

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

September 2020
Fact Sheet

When most people think of the American justice system, they likely picture a courtroom with lawyers, a judge, and a jury waiting to determine the facts of the case and provide a just outcome. In fact, criminal trials are rare. Instead, most criminal cases that result in conviction—97 percent in large urban state courts in 2009, and 90 percent in federal court in 2014—are adjudicated through guilty pleas. Of these cases adjudicated through guilty pleas, researchers estimate that more than 90 percent are a result of plea bargaining—an informal and unregulated process by which prosecutors and defense counsel negotiate charging and sentencing concessions in exchange for guilty pleas and waivers of constitutionally guaranteed trial rights.

In recent years, mounting concerns about plea bargaining's coercive nature, its role in encouraging the widespread forfeiture of procedural protections, and its critical role in fueling mass incarceration have stimulated further urgency in understanding how the process works. In order to provide an accessible summary of existing research to policymakers and the public, the Vera Institute of Justice (Vera) examined the small but growing body of empirical studies that has developed around plea bargaining. The result is a mix of complicated, nuanced, and sometimes contradictory research findings.

Findings

The seven focus areas covered by this report include:

- > **Coercive factors.** There is a strong association between pretrial detention and guilty pleas, as people who can't afford bail agree to plea deals to secure their release from jail as quickly as possible. When prosecutors have the option to pursue the death penalty, people are also more likely to plead guilty.
- > **Legal case characteristics.** Factors like the strength or volume of evidence in a case are widely assumed to affect the harshness of plea offers made by prosecutors and the likelihood that the person who is charged will accept. Research into both real and hypothetical cases suggests this is true—though not consistently and not by all metrics.
- > **Systemic inequities.** Conscious and unconscious biases create disadvantage and inequality across race, ethnicity, gender, and age, but because of the informality of plea bargaining, it is difficult to measure or monitor the effects of these biases. What appears certain is that, on average, Black men receive the least lenient plea deals, and white women receive the most lenient.
- > **The criminal law.** Variations in criminal code structures that offer prosecutors more or fewer charging options can significantly affect bargaining behavior.
- > **Caseloads.** Although prosecutorial caseload is often pointed to as a motivator for plea bargaining, studies found little association between overall caseload and the likelihood of an offer being made at all. Importantly, no studies measured the impact of defense counsel caseloads on plea bargaining. That said, it is undeniable that, should everyone who is charged with a crime take their case to trial, the criminal legal system would grind to a halt under the volume of cases.
- > **Trial penalty.** A substantial body of literature explores the so-called “trial penalty”—the difference between a criminal sentence produced by guilty plea versus by trial. Although examining this penalty is difficult, the general consensus is that the “bargain” underlying a plea bargain—the reduction of potential sentences—exists and is significant.

Vera INSTITUTE
OF JUSTICE



SUPPORTED BY THE JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION

For more information

To read the full report, visit www.vera.org/in-the-shadows. For more information about this report, contact Léon Digard, research strategy editor, at ldigard@vera.org. For more information about Vera's work

to reduce the use of jails, contact Elizabeth Swavola, acting project director, at eswavola@vera.org. For more information about Vera, visit www.vera.org.

This report was created with support from the John D. and Catherine T.

MacArthur Foundation as part of the Safety and Justice Challenge, which seeks to reduce overincarceration by changing the way America thinks about and uses jails. More information is available at www.SafetyandJusticeChallenge.org.

> **Innocence.** It is indisputable that some fraction of people who plead guilty are, in fact, innocent. Determining how many there are and what ultimately influences these pleas has frustrated researchers who must depend on the small number of exonerations or on self-reporting. Despite these limitations, research does confirm that among the millions of cases settled by guilty pleas each year, a meaningful number of people are actually innocent. It appears likely that false guilty pleas are more frequent for people who face lesser charges, especially misdemeanors, who must balance the time and cost—both financial and personal—of a

trial against the ability to immediately secure their freedom from jail.

That plea bargaining should remain so obscured, that its biases and injustices should prove so impervious to being seen and understood, is beyond problematic. Fixing the major failings of America's justice system—including mass incarceration and systemic racism—is made exponentially more difficult when the most common and most fundamental of court operations is largely invisible. It is therefore incumbent upon court actors, legislators, advocates, researchers, and the community to demand a system that embraces greater transparency.

Pretrial detention increases a person's likelihood of pleading guilty by 46 percent.



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

