 (1979).

gaining,<sup>137</sup> each side thinks it deserves a better deal than the other side thinks is warranted.<sup>138</sup> For example, one set of studies asked students to play the part of attorneys trying to negotiate a settlement for either the plaintiff or the defendant in a tort suit. Though each side received identical case files, plaintiffs' estimates of the fair settlement value and the likely judicial award were substantially higher than defendants' estimates.<sup>139</sup> Divergent predictions about the judge's award correlated strongly with failures to settle.<sup>140</sup> Even when both parties have complete information, they tend to interpret that information asymmetrically. As a result, each party's notion of fairness gravitates toward proposals that favor its own interests. Each side is inclined to see its own offers as fair and the other side's as unfair.<sup>141</sup>

Similarly, overconfidence and self-serving biases may impede plea bargaining. If one side overestimates the chances of winning at trial, it is likely to make unreasonable settlement offers and to reject reasonable offers.<sup>142</sup> Overconfidence leads each side to more extreme aspirations and reservation prices in negotiations, reducing the incentive to compromise.<sup>143</sup> There are two distinct strands of overconfidence at work here. First, each side is overconfident in predicting its chance of prevailing. Second, each side is overconfident or biased in viewing its own position as fair. Because each side sees a different, distorted shadow of trial, the parties may fail to settle when doing so would be

<sup>137</sup> See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 117-21 (1992); Linda C. Babcock & Craig A. Olson, *The Causes of Impasses in Labor Disputes*, 31 J. INDUS. REL. 348, 349, 358 (1992).

<sup>138</sup> So, for instance, teachers' union officials think that their pay should be comparable to that of colleagues in high-salary neighboring districts. School board presidents, in contrast, view low-salary neighboring districts as more appropriate sources for comparison. See Linda Babcock et al., *Choosing the Wrong Pond: Social Comparisons in Negotiations That Reflect a Self-Serving Bias*, 111 Q.J. ECON. 1, 10-13 (1996). The divergence in the sides' views correlates strongly with later breakdowns in bargaining and teachers' strikes, confirming that these self-serving biases impede bargains. See *id.* at 13; see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1502 (1998) (explaining how the Babcock study's hypothetical questions mitigated the risk that respondents would skew answers to influence actual bargaining).

<sup>139</sup> George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 145, 150-51 (1993).

<sup>140</sup> *Id.* at 151-52 & tbl.3.

<sup>141</sup> See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, J. ECON. PERSP., Winter 1997, at 109, 109-10.

<sup>142</sup> See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1817-29 (2000) (discussing the importance of fairness in striking bargains or in leading parties to reject advantageous but unfair bargains).

<sup>143</sup> See MARGARET A. NEALE & MAX H. BAZERMAN, *COGNITION AND RATIONALITY IN NEGOTIATION* 54 (1991); see also Margaret A. Neale & Max H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes*, 28 ACAD. MGMT. J. 34, 38, 45-46 (1985) (finding that overconfident negotiators are less willing to concede or compromise and more willing to risk impasse and adjudication).

in the best interests of both. Or, to overcome a client's overconfidence, counsel may resort to strong pressure or persuasion.

The effect of overconfidence will likely vary depending on the type of plea bargain and sentencing regime. Under indeterminate sentencing, optimism may lead each party to look at the bargain differently through its own rose-colored glasses. This optimism will be most potent if the parties strike a charge bargain but do not stipulate to the appropriate sentence. For example, the prosecution may agree to reduce a charge of grand larceny down to petty larceny. The defendant may plead guilty expecting that the judge will find him sympathetic and sentence him to probation. The prosecution, in contrast, may hope that the same plea will result in one year's imprisonment. The parties may thus take the bargain because their estimates of the bargain's value vary greatly. The effect will likely be reversed when a bargain in an indeterminate-sentencing state requires a stipulation to the appropriate sentence. In this case, defendants have little room to underestimate their sentences after pleas but much room to underestimate their sentences after trial. Because optimism makes the trial outcome seem more promising, defendants will lean toward rejecting these sentence bargains. The consequence is that the parties prefer charge bargains to sentence bargains.<sup>144</sup> Scholars have criticized charge bargains as inferior to sentence bargains because they are less transparent.<sup>145</sup> This opacity, however, contributes to the allure of charge bargaining, allowing each side to indulge its overconfidence.

The calculus changes greatly under sentencing guidelines. Because guidelines narrow sentence ranges, sentences in bargains and after trial are more predictable. There is therefore less room for optimistic misunderstanding about sentencing at either stage. Optimistic predictions about trial verdicts, however, may still make trials somewhat more attractive.

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<sup>144</sup> The room for optimism is particularly large when the charge bargain involves an indeterminate sentence. Even under sentencing guidelines, however, the charge bargain will leave open some kind of sentencing range. A sentence bargain, in contrast, might well specify the duration of imprisonment, removing room for optimism about the chances of getting a sentence at the low end of the range.

The example in the text involves the common practice of reducing the grade of a single count. The preference for charge bargaining may not exist or be as strong when there are multiple charges. For example, a defendant might plead guilty to only one of four counts of selling drugs or to rape in exchange for the dismissal of a kidnapping charge. In these situations, the sentences would likely have run concurrently in any event (in many states). In this case, dropping the extra count is a largely worthless concession because the judge would not have sentenced consecutively on both counts in the first place. One cannot know, however, how many defendants are aware of this fact and how many might mistakenly see the concession as valuable.

<sup>145</sup> See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33-35, 111-13 (2002).

Overconfidence is a particularly big problem when evaluating the likelihood of succeeding at a difficult task.<sup>146</sup> This problem afflicts the defendant who faces extremely strong evidence of guilt at trial. Though acquittal is nearly impossible, this defendant may be especially overoptimistic about the chances at trial and therefore be especially reluctant to take a beneficial plea bargain. The same would be true of the prosecutor with an extremely weak case, who might be too reluctant to dismiss the case because of misguided faith in its strength.

Overconfidence is also exceptionally strong when people have some control: they are overly optimistic about how well they can exercise that control to avoid bad outcomes. In forecasting the risk of traffic accidents, for example, people are much more confident when they see an accident as controllable than when they do not.<sup>147</sup> The traffic accident study also suggests that people tend to be overly optimistic in assessing their control over accidents.<sup>148</sup>

Trials look like controllable events. Each side can choose various witnesses, pieces of evidence, lines of cross-examination, and rhetorical strategies. There is thus a lot of room for each side to be too optimistic about both its control over the trial and its trial prospects. Each side can, for example, put too much faith in its own witnesses and too little in the other side's cross-examination. This optimism is likely to be even more excessive when the trial becomes complicated and has many moving parts. The more complicated the criminal law, the more charges, and the more elements per charge, the more room there is to overestimate one's persuasiveness. The absence of room for optimism or control explains why guilty pleas are especially likely for simple, cut-and-dried crimes.<sup>149</sup> For example, when prosecutors need prove only that an alien was deported from the United States and later found in the United States,<sup>150</sup> there is no possible defense, no room for optimism, and so no reason not to plead guilty. Thus, fewer than 2% of deported aliens accused of reentry go to trial, one-third of the trial rate

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<sup>146</sup> See Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 425-28 (1992).

<sup>147</sup> See DeJoy, *supra* note 135, at 336-37 & tbl.2 (finding a strong correlation between controllability and optimism); see also *id.* at 336 tbl.1 (revealing that the only accident about which people displayed no optimistic bias was being bumped from behind at a stoplight, an accident that, of course, is out of the driver's control).

<sup>148</sup> See *id.* at 337 (finding that people tend to view most accidents as controllable).

<sup>149</sup> Of course, simple trials do not consume as much time and money, so the monetary and time-savings incentives to plea bargain are less strong. But even simple trials have large fixed costs, and simple trials that lawyers end up losing risk harming their reputations.

<sup>150</sup> See 8 U.S.C. § 1326 (2000).

for all criminal cases.<sup>151</sup> Most cases, however, are more complex and so are more susceptible to optimism.

Finally, overconfidence varies greatly by demographic and personal characteristics. Across various age groups, men are consistently more overconfident in their own performance than are women.<sup>152</sup> Younger adults are more overconfident than older ones.<sup>153</sup> And there is some evidence that those who are less intelligent, as measured by test scores and grades, are more overconfident than others.<sup>154</sup> Neophytes have plenty of room to be overconfident because they are unfamiliar with the justice system, whereas recidivists' knowledge and experiences may limit their overconfidence.<sup>155</sup> Each of these effects produces distributive inequities that skew punishment for certain classes of defendants. These results suggest that less intelligent, young, male first offenders are most likely to reject beneficial plea bargains in favor of worse trial outcomes.<sup>156</sup> This overconfidence becomes a particularly large problem in plea bargaining because young men are overrepresented among defendants in the criminal justice system.<sup>157</sup>

### B. Denial Mechanisms and Psychological Blocks

Whereas optimism skews predictions about the likelihood of conviction and sentence, the related phenomena of denial mechanisms and psychological blocks skew assessments of one's own guilt, which in turn affect predictions. Offenders find it hard to acknowledge guilt to their lawyers, and even to themselves, because feelings of guilt and shame are painful and depressing.<sup>158</sup> Offenders use denial, excuses,

<sup>151</sup> See *Almendarez-Torres v. United States*, 523 U.S. 224, 269 (1998) (Scalia, J., dissenting) (citing statistics showing that 98.2% of defendants under 8 U.S.C. § 1326 plead guilty); *supra* note 9 (citing statistics indicating that 94% to 95% of defendants plead guilty instead of going to trial).

<sup>152</sup> See Gerry Pallier, *Gender Differences in the Self-Assessment of Accuracy on Cognitive Tasks*, 48 SEX ROLES 265, 270, 273-74 (2003).

<sup>153</sup> See Paul W. Grimes, *The Overconfident Principles of Economics Student: An Examination of a Metacognitive Skill*, 33 J. ECON. EDUC. 15, 23-26 (2002); Rebecca M. Pliske & Sharon A. Mutter, *Age Differences in the Accuracy of Confidence Judgments*, 22 EXPERIMENTAL AGING RES. 199, 212-14 (1996).

<sup>154</sup> See Grimes, *supra* note 153, at 24-26; Gerry Pallier et al., *The Role of Individual Differences in the Accuracy of Confidence Judgments*, 129 J. GEN. PSYCHOL. 257, 273, 293-95 (2002).

<sup>155</sup> Cf. Douglas A. Hershey & Jo A. Wilson, *Age Differences in Performance Awareness on a Complex Financial Decision-Making Task*, 23 EXPERIMENTAL AGING RES. 257, 268-69 (1997) (finding that young novices are overconfident and youths with more experience are underconfident, while older adults more accurately gauge their own performance).

<sup>156</sup> Sometimes, however, prosecutors may buy off these overconfident offenders with more generous plea bargains, if they are not so overconfident as to reject every deal. See *infra* pp. 2505-06.

<sup>157</sup> See JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 26 (1985).

<sup>158</sup> See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1394-96 (2003).

and rationalizations to avoid taking responsibility<sup>159</sup> and to block painful awareness of the harm they have done to others.<sup>160</sup> Denial is a particularly large problem for certain especially shameful crimes, such as sex offenses.<sup>161</sup> Denial takes many forms. Offenders often deny the facts, their deeds, their knowledge, or their culpability; or they minimize how harmful or wrong their actions were.<sup>162</sup> These denials are not simply public-relations ploys. They reflect offenders' fears of admitting the truth to themselves.<sup>163</sup> They flow from underlying attitudes and cognitive distortions that impede clear perception of the truth.<sup>164</sup> For example, offenders who falsely claim innocence to others begin to deceive themselves and to distort what they remember and how they interpret those memories.<sup>165</sup>

Offenders who falsely believe they are innocent probably overestimate their chances of acquittal at trial because they think juries will share their own distorted perspectives. They also likely underestimate their expected sentences after trial, particularly under indeterminate sentencing, as they expect sentencing judges to see these cases from their perspectives. This overconfidence helps to explain why many defendants in denial find it hard to take advantageous guilty pleas even when they are "obviously guilty."<sup>166</sup> If a defendant cannot see the

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<sup>159</sup> See KARL MENNINGER, *WHATEVER BECAME OF SIN?* 178 (1973) ("[A]ll evildoing in which we become involved to any degree tends to evoke guilt feelings and depression. These may or may not be clearly perceived, but they affect us. They may be reacted to and covered up by all kinds of escapism, rationalization, and reaction or symptom formation.").

<sup>160</sup> See Gad Czudner & Ruth Mueller, *The Role of Guilt and Its Implication in the Treatment of Criminals*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 71, 73 (1987).

<sup>161</sup> See MARC S. CARICH, *SEX OFFENDER TREATMENT OVERVIEW: TRAINING FOR THE MENTAL HEALTH PROFESSIONAL* 20 (1997); JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* 22 (1981) ("Denial has always been the incestuous father's first line of defense."); BARRY M. MALETZKY WITH KEVIN B. MCGOVERN, *TREATING THE SEXUAL OFFENDER* 12-27 (1991).

<sup>162</sup> See Bibas, *supra* note 158, at 1394 & n.159.

<sup>163</sup> Richard M. Happel & Joseph J. Auffrey, *Sex Offender Assessment: Interrupting the Dance of Denial*, 13 AM. J. FORENSIC PSYCHOL. 5, 6 (1995) ("[Sex offenders] are often sensitive about their deviance and afraid to admit the truth, even to themselves. The thought of being a sexual deviate can be so frightening or repugnant to them that they hide from themselves for years.").

<sup>164</sup> See Gene G. Abel et al., *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J.L. & PSYCHIATRY 89, 98-101 (1984); Gene G. Abel et al., *Sexual Offenders: Results of Assessment and Recommendations for Treatment*, in *CLINICAL CRIMINOLOGY: THE ASSESSMENT AND TREATMENT OF CRIMINAL BEHAVIOR* 191, 198-204 (Mark H. Ben-Aron et al. eds., 1985).

<sup>165</sup> See John F. Ulrich, *A Case Study Comparison of Brief Group Treatment and Brief Individual Treatment in the Modification of Denial Among Child Sexual Abusers* 52 (1996) (unpublished dissertation, Andrews University) (on file with the Harvard Law School Library).

<sup>166</sup> See Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1280 (quoting a defense lawyer as saying that "the psychological obstacles to confession in [a sex offense] case are so often overpowering" (internal quotation mark omitted)); *id.* at 1304 (discussing "a small group of obviously guilty defendants who are psychologically incapable of admitting their guilt"); see also Bibas, *supra* note 158, at 1393.



weaknesses in his own case and the merit in the other side's case, he cannot appreciate the reasonableness of the bargain offered. Prosecutors may sweeten their plea offers to try to buy off these defendants, but those in hard-core denial may reject all reasonable plea offers.<sup>167</sup> The results will often be jury convictions and much heavier sentences after trial, which will surprise no one except the defendants.

### C. Discounting of Future Costs

A third psychological influence on plea bargains is the discounting of future costs. Put simply, a day of freedom today is worth more than a day of freedom ten years from now. Some defendants will discount future costs only modestly, while the impatient or those with less self-control will discount greatly.<sup>168</sup> Discount rates vary widely from person to person.<sup>169</sup> Many people discount future losses (such as imprisonment) even more steeply than they discount future gains.<sup>170</sup>

Some discounting is rational because it reflects the expected future value of the sentence rather than variations in preferences based on timing. Because an inmate may die or win early release before his tenth year of imprisonment, the tenth year of the sentence is not as certain to occur as the first year. Even if he does serve the tenth year,

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One might wonder whether obviously guilty defendants gain much by pleading guilty instead of going to trial. They do, because plea bargains reward defendants not only for giving up the chance of acquittal (odds bargaining), but also for sparing the court and lawyers the time and expense of trial (costs bargaining). Even a slam-dunk trial imposes significant costs on the court and lawyers, and plea bargains reward defendants with sentence discounts for avoiding these costs. Thus, as noted, the federal system automatically gives 25% or 35% discounts to defendants who plead guilty, regardless of their chance of acquittal. See *supra* pp. 2488–89. States, unlike the federal system, do not formalize or specify this discount. Nonetheless, state judges and prosecutors routinely reward defendants for sparing them trials and impose heavier sentences on those who insist on trials, especially when there are no triable issues. See HEUMANN, *supra* note 14, at 122–23, 141–43.

<sup>167</sup> Cognitive distortions may not only impel some defendants to trial, but may also hamper effective trial preparation if defendants refuse to reveal facts to their attorneys or to pursue partial defenses.

<sup>168</sup> For example, smokers prefer immediate gratification to avoiding lung cancer decades later. See Monica Ortendahl & James F. Fries, *Time-Related Issues with Application to Health Gains and Losses*, 55 J. CLINICAL EPIDEMIOLOGY 843, 843 (2002). Impulse shoppers choose the thrill of purchasing right away despite the burden of paying off credit card debts months down the road. See Lawrence M. Ausubel, *The Failure of Competition in the Credit Card Market*, 81 AM. ECON. REV. 50, 70–72 (1991). Procrastinators and overeaters likewise fail to control themselves today and greatly discount future costs. See Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587, 650 (John H. Kagel & Alvin E. Roth eds., 1995); Michael R. Lowe & Kathleen L. Eldredge, *The Role of Impulsiveness in Normal and Disordered Eating*, in THE IMPULSIVE CLIENT: THEORY, RESEARCH, AND TREATMENT 185, 191 (William G. McCown et al. eds., 1993) [hereinafter THE IMPULSIVE CLIENT].

<sup>169</sup> See Joel Myerson et al., *Area Under the Curve as a Measure of Discounting*, 76 J. EXPERIMENTAL ANALYSIS BEHAV. 235, 237 (2001).

<sup>170</sup> See Marjorie K. Shelley, *Gain/Loss Asymmetry in Risky Intertemporal Choice*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 124, 150–51 (1994).

he will be more used to imprisonment by then, so the hardship will not be as great as in year one. These reasons partly explain why we all discount to some extent. But many people's discount rates greatly exceed the chance that things will change or that they will become accustomed to prison. This divergence bespeaks impulsiveness rather than rational calculation.<sup>171</sup>

The plea-bargaining literature has recognized that defendants discount the future costs of imprisonment.<sup>172</sup> What it has not addressed, however, is the import of varying discount rates. High discount rates are closely tied to impulsiveness and lack of self-control.<sup>173</sup> Impulsiveness, in turn, contributes greatly to criminal behavior, aggression, and drug abuse.<sup>174</sup> In particular, violent offenders are much more impulsive than nonviolent offenders.<sup>175</sup> Thus, repeat offenders, particularly violent and drug offenders, are likely to be more impulsive than average and so to have higher discount rates. They will therefore de-

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<sup>171</sup> If one takes the idea of revealed preferences seriously, all discounting is rational. But this strong reading would not explain why time horizons and perspectives change preferences — why, for example, procrastinators later regret having procrastinated and dieters later regret having binged. It is simpler and more intuitive to treat these behaviors as examples of weakness of the will (*akrasia*) and shortsightedness rather than as rational but time-variant preferences. This view better explains the many anomalies that psychologists and economists find when experimentally modeling discounting behavior. See, e.g., CHOICE OVER TIME (George Loewenstein & Jon Elster eds., 1992); George Loewenstein & Drazen Prelec, *Anomalies in Intertemporal Choice: Evidence and an Interpretation*, 107 Q.J. ECON. 573 (1992); George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, 3 J. ECON. PERSP. 181 (1989). I am indebted to Al Alschuler for prodding me to think about the points in this footnote and the accompanying textual paragraph.

<sup>172</sup> See, e.g., Easterbrook, *Criminal Procedure*, *supra* note 2, at 312–13.

<sup>173</sup> See generally GEORGE AINSLIE, PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON (1992).

<sup>174</sup> See MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 85–96 (1990) (contending that lack of self-control — or, put another way, impulsiveness — is a fundamental contributor to crime); A.W. LOGUE, SELF-CONTROL: WAITING UNTIL TOMORROW FOR WHAT YOU WANT TODAY 159–66 (1995) (discussing the connection between aggression and impulsiveness); WILSON & HERRNSTEIN, *supra* note 157, at 53–54 (attributing criminality to impulsiveness and high discounting of future costs); Harold G. Grasmick et al., *Testing the Core Empirical Implications of Gottfredson and Hirschi's General Theory of Crimes*, 30 J. RES. CRIME & DELINQUENCY 5, 23 (1993) (verifying an empirical link between low self-control and crime); Willard L. Johnson et al., *Impulsive Behavior and Substance Abuse*, in THE IMPULSIVE CLIENT, *supra* note 168, at 225, 226–27 (finding a strong correlation between impulsiveness and drug abuse); Gregory J. Madden et al., *Impulsive and Self-Control Choices in Opioid-Dependent Patients and Non-Drug-Using Control Participants: Drug and Monetary Rewards*, 5 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 256, 259 (1997) (noting that opioid-dependent subjects discounted delayed monetary rewards more than nondependent subjects did); Walter Mischel et al., *Delay of Gratification in Children*, 244 SCIENCE 933, 937 (1989) (suggesting a connection between difficulty delaying gratification and behavioral problems, such as aggressiveness).

<sup>175</sup> See Don R. Cherek et al., *Studies of Violent and Nonviolent Male Parolees: II. Laboratory and Psychometric Measurements of Impulsivity*, 41 BIOLOGICAL PSYCHIATRY 523, 527–28 (1997) (documenting this finding in a laboratory comparison of violent and nonviolent parolees).

mand larger discounts before taking plea bargains, which means that they will drive harder bargains or else go to trial.<sup>176</sup> Conversely, occasional offenders and those innocent of any crime are likely to be less impulsive than habitual offenders. They will therefore be more eager to plea bargain to secure future sentence benefits. The counterintuitive result is that many hardened recidivists will likely get more favorable plea bargains, proportionally speaking, than first-time offenders.<sup>177</sup> The most impulsive offenders, however, may bargain too hard, leading to bargaining impasse and, likely, a worse result at trial.

Impulsiveness may also correlate negatively with intelligence<sup>178</sup> and positively with psychopathy, brain damage or disease, and use of depressants such as alcohol.<sup>179</sup> Cognitive impairments should thus increase discount rates and reduce willingness to plea bargain.

Finally, impulsiveness correlates with youth, being male,<sup>180</sup> and low

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<sup>176</sup> Of course, these repeat offenders have more experience with, and knowledge of, the criminal justice system. Their greater experience and realism may to some extent offset distortions created by impulsiveness. But see *infra* pp. 2515–16 (suggesting that people often anchor on irrelevant or disanalogous past experiences), 2522 (noting that providing more information is a poor debiasing technique because it allows people to recall selectively the information favorable to their own positions). Without empirical work, it is difficult to quantify the net effect of these two countervailing phenomena.

<sup>177</sup> If pleas were sold in an efficient market with multiple sellers, competition might result in a fixed retail price, as in commodities markets. Then again, it might not: even the market for new cars reveals discrimination according to buyers' perceived knowledge, toughness, and willingness and ability to bargain. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 847–52 (1991). Furthermore, prosecutors are monopolists who have the market power to price-discriminate in a way that sellers in a competitive market cannot. Defendants lack an equal countervailing monopsony power; prosecutors can bargain for pleas from other defendants and try the cases of the few holdouts. I am indebted to Al Alschuler for this point.

<sup>178</sup> In one long-term experiment, researchers offered to give preschoolers treats — one marshmallow immediately or two marshmallows a bit later. The children's willingness to delay gratification correlated significantly with their standardized test scores later in life. Mischel et al., *supra* note 174, at 934, 936; Walter Mischel et al., *The Nature of Adolescent Competencies Predicted by Preschool Delay of Gratification*, 54 J. PERSONALITY & SOC. PSYCHOL. 687, 688–89, 692–95 (1988); see also WILSON & HERRNSTEIN, *supra* note 157, at 167, 171–72 (linking low intelligence to high discount rates, impulsiveness, and short time horizons); Monica Larrea Rodriguez et al., *Cognitive Person Variables in the Delay of Gratification of Older Children at Risk*, 57 J. PERSONALITY & SOC. PSYCHOL. 358, 365 (1989) (noting a correlation between intelligence and delaying gratification). There is of course much debate about the extent to which standardized tests measure intelligence. If one assumes that test scores are at least rough proxies for intelligence, then intelligence tends to go hand-in-hand with self-control and more modest discounting of future costs. Thus, less intelligent defendants are on average more impulsive and so are less willing to accept imprisonment today in exchange for plea bargains that are beneficial in the long run.

<sup>179</sup> See WILSON & HERRNSTEIN, *supra* note 157, at 204–05.

<sup>180</sup> Researchers have found that younger subjects and males have higher discount rates than older or female subjects. See Leonard Green et al., *Discounting of Delayed Rewards Across the Life Span: Age Differences in Individual Discounting Functions*, 46 BEHAV. PROCESSES 89, 94–

income.<sup>181</sup> Older, female, and well-off defendants will discount bargaining concessions less, making them more ready to accept smaller concessions and less likely to insist on trial. The impulsive, poor, young men who bargain too hard, insist on trial, and are convicted will grow older in prison. As they age and their discount rates decline, they may regret their earlier rash decisions to go to trial. All of these effects distribute punishment inequitably across members of these various groups.

#### D. Risk Taking and Loss Aversion

The decision to go to trial is a gamble: the payoff can be acquittal and complete freedom, but often the more likely outcome is conviction and a longer sentence. In contrast, plea bargains barter away this chance of acquittal for a lower but more certain sentence. Defendants' attitudes toward risk and loss will powerfully shape their willingness to roll the dice at trial. Furthermore, those who have successfully taken risks are more self-confident. Self-confident people may think that they personally have succeeded in managing risks in the past and that they will continue to succeed in the future, so they underestimate future risks.<sup>182</sup> Those who have successfully taken risks in the past are thus more likely to take risks again in the future.<sup>183</sup> In negotiations, risk-averse people prefer sure settlements, while risk preferrers insist on better deals or walk away from the table.<sup>184</sup>

Risk aversion is a broad concept that comprises multiple factors. The two categories of factors that determine risk behavior are risk propensity and risk perception. Risk propensity is the concept perhaps more commonly associated with risk aversion; it embraces one's willingness to take risks. But risk behavior is also influenced by risk perceptions. Information, advice, optimism, experience in the domain, and social influences all shape perceptions of risk. If a person sys-

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95 (1999); see also Marvin Zuckerman et al., *Sensation Seeking in England and America: Cross-Cultural, Age, and Sex Comparisons*, 46 J. CONSULTING & CLINICAL PSYCHOL. 139, 143 & fig.1, 145, 147-48 (1978). These correlations may partially explain why offenders are disproportionately young men. See WILSON & HERRNSTEIN, *supra* note 157, at 26.

<sup>181</sup> Lower-income adults appear to have higher discount rates than higher-income adults. See Leonard Green et al., *Temporal Discounting in Choice Between Delayed Rewards: The Role of Age and Income*, 11 PSYCHOL. & AGING 79, 82 (1996).

<sup>182</sup> See James G. March & Zur Shapira, *Variable Risk Preferences and the Focus of Attention*, 99 PSYCHOL. REV. 172, 173, 176, 181 (1992).

<sup>183</sup> See Sim B. Sitkin & Laurie R. Weingart, *Determinants of Risky Decision-Making Behavior: A Test of the Mediating Role of Risk Perceptions and Propensity*, 38 ACAD. MGMT. J. 1573, 1581-82 (1995) (finding a significant positive correlation between outcome history and risk propensity).

<sup>184</sup> See David L. Dickinson, *Illustrated Examples of the Effects of Risk Preferences and Expectations on Bargaining Outcomes*, 34 J. ECON. EDUC. 169, 170-71 (2003); see also Korobkin & Guthrie, *supra* note 10, at 131-38 (demonstrating that negative framing induces litigants to take risks by rejecting settlements that are framed as losses).

tematically overestimates the magnitude of risks, he will avoid risks just as an especially cautious person will.<sup>185</sup>

Risk taking is heavily influenced by another psychological phenomenon: loss aversion. Most people are loss averse: they weigh losses more heavily than they do gains of equal magnitude. As tennis great Jimmy Connors put it, "I hate to lose more than I like to win."<sup>186</sup> This phenomenon is related to the endowment effect: people are attached to keeping what they already have.<sup>187</sup> People would rather avoid loss than seek gain. As Daniel Kahneman and Amos Tversky have found, a 50% chance of winning an amount of money does not offset a 50% chance of losing the same sum because "losses loom larger than gains."<sup>188</sup> If people were primarily opposed to risks, then they would always be risk averse; for example, they would prefer a certainty of losing \$50 to a 50% chance of losing \$100. But avoiding loss seems to matter even more to people than avoiding risk. People prefer to lock in sure gains, but many would rather take big gambles than accede to losses. They are usually risk averse when it comes to gains and risk seeking when it comes to losses.<sup>189</sup> At racetracks, for example, long-shot bets increase as the day goes on, presumably because bettors who have lost money all day are especially eager to recoup their losses.<sup>190</sup> In other words, some losers take extra risks in an effort to dig themselves out of their holes. This observation partly explains why some defendants insist on gambling on acquittal at trial, even in the face of overwhelming evidence.<sup>191</sup>

<sup>185</sup> See Sim B. Sitkin & Amy L. Pablo, *Reconceptualizing the Determinants of Risk Behavior*, 17 ACAD. MGMT. REV. 9, 14-24 (1992).

<sup>186</sup> Tony Kornheiser, *Borg Ends Dominance by Connors*, N.Y. TIMES, Jan. 24, 1977, at 34 (internal quotation marks omitted). Connors also said, "I hate to see the happiness in their faces when they beat me." *Id.* (internal quotation marks omitted).

<sup>187</sup> See generally Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1325-28 (1990).

<sup>188</sup> Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979); see also Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S258 (1986).

<sup>189</sup> See Max H. Bazerman, *Negotiator Judgment*, 27 AM. BEHAV. SCIENTIST 211, 213 (1983); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453-54 (1981). The exception to the rule is that people are risk seeking for small probabilities of gains (and so buy lottery tickets) and risk averse for small probabilities of losses (and so buy insurance). See Kahneman & Tversky, *supra* note 188, at 274-85; see also Milton Friedman & L.J. Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 279, 279-80, 300 (1948) (noting that lotteries and insurance appear to defy generalizations about risk aversion, which hold true for moderate degrees of risk but perhaps not small or large risks).

<sup>190</sup> Kahneman & Tversky, *supra* note 188, at 287; Tversky & Kahneman, *supra* note 189, at 456.

<sup>191</sup> One might expect that defendants who face strong cases would be more likely to plead guilty. But prosecutors, unafraid of losing and wishing to chalk up easy trial victories, might offer few concessions in strong cases while stretching to bargain away weak cases. See *supra* section I.A.1, pp. 2470-76. Moreover, not all defendants bow to these realities. Some are deeply in denial

In short, most people are inclined to gamble to avoid sure losses and inclined to avoid risking the loss of sure gains; they are risk averse, but they are even more loss averse. When these gains and losses are uncertain probabilities rather than certain, determinate amounts, the phenomenon is reversed. In this situation, negotiators who face outcomes framed as losses make greater concessions, settle more often, and reach more integrative (win-win) solutions than do those facing outcomes framed as gains.<sup>192</sup> The implication is that parties who face losses are more likely to agree to indeterminate sentence ranges. Perhaps parties prefer these bargains because they leave plenty of room for each side's overoptimism to operate. Conversely, sentencing guidelines or stipulations make the amount of loss certain, discouraging bargaining over losses.

Once again, the plea-bargaining literature acknowledges in passing that risk aversion may influence bargains,<sup>193</sup> but it does not explore interpersonal variations in risk aversion, nor does it address loss aversion. As suggested above, one's personality powerfully shapes one's risk preferences, so that impulsive gamblers will be more likely to take risks. Those who are cautious or anxious will be more amenable to plea bargains than gambling types and so will demand smaller discounts and be less likely to go to trial.<sup>194</sup> Most criminals are less risk averse (at least with regard to imprisonment) than law-abiding citi-

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and balk at pleading guilty even when they are "obviously guilty." Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1304; see also Bibas, *supra* note 158, at 1377-79 (reporting interviews with judges, defense lawyers, and prosecutors who relayed anecdotes involving defendants who were in denial and would not plead guilty); *supra* section II.B. Others may be overconfident or risk-prefering gamblers. My informal conversations with current and former prosecutors suggest that in strong cases, federal defendants are more likely to go to trial than state defendants. Perhaps these defendants are gambling to avoid enormous federal penalties: a forty-year sentence after trial may not seem much worse than a twenty-year sentence after a plea. In addition, federal prosecutors may leave the weakest cases to the states.

<sup>192</sup> See William P. Bottom, *Negotiator Risk: Sources of Uncertainty and the Impact of Reference Points on Negotiated Agreements*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 89, 102-03, 108-09 (1998). Integrative (win-win) solutions in plea bargaining may, for example, take the form of a generous cooperation agreement in which prosecutors exchange a light sentence for information or testimony against codefendants.

Of course, all bargains benefit both sides. By win-win, I mean a solution that expands the size of the pie — that is, the total benefits to be divided — as opposed to a solution that simply carves up the saved costs and time of trial. Cooperation does this by giving the prosecution something it values more greatly than a high sentence in this case, allowing it to offer a greater sentencing discount to this defendant and still be better off than it would have been without a cooperation agreement.

<sup>193</sup> See, e.g., Easterbrook, *Plea Bargaining*, *supra* note 2, at 1975.

<sup>194</sup> Cf. NATHAN KOGAN & MICHAEL A. WALLACH, *RISK TAKING: A STUDY IN COGNITION AND PERSONALITY* 162, 186 (1964) (finding in a study of male subjects that anxiety correlates with risk aversion); Tamara L. Addison & Louis A. Schmidt, *Are Women Who Are Shy Reluctant To Take Risks? Behavioral and Psychophysiological Correlates*, 33 J. RES. PERSONALITY 352, 355 (1999) (answering the title question in the affirmative).



zens.<sup>195</sup> This understanding fits with the view of criminals as reckless thrill-seekers who fail to exercise self-control over their impulses to commit crime.<sup>196</sup> Likewise, substance abusers and psychopaths are risk takers.<sup>197</sup> Though defendants with little or no criminal history may be somewhat loss averse, caution will probably temper their loss aversion and make them more willing to take plea bargains. In contrast, self-confident recidivists will be more inclined to reject plea bargains and gamble on acquittal at trial. They will also be more inclined to engage in risky brinkmanship and reject plea offers in the hopes of extracting better plea offers. Because these recidivists are much less intent on avoiding risks by plea bargaining, prosecutors must offer them better deals or else go to trial. Recidivists who take these bargains may receive sweet deals, while those reckless enough to reject them may well face heavier punishment after trial. Therefore, defendants with the most self-control, who are least likely to recidivate and thus need punishment the least, may receive smaller plea discounts.<sup>198</sup>

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<sup>195</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968) ("The widespread generalization that offenders are more deterred by the probability of conviction than by the punishment when convicted turns out to imply in the expected-utility approach that offenders are risk preferrers, at least in the relevant region of punishments."); Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEG. STUD. 123, 136-38 (1995) (comparing reactions of prisoners and students in a laboratory experiment); see also Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 307-08 (1991) (finding that certainty of conviction has a stronger deterrent effect than severity of punishment); Ann Dryden Witte, *Estimating the Economic Model of Crime with Individual Data*, 94 Q.J. ECON. 57, 79 (1980) (same). But see JOANNA M. SHEPHERD, ARE CRIMINALS LIKE US? RISK ATTITUDES, SENTENCING GUIDELINES, AND INCREASED CRIME 1-2 (Emory School of Law, Law & Econ. Res. Paper Series, Working Paper No. 04-03, 2003) (finding that sentencing guidelines may reduce deterrence, which implies that criminals are risk averse), available at <http://ssrn.com/abstract=370421>; William S. Neilson & Harold Winter, *On Criminals' Risk Attitudes*, 55 ECON. LETTERS 97, 97-98 (1997) (attempting to reconcile criminals' risk aversion with their greater sensitivity to changes in certainty, rather than severity, of punishment).

Of course, one cannot automatically infer risk preference from risky behavior. If a criminal's only alternative to crime is starving to death, the criminal may commit crime even if he is very risk averse. But when some people commit crime and others similarly situated do not, the difference is likely due in part to variations in risk preferences.

<sup>196</sup> See GOTTFREDSON & HIRSCHI, *supra* note 174, at 85-96; see also MARVIN ZUCKERMAN, BEHAVIORAL EXPRESSIONS AND BIOSOCIAL BASES OF SENSATION SEEKING 27 (1994) (defining "sensation seeking" in part as a willingness to take risks — for example by violating the law and risking punishment — "as the price for the reward provided by the sensation or experience" of the risky activity).

<sup>197</sup> See WILSON & HERRNSTEIN, *supra* note 157, at 204-05; Antoine Bechara et al., *Decision-Making Deficits, Linked to a Dysfunctional Ventromedial Prefrontal Cortex, Revealed in Alcohol and Stimulant Abusers*, 39 NEUROPSYCHOLOGIA 376, 385 (2001) (showing that "addiction to substances is associated with impairment in decision-making" on a risk-taking task); Steven Grant et al., *Drug Abusers Show Impaired Performance in a Laboratory Test of Decision Making*, 38 NEUROPSYCHOLOGIA 1180, 1184 (2000).

<sup>198</sup> Defendants who are cautious and have self-control, however, are less likely to gamble and lose disastrously at trial. They may also feign reluctance to plead as a tactic to win better deals,

Just as with overconfidence and impulsiveness, risk preferences vary with demographics, including sex,<sup>199</sup> adolescence<sup>200</sup> and age generally;<sup>201</sup> wealth, social class, self-employment, and education;<sup>202</sup>

though this act is unlikely to be as credible as actual risk taking. Without empirical evidence, one cannot know whether risk taking raises or lowers the aggregate sentences of recidivists. All one can say is that, other factors being equal, the pattern of sentences for recidivists will probably be skewed more by bargaining stubbornness and by gambling at trial than will the pattern of sentences for first-time offenders.

Many other factors could offset the greater willingness of recidivists to take risks. For example, as section IIA hypothesized, recidivists have more relevant experience with the criminal justice system and so may be less prone to overconfidence. See *supra* p. 2502. Also, recidivists may fear that their prior records would hurt them at trial. Fearing impeachment by their prior convictions, recidivists may avoid testifying and hurt their chances of acquittal. Thus, the expected sentence after trial would be greater, and this larger shadow would raise plea-bargained sentences to some extent. A priori, it is impossible to tell which of these effects will predominate.

<sup>199</sup> More than a hundred studies have found that males are more inclined to take risks than females. James P. Byrnes et al., *Gender Differences in Risk Taking: A Meta-Analysis*, 125 PSYCHOL. BULL. 367, 377 (1999) (providing a meta-analysis of 150 studies, nearly all of which found significant differences); Melanie Powell & David Ansic, *Gender Differences in Risk Behaviour in Financial Decision-Making: An Experimental Analysis*, 18 J. ECON. PSYCHOL. 605, 607–10, 622–23 (1997) (collecting studies and presenting findings about business and financial risk preferences); see also Nancy Ammon Jianakoplos & Alexandra Bernasek, *Are Women More Risk Averse?*, 36 ECON. INQUIRY 620, 625–30 (1998) (finding that single women are more risk averse than single men but that the gap is smaller for black women than for white women).

<sup>200</sup> Adolescents tend to be less risk averse than older or younger people. See Charles E. Lewis & Mary Ann Lewis, *Peer Pressure and Risk-Taking Behaviors in Children*, 74 AM. J. PUB. HEALTH 580, 583 & tbl.5 (1984) (finding that junior high school students faced almost twice as many dares to commit risky behavior as elementary-school students, were more likely to comply with these dares, and were less likely to say no); see also ZUCKERMAN, *supra* note 196, at 109–11 (surveying studies of sensation-seeking differences among children and young adults of different age groups).

<sup>201</sup> Younger adults are less risk averse than older ones. See Bas Donkers et al., *Estimating Risk Attitudes Using Lotteries: A Large Sample Approach*, 22 J. RISK & UNCERTAINTY 165, 185 (2001); D.R. Rutter et al., *Predicting Safe Riding Behaviour and Accidents: Demography, Beliefs, and Behaviour in Motorcycling Safety*, 10 PSYCHOL. & HEALTH 369, 378, 380, 384 (1995) (finding that youth is the single strongest predictor of motorcycle traffic-law violations and accidents, in large part because the young “typically [have] a willingness to break the law and rules of safe riding”); see also Margaret F. Brinig, *Does Mediation Systematically Disadvantage Women?*, 2 WM. & MARY J. WOMEN & L. 1, 13–19 & fig.1 (1995) (finding that the combination of age and sex correlates significantly with risk taking in gambling).

<sup>202</sup> Self-employment, as well as increased wealth, social class, and education, may decrease risk aversion, though it is unclear whether evidence from financial studies applies to the prospect of imprisonment. See Donkers et al., *supra* note 201, at 185; Joop Hartog et al., *Linking Measured Risk Aversion to Individual Characteristics*, 55 KYKLOS 3, 16, 18–19 (2002); cf. Marguerite F. Levy, *Deferred Gratification and Social Class*, 100 J. SOC. PSYCHOL. 123, 129 (1976) (presenting a study of teenage boys finding that middle-class boys are less risk averse than lower-class boys). But see Ann-Marie Pålsson, *Does the Degree of Relative Risk Aversion Vary With Household Characteristics?*, 17 J. ECON. PSYCHOL. 771, 785 (1996) (finding no wealth effect). The Levy study appears more immune to the wealth effect, as the boys were not yet employed adults and the questions were not limited to wealth and investing. It is obvious how wealth, education, and employment affect the economic issues that the other researchers were studying. People with more wealth, for example, might be in a better position to take financial risks without jeopardizing their financial security. The same people might react quite differently to the prospect of im-

church attendance;<sup>203</sup> and marital status.<sup>204</sup> Single men, infrequent churchgoers, and perhaps the educated and well-to-do are more willing to gamble and so might insist on more generous plea bargains or else go to trial. Once again, the result is inequitable distribution of punishment according to demographic characteristics instead of to trial shadows, retribution, or deterrence.

Likewise, people who are especially loss averse are more willing to gamble on a complete acquittal at trial, even at the risk of a much longer sentence.<sup>205</sup> Loss aversion also varies with one's personality, cautiousness, and demographic traits. For example, females are loss averse more often and to a greater extent than are males.<sup>206</sup> Loss aversion also depends on one's baseline endowment or entitlement, as the next section discusses more fully.

### *E. Framing*

People tend to gamble to avoid sure losses, but they prefer to lock in sure gains. They assess gain and loss relative to the perceptions of both their options and their current state or baseline. Psychologists have found that gain and loss are malleable concepts and that people's choices vary greatly depending on the wording used to relate the options. Options that are packaged as gains (for example, "lives saved") induce risk aversion; when the very same choices are packaged as losses ("lives lost"), they induce risk taking because of loss aversion. This phenomenon is known as framing, and more than a hundred studies have documented the framing effect.<sup>207</sup>

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prisonment, however, so it may be dangerous to generalize. Nevertheless, educated and well-off people may have more at stake, as any criminal conviction may carry tremendous stigma in their communities and bar them from certain professions. Thus, certain white-collar defendants would be so ruined by any criminal conviction that they are more likely to gamble on complete acquittal at trial.

<sup>203</sup> Frequent churchgoers appear to be more risk averse. See ZUCKERMAN, *supra* note 196, at 118–19 (finding a dropoff in sensation seeking among frequent churchgoers).

<sup>204</sup> Married people are more cautious than divorced people. See *id.* at 119–20.

<sup>205</sup> This analysis assumes that the baseline is complete freedom and that any imprisonment is a loss. The next section discusses how framing affects the baseline from which one measures losses.

<sup>206</sup> See Ulrich Schmidt & Stefan Traub, *An Experimental Test of Loss Aversion*, 25 J. RISK & UNCERTAINTY 233, 245–46 (2002).

<sup>207</sup> See Anton Kühberger, *The Influence of Framing on Risky Decisions: A Meta-Analysis*, 75 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 23, 33–37 (1998) (reporting a meta-analysis of 136 empirical studies with almost 30,000 participants, and finding on average small to medium framing effects); *id.* at 36–37 & tbl.5 (showing that framing effects are larger when the framing is done by altering gain or loss wording than when wording remains neutral, and five times larger when subjects have to make a choice rather than a judgment or rating); Irwin P. Levin et al., *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 149, 154 tbl.2, 161 tbl.3, 169 tbl.4 (1998) (summarizing dozens of studies, most of which found that frames affected risk preference, evaluation of attributes, and choices in experiments).

These studies reveal that the framing of the question matters immensely. This finding undermines the economic assumption that people rationally maximize their expected utility,<sup>208</sup> which is a cornerstone of the shadow-of-trial model. Other experimenters have confirmed that positive framing both increases people's perceptions of risks and decreases their risky behavior, while negative framing does the reverse.<sup>209</sup>

Framing affects not only the subject's perceptions of his options, but also his perceptions of his own baseline. Ordinarily, the baseline is the status quo (one's current wealth or legal rights), but other expectations may set different baselines.<sup>210</sup> For example, gas stations manipulate baselines by offering cash discounts off a baseline credit-card price. Equivalent credit-card surcharges on top of a baseline cash price, however, would seem onerous. Additionally, framing effects vary widely based on demographic and situational factors, including sex,<sup>211</sup> age,<sup>212</sup> and perhaps type of risk.<sup>213</sup>

The selection of a referent largely determines whether a negotiator adopts a positive or a negative frame.<sup>214</sup> Negotiators who frame the issue in terms of losses are more risk seeking; that is, they take more chances in an effort to avoid losses. They concede less, demand and threaten more, and settle less easily and less often.<sup>215</sup> The result is a

<sup>208</sup> Tversky & Kahneman, *supra* note 189, at 453–54.

<sup>209</sup> See, e.g., Sitkin & Weingart, *supra* note 183, at 1585–86.

<sup>210</sup> See Kahneman & Tversky, *supra* note 188, at 286.

<sup>211</sup> Several studies have found that framing influences women's choices more than it affects men's choices. See, e.g., N.S. Fagley & Paul M. Miller, *The Effect of Framing on Choice: Interactions with Risk-Taking Propensity, Cognitive Style, and Sex*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 496, 504, 507–08 (1990); N.S. Fagley & Paul M. Miller, *Framing Effects and Arenas of Choice: Your Money or Your Life?*, 71 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 355, 368 (1997) [hereinafter Fagley & Miller, *Framing Effects*].

<sup>212</sup> Older adults show stronger framing effects; they are more risk averse in locking in gains and more risk seeking in gambling to avoid losses. See Marco Lauriola & Irwin P. Levin, *Personality Traits and Risky Decision-Making in a Controlled Experimental Task: An Exploratory Study*, 31 PERSONALITY & INDIVIDUAL DIFFERENCES 215, 220, 224 (2001); Michael J. Roszkowski & Glenn E. Snelbecker, *Effects of "Framing" on Measures of Risk Tolerance: Financial Planners Are Not Immune*, 19 J. BEHAV. ECON. 237, 244 tbl.1 (1990).

<sup>213</sup> Framing effects may be greater for choices involving human lives than for those involving less important goods, such as jobs or dropping out of school. There is some evidence to this effect, though it is not conclusive. See Sandra L. Schneider, *Framing and Conflict: Aspiration Level Contingency, the Status Quo, and Current Theories of Risky Choice*, 18 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, AND COGNITION 1040, 1046–47 (1992). But see Fagley & Miller, *Framing Effects*, *supra* note 211, at 367 (finding greater willingness to take risks to save lives than to save money but finding no significant framing effect).

<sup>214</sup> See NEALE & BAZERMAN, *supra* note 143, at 47; Tversky & Kahneman, *supra* note 188, at S259–S262.

<sup>215</sup> See Bottom, *supra* note 192, at 92; Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296, 297 (1992). Loss-framed negotiators drive harder bargains but are more likely to miss integrative (win-win) solutions than are gain-framed negotiators. See William P. Bottom & Amy Studt,

much greater likelihood of a negotiation impasse that leads to a trial. Negative framing can also induce stress and anxiety, which interferes with decisionmaking by restricting the attributes considered and by leading to overemphasis on negative information.<sup>216</sup>

Framing plays a powerful role in plea bargaining. Ordinarily, defendants view plea bargaining through a loss frame: they are used to being free and are being asked to accept months or years in prison. Prosecutors stand to gain convictions by plea bargaining. So one might expect gain-framed prosecutors to be more amenable to concessions and plea bargains than are loss-framed defendants.<sup>217</sup> Indeterminate sentencing lets overconfident defendants view acquittal or probation as the baseline and anything worse than that as a loss. This loss frame should impede concessions and produce unwillingness to bargain.<sup>218</sup>

Not all defendants view plea bargains through loss frames, however. A defendant who is in pretrial detention is more likely to view prison as the baseline and eventual freedom as a gain, particularly if freedom is possible in weeks or months. Thus, one side effect of pretrial detention is that detained defendants may become more pliable in plea bargaining. The same thing may happen if mandatory minima, three-strikes laws, or sentencing guidelines set clear base penalties. A defendant who knows the proof of guilt is strong and the fixed base penalty is an automatic fifteen years may view anything less as a gain. This outcome is particularly likely if the bargain involves cooperating with the government, which is almost the only escape hatch from the Federal Sentencing Guidelines and mandatory minima.<sup>219</sup> A proposal of cooperation looks like a significant gain: the parties discover a coop-

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*Framing Effects and the Distributive Aspect of Integrative Bargaining*, 56 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 459, 471-72 (1993). When one party sees the other as loss framed, the loss-framed party's concessions seem larger and more cooperative. Negotiators take advantage of this perceived cooperativeness, offering mismatched (smaller) concessions in return. The result is that "negotiators demand more and concede less when the opponent has a loss rather than a gain frame." Carsten K.W. de Dreu et al., *Effects of Gain-Loss Frames in Negotiation: Loss Aversion, Mismatching, and Frame Adoption*, 60 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 90, 99-100, 103-04 (1994). This reaction compounds the initial unwillingness of loss-framed negotiators to compromise.

<sup>216</sup> See Thomas E. Nygren, *Framing of Task Performance Strategies: Effects on Performance in a Multiattribute Dynamic Decision Making Environment*, 39 HUM. FACTORS 425, 434-35 (1997).

<sup>217</sup> Cf. Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 135-40 (1996) (finding, in an empirical study, that subjects assigned to role-play civil defendants slightly preferred litigation to settlement, whereas subjects assigned to role-play plaintiffs overwhelmingly preferred settlement). Yet as noted earlier, when one party sees the other as loss framed, that party perceives the other's concessions as more cooperative and yields smaller concessions in return. See *supra* note 215.

<sup>218</sup> This dynamic should be particularly true of sentence bargains, which leave no room for optimistic underestimation of the likely penalty.

<sup>219</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003).

erative, win-win solution by agreeing to a massive sentence discount in exchange for assistance in convicting others. The rhetoric of "sentencing discounts" for cooperators reinforces the gain frame, even if the absolute level of punishment is quite high. This gain-framing effect of sentencing guidelines may partially explain why federal plea rates have risen dramatically since the enactment of the Guidelines.<sup>220</sup> Even in indeterminate-sentencing states, prosecutors can set baselines and frames by developing going rates for certain crimes and recurring situations.<sup>221</sup>

Thus, under sentencing guidelines, gain-framed defense lawyers come to view small downward adjustments as golden nuggets<sup>222</sup> instead of as pathetic sops. When sentencing is more automatic and prosecutorial concessions are harder to come by, each concession seems more valuable.<sup>223</sup> Sentencing guidelines will have this effect, however, only on those defendants who are familiar with them. Defendants who are used to indeterminate sentences in some state courts will keep framing outcomes as losses and continue to resist bargaining.<sup>224</sup> Those who know about sentencing guidelines or statutes, perhaps because they have prior federal convictions or have heard three-strikes ads, will more readily adopt gain frames and strike deals.<sup>225</sup> The former may thus reap more generous deals than the latter, except for those few who are so stubborn that they hold out, go to trial, and probably receive worse results. This result distributes punishment inequitably according to defendants' experience.

#### F. Anchoring and Adjustment

Selection of a reference point affects not only framing, but also anchoring. People come up with or evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor. This anchor may come from a guess or from an analogous case.

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<sup>220</sup> 2002 SOURCEBOOK, *supra* note 9, at tbl.5.22 (reporting a rise in guilty-plea rates from 83.9% of all adjudicated federal cases excluding dismissals in 1984 to 95.2% in 2002).

I do not deny that the sizes of the threat and payoff remain the largest factors in decisions to plead. The Guidelines, by increasing sentences and discounts for pleas and cooperation, naturally increased these incentives. My more modest point is that framing may also have contributed to the upward plea trend.

<sup>221</sup> See Uphoff, *supra* note 85, at 105.

<sup>222</sup> Cf. Nagel & Schulhofer, *supra* note 80, at 529-30.

<sup>223</sup> The same would be true if a prosecutorial charging policy made charging certain crimes automatic or nearly so.

<sup>224</sup> As discussed in section II.G, defense lawyers may debias clients with varying degrees of success. See *infra* pp. 2519-27. Even if lawyers explain federal sentencing, however, clients may not trust them, particularly if the lawyers are court-appointed. See *supra* pp. 2478-79.

<sup>225</sup> This effect cuts against the greater impulsiveness and discounting of recidivists. See *supra* p. 2510. Without empirical evidence, one cannot know which effect is more likely to predominate.



Anchoring poses three main problems. First, the selection of an anchor is often biased. Because assessments of fairness are self-serving,<sup>226</sup> each side may choose a different anchor. This was the case, for example, with the teachers' unions that compared themselves to high-salary districts while the school boards compared themselves to low-salary districts.<sup>227</sup>

Second, even arbitrary, random, or irrelevant numbers can serve as anchors and distort calculations.<sup>228</sup> Numbers that are obviously manipulable likewise produce strong anchoring effects. For instance, the asking price of a house strongly influences appraisals of its value, even for experts who consider the asking price completely uninformative and who have plenty of other information.<sup>229</sup> Anchoring depends not so much on relevance as on recency. Experiment subjects are most influenced by information that they receive just before they make judgments, even if that information is obviously useless.<sup>230</sup>

Third, people usually do not adjust away from their anchors enough. As a result, their initial choice of anchors has an inordinate effect on their final estimates.<sup>231</sup> This underadjustment happens because the anchor brings to mind features of the target that resemble the anchor, thus leading people to overemphasize similarities and underestimate differences.<sup>232</sup> Additional information, standing alone, is

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<sup>226</sup> See Korobkin, *supra* note 142, at 1820-21.

<sup>227</sup> See *supra* note 138.

<sup>228</sup> See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128 (1974) (finding that the spin of a random-number wheel influenced subjects' predictions of the proportion of African nations in the United Nations and that incentives to reach the correct answer did not reduce this anchoring effect); see also J. EDWARD RUSSO & PAUL J. H. SCHOEMAKER, DECISION TRAPS 90-91 (1989) (finding that subjects who were asked to recall the last three digits of their home telephone numbers and then add 400 to that figure anchored strongly on the figure when guessing the date of Attila the Hun's defeat).

<sup>229</sup> See Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 94-95 (1987).

<sup>230</sup> See Glen Whyte & James K. Sebenius, *The Effect of Multiple Anchors on Anchoring in Individual and Group Judgment*, 69 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 75, 82 (1997).

<sup>231</sup> See Paul Slovic & Sarah Lichtenstein, *Comparison of Bayesian and Regression Approaches to the Study of Information Processing in Judgment*, 6 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 649, 693 (1971) ("Upon receipt of new information, subjects revise their posterior probability estimates in the same direction as the optimal model, but the revision is typically *too small*; subjects act as if the [subsequent] data are less diagnostic than they truly are."); Tversky & Kahneman, *supra* note 228, at 1128.

<sup>232</sup> See Gretchen B. Chapman & Eric J. Johnson, *Anchoring, Activation, and the Construction of Values*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 115, 119-21 (1999); Thomas Mussweiler & Fritz Strack, *The Semantics of Anchoring*, 86 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 234, 236-39 (2001); see also Amos Tversky, *Features of Similarity*, 84 PSYCHOL. REV. 327, 340 (1977) (discussing the role of context in subjects' judgments of similarity).

no cure for anchoring. On the contrary, more information permits more selective recall of similarities and creates stronger anchoring effects.<sup>233</sup>

Anchoring has these effects in lawsuits even if the anchor is implausible. Clever plaintiffs' lawyers, for example, may artificially inflate their requests for damages in personal injury lawsuits. Even a huge, implausible request serves as an anchor and increases the jury's ultimate award.<sup>234</sup>

Anchoring also helps to explain the course of negotiation. Bargainers who lack inside information about an opponent's payoff matrix are more influenced by the opponent's initial offer than by later concessions.<sup>235</sup> This phenomenon may exist because negotiators anchor on the initial offer or asking price and make insufficient adjustments up or down from that figure.<sup>236</sup>

The same dynamics help to explain the course of plea bargaining. For example, a prosecutor might initially offer a robbery defendant

<sup>233</sup> See Mussweiler & Strack, *supra* note 232, at 238.

<sup>234</sup> See Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 522-27 (1996); see Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 120, 137 (Thomas Gilovich et al. eds., 2002) [hereinafter HEURISTICS AND BIASES] (reporting that plaintiffs' demands influence jury verdicts on both liability and damages, even if the demands are ridiculously low or high); see also *The Closing Argument*, Silkwood v. Kerr-McGee Corp. (W.D. Okla. May 14, 1979) (Civil 76-0888) (Gerald Spence for the plaintiff), in ROBERT M. COVER ET AL., PROCEDURE 990, 996-97, 1006, 1009 (1988) (suggesting anchors of \$70 million and \$500 million for punitive damages and then, in contrast, describing the plaintiff's punitive damage demand as "some piddling little ten million dollar verdict"); *Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 570 (W.D. Okla. 1979) (reporting that the jury ultimately awarded \$10 million in punitive damages on top of \$505,000 in compensatory damages), *aff'd in part, rev'd in part*, 667 F.2d 908 (10th Cir.), *rev'd* 464 U.S. 238 (1981).

To give another example, one group of judges who heard a hypothetical lawsuit denied an obviously meritless motion to dismiss the suit for failure to meet a \$75,000 jurisdictional threshold. These judges nonetheless anchored on the \$75,000 figure and awarded damages that were more than \$350,000 lower than the damages awarded by judges who did not hear the motion. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 790-92 (2001).

<sup>235</sup> See Robert M. Liebert et al., *The Effects of Information and Magnitude of Initial Offer on Interpersonal Negotiation*, 4 J. EXPERIMENTAL SOC. PSYCHOL. 431, 438-39 (1968); see also Gary A. Yukl, *Effects of Situational Variables and Opponent Concessions on a Bargainer's Perceptions, Aspirations, and Concessions*, 29 J. PERSONALITY & SOC. PSYCHOL. 227, 230, 232, 235 (1974).

<sup>236</sup> See JEFFREY Z. RUBIN & BERT R. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 267-69 (1975) (noting that extreme initial demands lead to more favorable settlement outcomes than do more moderate demands); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 19 (1994) (reporting experimental confirmation of strong anchoring on initial offers in civil dispute resolution); Henrik Kristensen & Tommy Gärling, *The Effects of Anchor Points and Reference Points on Negotiation Process and Outcome*, 71 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 85, 92-93 (1997) (finding that initial offers significantly affected negotiators' counteroffers).

twenty years' imprisonment by piling on every plausible enhancement. The defendant, of course, rejects this unreasonable offer out of hand, but the initial offer serves as a high anchor. When the prosecutor comes back with a revised offer of fifteen years, that offer sounds more reasonable. By the time the prosecutor comes down to twelve years, the defendant is ready to jump at the deal. If the prosecutor had started out at twelve years, however, the defendant might have anchored on that number as the highest likely sentence and rejected it as a bad deal.<sup>237</sup>

Defendants who have been sentenced for similar crimes before in the same court system may start off with more relevant anchors. Thus, on average, anchoring will confuse neophyte defendants more than it will savvy recidivists. But, as noted earlier, a recent anchor may carry great weight even if it is not logically relevant or plausible. So, even if a defendant thinks he is innocent and deserves zero punishment, the prosecutor's opening offer may serve as an anchor and influence the defendant.

Anchoring also gives prosecutors great power to influence judges' sentences. A team of researchers asked both new and experienced German trial judges to sentence a hypothetical rape case. The researchers held all facts constant while varying the prosecutors' sentencing demands. Their findings were striking: when setting sentences, judges anchor heavily on prosecutors' demands. This anchoring occurs even if the judge is experienced, even if the judge knows the prosecutor is inexperienced, and even if the judge claims that the prosecutor's demand is irrelevant.<sup>238</sup> Thus, a judge who is uncertain how to rule on certain sentencing-guidelines factors in a close case may anchor on whatever position the prosecutor takes. In about one-third of all federal districts, federal prosecutors follow a policy of not recommending specific sentences for cooperating defendants.<sup>239</sup> This pol-

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<sup>237</sup> Note also that anchoring can interact with the availability heuristic. In other words, people anchor on memorable examples of possible outcomes even if the available examples are not very probable or representative. See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman et al. eds. 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY].

<sup>238</sup> See Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1540-41, 1544, 1546-47 (2001) (reporting the results of three studies). The same phenomenon occurs in bail hearings. An empirical study of actual cases found that judges anchor heavily on prosecutors' bail recommendations, even after controlling for defendants' criminal records, local ties, and the severity of crimes. See Ebbe B. Ebbesen & Vladimir J. Konečni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 32 J. PERSONALITY & SOC. PSYCHOL. 805, 817-18 (1975).

<sup>239</sup> SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP, U.S. SENTENCING COMM'N, FEDERAL COURT PRACTICES: SENTENCING REDUCTIONS BASED ON DEFENDANT'S SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT 33-34 (1997). Even when prosecutors do

icy allows defense counsel to set low anchors unilaterally, without having to compete with prosecutorial anchors. Anchoring might also mean that defendants who receive and reject low plea-bargain offers may nonetheless be able to use these offers as low anchors if they mention them in passing to judges.

Finally, anchoring adds another reason why prosecutorial overcharging is effective. The conventional explanation for overcharging is that it gives prosecutors additional plea-bargaining chips.<sup>240</sup> There is much truth to this explanation. But overcharging works for another reason as well: it provides high anchors for defendants. Defendants who anchor initially on maximum life sentences are more likely to think that they are getting good deals when they are offered lower sentences. This is doubly true if prosecutors can frame charge reductions as gains. If the initial charge and sentence serve as anchors and baselines, any prosecutorial concessions look like discounts or savings — wins for defendants instead of reduced losses.

### G. Lawyers as Debiasers?

All of these heuristics and biases skew defendants' evaluations and decisions in plea bargaining. In some cases, a party might benefit from faking these biases to convince the other party to yield more concessions.<sup>241</sup> Even if it is sometimes beneficial to feign irrationality, however, actual irrationality is obviously disadvantageous because it skews clear assessments of one's options. But defendants have lawyers to assist them in making their decisions. While lawyers must not substitute their own ends for their clients', they should inform and advise clients about less biased means to those ends.<sup>242</sup>

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not advocate specific numbers, they can influence sentences with fuzzier guidance, for example by describing the defendant's cooperation at sentencing. See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 18 n.74 (2003); cf. *United States v. Ming He*, 94 F.3d 782, 786–87 (2d Cir. 1996) (describing a trial court's decision to give a cooperator only a marginal sentence discount after the prosecutor "disparaged" the cooperation provided).

<sup>240</sup> See ROBERT A. CARP & RONALD STIDHAM, *JUDICIAL PROCESS IN AMERICA* 159 (5th ed. 2001) (quoting an assistant district attorney who sought to charge a barroom brawler with first-degree murder, even though there was no evidence of premeditation, because "it will strengthen our hand at the time when we talk with his attorney" (internal quotation marks omitted)); Alschuler, *The Prosecutor's Role*, *supra* note 11, at 85–104; Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 74–75 (1985); Wright & Miller, *supra* note 145, at 85.

<sup>241</sup> See Korobkin, *supra* note 142, at 1801–04 (explaining how parties misrepresent their risk aversion, their optimism about trial prospects, and their reserve prices, among other things, in an effort to make opposing negotiators concede more).

<sup>242</sup> See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 125–30 (1997) (arguing that while lawyers must respect clients' ultimate ends or values, they should suggest better means by counteracting cognitive errors).

Lawyers, though they suffer from many of the same biases, may be less susceptible to a number of them. Lawyers can therefore at least moderate some of these biases. At the same time, lawyers vary widely in their knowledge, skill, and incentives to debias their clients.

Expertise is no panacea for heuristics and biases.<sup>243</sup> In one example, judges denied a meritless motion to dismiss a tort suit for failure to meet the \$75,000 jurisdictional threshold. Nonetheless, they anchored on the \$75,000 amount and awarded much lower damages than did judges who had not heard the motion.<sup>244</sup> In another study, judges favored a settlement framed as a gain to the plaintiff more than the same settlement framed as a loss to the defendant.<sup>245</sup> A survey of bankruptcy judges and lawyers found much evidence that both respond to questions with self-serving answers. For example, judges report that they handle fee requests much more swiftly than lawyers say they do.<sup>246</sup> "Lawyers also view themselves as less aggressive in seeking [above-normal] fees than judges view them."<sup>247</sup>

In experiments, judges seem to be just as susceptible as laymen to anchoring and egocentric biases, though they are less susceptible to

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<sup>243</sup> Studies have repeatedly shown that experts are subject to framing, anchoring, overoptimism, self-serving bias, and other heuristics. See Babcock et al., *supra* note 138, at 10–12 (finding self-serving bias among teachers' union professional negotiators and school board presidents); N. S. Fagley et al., *The Effect of Positive or Negative Frame on the Choices of Students in School Psychology and Educational Administration*, 14 *SCHOOL PSYCHOL. Q.* 148, 158 (1999) (finding large framing effects even for professionals-in-training); Pamela J. Hinds, *The Curse of Expertise: The Effects of Expertise and Debiasing Methods on Predictions of Novice Performance*, 5 *J. EXPERIMENTAL PSYCHOL.: APPLIED* 205, 218 (1999) (reporting that "[e]xperts have been found to be overconfident in judgments related to their field of expertise and to become increasingly confident, although not more accurate, with increasing information," and finding that experts are blinded by their own expected outcomes); Margaret A. Neale & Gregory B. Northcraft, *Experts, Amateurs, and Refrigerators: Comparing Expert and Amateur Negotiators in a Novel Task*, 38 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 305, 315 (1986) (finding that framing influences professional negotiators); Northcraft & Neale, *supra* note 229, at 94–95 (noting that experienced realtors who claim that listing prices of houses are irrelevant still anchor on those prices, even when given plenty of other information); Roszkowski & Snelbecker, *supra* note 212, at 245 ("[F]inancial planners are prone to the same framing bias that occurs with the population-at-large, as well as members of some other professions studied so far, e.g., negotiators . . . . The lack of a significant relationship between years of experience as a planner and the susceptibility to framing buttresses this conclusion."); Tversky & Kahneman, *supra* note 228, at 1130 ("The reliance on heuristics and the prevalence of biases are not restricted to laymen.").

<sup>244</sup> See Guthrie et al., *supra* note 234, at 790–94. Although judges are no longer practicing lawyers, they typically have practiced as lawyers, have more experience than the average lawyer, and are more detached. All of these factors suggest that judges should be even less susceptible to biases than practicing lawyers are. Evidence that judges suffer from them suggests that practicing lawyers do too.

<sup>245</sup> *Id.* at 796–99 (reporting that 39.8% of gain-framed judges but only 25% of loss-framed judges favored the same settlement).

<sup>246</sup> See Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 *WASH. U. L.Q.* 979, 983 *tbl.1* (1994).

<sup>247</sup> *Id.* at 988.

framing.<sup>248</sup> Lawyers are also influenced by the level of detail used to describe possible outcomes: they overestimate the likelihood of scenarios that are described in detail and underestimate unspecified alternatives.<sup>249</sup> And simply adding a lawyer's opinion to the client's does not automatically eliminate the client's biases. The evidence is mixed on whether groups moderate heuristics and biases, and groups often go to extremes in deliberating or in taking risks.<sup>250</sup> Professionals have biases of their own, such as risk aversion regarding their clients' affairs (though this aversion may cancel out clients' risk propensity).<sup>251</sup> These heuristics affect the real world just as they affect laboratory experiments. An empirical bail study confirmed that when judges set bail for actual defendants, they continue to exhibit strong anchoring effects.<sup>252</sup>

Though lawyers are far from perfect, they may nonetheless be less biased than their clients. Lawyers typically have seen more criminal convictions than their clients have, and past failure helps to reduce unrealistic optimism.<sup>253</sup> One study of hypothetical civil settlement negotiations suggests that lawyers anchor less strongly than do their clients on the other side's opening offer.<sup>254</sup> Presumably, this is because lawyers can recall and rely on more pertinent anchors. Another study found that litigants were more likely to be influenced by gain and loss

<sup>248</sup> See, e.g., Guthrie et al., *supra* note 234, at 816–21. But cf. Timothy D. Wilson et al., *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J. EXPERIMENTAL PSYCHOL.: GENERAL 387, 390–91 (1996) (finding that knowledgeable subjects were less affected by anchors than were unknowledgeable subjects).

<sup>249</sup> Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities That Are Described in Greater Detail*, 26 LAW & HUM. BEHAV. 159, 167–70 (2002).

<sup>250</sup> See Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 691–93 (1996) (conducting a meta-analysis of more than thirty studies and finding mixed effects); Sitkin & Pablo, *supra* note 185, at 13 (citing research that finds that “group contexts tend to influence individuals to take more extreme positions with regard to risk”); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 88–95 (2000) (discussing biases that affect individuals in group settings).

<sup>251</sup> See Roszkowski & Snelbecker, *supra* note 212, at 245 (discussing financial planners' caution in investing their clients' money). Of course, financial planners may behave differently from lawyers, particularly because the former have no self-interest in getting rid of their clients' cases quickly.

<sup>252</sup> See *supra* note 238 (discussing the study).

<sup>253</sup> See Frank P. McKenna & Ian P. Albery, *Does Unrealistic Optimism Change Following a Negative Experience?*, 31 J. APPLIED SOC. PSYCHOL. 1146, 1155 (2001); D.R. Rutter et al., *Perceptions of Risk in Motorcyclists: Unrealistic Optimism, Relative Realism and Predictions of Behaviour*, 89 BRITISH J. PSYCHOL. 681, 693 (1998). But see Loewenstein et al., *supra* note 139, at 157 (questioning whether negotiating attorneys in fact learn from past settlement outcomes that their demands are unrealistic or instead attribute poor results to the intransigence of the other side).

<sup>254</sup> See Korobkin & Guthrie, *supra* note 242, at 103–07 (reporting that, while the difference between the two subject pools was not statistically significant, the lawyers' anecdotal responses buttressed the hypothesis that the lawyers were less susceptible to anchoring).



frames. In contrast, lawyers based tort settlement recommendations on the expected value of trial versus settlement and so were less swayed by frames.<sup>255</sup>

What can lawyers do to help their clients? Unfortunately, many obvious strategies for debiasing do not work. Simply telling someone about a heuristic or bias does not counteract it,<sup>256</sup> although drawing attention to someone's mood can offset that mood's influence.<sup>257</sup> Telling people to try harder or concentrate more does not work,<sup>258</sup> nor does offering monetary incentives to get the right result.<sup>259</sup> Informing people about various risk factors and asking them to describe how those factors apply to them has no effect on overoptimism.<sup>260</sup> Nor does it help much to ask people to compare their cases to best-case scenarios instead of to worst-case scenarios.<sup>261</sup> Indeed, focusing attention on risk factors can exacerbate overoptimism<sup>262</sup> because it allows people to emphasize selectively the facts favorable to them. Likewise, giving people more information exacerbates overoptimism by facilitating selective recall.<sup>263</sup>

There are, however, effective mitigating techniques that lawyers can learn to use. Negotiators who simply learn on the job do not outgrow their biases and heuristics. But specific training can teach negotiators to be attentive to their own biases, to focus on actual gains and losses, and to resist framing and other manipulations.<sup>264</sup> As Russell Korobkin and Chris Guthrie's framing study shows, lawyers are trained to measure results in terms of the expected value of the party's final assets.<sup>265</sup> By reformulating outcomes in these terms, lawyers can reduce risk seeking induced by loss aversion<sup>266</sup> and mitigate framing

<sup>255</sup> See *id.* at 96–101, 121–22 (finding statistically significant differences between clients' and lawyers' settlement decisions).

<sup>256</sup> See Baruch Fischhoff, *Debiasing*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 237, at 422, 434 tbl.2, 440 [hereinafter Fischhoff, *Debiasing*]; Wilson et al., *supra* note 248, at 397–99; see also Baruch Fischhoff, *Hindsight≠Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288, 298 (1975).

<sup>257</sup> See generally Norbert Schwarz, *Feelings as Information: Moods Influence Judgments and Processing Strategies*, in HEURISTICS AND BIASES, *supra* note 234, at 537.

<sup>258</sup> See Fischhoff, *Debiasing*, *supra* note 256, at 428–29. But see Kazuhisa Takemura, *Influence of Elaboration on the Framing of Decision*, 128 J. PSYCHOL. 33, 37–38 (1993) (reporting that telling subjects to think about a decision for three minutes almost eliminated framing effects).

<sup>259</sup> See Chapman & Johnson, *supra* note 234, at 125; Wilson et al., *supra* note 248, at 395–96.

<sup>260</sup> See Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, 14 HEALTH PSYCHOL. 132, 138 (1995).

<sup>261</sup> See *id.* at 134, 138.

<sup>262</sup> See *id.* at 138.

<sup>263</sup> See *supra* pp. 2498–99.

<sup>264</sup> See Neale & Bazerman, *supra* note 143, at 46.

<sup>265</sup> See *supra* pp. 2521–22.

<sup>266</sup> See Kahneman & Tversky, *supra* note 188, at 287.

effects.<sup>267</sup> Indeed, lawyers have to be careful with their great power to frame. Clients may anchor heavily on lawyers' initial frames, so an initial forecast that is bleak or optimistic may be hard to revise later on.<sup>268</sup> Lawyers can also educate clients about the many forces that are beyond their control at trial. Because overoptimism is especially severe when parties think they can control outcomes,<sup>269</sup> lawyers can reduce overoptimism by reducing illusions of control. Lawyers can use clients' families to challenge clients' denials or to offset their overoptimism.<sup>270</sup> Lawyers can also perform detailed risk analyses, drawing attention to the temporal, emotional, and monetary costs of continuing litigation, as well as to its various risks.<sup>271</sup> Prompting clients to give rationales for their choices reduces framing,<sup>272</sup> and asking clients to quantify their certainty helps reduce overconfidence.<sup>273</sup>

By far the most successful debiasing technique is to have clients consider the opposite. Overoptimism, self-serving bias, denial, framing, anchoring, or loss aversion may prompt a defendant to count on acquittal at trial. In response, lawyers can make defendants focus on evidence and arguments that cut against their own position. Psychologists have repeatedly found that considering the opposite reduces overconfidence, biased information assimilation, biased hypothesis testing, and excessive perseverance of beliefs.<sup>274</sup> This technique is effective

<sup>267</sup> See Rachlinski, *supra* note 217, at 147–48, 171–72.

<sup>268</sup> See Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783, 799–800 (2003).

<sup>269</sup> See Marie Helweg-Larsen & James A. Shepperd, *Do Moderators of the Optimistic Bias Affect Personal or Target Risk Estimates? A Review of the Literature*, 5 PERSONALITY & SOC. PSYCHOL. REV. 74, 88 (2001) (“[P]erceived control functions as a personal risk moderator. As perceptions of control decline, so too does the optimistic bias because estimates of personal risk increase.”); *supra* p. 2501.

<sup>270</sup> See Bibas, *supra* note 158, at 1396. Of course, defense lawyers can use family pressure for good or for ill. See *United States ex rel. Brown v. LaVallee*, 424 F.2d 457, 459–60 (2d Cir. 1970) (recounting how defense counsel encouraged the defendant's mother to persuade her son to plead guilty in order to avoid the possibility of the death penalty); Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1192–94 (discussing *Brown*).

<sup>271</sup> See John Wade, *Systematic Risk Analysis for Negotiators and Litigators: How to Help Clients Make Better Decisions*, 13 BOND L. REV. 462, 475–85 (2001), available at [www.bond.edu.au/law/blr/vol13-2/contents13-2.htm](http://www.bond.edu.au/law/blr/vol13-2/contents13-2.htm).

<sup>272</sup> See Fagley & Miller, *Framing Effects*, *supra* note 211, at 359–60; Paul M. Miller & N.S. Fagley, *The Effects of Framing, Problem Variations, and Providing Rationale on Choice*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 517, 520 (1991).

<sup>273</sup> See Richard A. Block & David R. Harper, *Overconfidence in Estimation: Testing the Anchoring-and-Adjustment Hypothesis*, 49 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 188, 205 (1991).

<sup>274</sup> See Craig A. Anderson, *Inoculation and Counterexplanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 SOC. COGNITION 126, 134–35 (1982); Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 116–17 (1980); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239–41 (1984); Paul W. Paese & Robert

because it tears people away from anchors favorable to their own positions and makes contrary anchors more accessible and salient.<sup>275</sup> Prompting subjects to consider reasons that cut against an anchor, or differences between their cases and the anchor, greatly reduces anchoring.<sup>276</sup> A variation of this technique is to have clients consider multiple plausible alternative outcomes and explanations.<sup>277</sup> Merely telling someone to consider the other side's arguments is no panacea, however. Subjects may find counterarguments so difficult to imagine and formulate that they may become even more convinced of their original positions.<sup>278</sup> Rather, for this method to be effective, the lawyer should make the other side's strongest case forcefully and persuasively. This is exactly what mediators do in civil settlements.

In practice, considering the opposite significantly reduces self-serving biases and increases settlement. In one negotiation experiment, telling negotiators to consider and list the weaknesses in their cases raised settlement rates from 65% to 96%.<sup>279</sup> Awareness of their own weaknesses greatly reduced bias in both sides' predictions of the judge's likely award and made settlement much more attractive.<sup>280</sup> In another experiment, Korobkin and Guthrie found that considering the opposite significantly overcame fairness objections to settlement, though it had less of an effect on framing.<sup>281</sup> Interestingly, Korobkin and Guthrie found that the most influential step lawyers can take is to recommend a settlement without giving any reasons.<sup>282</sup> Apparently, clients are more inclined to defer to a lawyer's judgment and authority than they are to assimilate and apply debiasing instructions. In other words, lawyers exert a great deal of influence over clients' settlement decisions just by offering their opinions. Because appointed counsel meet with their clients later and less often than retained counsel,<sup>283</sup> they have less time to cultivate and exercise this influence.

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D. Yonker, *Toward a Better Understanding of Egocentric Fairness Judgments in Negotiation*, 12 INT'L J. CONFLICT MGMT. 114, 129 (2001).

<sup>275</sup> See Lord et al., *supra* note 274, at 1241.

<sup>276</sup> See Chapman & Johnson, *supra* note 234, at 144.

<sup>277</sup> See Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069, 1083-85 (1995).

<sup>278</sup> See Lawrence J. Sanna, *Accessibility Experiences and the Hindsight Bias: I Knew It All Along Versus It Could Never Have Happened*, 30 MEMORY & COGNITION 1288, 1294 (2002).

<sup>279</sup> Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 917, 919 tbl.1 (1997).

<sup>280</sup> See *id.* at 919-20 & tbl.1.

<sup>281</sup> See Korobkin & Guthrie, *supra* note 242, at 108-11, 119-21 (finding that the effect on framing was not statistically significant).

<sup>282</sup> See *id.* at 121 (noting that the finding, while not statistically significant, was nonetheless suggestive).

<sup>283</sup> See *supra* p. 2482.

Good criminal defense attorneys make their clients consider the opposite, and counteract denial and overoptimism, by confronting their clients with the evidence and arguments against them. As Al Alschuler notes:

It may often be a lawyer's duty to emphasize in harsh terms the force of the prosecution's evidence: "What about this fact? Is it going to go away? How the hell would you vote if you were a juror in your case?" It may sometimes be a lawyer's duty to say bluntly, "I cannot possibly beat this case. You are going to spend a long time in jail, and the only question is how long."<sup>284</sup>

Prosecutors do something similar, but perhaps even more effective, during so-called reverse proffer sessions. In my experience as a prosecutor, defendants are often impressed to hear prosecutors' forceful explanations of how the government could convict them at trial. This is especially true if prosecutors are willing to show many of their cards during reverse proffers. Preliminary hearings can have the same effect by showcasing the prosecution's evidence. Defendants, forced to consider the opposite, can better see how jurors would view the case.

Statements like those listed by Alschuler are sometimes coldly clear-eyed and realistic, but at other times they may be pessimistic. Lawyer pessimism can be a calculated effort to push clients toward plea bargains. Economic incentives, pressures from judges and opposing counsel, and risk-averse desires to avoid humiliating losses at trial all give defense lawyers incentives to favor pleas. To persuade their clients to settle, lawyers sometimes underestimate the prospects at trial, misrepresent the course of negotiations, and slant their presentation of settlement offers.<sup>285</sup>

Sometimes, even able repeat players prefer to err on the side of pessimism. Optimistic forecasts risk being proven disastrously wrong at trial, an embarrassing result that makes clients angry. On the other hand, if clients plead based on their lawyers' overly pessimistic advice, the cases do not go to trial and the clients are none the wiser.<sup>286</sup> Calculated pessimism about trial, in short, is a rational tactic to avoid trial risks and to manipulate clients into pleading guilty.

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<sup>284</sup> Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1309.

<sup>285</sup> See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 700-01 (1990) (discussing the findings of a study on lawyer-client relationships in personal injury cases in D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974)); *id.* at 734 (discussing lawyers who lowball their valuations of cases so that eventual settlements look favorable); *id.* at 740 (discussing how lawyers who want to lighten their workloads present settlement offers to their clients in ways that are calculated to induce acceptance).

<sup>286</sup> I am grateful to Al Alschuler for pressing me on these points.

More speculatively, many lawyers might be unconsciously pessimistic.<sup>287</sup> Biases and heuristics might encourage lawyers to offer pessimistic advice to serve their own interests. For example, egocentric bias could lead lawyers to mold their views unconsciously to fit their self-interest, which often favors quick pleas. The availability heuristic and risk aversion could lead lawyers to remember and dwell on their memorable trial defeats even if they are unlikely to recur.<sup>288</sup>

Without empirical evidence, it is impossible to know whether lawyer pessimism is insufficient, adequate, or overcompensatory to offset the heuristics and biases discussed above. It is also impossible to know whether pessimism springs mainly from conscious tactics, unconscious biases, or both. All one can say is that pessimistic advice appears to be potent enough to offset overconfidence, risk-seeking loss aversion, and other biases that discourage defendants from pleading guilty.<sup>289</sup>

Still, lawyers vary widely in their skills, knowledge, and incentives to debias. Lawyers who are aware of biases and heuristics can take steps to counteract them.<sup>290</sup> Lawyers who are more experienced at handling stubborn, optimistic, or reckless clients may be more used to ameliorating these problems. Lawyers in large offices have more colleagues whom they can ask about how to handle these types of clients. Experienced lawyers care less about gaining trial experience; having been burned before, they learn to avoid repeating past defeats, especially as they age and become more risk averse.<sup>291</sup> The most experienced lawyers also have better anchors, both for the going rates in plea

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<sup>287</sup> Conventional wisdom and anecdotal evidence stereotype lawyers as pessimists who overstate risk, whether because of training, habit, or temperament. See Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 375–76 (1997); see also John M.A. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81, 101 (2001). Though this conventional wisdom rests on anecdotal rather than hard empirical evidence, the perception of pessimism is widespread enough to take seriously.

<sup>288</sup> See *supra* note 237 (explaining the availability heuristic).

<sup>289</sup> See *supra* note 9 (discussing the 94% to 95% rate of guilty pleas).

<sup>290</sup> See Korobkin & Guthrie, *supra* note 242, at 114–21 (noting that various measures — such as telling clients about biases, forcing them to consider the opposite, rephrasing the settlement in terms of the net expected value, or simply recommending the settlement — can increase clients' willingness to settle and overcome framing, anchoring, and equity-seeking heuristics).

<sup>291</sup> See *supra* note 201 and accompanying text (discussing how risk aversion increases with age). For instance, Milton Heumann interviewed one new prosecutor who, overconfident in his case, was inflexible in plea bargaining and suffered a seemingly irrational acquittal. In hindsight, the new prosecutor questioned his unwillingness to bargain. Commenting on this newcomer's risk taking, a veteran prosecutor noted: "You see, . . . that's why I don't like to try a case. He'll think twice about it next time." HEUMANN, *supra* note 14, at 112 (internal quotation marks omitted).

bargaining and for the likelihood of conviction at trial.<sup>292</sup> This advantage is particularly true if the lawyer specializes in a particular court or type of crime, such as white-collar crime in federal court in Manhattan. Good, experienced lawyers tend to charge more based on their years of experience, so richer clients are more likely to benefit from their advice. Of course, there are many excellent and conscientious public defenders and appointed counsel who try hard to debias their clients and give sound advice. Regardless of counsel's quality, however, clients are less likely to trust appointed counsel, on the theory that free advice is worth what you paid for it.<sup>293</sup>

In short, good lawyers can do a great deal to debias clients. In fact, they can overcompensate, pushing clients from risk taking into risk aversion by painting pessimistic forecasts. Though appointed counsel may enjoy less trust, clients on average give lawyers' recommendations a great deal of weight.<sup>294</sup> But lawyers' abilities and funding, clients' personalities, and case characteristics vary widely. These variations distort the shadows of trials to varying degrees, meaning that clients with the same prospects at trial wind up with different plea bargains. The next section encapsulates these variations in a perspective that supplements the classical model.

### III. DIRECTIONS FOR THE FUTURE

The structural-psychological perspective on bargaining that emerges from Parts I and II is much more complex than the classical model of fully informed and rational bargaining in the shadow of trial. The classical model, in other words, is seriously misleading. Section III.A draws together the strands from Parts I and II to show that uncertainty, money, self-interest, and demographic variation explain why plea bargains diverge from trials' shadows. These pervasive themes demonstrate the need for the structural-psychological perspective that I propose.

Section III.B considers reforms that could solve or ameliorate these problems. At this point, some scholars would simply call for the abolition of plea bargaining as the only way to eradicate all of these flaws. That is one solution, but an impractical one.<sup>295</sup> I take it as a given

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<sup>292</sup> See *supra* p. 2481. As noted earlier, trials are infrequent enough that their shadows are often very faint. Those who do not frequently try this kind of case in this particular court may have only the foggiest, most inaccurate scuttlebutt on which to base their guesses. See *id.*

<sup>293</sup> See *supra* pp. 2478–79.

<sup>294</sup> See Korobkin & Guthrie, *supra* note 242, at 121 (finding that a lawyer's bare recommendation to settle a case had even more impact on settlement than did various explanations or other attempts to debias).

<sup>295</sup> Indeed, abolition could worsen these problems in some ways. First, unpredictability might impair parties' forecasts even more. Just as uncertainty distorts plea bargains, so uncertainty



that plea bargaining is here to stay. Though bargaining itself is too entrenched to abolish, legislatures can still improve some of the procedures that affect the course of bargaining. The rules governing defense counsel, pretrial detention, sentencing guidelines, discovery, and plea colloquies should respond to and compensate for some of the problems noted above. Though these measures cannot make plea bargaining perfectly rational and smooth, they can at least offset some of its biggest distortions. The goal is to bring plea bargains more in line with expected trial outcomes and with normatively desirable results. Ideally, sentences should reflect desert, culpability, and other relevant factors, rather than structural and psychological pressures.

Section III.B.1 considers how additional information and better advice could combat the influence of uncertainty. Section III.B.2 considers the flip side of uncertainty, namely rigidity or lumpiness in sentencing statutes and guidelines. Section III.B.3 suggests ways to moderate the influence of money on plea bargaining. Section III.B.4 addresses the problems of self-interest and agency costs. Section III.B.5 analyzes how one might respond to demographic and other personal variations among defendants and lawyers.

#### *A. The Structural-Psychological Perspective on Bargaining*

Parts I and II explained a welter of structural and psychological forces that influence plea bargaining. Though these problems vary, they spring from a handful of sources: uncertainty, money, self-interest, and demographic variation. To succeed, any reforms must acknowledge and tackle these root causes.

The first pervasive influence is uncertainty. Discovery limitations contribute to uncertainty by breeding ignorance. Indeterminate sentencing and complex sentencing guidelines also promote uncertainty, by leaving more room for excessive optimism and risk taking. Experienced counsel and repeat players reduce uncertainty by developing going rates and bonds of trust. But overconfidence and denial give rise to false certainty, and risk seeking and loss aversion encourage gambling in the face of uncertainty. Conversely, lawyers' risk aversion

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about unpredictable jurors distorts forecasts of trials. Abolition of plea bargaining would swamp the system with trials, making each one more slapdash and less predictable. *See* Scott & Stuntz, *supra* note 2, at 1931–34. Sentence bargains are also more predictable than post-trial sentences, except where sentencing guidelines are in force. Second, funding inequities might operate even more strongly at trial than in pleas. The flood of trials in a world without bargaining would stretch prosecutors and defense counsel extremely thin, exacerbating current inequities. Third, lawyer ability might have more impact at trial than during plea bargaining because there is more room for variation in lawyers' performance. Poor defendants would suffer from this effect the most. *See id.* at 1933–34. Fourth, demographic characteristics can also skew trials; for example, black defendants may fear the prejudices of white jurors. I am indebted to George Fisher for all of these insightful observations.

makes them shy away from the uncertainty of possible loss at trial. Lawyers and clients who are adrift in a sea of uncertainty anchor onto existing data too tightly. When debiasing, lawyers must challenge false certainties vigorously and offer alternative frames to dislodge clients', and sometimes their own, certitude.

The second distorting influence is money. Money buys private investigators and good defense counsel, who benefit from experience, knowledge, and relationships with prosecutors. Money matters not only at the level of individual defendants' wealth, but also at the systemic level of funding. Lack of money means too few prosecutors and defense lawyers for too many cases, leading to crushing workloads and great pressure to plea bargain. Scarce prosecutorial and indigent-defense money is siphoned off by defendants who go to trial because of irrationalities, biases, or heuristics. Thus, less money remains for other cases. Money greatly influences lawyers' incentives to put in extra work and to stand ready for trial, and thus affects clients' bargaining leverage. By influencing lawyers' incentives, money may also affect their pessimism and their zeal in debiasing clients. Additionally, money has a tremendous influence on bail and thus on plea bargains, especially in small cases.

The third influence is self-interest. Self-interest creates agency-cost problems. Fee structures, for example, lead self-interested lawyers to underinvest in individual cases and push clients to plead. This is particularly true of flat fees and salaries. Defendants trust court-appointed lawyers less than retained counsel; the defendants assume that self-interest skews lawyers' advice because their salaries come from the state rather than from the client. Self-interest also encourages lawyers to shy away from potentially damaging their reputations by risking loss at trial. Self-interest is not limited to the conscious level, however. The self-serving or egocentric bias unconsciously slants information and decisions toward those that favor one's own interests. Self-interested lawyers thus render biased advice, which may over-encourage plea bargains. A countervailing force is that self-interested defendants overconfidently see the facts as favoring their own interests. Defendants interpret additional information to reinforce their preexisting ideas and serve their interests. And the instinct to preserve one's self-image encourages defendants to remain in denial and not see the facts as a jury would.

The fourth influence is demographic variation. Men, the young, and the less intelligent are more overconfident and have higher discount rates. In addition, men and the young are less risk averse. On average, women and older people are more susceptible to framing. Repeat offenders (especially violent and drug offenders) have higher discount rates and less risk aversion, though their greater experience may give them more relevant anchors. These variations can lead to some truly perverse results, such as larger plea-bargain discounts to

induce pleas from worse offenders. Finally, the poor, the young, and minorities may be less able to afford good counsel and to make bail than others can; their poverty leads to disparate impacts on these groups.

The classical model either ignores or, at best, pays lip service to these and other influences. Perhaps this is because they are difficult to quantify and measure. There is no a priori formula that tells one how large agency costs are or how much money matters. But indefiniteness is no reason to ignore the problem.<sup>296</sup> The size of each variable may be uncertain, but that is not a good reason to set each variable at zero. Rather, this difficulty should spur empirical research to measure these factors. Though there are many empirical studies on negotiating civil settlements,<sup>297</sup> very few exist on the criminal side.

For now, though, one can only make educated guesses. Of the many influences outlined in Parts I and II, which are likely to create large distortions in day-to-day plea bargaining? The most powerful factors doubtless include the strength of the evidence and the likely sentence after trial, the two factors embraced by the shadow-of-trial model. But factors unrelated to the merits also loom large. I suspect that lawyer quality and experience, lawyer funding and workload, pre-trial detention, the operation of mandatory or other lumpy sentences, and perhaps information deficits play the largest roles. Denial is a severe problem in certain categories of cases, such as sex offenses.<sup>298</sup> The influence of overconfidence, risk preferences, framing, and anchoring appears to be more subtle. Lawyers debias enough to keep the number of trials relatively low. To encourage pleas, however, they may often use distorted frames and anchors that impair clients' evaluations of bargains. Many of these clients might have pleaded guilty regardless, but these influences probably affect the sweetness of the deals that they receive and are willing to accept. These hunches, of course, must await empirical confirmation. It is not too early, however, to start fixing the problems.

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<sup>296</sup> See Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 57–59 (2000) (arguing that even though behavioral analysis may be less simple and determinate than classical economic analysis, this indeterminacy is no reason to shy away from exploring and gradually quantifying the complexity); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1071–73 (2000) (explaining that while the simple, elegant rational-choice theory may be convenient and desirable, realism demands adding more sophisticated, nuanced behavioral refinements, and that these refinements may have to grow incrementally into a detailed model with useful predictive power).

<sup>297</sup> See, e.g., Babcock et al., *supra* note 138; Babcock et al., *supra* note 279; Babcock & Loewenstein, *supra* note 141; Korobkin & Guthrie, *supra* note 242; Loewenstein et al., *supra* note 139; Rachlinski, *supra* note 217.

<sup>298</sup> See Bibas, *supra* note 158, at 1378, 1393–99.

### B. Possible Solutions

1. *Remedies for Uncertainty.* — Plea bargaining involves exchanging a calculated risk of conviction at trial for a sure but less severe conviction and sentence after plea. Some uncertainty is inherent in the process; indeed, reducing uncertainty is often one reason to plea bargain. But wide disparities or variations in each party's information threaten equity and fairness.

For example, most defendants have private knowledge about their guilt, the crime, and the likely witnesses against them. But defendants who are innocent, are mentally ill, or were intoxicated are disadvantaged because they may know or remember little. In the federal and many state systems, discovery rules are highly restrictive or do not require discovery early enough for plea negotiations. Indeed, some prosecutors even require defendants to waive their rights to exculpatory or impeachment material as part of their plea agreements.<sup>299</sup> Though informal discovery often supplements formal discovery, the quality and quantity of this information may depend on the particular prosecutor and his relationship with the particular defense lawyer.<sup>300</sup> Many discovery rules are designed to give defendants information in time for effective use at trial, not for effective use in plea bargaining. Likewise, prosecutors may not know what witnesses the defense will call or what witnesses will say until trial itself.

The obvious remedy is to liberalize discovery. Discovery rules designed for plea bargaining would provide more information earlier. Though there is no constitutional right to impeachment information in advance of trial,<sup>301</sup> and likely no right to exculpatory material in advance of trial,<sup>302</sup> prosecutors are free to provide this information earlier, and some do.<sup>303</sup> Exculpatory information is particularly important to innocent defendants, who, as noted above, may be the least knowledgeable about the prosecution's case.<sup>304</sup> One possible draw-

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<sup>299</sup> See, e.g., *United States v. Ruiz*, 536 U.S. 622, 625 (2002) (upholding a plea bargain that required the defendant to waive his right to discovery of impeachment material, and explaining that these waivers have become standard in certain immigration cases in parts of the Southwest).

<sup>300</sup> See *supra* p. 2495.

<sup>301</sup> See *Ruiz*, 536 U.S. at 629.

<sup>302</sup> The Court's reasoning in *Ruiz* is potentially applicable to exculpatory information. Cf. *id.* at 629–33.

<sup>303</sup> Note that under the Jencks Act, 18 U.S.C. § 3500(a) (2000), the defense cannot discover or inspect statements made by a prospective federal prosecution witness until the witness has testified at trial. Nevertheless, in my experience, prosecutors in the U.S. Attorney's Office for the Southern District of New York routinely turn these items over a few days before the start of trial. In longer trials, however, prosecutors may wait until a few days before the witness actually testifies. In other words, they disclose on a rolling basis.

<sup>304</sup> The danger is that liberalized discovery may lead to tampering with prosecution witnesses or fabrication of alibis. But fabrication of alibis is already a risk because at trial the defendant hears all of the government's evidence before putting on his own case. To reduce the risk of wit-

back of more discovery is that egocentrism skews interpretation of new information to reinforce self-serving beliefs.<sup>305</sup>

The need for information is reciprocal: prosecutors also need information about likely defenses to evaluate plea bargains. Currently, prosecutors may receive documents, objects, scientific examinations and tests, expert witness reports, and advance notice of a few defenses.<sup>306</sup> Until indictment, they may also compel potential witnesses to testify before the grand jury. But currently, in the federal system and in many states, prosecutors have no right to the names, addresses, or prior statements of defense witnesses other than expert witnesses.<sup>307</sup> While the Fifth Amendment limits prosecutors' access to defendants' own statements,<sup>308</sup> the law could allow greater reciprocal discovery of defendants' witnesses and defenses in time for plea bargaining. Greater discovery, of course, costs money and impairs efficiency, but this may be a price worth paying.

Additionally, better sharing of sentencing information could help nonrepeat players to understand the going rates or prices for crimes. For example, just as commercial markets increase efficiency by posting the recent prices of particular commodities or stocks, so plea-bargaining markets could use a database of prices. A database of past trial and plea-bargain outcomes would give lawyers access to information that some repeat players already know (individually or collectively as an office). Plea bargains, however, are often complex, multidimensional agreements in which the parties need to know the defendant's criminal history and the strength of the evidence as well as the likely sentence. While a database could not capture these facts fully, it could at least provide a starting point or relevant anchor for researching, comparing prices, and bargaining.<sup>309</sup>

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ness tampering and intimidation, exceptions to discovery could allow redaction of witnesses' names and identifying information, especially in violent, drug, gang, and organized-crime cases. Hearsay rules could also allow admission of witnesses' past statements whenever there is evidence of tampering or violence, thus undercutting the incentives to tamper. *Cf.* FED. R. EVID. 804(b)(6) (creating a hearsay exception for statements offered against parties who engage or acquiesce "in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness"). The difficulty is that it may be hard to detect witness tampering and to prove the party's responsibility or acquiescence. Perhaps a lower standard of proving misconduct might help address this problem.

<sup>305</sup> See *supra* pp. 2498–99.

<sup>306</sup> See, e.g., FED. R. CRIM. P. 12.1, 12.2, 16(b) (providing for advance notice of alibi and insanity defenses, as well as for advance production of documents, tangible objects, reports of tests and exams, and expert witness testimony that the defendant intends to introduce at trial).

<sup>307</sup> See, e.g., FED. R. CRIM. P. 15(b)(2)(B); ALA. R. CRIM. P. 16.2(d); KAN. CRIM. PROC. CODE ANN. § 22-3212(c) (West 2003); LA. CODE CRIM. PROC. ANN. art. 728 (West 2003); N.C. GEN. STAT. § 15A-906 (2003); N.D. R. CRIM. P. 16(b)(2); S.C. R. CRIM. P. 5(b)(2); S.D. CODIFIED LAWS § 23A-13-14 (Michie 2003); WYO. R. CRIM. P. 16(b)(2).

<sup>308</sup> See U.S. CONST. amend. V.

<sup>309</sup> I am indebted to Herb Hovenkamp for this idea.

Another major source of uncertainty is the type of sentencing regime. Indeterminate sentencing produces greater uncertainty.<sup>310</sup> Indeterminacy leaves more room for each side to be overly optimistic, to take risks, to anchor on irrelevant benchmarks, or to otherwise misestimate the likely sentence. This uncertainty is particularly true of charge bargains, as opposed to sentence bargains, because charge bargains leave sentencing entirely up to judges. In effect, indeterminate sentencing plays on overoptimism and loss aversion to encourage bargains. Defendants reject honest, clear sentence bargains because overconfidence or risk seeking leads them to prefer their indeterminate chances after trial. Sentencing guidelines and statutes, in contrast, leave less room for this type of gambling behavior and overoptimism. Whether they are lumpy or finely grained, sentencing guidelines are more predictable and transparent. Guidelines quantify both the size of the range and, in the federal system, the discount for pleading guilty.<sup>311</sup> Guidelines also provide more pertinent anchors, namely the top and bottom of an applicable range, as opposed to the theoretical statutory minimum and maximum. True, defendants can still be overconfident or risk seeking about the probability of conviction even under sentencing guidelines, but the ambit of uncertainty and the resulting overconfidence is smaller. Furthermore, sentencing guidelines help to reframe defendants. Defendants who are free on bail may view any imprisonment in a loss frame. This frame is usually unrealistic because most defendants are eventually convicted.<sup>312</sup> Sentencing guidelines, by establishing clear baselines for likely sentences after trial, help to put defendants into gain frames so that they can see the advantages of pleas or cooperation. In other words, the plea discount (or cooperation discount) is a gain over the sentence at trial, not a loss from a status quo in which the baseline sentence is zero. This gain frame may thus discourage some of the reckless gambles that loss-averse defendants would otherwise take.<sup>313</sup> At least some determinacy in sentencing is

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<sup>310</sup> To some extent, though, informal expectations such as going rates for particular crimes can make indeterminate sentencing more predictable.

<sup>311</sup> See *supra* pp. 2488–89 (discussing the almost automatic discount of roughly 25% or 35% for guilty pleas under the Federal Sentencing Guidelines). Of course, the exact percentage discount varies depending on one's place on the sentencing grid.

The dangers of lumpiness may partially offset the benefits of predictability. See *supra* section I.B; *infra* section III.B.2, pp. 2535–39. Sentencing guidelines can be predictable without being lumpy, however, if they incorporate smooth slopes rather than large bumps or cliffs.

<sup>312</sup> See 2002 SOURCEBOOK, *supra* note 9, at tbl.5.7 (reporting that of 68,418 felony defendants whose cases were terminated in federal court in fiscal year 2001, only 622 (0.9%) were acquitted and 4952 (7.2%) had their cases dismissed); *id.* tbl.5.57 (reporting that in the state courts for the seventy-five largest urban counties in 1998, only 1% of felony defendants were acquitted and the cases of another 27% were dismissed).

<sup>313</sup> Good lawyers already reframe clients to see advantageous pleas as gains. But inadequate lawyers may not do as good a job of recognizing and counteracting frames; the result may be dis-



preferable to indeterminacy, and thus clear sentence bargains are preferable to opaque charge bargains.

Another factor that contributes to uncertainty is the inexperience of counsel. In some courts, private lawyers are assigned to represent indigent defendants either off a list or ad hoc, even if they do not handle much criminal work in that court. In others, public defenders handle most of the work. Public defenders are preferable because experienced, specialized repeat players are best able to forecast trial verdicts and sentences, including plea sentences. They can use their expertise to combat overoptimism and risk seeking. By explaining post-trial baseline sentences using past benchmarks, they are better able to reframe defendants and show that advantageous pleas are gains. They know the intricacies of the sentencing system and are less likely to overlook potential discounts or opportunities to bargain before indictment. In addition, they have developed bonds of trust with prosecutors and judges. Thus, they are better able to secure informal discovery, assess the other side's bargaining flexibility, and suggest prices for pleas by anchoring on comparable cases. Of course, there will always be some new prosecutors and public defenders in the system, and the cost of their inexperience is unavoidable. But concentrating most of the work among specialist repeat players can minimize the overall cost of inexperience.

Psychological factors also skew assessment of uncertainty. Overconfidence and denial lead defendants to underestimate their chances of conviction. As noted earlier, the best way to debias defendants is to make them consider the weaknesses of their cases.<sup>314</sup> Defense counsel's vigorous presentation of the prosecution's case is one approach; perhaps checklists for new defense lawyers should emphasize this step. Prosecutors can present their cases forcefully to defendants in reverse proffers, and defendants who mistrust their court-appointed lawyers may (oddly enough) trust prosecutors more.<sup>315</sup> More formal mechanisms, analogous to mini-trials and settlement conferences in civil alternative dispute resolution, could serve the same function. Judges or mediators might give defendants a sense of their likely post-trial or post-plea sentences and the likelihood of conviction. These numbers would then serve as accurate anchors and would frame plea discounts

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parate outcomes. Clients who are too poor to hire good lawyers (and who receive appointed lawyers who happen to be bad) suffer disproportionately. The proposal for explicit sentencing guidelines, by starting all defendants in a gain frame, helps to even out this effect.

<sup>314</sup> See *supra* pp. 2523–24.

<sup>315</sup> See *supra* p. 2525 (discussing reverse proffers). I know that this observation seems odd, but it certainly was true in my experience as a prosecutor and in the experience of some of my colleagues. Defendants who mistrusted their court-appointed lawyers seemed much more willing to listen to a prosecutor's explanation of why the defendant had no chance at trial.

as gains.<sup>316</sup> Moreover, all the previously discussed informational remedies would help defense lawyers to reframe defendants and to limit the potential for overconfidence.

2. *Lumpiness and Rigidity in Sentencing Laws.* — While determinate sentencing is less uncertain than indeterminate sentencing, it risks being lumpy. If we wanted plea bargaining to work like a smooth, efficient market, we would have to iron out its rigidity and lumps. One way to smooth out bargaining is to replace cliff-like statutory minima and maxima with more fine-grained, slope-like adjustments under sentencing guidelines.<sup>317</sup> For example, the career-offender provisions of the U.S. Sentencing Guidelines could have more gradations instead of jumping as much as seven levels at a time.<sup>318</sup>

The more fundamental question is whether we want plea bargaining to track trial shadows smoothly. Right now, the federal sentencing system awards a fixed discount of about 35% for all guilty pleas.<sup>319</sup> Many academics have endorsed this approach, favoring a single fixed discount of up to 50% for pleas instead of case-by-case bargaining.<sup>320</sup>

<sup>316</sup> The federal system and more than half of state systems forbid judges to participate in plea bargaining. See FED. R. CRIM. P. 11(e)(1)(c); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 1057 (2d ed. 2003). But judges can serve both as valuable sources of information and as counterweights to prosecutorial unreasonableness or poor defense counsel. Thus, Alschuler favors allowing judges to participate in the plea-bargaining process, see Alschuler, *The Trial Judge's Role*, *supra* note 94, at 1059–61, 1123–34, and a British law-reform commission favors allowing judges to tell defendants the heaviest sentence they would impose after guilty pleas, see REPORT OF THE ROYAL COMMISSION ON CRIMINAL JUSTICE 112–13 (1993) (Runciman Commission).

<sup>317</sup> Justice Kennedy recently called for such a reform in a speech before the American Bar Association. See Bob Egelko, *High Court Justice Crusades for Mercy: He Calls Sentences Too Severe, Too Long*, S.F. CHRONICLE, Aug. 10, 2003, at A2, LEXIS, News Library, Allnews File. This reform would require Congress to put more trust in the U.S. Sentencing Commission, something that seems unlikely at the moment. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power To Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 303 (2004).

<sup>318</sup> Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(b)(E) (2003) (setting the base offense level at twenty-four for career offenders convicted of crimes with maximum penalties of ten to fourteen years), with *id.* § 4B1.1(b)(F) (setting the base offense level at seventeen for career offenders convicted of crimes with maximum penalties of five to nine years).

<sup>319</sup> As discussed in section I.B, it is unclear whether the standard federal discount is now two levels or whether defendants can still get an automatic three levels simply by pleading guilty immediately. See pp. 2488–89. Two levels would be roughly 25%, depending on where one was on the sentencing grid; three levels would be roughly 35%. The remainder of this discussion uses the 35% figure for purposes of illustration; one could just as easily substitute 25% if that becomes standard.

<sup>320</sup> See, e.g., Alschuler, *The Trial Judge's Role*, *supra* note 94, at 1124–28 (endorsing a uniform discount rate for guilty pleas but proposing that judges should retain some discretion at sentencing); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 222–23 (1977) (proposing an automatic 50% discount for guilty pleas); Harvey S. Perlman & Carol G. Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175, 1264–65 (1979) (proposing an explicit sentencing concession for guilty pleas); Note, *Restruc-*

In theory, there are good reasons not to extend the shadow-of-trial model to its logical conclusion by promoting free, frictionless bargaining calibrated to risk. For one, in case-by-case bargaining prosecutors give the largest discounts to those defendants who face the weakest cases and so are most likely to be innocent. Knowing that they can buy these weaker cases rather cheaply, prosecutors need not worry about dismissing them to avoid embarrassing losses at trial. In addition, Alschuler notes that flexible discounts depend on defendants' wealth, race, and bail status, as well as their lawyers' skills, connections, and threats to make extra work for prosecutors.<sup>321</sup> Conversely, if plea discounts were fixed or capped, prosecutors would be less able to bargain away weak cases. Because prosecutors would be able to offer only limited plea discounts, innocent defendants (or those facing the weakest cases) would not likely accept the offered plea bargains. Prosecutors would thus be reluctant to pursue charges in the weakest cases and would be more likely to dismiss them to avoid risking loss at trial. True, loss aversion would deter prosecutors from bringing some meritorious cases to protect their reputations and win-loss records. This prosecutorial caution, however, would be a price worth paying to deter prosecutions of the possibly innocent.

In practice, however, fixed discounts do not stop bargaining, because they are hard to enforce. Here, as in other markets, price controls lead to black markets and widespread evasion. Fixed discounts are unworkable in indeterminate-sentencing states, as there is no clear post-trial sentence on which to base the discount. Even under determinate sentencing, fixed discounts are manipulable in practice. The Federal Sentencing Guidelines' automatic 35% discount has not stopped the parties from agreeing to even greater concessions. An empirical study suggests that 20% to 35% of federal plea bargains evade the Guidelines' strictures.<sup>322</sup> Parties do this by manipulating charges, facts, guidelines adjustments, and terms of cooperation.<sup>323</sup> They can thus modify the base sentence (by, for example, filing charges with low statutory maxima) and increase the percentage discount off that sentence. Because prosecutors retain broad charging discretion, there is no neutral baseline on which to base fixed discounts. As long as prosecutors can manipulate baseline charges, trying to cap discounts is hopeless. Even within the Guidelines, parties negotiate for extra dis-

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*turing the Plea Bargain*, 82 YALE L.J. 286, 301-02 (1972) (proposing a uniform discount rate for guilty pleas).

<sup>321</sup> See Alschuler, *The Trial Judge's Role*, *supra* note 94, at 1125-26.

<sup>322</sup> See Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 845 (1992).

<sup>323</sup> See *id.*

counts by striking cooperation agreements.<sup>324</sup> Thus, skilled defense lawyers can extract greater concessions, and prosecutors can offer larger discounts to get rid of weak cases. The attempt to stop or cap bargaining has simply driven it underground, putting an even greater premium on defense attorneys' knowledge of these hidden practices. Those defendants who can afford the best defense lawyers benefit the most, creating disparities based on wealth.<sup>325</sup>

The main effect of large fixed discounts is to confer windfalls on defendants who have little hope of acquittal. In addition, large fixed minimum discounts distort the shadows of trials. They fail to differentiate moderately strong cases from rock-solid ones with no doubts about guilt. Defendants in both kinds of cases plead guilty instead of going to trial. Police and prosecutors therefore have less incentive to prefer the strongest cases. A fixed 35% discount means that everyone gets the same automatic discount, whether his defense has a 0% or 25% chance of success. Prosecutors need not offer any additional concessions to buy off the defense that is 25% likely to succeed. Thus, defenses that are less than 35% likely to succeed have no effect on sentences.<sup>326</sup> Some defenses, such as entrapment, are fact-bound and require resolution at trial rather than on pretrial motions to suppress or dismiss. If a defendant must plead guilty before litigating the defense, and if the chance of success is less than 35%, the defense will

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<sup>324</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003).

<sup>325</sup> If fixed discounts were nevertheless effective at capping bargaining, their effects might be perverse. Prosecutors might still bring weak cases and might find it difficult to dismiss them after discovering their weaknesses. Prosecutors would be unable to offer large discounts to get rid of weak cases, leading defendants facing the weakest cases to go to trial. If we hypothesize that a weak case involves a one-third chance of acquittal on average, two-thirds of these defendants would be convicted. They would then serve substantially longer sentences than those defendants who face strong cases and accept the fixed plea discount. The perverse distributive effect might be to overpunish the majority of weak cases, in which defendants might be innocent, and to underpunish strong ones, in which there are few doubts about guilt. It is, however, difficult to know a priori how much caps would limit bargaining in practice. I am indebted to Bill Stuntz for this point.

<sup>326</sup> See *supra* p. 2489. More precisely, if the chance of the defense's success, plus the saved transaction costs and opportunity costs of trial, plus the value of risk aversion and discounting of future costs, all add up to 35% or less, the defense will have no effect on the plea bargain. If these factors combined exceed 35%, they will affect the bargain only to the extent that they exceed 35%.

One argument in favor of fixed sentencing discounts is that a fixed discount creates a focal point within a large bargaining zone (the zone between each party's reservation price, in which any deal is mutually advantageous). A focal point helps the parties to reach deals more quickly and to avoid impasses and the inefficient costs of protracted bargaining. But a fixed discount of much less than 35% (say, 15%) would serve the same function while creating less pressure on innocents and fewer inequities based on defendants' tactical decisions to plead. Furthermore, the focal-point theory assumes that the parties will wind up at the 35% discount. More likely, however, the discount will serve as a starting point for bargaining, with the parties still haggling over additional discounts. If this is the case, why not start the bargaining at 0% or 10% instead of 35%?

not affect the (nonexistent) trial or sentence. Thus, the entrapment defense can have no marginal deterrent effect on police misconduct.<sup>327</sup>

I have argued elsewhere that *Apprendi v. New Jersey*<sup>328</sup> has a similar effect on sentencing enhancements.<sup>329</sup> By moving sentencing enhancement issues to trial, *Apprendi* requires defendants who are unwilling to go to trial to surrender enhancements in plea bargains. Defendants now have no way both to challenge the enhancement and to claim the discount. Thus, defendants must forgo challenging enhancements to plead guilty. They must take the bird in the hand (a guaranteed plea discount) instead of the bird in the bush (a possible win on enhancements at trial). The rights become meaningless in practice and do not influence prosecutors or police. In other words, the theoretical trial rights cast no shadows because in most cases the defendant must plead and take the automatic 35%.<sup>330</sup>

If there is to be a fixed minimum discount, it should be smaller than the current federal discount, say 10% or 15%.<sup>331</sup> Moderately strong defenses and sentencing enhancements would become viable issues for trial (and hence negotiable) instead of being overwhelmed by

<sup>327</sup> If the law awarded fixed discounts rather than a range, there would be other ways to keep plea discounts from overwhelming defenses such as entrapment. One way is to redraw the legal standard for entrapment, for example, to make it more objective and thus resolvable by motion before trial. The parties could then choose either to litigate before bargaining or to bargain away viable rights to bring motions. Another way is to make adjustments available at sentencing so that they are not automatically waived by guilty pleas. Defendants could earn the benefits of pleading guilty while still reserving the right to litigate limited issues at sentencing.

<sup>328</sup> 530 U.S. 466 (2000).

<sup>329</sup> See Bibas, *supra* note 97, at 1148–51, 1152–67.

<sup>330</sup> See *id.* at 1152–67 (also explaining why defendants cannot simply waive their *Apprendi* rights at the trial stage but still litigate them at sentencing).

<sup>331</sup> See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–61 (1981) (suggesting fixed discounts of 10% to 20% to avoid pressuring those who have viable defenses); William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 190 n.62 (1988) (quoting Schulhofer from a 1986 U.S. Sentencing Commission hearing, at which he stressed the need to keep plea discounts to 10% to 15% at most to prevent windfalls to clearly guilty defendants and to prevent pressuring innocent defendants to plead guilty); Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 782 (1998) (proposing a strict sentencing discount of 10% to 20%); see also Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 792–94 (1980) (suggesting small fixed concessions for pleas, coupled with possible additional concessions for case weaknesses unrelated to factual guilt, such as potential exclusionary rule violations).

Because defendants greatly discount imprisonment that is far off in the future, very long sentences might require higher discounts. See Easterbrook, *Criminal Procedure*, *supra* note 2, at 314 tbls.1–2 (discounting sentences to present value using discount rates of 10% or 20% and various probabilities of conviction, and showing that sentences of ten years or more would require plea discounts in excess of 15% to offset defendants' discount rates for future imprisonment). To put the point in lay terms, a person who faces decades in prison even after a plea sees little reason not to roll the dice at trial; either way, the penalty seems like the rest of the defendant's life.

huge plea discounts. They would thus be more likely to influence police conduct and prosecutors' behavior in bringing cases. If prosecutors brought weak cases at all, they would at least have to offer larger discounts. Prosecutors would thus have some incentive to bring stronger cases.<sup>332</sup>

3. *Ameliorating the Influence of Money.* — Money plays a tremendous role in criminal justice. In particular, the underfunding of indigent defense causes many of the problems highlighted in this Article.<sup>333</sup> Various litigation or legislative strategies may increase funding to more adequate levels.<sup>334</sup> But assume that these reforms do not solve the funding problem. In a world of chronically strapped budgets, how can we best use the limited resources that we have?

The analysis of repeat players and expertise in plea bargaining should inform how to allocate scarce funding for court-appointed counsel systems. Most likely, defendants are better off with public defenders than with private attorneys appointed ad hoc because the former are more experienced, high-volume repeat players in the criminal arena.<sup>335</sup> They know the nuances of sentencing guidelines, the intricacies of cooperation, and the going rates for various crimes. They can counteract unrealistic frames by explaining to their clients that any sentence more lenient than the going rate is a gain or a win. Experienced public defenders use lenient past dispositions as baseline precedents to negotiate for more favorable outcomes.<sup>336</sup> They can prioritize among their many cases, allocating time and effort to those cases that would benefit most from them. True, public defenders may suffer

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<sup>332</sup> If the law awarded fixed discounts rather than a range, there would be other ways to keep plea discounts from overwhelming defenses such as entrapment. One way is to redraw the legal standard for entrapment, for example, to make it more objective and thus resolvable by motion before trial. The parties could then choose either to litigate before bargaining or to bargain away viable rights to bring motions. Another way is to make adjustments available at sentencing so that they are not automatically waived by guilty pleas. Defendants could earn the benefits of pleading guilty while still reserving the right to litigate limited issues at sentencing.

<sup>333</sup> See *supra* section I.A.2, pp. 2476–86.

<sup>334</sup> See, e.g., *State v. Peart*, 621 So. 2d 780, 790–91 (La. 1993) (finding the New Orleans public defender system to be unconstitutionally overburdened, and creating a presumption of ineffective assistance of counsel until legislative action reduced workloads per attorney and increased other resources); Ronald F. Wright, *Resource Parity for Defense Counsel and the Struggle Between Public Choice and Public Ideals*, 90 IOWA L. REV. (forthcoming 2004) (manuscript at 11–19, 29–38, on file with the Harvard Law School Library) (suggesting legislative strategies for improving funding of defense counsel, such as requiring parity of funding for prosecutors and defense counsel).

<sup>335</sup> Some private attorneys on appointment panels or pools may also be repeat players, though probably to a lesser degree.

<sup>336</sup> Experienced defense counsel's use of past bargains as precedents partially explains why veteran prosecutors tend to mellow over time. Once a prosecutor shows mercy in one case, experienced defense counsel cite the merciful disposition as precedent to obtain equally or more favorable deals in the future. Cf. HEUMANN, *supra* note 14, at 120–21.



burnout and may sink into routine ways of disposing of cases instead of being willing to fight. They may also feel pressure from judges and prosecutors not to rock the boat too much. But, on balance, the greater expertise and credibility these repeat players gain may benefit clients in the long run.

Money also plays a big role in the problem of pretrial detention because many poor defendants cannot make bail. Pretrial detention sets the status quo at imprisonment and so frames plea bargains as gains (less time remaining in prison). As a result, defendants may be more pliable in bargaining. Detention makes it harder for defendants to meet with their lawyers, which impedes the trust and flow of information needed for bargaining. And in small cases, the length of detention may dwarf the likely prison sentence, coercing poor defendants to plead to misdemeanors to get out of jail.<sup>337</sup> A partial solution would be to use substitutes for monetary bail. For example, electronic monitoring, nonmonetary collateral, and cosigners may ensure that defendants in less serious cases do not flee. Many jurisdictions employ these alternatives already, but they could do so even more aggressively.<sup>338</sup> This solution, however, cannot work for defendants who are detained because they may pose a danger to the community. For these defendants, courts should act more swiftly in order to minimize the coercive effect of protracted pretrial detention.

In addition, lack of money impairs investigative and other resources. While increased funding is the only obvious solution, public defenders may make the best use of limited funds because of economies of scale. For example, a large public defender's office can keep a private investigation staff, spreading the cost over the office's aggregate budget. A solo practitioner, in contrast, must hire an investigator (at greater expense) each time the need arises.

4. *Managing Self-Interest and Reducing Agency Costs.* — Money is also closely bound up with self-interest, agency costs, and incentives. Attorney fee structures create inadequate incentives for zealous representation and hard bargaining. Flat-fee arrangements for defense counsel encourage quicker pleas.<sup>339</sup> An hourly fee arrangement gives

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<sup>337</sup> See *supra* section I.C.

<sup>338</sup> For example, thirty of the fifty states use electronic monitoring to track roughly 30,000 persons, though this figure also includes those already convicted and sentenced to home confinement. Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 374 (1995). Nevertheless, in the context of America's vast criminal justice system, "home confinement [including electronic monitoring] is a relatively novel option and small in size." Dorothy K. Kagehiro, *Psycholegal Issues of Home Confinement*, 37 ST. LOUIS U. L.J. 647, 674 (1993).

<sup>339</sup> See *People v. Winkler*, 523 N.E.2d 485, 487 (N.Y. 1988); Alschuler, *The Defense Attorney's Role*, *supra* note 11, at 1200 (noting that many criminal defense attorneys are paid flat fees up front and that "once the lawyer has collected his fee, his personal interests lie in disposing of the

attorneys at least a modest incentive to invest work, though often the hourly fee is inadequate to encourage work. Public defenders' fixed salaries provide no additional incentive to go to trial, beyond the idealism and esprit de corps that motivate many public defenders.

One can imagine alternative fee structures. For example, defense lawyers could receive one lump sum for pleading a case out, another for a motion to suppress, and one more for trial.<sup>340</sup> Judges, however, might be reluctant to embrace a system that pays more for bothersome trials, so fixed hourly rates might work better. If these rates were set adequately, they could partly offset the disincentive to go to trial. Compared with salaries or flat fees, effort-based or hourly fees would better discourage sloth, encourage clients to trust their lawyers, and lead prosecutors to offer better bargains to lawyers who would otherwise put up a fight.<sup>341</sup> Overly generous rates might encourage protracted litigation, but our underfunded system is in no danger of being too generous.

Self-interest and risk aversion motivate most line attorneys to safeguard their reputations, win-loss records, and egos by not risking losses at trial. Supervisors, however, do not necessarily share these interests. Supervisors can promulgate policies that require supervisory review and approval for charging and plea bargains. Line prosecutors and defense counsel would then have to justify the bargains they offer and could not rely on self-interested reasons, at least not openly. Reducing all plea bargains to writing would allow supervisors and central administrators to monitor practices in the field. The U.S. Department of Justice had such policies in place during the first Bush Administration and is moving to reinstate them now.<sup>342</sup> A scheme of centralized con-

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case as quickly as possible"); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 522-23 (1991).

<sup>340</sup> See Lushing, *supra* note 339, at 515 (describing the "stairstep" method of setting a fee for each stage of a case).

<sup>341</sup> This analysis assumes that defense attorneys have some elasticity in the number of hours they choose to work and the number of cases they handle. A public defender in a busy office could, in theory, work a fixed number of hours and be fully booked with cases regardless of how quickly he processes each case. This perfectly busy public defender would have no incentive to be slothful, and his fee structure would be irrelevant. It is hard to imagine, however, that many public defenders' offices approximate the perfectly busy, inelastic hours model. In my experience, plea bargaining means that both prosecutors and criminal defense counsel have more freedom to go home in time for dinner, while going to trial means working late. When a lawyer disposes of a case, a new case does not instantly appear and consume all of the time saved (though new case assignments, of course, eventually do appear).

<sup>342</sup> See Memorandum from George J. Terwilliger, III, Acting Deputy Attorney General, U.S. Dep't of Justice, to Holders of United States Attorneys' Manual Title 9 (Feb. 7, 1992), *reprinted in* 6 FED. SENTENCING REP. 350, 350 (1994); U.S. DEP'T OF JUSTICE, PLEA POLICY FOR FEDERAL PROSECUTORS (1989), *reprinted in* 6 FED. SENTENCING REP. 347, 347-49 (1994). Attorney General Reno loosened a number of these policies during the Clinton administration. Her phrasing is more general and less precise about the level of review and documentation re-

trol and review has regulated plea bargaining effectively in the New Orleans District Attorney's Office.<sup>343</sup> Public defender offices could do something similar to vet defense attorneys' plea recommendations.

Clearer standards for ineffective assistance of counsel could better regulate defense representation during plea bargaining. Currently, *Strickland v. Washington*<sup>344</sup> eschews clear rules for determining defense counsel's effectiveness. Instead, it asks whether defense counsel's performance "fell below an objective standard of reasonableness" considering all of the circumstances.<sup>345</sup> This vague, highly deferential test has led some judges to rubber-stamp a defense lawyer's inexplicable failure to engage in any plea bargaining at all before entry of a guilty plea.<sup>346</sup> Even when defense lawyers do plea bargain, the test for prejudice is whether, but for attorney errors, a defendant would have insisted on going to trial.<sup>347</sup> This inadequate test ignores how laziness and errors can lead to worse plea bargains for defendants who would have struck some kind of bargain in any event. Clearer checklists or rules, such as a rule requiring some plea discussions, and a tighter standard for prejudice might help.<sup>348</sup>

Perhaps the most radical solution to these agency cost problems is to give judges a more active role in reviewing plea bargaining. More thorough judicial oversight could catch the most blatant types of poor lawyering. By digging into the evidence, judges might gain a sense of how strong the government's case is and thus how large a discount to award at sentencing.<sup>349</sup> Ideally, the judge who heard the plea colloquy

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quired: "To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied." Memorandum from Janet Reno, Attorney General, U.S. Dep't of Justice, to Holders of U.S. Attorney's Manual, Title 9 (Oct. 12, 1993), *reprinted in* 6 FED. SENTENCING REP. 352, 352 (1994). Attorney General Ashcroft has moved to reinstate the stricter policies. See Memorandum from John Ashcroft, Attorney General, U.S. Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003), [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm).

<sup>343</sup> See Wright & Miller, *supra* note 145, at 62-66 (describing the office's management process for cases and plea bargains).

<sup>344</sup> 466 U.S. 668 (1984).

<sup>345</sup> *Id.* at 687-88.

<sup>346</sup> See, e.g., *People v. Palmer*, 643 N.E.2d 797, 804-05 (Ill. 1994).

<sup>347</sup> See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

<sup>348</sup> See Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. (forthcoming) (manuscript at 5-6, on file with the Harvard Law School Library).

<sup>349</sup> Of course, judges are not perfect. They are paid salaries and so have no financial incentive to invest extra work. They have little reputational incentive to scrutinize plea bargains carefully, they have large caseloads, and they may face reelection by voters who do not sympathize with defendants. Despite all of these shortcomings, judges have the power to check prosecutorial harshness. This judicial check is no substitute for adequate defense counsel, but it can supplement defense counsel's role. The less power judges have, the more leverage prosecutors have to raise sentences unilaterally. This is one of the brilliant insights of George Fisher's history of plea bargaining. Plea bargaining should involve a balance of power, and the constriction of the judi-

and factual basis would also perform the sentencing, instead of farming out pleas to magistrates as many federal district judges do.<sup>350</sup> One fear about judicial involvement is that if negotiations break down, the judge who tried to broker the plea might be biased at trial.<sup>351</sup> To avoid this problem, when defendants reject judges' advice to plead, courts could automatically reassign their cases to different judges for trial.<sup>352</sup> If judicial involvement is too radical or not feasible, nonjudicial mediators could give advice and try to debias the parties.

Self-interest afflicts not only lawyers, in the form of agency costs and incentives, but also their clients, by unconsciously biasing their decisions in self-serving ways. For example, defendants try to preserve their self-images and reputations through denial.<sup>353</sup> These denials are sometimes for public consumption, but they often involve distorted memories and interpretations of events.<sup>354</sup> Defendants in denial may be unwilling or unable to acknowledge the force of the evidence against them. As a result, they may reject fair plea bargains and proceed to preordained convictions at trial. Prosecutors and defense counsel should respond by firmly challenging denials, which is a "very effective" way to overcome them.<sup>355</sup> Defense counsel can forcefully simulate the prosecutor's likely opening statement, for example. Prosecutors can present the evidence that they would put on at trial at a reverse proffer.<sup>356</sup> Once defendants come to view their cases through others' eyes, they can better strike bargains in the shadow of expected trial outcomes. When debiasing, however, lawyers must be careful not to abuse the deference that clients accord to them. Lawyers should illuminate clients' interests and irrationalities, but ultimately they must not override clients' choices.

A milder problem than outright denial is overconfidence. Overconfidence not only affects computations of probability, but also biases parties' interpretation of new information in self-serving ways. Once again, counsel can ameliorate the problem by presenting the opposite point of view. Counsel can also offer plausible alternative frames and anchors (such as the going rate in recent cases), which clients may not

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cial role has left prosecutors as unchallenged masters of the field. See FISHER, *supra* note 17, at 206-29.

<sup>350</sup> See Bibas, *supra* note 158, at 1410.

<sup>351</sup> See Kathleen Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R.-C.L. L. REV. 29, 44-45 (1974).

<sup>352</sup> See Note, *supra* note 320, at 302, 306.

<sup>353</sup> See *supra* section II.B.

<sup>354</sup> Cf. Bibas, *supra* note 158, at 1394-95 (discussing the attitudes and cognitive distortions that lead sex offenders to lie and deny or minimize guilt).

<sup>355</sup> *Id.* at 1396 (quoting W.L. Marshall, *Treatment Effects on Denial and Minimization in Incarcerated Sex Offenders*, 32 BEHAV. RES. & THERAPY 559, 563 (1994)) (internal quotation marks omitted).

<sup>356</sup> See *supra* p. 2525.

have considered. The discovery and compensation reforms proposed above could lead clients to trust counsel's debiasing advice more. Clients will be more likely to listen if their counsel are well informed and lack obvious financial incentives to shortchange them. Additionally, counsel can challenge defendants to list the weaknesses in their own cases. They can also use the reactions of mediators or mock jurors to give defendants additional perspective.

5. *Demographic Variations.* — Many of the psychological biases and heuristics described in Part II vary greatly depending on one's sex, age, class, intelligence, or temperament.<sup>357</sup> These variations threaten to introduce troubling disparities and inequities based on legally irrelevant characteristics. What can the legal system do to even out these heuristics and biases?

The first step is to use general debiasing tools. If older people and women are particularly susceptible to framing, defense counsel must be vigilant in offering alternative frames. Sentencing guidelines may break the habit of loss framing in criminal cases by making the sentence after trial the natural baseline. If less intelligent young men are especially overconfident, defense counsel must vigorously press them to consider the weaknesses in their cases. Again, sentencing guidelines reduce the room for overconfident predictions of how judges will sentence. If less intelligent young men and recidivists have high discount rates, defense counsel must vividly emphasize the regret they may feel in their fourteenth year in prison. If young men take more risks, defense counsel should suggest gain frames that reduce risk-seeking loss aversion. These methods, though far from perfect, are at least a start.

Calling attention to these problems may help to solve them. Further research and anecdotes from experienced defense attorneys may highlight tactics that work particularly well with certain groups. For example, impulsive, risk-seeking defendants who are inclined to gamble may listen to prison inmates who took the same foolish gamble and now regret it. Counsel must not, however, assume that stereotypes are always accurate or overlook the problems their individual clients actually face.

Beyond this point, however, there may be little that lawyers can do. High discount rates and risk preference spring in part from a deep-seated impulsiveness and perhaps from low intelligence. Lawyers can neither change their clients' personalities nor override their choices. Any system that allows plea bargaining allows clients' reckless or unwise judgments to raise their sentences. This is one of Alschuler's most powerful indictments of plea bargaining: it varies sentences based in part on tactical choices unrelated to retribution, deterrence, or inca-

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<sup>357</sup> See *supra* pp. 2502, 2505–07, 2511–12.

pacitation.<sup>358</sup> Perhaps impulsive clients are more dangerous and need somewhat more deterrence, incapacitation, and rehabilitation. But there is little reason to believe that these justifications for punishment correlate well with the stupidity or recklessness of a particular plea. Short of abolishing plea bargaining entirely, there is no obvious remedy.

### CONCLUSION

Trials affect pleas, but so do many other influences unrelated to the merits. These influences would be cause for concern even if they operated uniformly and systematically, but they do not. They vary widely and introduce troubling disparities based on wealth, class, temperament, intelligence, age, and sex. Lawyers are the linchpins of the plea-bargaining system. But they differ greatly in their abilities, skills, and resources, and in their incentives to secure discovery, counteract biases, navigate intricate sentencing laws, and bargain with repeat players. There is precious little oversight of what these lawyers do. In the Introduction, I noted that the shadow-of-trial model purports to justify plea bargaining, obviate additional safeguards on bargains, calibrate sentences to culpability and proof, and deter entrapment and prosecution of weak cases.<sup>359</sup> If the shadows of trials are so fuzzy and warped, however, we should have much less faith in unregulated plea bargaining. Further research must consider more safeguards, such as discovery mechanisms, debiasing interventions, use of mediators or other structured dispute resolution, and judicial involvement.

One of the broader lessons of this Article is the danger of analogizing criminal procedure to civil procedure. The shadow-of-trial model was originally developed in civil law but later applied to criminal cases. The two types of litigation, however, are vastly different. Civil cases involve extensive discovery and significant monetary incentives for lawyers (often contingency or sizable hourly fees). Each side represents an identifiable client with clear monetary interests and has incentives to maximize its outcome. Civil litigants do not risk their liberty and are never detained pending trial. A few kinds of civil litigation stir up strong emotions: divorce, child custody, and employment discrimination come to mind. But on the whole, the stakes are monetary and fungible, and the passions and biases do not run as deep. Even in the civil arena, however, the shadow-of-trial model is prob-

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<sup>358</sup> See Alschuler, *supra* note 114, at 932; Alschuler, *The Changing Debate*, *supra* note 11, at 652–83.

<sup>359</sup> See *supra* pp. 2466–77.



lematic because civil juries are rare and send at best muffled, distorted signals.<sup>360</sup>

Criminal litigation, in contrast, is greatly complicated by the structure of representation and funding. Prosecutors represent no individual client, have little oversight, and have few incentives to go to trial. As Bill Stuntz's excellent contribution to this issue notes, prosecutors do not simply maximize sentences as a contingency-fee plaintiff's lawyer might maximize damages. Rather, they induce pleas with deep discounts off inflated post-trial sentences. They can maximize their win-loss rates, leisure time, and volume of cases brought, while still remaining tough enough to satisfy their and the public's sense of justice.<sup>361</sup> Appointed defense counsel are not paid by their clients and have inadequate resources and incentives. Criminal defendants have little information about lawyer quality, little trust in appointed lawyers, and little ability to shop for better lawyers, especially if the state is paying for them. Defense lawyers who are not repeat players are at a distinct disadvantage in getting informal discovery, manipulating complex sentencing rules, and bargaining with unfamiliar prosecutors. Public funding is often inadequate. Those with money spend much more on counsel and make bail, while those without money might not make bail and must often plead guilty to get out of jail.

In addition, many of the litigants in criminal cases have particular psychological difficulties. Criminal defendants are disproportionately poor young men. Many are mentally retarded, and many others are of low intelligence. They are likely to lack self-control and to be impulsive, overconfident, or even in denial because certain crimes are so psychologically freighted. Repeat offenders, especially violent and drug offenders, have high discount rates and strong risk preferences. Discovery limits and information deficits compound these problems, creating uncertainty and leaving plenty of room for overconfidence and risk taking. Pretrial detention can affect negotiations by making defendants unhappy, angry, anxious, or fearful. One would expect defendants to be more angry or anxious than civil litigants because their lives or liberties are at stake.

In short, civil negotiation looks more like a classic business decision, with parties haggling over how to split a pot of money. Criminal negotiation involves higher stakes, less information, less adequate funding and incentives, more variable representation, and more structural and psychological distortions. Thus, studies of civil negotiations

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<sup>360</sup> See Galanter, *supra* note 10, at 251.

<sup>361</sup> See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2554 (2004).

can provide a starting point for understanding plea bargaining — but no more.

Another difficulty is that plea bargaining hides within a low-visibility process. Scholars tend to gravitate toward studying criminal jury trials,<sup>362</sup> perhaps in part because the information is public and readily accessible. A few researchers have been able to observe bargaining or to review prosecutors' files,<sup>363</sup> but by and large attorneys are reluctant to let outsiders into the plea-bargaining process. Ideally, a researcher's privilege would allow scholars access in exchange for confidentiality of individually identifiable information.<sup>364</sup> Short of that, scholars need to study the problem from other angles. They can use databases to compare charges and sentences, can interview lawyers and defendants, and can test hypothetical scenarios on these parties.

One final observation is that this Article takes the behavioral law and economics genre in a new direction. To oversimplify, the psychological literature on civil negotiation focuses on factors that affect settlement rates and so may prevent wealth-maximizing deals. In other words, the primary concern is with the raw percentage of deals being struck and how to improve that percentage. While this emphasis on maximizing efficiency is important, it neglects the distributional justice concerns that loom large in this Article. Perhaps 95% of defendants would still plead guilty in a flawless bargaining system, but the terms of their deals might look very different. Age, sex, wealth, intelligence, lawyer quality and self-interest, and other irrelevant factors create distributional inequities. These issues of distribution, power, and inequity deserve much closer attention, regardless of whether they reduce aggregate efficiency.<sup>365</sup>

The simplistic shadow-of-trial model has given scholars, courts, and legislators a false sense of confidence in the plea-bargaining system. We cannot demolish the huge edifice of plea bargaining, but we can at least expose and reform its flaws and inequities. Sentencing guidelines, mandatory minima, and new psychological research have created or exposed new difficulties and weaknesses — ones that this Article only begins to explore. Identifying the complicated reality is the first step toward improving it.

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<sup>362</sup> See Bibas, *supra* note 97, at 1149 & n.328 (noting that scholarship on jury trials is ten times as copious as scholarship on guilty pleas, even though guilty pleas are twenty-four times more numerous).

<sup>363</sup> See, e.g., HEUMANN, *supra* note 14 (studying Connecticut state courts); Wright & Miller, *supra* note 145, at 58–84 (examining the New Orleans District Attorney's Office).

<sup>364</sup> See Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 251–54 (asserting the need for a researcher's privilege, which would remove "the obstacles that exist to the gathering of empirical data about legal conflict").

<sup>365</sup> I am grateful to Jerry Wetlauffer for this important observation.