



## ARTICLE

**Open Prosecution**

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**Abstract.** Where the vast majority of criminal cases are resolved without a trial, the criminal system in the United States is a system of pleas, not trials. While a plea, its terms, and the resulting sentence entered in court are all public, how the outcome was negotiated remains almost entirely nonpublic. Prosecutors may resolve cases for reasons that are benign, thoughtful, and well-calibrated—or discriminatory, self-interested, and arbitrary—with very little oversight or sunlight. For years, academics and policymakers have called for meaningful data to fill this crucial void.

In this Article, we open the “black box” of prosecutorial discretion by tasking prosecutors with documenting detailed case-level information concerning plea bargaining. This is not a hypothetical or conceptual exercise, but rather the product of theory, design, and

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implementation work by an interdisciplinary team. We collected systematic data from two prosecutors' offices for one year. The Article describes how the data-collection methodology was designed, piloted, and implemented, as well as the insights that have been generated. Our system can be readily adapted to other offices and jurisdictions. We conclude by discussing how documenting the plea-bargaining process can affect prosecution practices, defense lawyering, judicial oversight, and public policy, its constitutional and ethical implications, and its broader implications for democratic legitimacy. An open-prosecution approach is feasible and, for the first time in the United States, it is in operation.

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## Introduction

Where the vast majority of criminal cases in the United States are resolved without a trial, “criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>1</sup> While a plea and the resulting judgment and sentence entered in court are public, the negotiation itself remains almost entirely nonpublic.<sup>2</sup> Prosecutors may resolve cases for reasons that are benign, well-calibrated, and just—or for reasons that are discriminatory, self-interested, and arbitrary—with very little oversight or sunlight.<sup>3</sup> Plea bargaining is thus a “black box,” within which prosecutors have free reign absent strong evidence of discrimination.<sup>4</sup> In a handful of areas, researchers have been able to document racial disparities in charging.<sup>5</sup> In some high-profile cases, DNA tests have exonerated innocent people who pled guilty.<sup>6</sup> Yet despite the known errors and unfairness resulting from the plea process, “little is known” about the process itself and how prosecutors exercise discretion.<sup>7</sup>

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1. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“To a large extent . . . horse trading . . . determines who goes to jail and for how long. . . . [Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.” (first alteration in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))).
  2. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 34 (2002) (“Plea bargaining is inaccessible because bargains are made in the shadows. Only the final product of each negotiation is reported on paper and in the courtroom.”).
  3. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-72 (2004).
  4. *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128-29, 159-62 (2008) (describing the near-absence of external and constitutional regulation of prosecutorial discretion but suggesting the promise of internal regulation).
  5. *See, e.g.*, David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1658-60 (1998). For a study documenting racial disparities in charging decisions, particularly with respect to defendants who lack prior convictions or are only charged with lower-level offenses, *see* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191-92 (2018).
  6. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 151-53 (2011) (describing examples of DNA exonerations following guilty pleas, but also noting how little is known regarding their incidence, including because a plea is often a barrier to postconviction DNA testing and relief).
  7. As one recent report put it, “[L]ittle is known about plea bargaining. Pleas are offered and retracted at the unfettered discretion of prosecutors. Bargains themselves are undocumented and largely unchallenged.” Elizabeth Swavola, *From the Director: Foreword* to RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING, at iii (2020), <https://perma.cc/8DGF-8K3P>.

Regardless of whether a case goes to trial, very little is documented, communicated, or known about the bulk of decisionmaking in criminal cases, even within prosecutors' offices. With respect to plea bargaining specifically, prosecutors rarely document negotiations, and they are not required to do so systematically.<sup>8</sup> As a result, prosecutors, defense lawyers, judges, and the public are left to rely on anecdotal evidence to surmise what factors drive negotiated criminal outcomes.<sup>9</sup> Given the significance of the plea process—which affects constitutional rights, public policy, and legal ethics—we argue that it implicates the core Rawlsian democratic commitment to public reason-giving.<sup>10</sup>

In this Article, we describe how we have opened the “black box” of prosecutorial discretion by collaborating with prosecutors in two jurisdictions to document detailed case-level information concerning plea bargaining. This is not a hypothetical or conceptual exercise, but rather the product of theory, design, and implementation by an interdisciplinary team. For years, academics and policymakers have called for data to fill the crucial void in our understanding of plea bargaining.<sup>11</sup> Existing pilot projects have, however, only collected limited data concerning pleas, focusing instead on initial screening and charging decisions or sentencing data.<sup>12</sup> Efforts by prosecutors to create data dashboards have not resulted in the documentation of plea negotiations.<sup>13</sup>

In this Article, we describe the feasibility and implementation of plea tracking. We have collected systematic data from two prosecutors' offices.<sup>14</sup>

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8. See ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, URB. INST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING: FINDINGS FROM 2018 NATIONAL SURVEY OF STATE PROSECUTORS' OFFICES 1-2, 4 (2018), <https://perma.cc/8VDN-SQAF> (surveying 158 state prosecutors' offices and finding that “many prosecutors have an interest in collecting and using data,” but that it is “uncommon” to have any “systematic approaches for tracking compliance with office policies”). Nor is the role of defense counsel, effective or not, documented in any meaningful way during the plea process. We turn to that concern in Part III below.
  9. Regarding the importance of prosecutorial discretion generally, see, for example, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1326 (2014) (explaining that “[l]egal scholars, judges, and practitioners broadly agree that prosecutorial decisions play a dominant role in determining sentences”); and ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4-5 (2007).
  10. See generally John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 767-72 (1997) (describing the concept of public reason and arguing for its crucial role in democracy).
  11. See *infra* Part I.
  12. See *infra* Part I.
  13. See *infra* Part I.D.
  14. We are grateful to Durham County District Attorney Satana Deberry and her office, including Assistant District Attorney Daniel Spiegel and Judge Alyson Grine, a former assistant district attorney, for their collaboration on the plea tracker described in *footnote continued on next page*

Prosecutors in Durham County, North Carolina, and Berkshire County, Massachusetts, piloted and implemented plea tracking for over one year.<sup>15</sup> This Article discusses the development of these systems and our findings.<sup>16</sup>

The feedback we received from line prosecutors and leadership was positive. It takes less than fifteen minutes to document a typical case. The tracker allows prosecutors to record information about not only plea offers and subsequent negotiations, but also their reasons supporting plea offers. At the heart of the work, prosecutors use a set of factors—including aggravating, mitigating, and collateral-consequence-related factors—to justify a more serious or more lenient plea. In short, the system requires prosecutors to articulate and record their reasoning regarding plea offers. No such structure has existed in the past, although sentencing guidelines may note relevant considerations to guide lawyers and judges in sentencing.<sup>17</sup> We were able to observe and study the reasoning behind plea offers. This system can be readily adopted by other jurisdictions: An open-prosecution approach is feasible and, for the first time, operational.

In Part I, we begin by describing the perennial “black box” problem. This is the result of judicial deference to the “special province” of prosecutorial

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Part II below. We are similarly grateful to former Berkshire District Attorney Andrea Harrington and the Berkshire District Attorney’s Office.

15. For initial news coverage of this work, see, for example, Virginia Bridges, *9 Out of 10 Cases End in Plea Deals. Duke Law, NC Prosecutor Want to Know How*, NEWS & OBSERVER (updated July 15, 2021, 4:05 PM), <https://perma.cc/TX6K-JR9H>; Shira Schoenberg, *Berkshire District Attorney Aims to Open ‘Black Box’ of Plea Negotiations*, COMMONWEALTH (July 15, 2021), <https://perma.cc/2MH6-MNWT>; Henry Gass, *A Step Toward Better Justice: Prying Open the ‘Black Box’ of Plea Deals*, CHRISTIAN SCI. MONITOR (Jan. 12, 2022), <https://perma.cc/23VB-9U9X>. For an op-ed describing the work, see Andrea Harrington, Satana Deberry & Adele Quigley-McBride, *Opinion, Why Prosecutors Must Shine a Light on Plea Agreements*, BOS. GLOBE (updated Oct. 18, 2021, 10:00 AM), <https://perma.cc/L9VZ-UXV9>.
16. Several reports summarizing the first year of data collection were prepared, one for the Durham office and two for the Berkshire office. See generally ADELE QUIGLEY-McBRIDE & BRANDON L. GARRETT, WILSON CTR. FOR SCI. & JUST. AT DUKE UNIV. SCH. OF L., PLEA TRACKING IN THE BERKSHIRE COUNTY DISTRICT ATTORNEY’S OFFICE: PART ONE (2022), <https://perma.cc/URP7-DVHK> [hereinafter QUIGLEY-McBRIDE & GARRETT, PLEA TRACKING IN BERKSHIRE COUNTY PART ONE]; ADELE QUIGLEY-McBRIDE & BRANDON L. GARRETT, WILSON CTR. FOR SCI. & JUST. AT DUKE UNIV. SCH. OF L., PLEA TRACKING IN THE BERKSHIRE COUNTY DISTRICT ATTORNEY’S OFFICE: PART TWO (2022), <https://perma.cc/T9AX-RJTR> [hereinafter QUIGLEY-McBRIDE & GARRETT, PLEA TRACKING IN BERKSHIRE COUNTY PART TWO]; KEVIN DAHAGHI, CATHERINE GRODENSKY, ELIZABETH GIFFORD, BRANDON L. GARRETT, WILLIAM CROZIER, ADELE QUIGLEY-McBRIDE, JENNIFER TEITCHER & LAUREN CLATCH, WILSON CTR. FOR SCI. & JUST. AT DUKE UNIV. SCH. OF L., PLEA TRACKING IN THE DURHAM COUNTY DISTRICT ATTORNEY’S OFFICE: ONE-YEAR REPORT (2023), <https://perma.cc/5XCS-BDLS>.
17. See, e.g., 18 U.S.C. § 3553(a) (listing “factors to be considered in imposing a sentence” (capitalization altered)).

discretion, which is largely unfettered by constitutional criminal procedure or statutory rules, during plea bargaining.<sup>18</sup> While there have been efforts to produce more open data concerning traffic stops, police use of force, officer misconduct, prison populations, and criminal sentencing,<sup>19</sup> the charging and plea-bargaining processes have largely remained closed to public review. We focus on two of the primary efforts to improve data collection in prosecutors' offices: the Vera Institute of Justice's Prosecution and Racial Justice Program and the John D. and Catherine T. MacArthur Foundation's Prosecutorial Performance Indicators.<sup>20</sup> These efforts set the stage for rethinking prosecutorial data collection and policy, but neither included plea tracking.<sup>21</sup>

In Part II, we first describe how we developed and piloted data collection at two prosecutors' offices. As part of piloting, we collected qualitative data about approaches to plea bargaining and quantitative data coded from written records of pleas.<sup>22</sup> Second, we describe results from our first year of data collection. We explore what considerations informed plea offers, the roles of judges and defense counsel, and what factors impacted pleas and sentences during the process.<sup>23</sup> Third, we describe how these data can be used to inform prosecution data collection and policy.

In Part III, we describe how our plea-tracking platform and results can inform the practices of prosecutors, including by structuring the plea-bargaining process. Although a full discussion of an analogous open-defense approach is beyond the scope of this project, we explain why plea tracking provides a powerful tool for defense lawyers as well.<sup>24</sup> We then turn to how this work can inform judges and judicial review.<sup>25</sup> Finally, we describe its larger implications for public awareness and policymaking. Asking prosecutors to take time to document their holistic thought processes has the

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18. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

19. See Brandon L. Garrett, Essay, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 1490, 1501-05, 1513-16 (2018) (describing evidence-informed approaches in criminal justice and noting that plea bargaining was not a system that was ever informed by empirical evidence).

20. See *infra* Parts I.D.1-2.

21. Similarly, leading efforts to study disparities in criminal cases have analyzed charging, defendant characteristics, and sentencing outcomes, but not what occurred during the plea negotiations. See Baldus et al., *supra* note 5, at 1667-68; Berdejó, *supra* note 5, at 1191.

22. See *infra* Part II.

23. See *infra* Part II.

24. See *infra* Part III.B. We are currently exploring plea tracking with several public defender offices, and we have conducted piloting in one jurisdiction.

25. See *infra* Part III.C.

potential to introduce “friction” into the plea negotiation process, which can serve as a check against racial and other invidious biases.<sup>26</sup>

This Article reflects the larger goal of promoting the documentation of plea negotiations as a standard criminal law practice. Members of the public cannot assess how prosecutors are performing without meaningful, detailed, and interpretable information about what occurs during the plea negotiation process. We agree with critics that there are real reasons to be concerned about the central role that plea bargaining plays in our criminal system.<sup>27</sup> So long as plea bargaining remains central to how lawyers resolve criminal cases, however, requiring documentation offers a crucial safeguard of the fundamental values of public reason and democratic legitimacy.<sup>28</sup>

## I. The Lack of Prosecutorial Transparency

Despite data collection’s ability to promote transparency and internal accountability, data relevant to prosecution and plea-bargaining outcomes are often not collected, making prosecutors’ offices outliers among executive agencies generally, and within the criminal system specifically. Unlike a decision to arrest, prosecutorial discretion to pursue or dismiss charges, negotiate outcomes for the charges that are pursued, and proceed to trial can be made over an extended period of time. Prosecutorial discretion reflects a perceived need for flexibility to adjust to evolving considerations in cases.<sup>29</sup> The rise of plea bargaining as a means to resolve cases more efficiently has heightened the importance of prosecutors’ largely undocumented and nonpublic discretionary decisionmaking.<sup>30</sup>

Over the past two decades, a slowly growing movement has promoted internal data collection by prosecutors. Traditionally, prosecutors have been evaluated based on measures, such as conviction rates, that may provide a skewed perspective of their work. For prosecutors to develop newer measures

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26. See JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* 184-86 (2019) (describing the value of adding “friction” to a process to reduce racial bias); Nat’l Acads. of Scis., Eng’g, & Med., *The Science of Implicit Bias: Implications for Law and Policy* 3 (2021), <https://perma.cc/J7SP-JM4F>.
27. For an excellent recent critique of plea bargaining, see generally CARISSA BYRNE HESSICK, *PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL* (2021).
28. See Rawls, *supra* note 10, at 765-66 (describing the value of public reason as a core feature of democratic governance).
29. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLAL REV. 1, 2, 5 (1971).
30. See M. ELAINE NUGENT-BORAKOVE & LISA M. BUDZILOWICZ, NAT’L DIST. ATT’YS ASS’N, *DO LOWER CONVICTION RATES MEAN PROSECUTORS’ OFFICES ARE PERFORMING POORLY?: A REPORT OF THE PROSECUTION PERFORMANCE MEASUREMENT PROJECT 1* (2007), <https://perma.cc/85FJ-BR5V>.



with which to evaluate their work, they need to collect new data. As this Part describes, most data-related efforts have focused on documenting charging and disparities in sentencing outcomes. These existing efforts have demonstrated that it is feasible for offices to collect and share prosecution data. In recent years, however, prosecutors—particularly in larger jurisdictions and with outside grant support—have embraced more systematic efforts to collect data and share it with the public using dashboards. This Part concludes by discussing the strengths and limitations of pilot efforts to collect internal prosecution data, as well as the insights these efforts have generated.

### A. Prosecutors as Enforcement Outliers

As the U.S. Supreme Court observed in *McCleskey v. Kemp*, prosecutorial discretion is “at the heart of the State’s criminal justice system,” but “the power to be lenient [also] is the power to discriminate.”<sup>31</sup> That power is not subject to the type of regulation or oversight that is present in other government agencies.<sup>32</sup> While prosecutorial discretion is “subject to constitutional constraints,”<sup>33</sup> these are very deferential limits, chiefly prohibitions on vindictive and selective prosecution.<sup>34</sup> Regarding selective prosecution, it is extremely difficult to meet the rigorous test set out in *United States v. Armstrong*, which requires a defendant to put forth “some evidence that similarly situated defendants of other races could have been prosecuted, but were not” to even obtain discovery on the question of whether prosecutors engaged in race discrimination in charging.<sup>35</sup>

Courts have expressed deep reluctance to review decisions not to file charges, citing separation-of-powers concerns.<sup>36</sup> As the Supreme Court has emphasized:

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31. 481 U.S. 279, 297, 312 (1987) (alteration in original) (quoting KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 170 (1969)).

32. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006) (“[T]he government faces almost no institutional checks when it proceeds in criminal matters.”).

33. *United States v. Batchelder*, 442 U.S. 114, 125 (1979).

34. See, e.g., *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974).

35. 517 U.S. 456, 468-69 (1996); see Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1106-19 (1997) (describing the substantial barriers to litigating selective prosecution under the Equal Protection Clause). No such claim has succeeded in federal court since *Yick Wo*. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 970 n.37 (2009).

36. See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 908 (3d ed. 2007) (noting that “only in rare circumstances” do judges review charging decisions and that such review is “very deferential”); Bennett L. Gershman, Essay, *A Moral Standard for the Prosecutor’s Exercise of the Charging*  
*footnote continued on next page*

Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.<sup>37</sup>

The Supreme Court has also made it clear, regarding plea negotiations specifically, that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."<sup>38</sup>

Although local head prosecutors are elected in most states, the work of line prosecutors is not particularly transparent to the public.<sup>39</sup> Some hope that reforming criminal codes to reduce the discretion of prosecutors could bring greater accountability.<sup>40</sup> It would also be necessary to reform sentencing laws, which have expanded the options, power, and discretion of prosecutors.<sup>41</sup> Inaction, such as a decision not to bring charges, is a central feature of prosecutorial discretion, and this substantial power is often disguised.<sup>42</sup> As Stephanos Bibas has noted, for lawmakers and policymakers to really understand the nature of the exercise of prosecutorial discretion, they need "full access to the underlying data."<sup>43</sup> Due to a lack of existing data, however, "it is unclear whether oversight of prosecutors can be probing."<sup>44</sup> Currently, one cannot assess whether prosecutors offer plea deals that align with their expected outcome at trial, seek to provide leniency in low-level cases, reflect written policies in their office or jurisdiction, contain asymmetric information, mirror cognitive biases, or are

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*Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993) ("The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

37. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

38. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977).

39. See Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U.L. REV. 911, 923-31 (2006).

40. See Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 630-31 (2005) (advancing code-based reform in the context of federal prosecutorial discretion).

41. See Bibas, *supra* note 39, at 940 (describing how mandatory-minimum sentencing laws have expanded prosecutorial power).

42. See DAVIS, *supra* note 31, at 3, 22, 98 (describing "the power to do nothing," an "enormous discretionary power," and advocating "[o]pportunism" in the exercise of discretionary power to check potential arbitrariness).

43. See Bibas, *supra* note 35, at 968.

44. *Id.*

motivated by resource concerns.<sup>45</sup> Before turning to those questions, we step back to briefly describe the forces underlying the dominance of plea negotiations in modern American criminal justice.

## B. The Rise of Plea Bargaining

The well-documented rise of plea bargaining in the United States—with the vast majority of criminal cases now resolved through plea bargains<sup>46</sup>—magnifies the importance of understanding how prosecutors exercise their discretion at the plea-bargaining stage.<sup>47</sup> Today, the “ordinary course” of a criminal case is to plea bargain.<sup>48</sup> Over several decades, the central role of plea bargaining was cemented by increasing caseloads, more severe and structured sentencing guidelines, and altered professional norms.<sup>49</sup> Prosecutors have limited resources and can only charge so many cases; resolving cases by obtaining judgments through negotiated dispositions is far more efficient than proceeding to trial.<sup>50</sup> Further, prosecutors may have incentives to dispose of low-profile cases, or cases that have weak evidence and might pose a risk of loss at trial, quickly and cheaply.<sup>51</sup>

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45. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1139-40, 1142-43 (2008) (describing how plea bargaining saves resources and costs for prosecutors and defense attorneys, and emphasizing the role of leniency in low-level criminal cases); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796-97, 824 (2012) (exploring how racial bias can affect prosecutorial decisionmaking and discussing a proposal for prosecutors’ offices to collect data to systematically examine any such bias).
46. Bibas, *supra* note 39, at 912 (noting that about 95% of cases are resolved through plea bargaining).
47. See GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 6 (2003); MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 110-17 (1978) (describing how prosecutors learn to exercise their discretion and how they adapt their approach to the plea-bargaining process); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).
48. See *Lafler v. Cooper*, 566 U.S. 156, 167-68 (2012).
49. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 50-51, 54 (1968). See generally Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) (describing the fairly recent historical origins of plea bargaining).
50. See Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. U. L. REV. 261, 274 (2021) (summarizing the standard shadow-of-trial model for plea bargaining); see also *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (plurality opinion) (“[Prosecutors] also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.”).
51. See Grunwald, *supra* note 50, at 275-76; Bibas, *supra* note 3, at 2464-67 (critiquing the shadow-of-trial model of plea bargaining).

Prosecutors also employ a range of discretionary procedures—including case initiation, screening, and charging—prior to the plea-bargaining stage. The rules governing these procedures vary by jurisdiction, including as to whether police can file cases themselves and whether judges have the power to dismiss or divert charges.<sup>52</sup> Researchers have studied charging decisions since such information is sometimes documented in administrative court data.<sup>53</sup> Unfortunately, many states only document charges that result in convictions, precluding an examination of discretion in dropped charges or dismissals.<sup>54</sup> The decisions prosecutors make in the early stages of a case—including whether to join charges or engage in charge “piling”—can affect subsequent plea negotiations.<sup>55</sup> Moreover, prosecutorial discretion does not exist in a vacuum. The defense lawyer and defendant might challenge the prosecutor’s plea offer.<sup>56</sup> Further, the prosecutor’s discretion may be partly cabined by sentencing statutes and guidelines.<sup>57</sup> While typically limited, even in jurisdictions that provide for judicial involvement in plea bargaining, the judge may also play a role in what plea is negotiated and imposed.<sup>58</sup>

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52. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1310-16 (2018) (describing the charging discretion of prosecutors and how state law affects it); Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1306-07, 1377-78 (1998); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017).

53. For charging studies, see, for example, Malcolm D. Holmes, Howard C. Daudistel & Ronald A. Farrell, *Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery*, 24 J. RSCH. CRIME & DELINQ. 233, 242-45 (1987) (studying race disparities in charge reductions in Delaware County, Pennsylvania); Cassia Spohn, John Gruhl & Susan Welch, *The Impact of the Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOLOGY 175, 183-86 (1987); and Besiki Luka Kutateladze, Nancy R. Andiloro & Brian D. Johnson, *Opening Pandora’s Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 413-14 (2016) (documenting race disparities in misdemeanor marijuana charges and plea offers in Manhattan).

54. See Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 396 (2010) (“The limited empirical attention devoted to prosecutorial discretion is largely the result of data limitations. Whereas data on judicial sentencing decisions are now readily available, records on prosecutorial charging behavior remain elusive.”).

55. See *id.* at 406; *infra* Part II; Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1121, 1126-27 (2005).

56. See Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295, 1339 (2021) (surveying public defenders regarding plea-bargaining practices).

57. See, e.g., Stephen J. Schulhofer & Ilene H. Nagel, *Commentary, Plea Bargaining Under the Federal Sentencing Guidelines*, 3 FED. SENT’G REP. 218, 218, 221 (1991).

58. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1230-31, 1238, 1247-48 (2016) (describing the lack of “meaningful” constitutional judicial review of plea bargaining while also discussing statutes in a few states that

*footnote continued on next page*

While constitutional criminal procedure regulates the plea-bargaining process, as do state statutes, the limitations imposed by those sources of law are minimal. A plea can only be entered if it can be demonstrated that the defendant knowingly and voluntarily waived their trial rights.<sup>59</sup> Further, the Supreme Court has explained that because a plea is a contract, the prosecutor must fulfill the promises made.<sup>60</sup> Some constitutional rulings actually reinforce prosecutorial discretion during the plea negotiation process. Prosecutors may extend offers of leniency in exchange for a plea,<sup>61</sup> and they may also, without violating due process, threaten more serious charges if a defendant does not accept a plea offer.<sup>62</sup>

The defendant is also protected by the Sixth Amendment right to an adequate defense, and defense counsel is obligated to provide effective assistance during the plea negotiation process. Defense counsel must adequately communicate the terms of a plea offer to the client and ensure the client understands the consequences of a conviction.<sup>63</sup> However, the prosecution need not disclose exculpatory evidence to the defense during the plea negotiation process, so defendants might not know the full extent of the case against them.<sup>64</sup> Further, rules governing coercion during plea bargaining are quite forgiving; individuals are commonly detained in jail pretrial and face enormous pressure to plead guilty.<sup>65</sup> In some jurisdictions, persons are not represented by counsel pre-indictment, and pleas can be entered by unrepresented individuals.<sup>66</sup>

Parties can negotiate several different types of pleas. Pleas can include charge bargains, where the agreement involves the dismissal of one or more charges or the substitution of a lesser offense.<sup>67</sup> Sentence bargains—another

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allow judges to proactively dismiss charges); *see also* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1061 (1976).

59. *Brady v. United States*, 397 U.S. 742, 748 (1970).

60. *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

61. *See Corbitt v. New Jersey*, 439 U.S. 212, 221-23 (1978).

62. *See Bordenkircher v. Hayes*, 434 U.S. 357, 372-73 (1978) (Powell, J., dissenting) (“In this case, the . . . admitted purpose was to discourage and then to penalize with unique severity [the defendant’s] exercise of constitutional rights.”).

63. *See Padilla v. Kentucky*, 559 U.S. 356, 364-69 (2010); *Lafler v. Cooper*, 566 U.S. 156, 162-64 (2012).

64. *United States v. Ruiz*, 536 U.S. 622, 628-29 (2002).

65. *See SUBRAMANIAN ET AL.*, *supra* note 7, at 3-5.

66. *See* Abbe R. Dembowitz, *Pleas, Sir, May I Have an Attorney? Why the Sixth Amendment Right to Counsel Should Extend to Pre-Indictment Plea Negotiations*, 56 AM. CRIM. L. REV. ONLINE 44, 44-45, 49-50 (2019) (arguing that the Sixth Amendment right to counsel should apply pre-indictment).

67. *Crespo*, *supra* note 52, at 1310-11.

type of plea—involve agreements to lower sentences.<sup>68</sup> Still other pleas may involve fact bargains, where the parties agree to facts that may preclude the imposition of harsher penalties.<sup>69</sup> A case may involve some or all of these types of bargaining.<sup>70</sup> Some states allow “open” or “blind” pleas, where a person agrees to plead guilty without any assurances from the prosecutor or judge regarding their ultimate punishment.<sup>71</sup>

State and federal statutes may also set out the basic mechanics of the plea process. In the federal system, Federal Rule of Criminal Procedure 11 discusses categories of pleas, including charge bargains and sentencing bargains, and the approval process and standards for each.<sup>72</sup> Notably, in the federal system, the judge must not participate in plea discussions.<sup>73</sup> Rule 11 also requires that the defendant enter a plea voluntarily, with the judge determining whether there is a “factual basis” for the plea.<sup>74</sup> The judge must address the defendant under oath “personally in open court,” inform them of the trial rights they are waiving, and determine whether the plea is voluntary.<sup>75</sup> The rule provides no specific guidance, however, for how judges should make the voluntariness determination.<sup>76</sup> Additionally, the rule mandates that plea proceedings “be recorded by a court reporter or by a suitable recording device.”<sup>77</sup> Separate statutes give victims of certain alleged crimes the right to be notified of plea negotiations and an opportunity to share their views for consideration.<sup>78</sup>

To provide a relevant state law example, North Carolina permits negotiation over charges, dismissals, and sentencing.<sup>79</sup> For a plea with a recommended sentence, the proposed sentence must be disclosed to the court, whereas a plea that only disposes of charges merely requires the judge to ensure

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68. SUBRAMANIAN ET AL., *supra* note 7, at 2 (explaining sentence bargains).

69. *Id.*

70. *See id.*

71. *See id.*

72. *See* FED. R. CRIM. P. 11(a)-(c).

73. *Id.* R. 11(c)(1).

74. *Id.* R. (b)(2)-(3).

75. *Id.* R. (b)(1)-(2).

76. *Id.* R. (b)(2) (“Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).”).

77. *Id.* R. 11(g).

78. *See* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 6, 96 Stat. 1248, 1256 (codified as amended at 18 U.S.C. § 1512 note (Federal Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System)).

79. *See* N.C. GEN. STAT. § 15A-1021(a) (2023).

that the defendant’s consent is “informed” and supported by a “factual basis.”<sup>80</sup> A court form provides defendants with information regarding the rights waived, consequences of the charges and plea, and acceptance of the offer.<sup>81</sup> Further, prosecutors may not seek to induce a plea by “charging or threatening to charge” defendants with crimes not “supported by the facts” or “not ordinarily charged in the jurisdiction,” or by threatening a more severe sentence than what is “ordinarily imposed.”<sup>82</sup> Without information on what is “ordinarily” charged or imposed in the jurisdiction, though, those protections are hard to enforce.

Other states set out the roles of prosecutors and judges quite differently. In Massachusetts, if the negotiated plea does not include *both* an agreed-upon sentence and charge, the judge may increase the sentence beyond the recommendation of one of the parties after giving the defense an opportunity to withdraw approval of the plea.<sup>83</sup>

While less scholarship has focused on the lack of transparency in plea bargaining specifically, as opposed to prosecutorial discretion writ large, the concern has not gone unnoticed.<sup>84</sup> Plea negotiations themselves are often nonpublic and unrecorded, much less included in a searchable database.<sup>85</sup> Instead, plea offers are often made orally “over the phone, in the courtroom corridor, or in the prosecutor’s office.”<sup>86</sup> Only when an agreement is finalized on the record, in a plea colloquy, is it documented in court. Even then, the

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80. *Id.* § 15A-1023.

81. See State of N.C., Transcript of Plea 1-3 (n.d.), <https://perma.cc/2TZN-4XKH>.

82. See N.C. GEN. STAT. § 15A-1021 official commentary.

83. See MASS. R. CRIM. P. 12(c)-(d).

84. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 302 (2011) (“Guilty pleas, especially ones that happen early in the process, are largely invisible. So is the bargaining that lies behind them.”); Bibas, *supra* note 39, at 917; Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO ST. J. CRIM. L. 423, 429 (2020); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 441 (2019).

85. See Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 975 (2021) (“Plea offers are often not documented, and the final plea agreements are not always in writing or placed on record with the court.”); see also Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653, 654-55, 664 (2019) (describing the often-limited information that defense lawyers rely upon during plea negotiations and calling for the creation of a database containing plea bargaining factors and outcomes).

86. See Turner, *supra* note 85, at 976-78 (describing how plea offers are typically conveyed informally and arguing that lawmakers should require that plea agreements be put on the record); see also NICOLE ZAYAS FORTIER, ACLU, *UNLOCKING THE BLACK BOX: HOW THE PROSECUTORIAL TRANSPARENCY ACT WILL EMPOWER COMMUNITIES AND HELP END MASS INCARCERATION* 9 (2019), <https://perma.cc/35D8-857P> (calling for legislation to require documentation of plea bargains).

documentation likely contains very limited information concerning the factual and legal support for the plea.<sup>87</sup> Only the voluntariness of the plea and some factual basis for the plea will normally be put on the record.<sup>88</sup> As Jenia Turner has argued, where court proceedings are normally open to the public, plea agreements can be placed on the record in court, but portions of the record can be sealed to protect the identities of witnesses or victims.<sup>89</sup> Yet that has not been standard practice.

Thus, plea offers, along with charging decisions, are often nonpublic and not formally documented in court or within a prosecutor's office. Indeed, courts have expressed concern that documenting more information on the record regarding pleas would be too burdensome. As the California Supreme Court explained, "memorializing plea bargain discussions in this particular manner could be burdensome in high-volume courts were it to be followed as a general practice."<sup>90</sup>

This lack of documentation explains why the study of plea negotiations has been difficult in the past. As will be discussed in the next Subpart, not only are plea negotiations undocumented, but the policies and practices of an office are also not typically written down.

### C. Prosecution Policies Concerning Plea Bargaining

In general, there is very little formal policy on how prosecutors should negotiate pleas, and it is unusual for a prosecutors' office to have written policies regarding plea bargaining.<sup>91</sup> In place of a written policy, prosecutors' plea decisions can be informed by group norms, informal discussions among colleagues, and formal supervisory feedback.<sup>92</sup> In the rare circumstance that an office has plea guidelines in place, the policy is often oriented toward more, rather than less, punitive dispositions.<sup>93</sup> For example, offices may offer "price

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87. See Turner, *supra* note 85, at 981-82.

88. See *id.*

89. See *id.* at 976.

90. *In re Alvernaz*, 830 P.2d 747, 756 n.7 (Cal. 1992).

91. See Bibas, *supra* note 35, at 1005-07 (describing how unwritten practices can develop in prosecutors' offices, but also noting how written policies, when they exist, may not be consistently followed). *But cf.* Abrams, *supra* note 29, at 14 (noting examples in which prosecutors did adopt internal policies regarding nonprosecution).

92. See Miller & Wright, *supra* note 4, at 129-31; BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUST., THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT 1-5 (2012), <https://perma.cc/NK2Q-WQ8J>.

93. The influential federal guidelines counsel: "[T]he prosecutor should seek a plea to the most serious readily provable offense(s) charged." U.S. Dep't of Just., Just. Manual § 9-27.400 (2018).



lists,” setting out schedules of plea offers for certain offenses.<sup>94</sup> Although victims have notice and participation rights and judges may decide whether to accept a plea, individual prosecutors typically exercise near-absolute discretion to make “choices without the approval or cooperation of other actors.”<sup>95</sup>

More prosecutors’ offices have policies governing initial charging decisions. For example, the U.S. Department of Justice’s Justice Manual currently states, with several qualifications, that federal prosecutors should aim to pursue the most serious provable offense.<sup>96</sup> At the local level, the Philadelphia District Attorney’s Office recently adopted policies, including guidelines for plea bargaining, that aim to eliminate certain types of overly punitive charges, “charge lower gradations for certain offenses,” and divert more cases.<sup>97</sup> Richard Frase has found that the requirement that federal prosecutors document in writing their reasons for charging decisions (an uncommon rule in state systems) can produce consistency in outcomes.<sup>98</sup> Additionally, several prosecutors’ offices have adopted policies providing for or requiring supervisory review of decisions to seek the death penalty.<sup>99</sup>

Law and economics theorists have modeled plea bargaining. In this model, prosecutors seek to maximize the number of convictions and the severity of sentences, and defendants consider the likelihood of conviction at trial and the expected sentence should a conviction result.<sup>100</sup> In theory, then, plea bargaining proceeds as a rational arms-length negotiation. In practice,

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94. See Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1123 (2014).

95. See Ronald F. Wright, *Prosecutor Institutions and Incentives*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 49, 50 (Erik Luna ed., 2017).

96. U.S. Dep’t of Just., Just. Manual § 9-27.300 (2018) (“Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses.”). The policy does suggest that exceptions may be warranted, however, and it provides that “[t]o ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney.” *Id.*

97. See Phila. Dist. Att’y’s Off., Philadelphia DAO New Policies 1-2 (2018) (capitalization altered), <https://perma.cc/4EGS-E5MC>. For an overview of recent efforts by prosecutors to limit overly punitive and coercive plea bargaining, see Fair and Just Prosecution, Issues at a Glance: Plea Bargaining 6-8 (2022), <https://perma.cc/YVJ4-7T3R>.

98. See Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 292-96 (1980).

99. See Jonathan DeMay, Note, *A District Attorney’s Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 788-91, 799 (1999).

100. See William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66-69 (1971); Edward A. Ruttenburg, *Plea Bargaining Analytically—The Nash Solution to the Landes Model*, 7 AM. J. CRIM. L. 323, 330-37 (1979).

however, plea bargaining is typically not arms-length. Scholars have argued that the idea that fair bargaining occurs in the criminal system is a myth.<sup>101</sup>

More invidious considerations may also infect plea bargaining. Concerns have been raised that prosecutors may offer pleas based not just on the strength of the case, but also on the “wealth, sex, age, education, intelligence, and confidence” of the defendant,<sup>102</sup> as well as the race of the defendant and victim, whether the defendant is in pretrial detention, and the ability of counsel.<sup>103</sup> Further, scholars have argued that plea bargaining can be coercive or is inherently coercive.<sup>104</sup> Some also raise concerns that plea bargaining has created a “trial penalty,” whereby the threat of a longer sentence after trial severely penalizes the defendant’s exercise of their trial rights.<sup>105</sup>

Other scholars have expressed concerns about the accuracy of the evidence relied upon during plea negotiations.<sup>106</sup> Researchers have documented examples of wrongful convictions where individuals pled guilty but were later exonerated through postconviction DNA testing.<sup>107</sup> Surveys have revealed large numbers of self-reported false guilty pleas.<sup>108</sup> Although prosecutors must, as Ronald Wright has put it, “fly solo and fly blind,” they sometimes “respond poorly to the dangerous weather and they crash.”<sup>109</sup>

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101. See Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 79-84 (2011); Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1519 (2016). But see Frank H. Easterbrook, Symposium Comment, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992) (“Plea bargains are compromises. Autonomy and efficiency support them.”); Robert E. Scott & William J. Stuntz, Symposium Comment, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2015 (1992).

102. See Bibas, *supra* note 3, at 2468.

103. See Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 111, 117, 119 (2021) (discussing the roles of “racialized presumption[s] of guilt,” the race of the victim, delays in jail, and inexperienced defense counsel).

104. See Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527, 552 (1979).

105. See, e.g., Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM L.Q. 67, 79, 87 (2005); see also Grunwald, *supra* note 50, at 264 (distinguishing the concept of plea discounts from trial penalties).

106. See, e.g., Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 935 (2016) (“One individual’s opinion is a weak safeguard against conviction of the innocent, especially when this individual is a prosecutor and especially when he has engaged in odds bargaining because he knows that a jury may disagree.”).

107. See GARRETT, *supra* note 6, at 7, 150-53.

108. See Allison D. Redlich, Alicia Summers & Steven Hoover, *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79, 83 (2010) (surveying individuals with mental illness); see also Bowers, *supra* note 45, at 1119-20 (describing when “guilty pleas may prove attractive to the innocent”).

109. See Wright, *supra* note 95, at 50.

Relatedly, managerial-justice literature has explored how prosecutors may use plea negotiations in petty cases not only to increase efficiency or achieve outcomes in the shadow of trial but also to supervise large numbers of people through conditions of release.<sup>110</sup> In more serious cases, the elements of substantive offenses and the accompanying sentencing guidelines may play a far greater role in structuring outcomes during negotiations.<sup>111</sup>

In response to this wide range of concerns, very little has been proposed to investigate which model of prosecutorial decisionmaking is correct, to what extent deep biases and errors infect the plea process, and whether there is variation among jurisdictions and types of cases. As one research review summarized, “Ultimately, the lack of clarity regarding the administration and impacts of plea bargaining is perhaps the most important thing that research has revealed.”<sup>112</sup>

Policy groups have certainly pushed to change this state of affairs. For example, a model Prosecutorial Transparency Act proposed by the American Civil Liberties Union (ACLU), a version of which was introduced in Nebraska, would require that prosecutors make public internal policies and a range of data concerning case dispositions.<sup>113</sup> While the model Act would require, “for each case,” the disclosure of “[a]ll terms of all pleas offered,” whether discovery was provided, and the final disposition,<sup>114</sup> it would not require detailed documentation of the reasons for those decisions.<sup>115</sup> Over the past two decades, some pilot projects and longer-term implementation efforts have attempted to collect more prosecution data, but like the ACLU proposal, they have tended to focus on charging, screening, and sentencing data, not plea bargaining.<sup>116</sup> As discussed next, however, such efforts do provide insights into prosecution data-gathering practices generally, forming the backdrop for our open-prosecution work.

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110. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014).

111. See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1937 (2006).

112. See SUBRAMANIAN ET AL., *supra* note 7, at 49.

113. See Leg. 151, 108th Leg., 1st Sess. (Neb. 2021) (providing that prosecutors shall collect and report demographic and criminal information related to defendants and pleas, including the terms of a plea and whether it was accepted or rejected); FORTIER, *supra* note 86, at 21–28.

114. See Fortier, *supra* note 86, at 22, 24.

115. See *id.* at 22–25 (detailing the information required to be collected under the model Prosecutorial Transparency Act).

116. See *infra* Part I.D.

#### D. Efforts to Open the Black Box of Prosecution Data

A lack of data is not unique to plea bargaining.<sup>117</sup> In 2018, an Urban Institute study surveyed over 158 state prosecutors' offices concerning their data collection practices.<sup>118</sup> The study found that most offices do collect and analyze basic foundational data, such as screening and sentencing outcomes, but few collect more comprehensive data.<sup>119</sup> Typically, the data prosecutors collect are limited to basic information, such as the number of cases diverted to alternative sentencing, handled in a specialty court, or resolved through a plea bargain.<sup>120</sup>

Without the ability to link these aggregate data with salient individual case features—such as defendant demographics, charges, or even the identity of the prosecutor—it is impossible to evaluate important questions, including whether individual prosecutors are consistent in the charging and sentencing outcomes they pursue and whether those outcomes align with office policies and norms. Many large offices do make data available publicly.<sup>121</sup> But offices also express concerns about the accuracy of data, particularly where basic data regarding case processing or outcomes may not reflect the individual characteristics underlying the differences in how cases are processed and resolved.<sup>122</sup>

While researchers have developed theoretical models for plea bargaining, there is a dearth of research using real-world cases. Researchers have shown a growing interest in using experimental methodologies and qualitative methods.<sup>123</sup> A primary limitation of this work is that prosecutors themselves do not document the plea-bargaining process. Thus, studies have examined

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117. See Allison D. Redlich, Miko M. Wilford & Shawn Bushway, *Understanding Guilty Pleas Through the Lens of Social Science*, 23 PSYCH. PUB. POL'Y & L. 458, 465-68 (2017) (describing research questions related to, and challenges in studying, plea bargaining).

118. See OLSEN ET AL., *supra* note 8, at 1, 4.

119. *Id.* at 6.

120. See *id.* at 7-8 (noting that most of the offices surveyed collected data regarding the numbers of cases diverted, routed to alternative courts, or deferred).

121. *Id.* at 9 (noting that “half (50 percent) of offices encourage or solicit input from community groups or residents, and about a quarter (24 percent) publish analyses publicly. More than half (58 percent) of the medium-large offices share data analyses publicly, while only 6 percent of small offices do”).

122. See *id.* at 10 (noting concerns about data accuracy expressed by prosecutors' offices).

123. See, e.g., Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz & Rachel Z. Novick, *Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents*, 24 PSYCH. PUB. POL'Y & L. 180, 180 (2018) (describing experimental studies); Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH. PUB. POL'Y & L. 250, 252-57 (2016) (describing qualitative research regarding plea pleas entered by youths and adults).

final sentencing recommendations by prosecutors to infer what factors may have informed those recommendations.<sup>124</sup>

In their seminal article, “The Black Box,” Marc Miller and Ronald Wright examined several programs aimed at internal accountability within prosecutors’ offices.<sup>125</sup> They examined the New Orleans District Attorney’s Office, where prosecutors were required to record “an unusually rich computerized record of their prosecutorial choices and reasoning.”<sup>126</sup> In a different article, they explored the use of that data in a screening program to inform initial charging decisions.<sup>127</sup>

During the period in which Miller and Wright were documenting the practices of the New Orleans District Attorney’s Office, others began to call for more sustained data collection efforts by prosecutors. For example, in 2004, the American Prosecutors Research Institute, part of the National District Attorney’s Association, called for a new approach for measuring prosecution outcomes.<sup>128</sup> Shortly afterwards, nonprofit foundations began to fund new efforts to encourage prosecution data collection, as discussed below.

### 1. The Vera Prosecution and Racial Justice Program

Motivated by the lack of insight into the decisionmaking of line prosecutors and a desire to address racial disparities in outcomes, the Vera Institute of Justice launched its Prosecution and Racial Justice Program in 2005.<sup>129</sup> Initially, the program involved three cities: Charlotte, North Carolina; San Diego, California; and Milwaukee, Wisconsin.<sup>130</sup> The team described the challenges associated with data collection: “Most prosecutors’ offices have never worked with outside researchers or tried to conduct a research study.”<sup>131</sup>

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124. See, e.g., Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 433-34 (2007).

125. See Miller & Wright, *supra* note 4, at 129.

126. *Id.*

127. See Wright & Miller, *supra* note 2, at 58-84.

128. See STEVE DILLINGHAM, M. ELAINE NUGENT & DEBRA WHITCOMB, AM. PROSECUTORS RSCH. INST., PROSECUTION IN THE 21ST CENTURY: GOALS, OBJECTIVES, AND PERFORMANCE MEASURES 1 (2004).

129. See VERA INST. OF JUST., A PROSECUTOR’S GUIDE FOR ADVANCING RACIAL EQUITY 5 (2014), <https://perma.cc/65ZE-VCSX> (“From the start, [the Prosecution and Racial Justice Program]’s goal has been to help the partnering prosecutors’ offices reduce unwarranted racial disparity in the criminal justice system by showing them the cumulative impact on case outcomes of their policies, procedures, and daily practices.”).

130. See Wayne McKenzie, Don Stemen, Derek Coursen & Elizabeth Farid, Vera Inst. of Just., *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution 1* (2009), <https://perma.cc/43CP-KSGE>.

131. See VERA INST. OF JUST., *supra* note 129, at 7.

The Vera Institute’s approach called for data collection at each stage in the prosecution process, from case screening, to charging, to plea offers, to final disposition.<sup>132</sup> The project adopted only limited indicators related to plea offers, including the seriousness of charges, the number of charges, defendant demographics, acceptance of pleas, and the sentence offered.<sup>133</sup> Since the Vera Institute’s approach involved collecting data across the entire criminal process, the data collection at any one stage was limited. The data shed light on offices’ entire case flows and identified sources of racial disparities. For example, the Charlotte work found that Black defendants were more likely than white defendants to have an arrest charge rejected, but were also more likely to be offered pleas that called for active jail or prison time.<sup>134</sup>

Since then, additional efforts to inform policy have employed similar forms of prosecutorial data collection. As part of a more recent Vera-supported effort, Bruce Frederick and Don Stemen investigated prosecutorial decisionmaking in two large prosecutors’ offices in separate counties.<sup>135</sup> One aspect of their project involved a series of experimental surveys, as well as a qualitative analysis using focus group discussions with prosecutors in the offices.<sup>136</sup> In the experimental surveys, prosecutors responded to hypothetical cases.<sup>137</sup> They were asked whether they would have prosecuted the cases, as well as what charges to prosecute, what plea offers to make, and what sentences to seek.<sup>138</sup> In the vignettes, the researchers varied the strength of the evidence and the seriousness of the arresting charge.<sup>139</sup> They found the prosecutors to be “remarkably consistent” in their decisions whether or not to prosecute.<sup>140</sup> Nearly all prosecutors from both counties decided to prosecute cases with high evidence strength and reject cases with low evidence strength.<sup>141</sup> The two groups of prosecutors varied widely, however, in which hypothetical charges they decided to pursue.<sup>142</sup>

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132. *Id.* app. B at 22.

133. *See id.* at 15, 22.

134. *Id.* at 14-15.

135. *See* FREDERICK & STEMEN, *supra* note 92, at 2.

136. *Id.* at 19, 22.

137. *Id.* at 19.

138. *See id.* at 19, 171 (describing responses to the survey by sixty-two prosecutors).

139. *Id.* at 123-24.

140. *Id.* at 169.

141. *See id.* at 169, 172-73, 173 fig.3.4.3-2.

142. *See id.* at 184-86 (describing prosecutor-level variation in the charging decisions made in hypothetical cases). Frederick and Stemen found real variation in approaches to plea bargaining among surveyed prosecutors as well, including what factors were relevant and whether sentences would be negotiated. *See id.* at 196-97.

Notably, these experimental results did not fully reflect patterns observed in actual cases.<sup>143</sup> Frederick and Stemen analyzed the real-world practices of both groups of prosecutors and found significant variation between the two offices, within each office, and within units in offices.<sup>144</sup> In general, prosecutors were more consistent when reviewing hypothetical cases than in screening actual cases.<sup>145</sup> The data generated by Frederick and Stemen provide insights into the legal and extralegal factors affecting prosecutorial decisionmaking, indicating the complexities that affect actual case outcomes. In particular, the authors noted that group norms, court resources, and law-enforcement priorities—rather than office-wide policies—significantly influenced cases.<sup>146</sup>

Several additional Vera Institute projects have researched prosecutorial decisionmaking for evaluative purposes. More recently, the Vera Institute examined racial disparities in several additional prosecutors' offices.<sup>147</sup> In 2012, the Vera Institute's Prosecution and Racial Justice Program began working with the New York County District Attorney's Office to study two years of data comprising more than 220,000 cases.<sup>148</sup> They ultimately found that the office exercised very little charging discretion and "prosecute[d] nearly all cases brought by the police, with no noticeable racial or ethnic differences at case screening."<sup>149</sup> For subsequent decisions, however, disparities were more apparent. Black and Latino defendants "were more likely to be detained" pretrial, "to receive a custodial sentence offer" during plea bargaining, and "to be incarcerated, but they were also more likely to have their cases dismissed."<sup>150</sup> In 2021, as part of a push toward transparency and accountability, the office released years of race information in a data portal.<sup>151</sup>

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143. *See id.* at 205 (summarizing findings from actual cases and noting that strength of evidence was most strongly correlated with observed results).

144. *See id.* at 157-58, 221, 280-81 (describing variations in case acceptance rates among individual prosecutors and units, and discussing differences in outcomes and approaches across offices).

145. *Id.* at 280-81.

146. *See id.* at 277-79.

147. *See, e.g.*, Besiki Kutateladze, Whitney Tymas & Mary Crowley, *Race and Prosecution in Manhattan 2* (2014), <https://perma.cc/L2RJ-B9VJ>. For an overview of the Vera Institute's work with different prosecutors' offices, see *Reshaping Prosecution Initiative*, VERA INST. OF JUST., <https://perma.cc/JRG5-M65E> (archived Apr. 30, 2023).

148. *See* Kutateladze et al., *supra* note 147, at 2, 4.

149. *Id.* at 3.

150. *Id.* at 3, 5-7.

151. Shayna Jacobs, *Manhattan District Attorney to Release Years of Racial Data as Part of Nationwide Accountability Push*, WASH. POST (Mar. 18, 2021, 6:00 AM EDT), <https://perma.cc/GY9T-V9A2>.

2. The MacArthur Prosecutorial Performance Indicators project

The John D. and Catherine T. MacArthur Foundation's Safety and Justice Challenge has supported work to examine data from several prosecutors' offices and produce indicators of prosecution outcomes.<sup>152</sup> These indicators comprise a menu of fifty-five measures that go beyond traditional reliance on conviction rates.<sup>153</sup> The indicators are organized under the following categories: organizational capacity, resource prioritization, victim service, timeliness, racial and ethnic disparities, minimization of unnecessary punitiveness, community outreach, prosecutorial ethics and integrity, and addressing serious crime.<sup>154</sup>

Supported by this program, the Milwaukee County District Attorney's Office participated in a study that found a lack of racial bias in prosecutions.<sup>155</sup> Another report examined the Hillsborough County, Florida, State Attorney's Office. It studied "nearly 87,000 cases from 2017 and 2018" and did not find "glaring" racial or ethnic disparities in outcomes, though it identified needs regarding resource allocation, use of diversion, and sentencing.<sup>156</sup> These reports highlight that offices exercise discretion quite differently at the various stages of a case and, further, that biases can be introduced at any of these stages.

This effort has also assisted prosecutors in constructing public-facing features like felony-disposition dashboards. For example, the Milwaukee County District Attorney's Office created a data dashboard, which displays data such as race and ethnicity among persons diverted to prosecution alternatives and the number of cases with jail sentences.<sup>157</sup> Similarly, Cook County State's Attorney Kim Foxx oversaw the creation of a felony dashboard and released annual reports on prosecutions.<sup>158</sup> The office's 2017 report showed that the vast

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152. See Besiki Luka Kutateladze, *Prosecutorial Performance Indicators: What Constitutes Success in Prosecution?*, SAFETY & JUST. CHALLENGE (Dec. 14, 2018), <https://perma.cc/D5XP-2JN7>.

153. See *id.*

154. For the complete menu of indicators, see PROSECUTORIAL PERFORMANCE INDICATORS, <https://perma.cc/D93U-S655> (archived Apr. 30, 2023).

155. See Bruce Vielmetti, *Race Plays Little Role in Prosecutions Carried Out by Milwaukee County Prosecutors, Study Finds*, MILWAUKEE J. SENTINEL (Dec. 9, 2019, 6:00 AM CT), <https://perma.cc/2A6P-D43M>.

156. See Andrew Warren, *Foreword* to BESIKI LUKA KUTATELADZE, REBECCA RICHARDSON, RYAN MELDRUM, DON STEMEN, DAVID OLSON, ELIZABETH WEBSTER, MARIA ARNDT, DYLAN MATTHEWS & SADHIKA SOOR, *FLA. INT'L UNIV., LOYOLA UNIV. CHI., SAFETY & JUST. CHALLENGE & MACARTHUR FOUND., RACE, ETHNICITY AND PROSECUTION IN HILLSBOROUGH COUNTY, FLORIDA* 3, 3 (2019), <https://perma.cc/YJ4T-MHE4>.

157. See MILWAUKEE CNTY. DIST. ATT'Y DASHBOARD, <https://perma.cc/KT3V-LG3J> (archived May 1, 2023).

158. See *The Data-Driven CCSAO*, COOK CNTY. STATE'S ATT'Y, <https://perma.cc/V5AE-XWKW> (archived May 1, 2023).



majority of felony charges resulted in a guilty plea.<sup>159</sup> For felony cases, the office also releases case-level information about initiation, sentencing, and disposition on its dashboard.<sup>160</sup> The San Francisco District Attorney’s Office maintains similar dashboards, which provide aggregate data on case processing.<sup>161</sup>

The Philadelphia District Attorney’s Office launched a dashboard that is somewhat more detailed,<sup>162</sup> with reports showing how many cases are dismissed, diverted, or result in guilty pleas versus guilty verdicts at trial.<sup>163</sup> As part of the MacArthur-supported Prosecutorial Performance Indicators project, the office partnered with researchers to “measure office performance” and inform policy changes.<sup>164</sup> The office’s dashboard does not report on plea negotiations apart from providing aggregate numbers of pled cases.<sup>165</sup> One cannot observe whether pleas were lenient or harsh, which charges were dropped, which pleas were accepted or rejected, or what explained those outcomes.

Most recently—with support from the Tableau Foundation—the nonprofit Measures for Justice and the Association of Prosecuting Attorneys have developed dashboards for fifteen prosecutors’ offices.<sup>166</sup> For example, the Yolo County, California, dashboard measures progress toward a goal to increase felony diversions by September 2022, depicting the percentage of felony cases diverted each month.<sup>167</sup> The dashboard also tracks how cases are resolved, including trends over time regarding guilty pleas, but it does not show individual case characteristics or factors contributing to any of these trends.<sup>168</sup> These dashboards are far more accessible and up-to-date than

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159. See COOK CNTY. STATE’S ATT’Y, 2017 DATA REPORT 8-9 (2018), <https://perma.cc/A2VP-DTAB>.

160. See *Felony Dashboard*, COOK CNTY. STATE’S ATT’Y, <https://perma.cc/N2AC-54E4> (archived May 1, 2023).

161. See *Data Dashboards*, S.F. DIST. ATT’Y, <https://perma.cc/Z6ZW-4ATS> (archived May 1, 2023).

162. See *Public Data Dashboard*, PHILA. DIST. ATT’Y’S OFF., <https://perma.cc/AA4T-K77D> (archived May 1, 2023).

163. See *Case Outcomes: Year End 12/31/2022*, PHILA. DIST. ATT’Y’S OFF., <https://perma.cc/XW6M-B2BM> (archived May 1, 2023).

164. See *Research at the DAO*, PHILA. DIST. ATT’Y’S OFF., <https://perma.cc/2QWQ-SBJ4> (archived May 1, 2023) (to locate, select “View the live page”).

165. See *Case Outcomes: Year End 12/31/2022*, *supra* note 163.

166. See *15 District Attorneys Join Effort to Disclose Prosecution Data*, ARIZ. STATE UNIV. CRIME & JUST. NEWS, (May 14, 2021, 7:16 AM), <https://perma.cc/8ECR-5M9S> (to locate, select “View the live page”).

167. See *Yolo County, CA: Policy Goal*, MEASURES FOR JUST. (updated Jan. 10, 2023), <https://perma.cc/2SBS-J7HR>.

168. See *id.*; see also *Yolo County, CA: Case Flow Data*, MEASURES FOR JUST. (updated Jan. 10, 2023), <https://perma.cc/W8DA-RR87> (displaying data and trends regarding dispositions).

administrative data. However, they do not show what occurred during the plea negotiation process. The next Part turns to our efforts to open that black box.

## II. Opening the Black Box of Plea Negotiations

Collecting transparent and reliable data that documents plea negotiations can open the “black box” surrounding plea bargaining and provide prosecutors with information that they urgently need.<sup>169</sup> Typically, much of what prosecutors record regarding plea bargaining is retained in paper files, if negotiations are documented at all.<sup>170</sup> The pilot projects described in Part I.D included efforts to record reasons for prosecutors’ charging decisions, but not reasons for offering pleas.<sup>171</sup> In the absence of legislation requiring prosecutors to collect such data, or common practices of doing so, we identified a need to show the feasibility and promise of plea tracking. In this Part, we discuss the implementation of a plea-bargaining tracking system in two jurisdictions. First, in early 2019, the District Attorney’s Office in Durham County, North Carolina, opened their felony case files to us, and then, beginning in April 2021, the office implemented a data collection system to record information concerning felony plea negotiations. Second, also in April 2021, prosecutors in the Berkshire County, Massachusetts, District Attorney’s Office implemented a data collection system to record information concerning all misdemeanor and felony plea negotiations. Below, we describe each plea tracking effort, its development, and the insights generated. We go on to explore our findings, presenting descriptive population data, but not statistical analyses, since our focus is not the causal impact of any change in policy or practice, but rather a rich first-time window into plea-bargaining practices.

### A. Tracking Plea Negotiations in Durham County, North Carolina

#### 1. The Durham County District Attorney’s Office

In January 2019, District Attorney Satana Deberry took office in Durham County, North Carolina, after campaigning to make substantial changes to prosecutorial priorities and practices.<sup>172</sup> Durham County is a moderate-sized

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169. See Miller & Wright, *supra* note 4, at 129.

170. See McKenzie et al., *supra* note 130, at 5 (“[P]rosecution offices . . . often rely on paper files for managing their cases.”).

171. See VERA INST. OF JUST., *supra* note 129, at 31 tbl.6.

172. See *We Deserve Better: A Platform for a Fairer and Safer Durham*, SATANA DEBERRY FOR DIST. ATT’Y, <https://perma.cc/3JF5-PDXV> (archived May 1, 2023) (to locate, select “View the live page”).

county of about 320,000 residents, the sixth most populous in the state.<sup>173</sup> The Durham County District Attorney's Office files over 30,000 charges each year.<sup>174</sup> Under District Attorney Deberry, the office has seven teams: Administrative, Homicide & Violent Crimes, Special Victims Unit, Drug & Property Crimes, Juvenile, Traffic, and District Court.<sup>175</sup> When fully staffed, there are twenty-two prosecutors in the office.<sup>176</sup>

Shortly after District Attorney Deberry assumed her position, the office began to prioritize prosecuting the most serious offenses, while at the same time dismissing or offering reduced or alternative sentences in low-priority cases.<sup>177</sup> Deberry also endorsed expanded diversion of persons with behavioral health needs.<sup>178</sup>

In North Carolina, prosecutors have discretion to make a wide variety of decisions regarding a plea offer.<sup>179</sup> Prosecutors must consider where a case falls within the state's sentencing guidelines, which depends on the class of the offense charged and the defendant's prior record.<sup>180</sup> They can choose to offer a deal in which the defendant pleads to a lesser offense or receives a dismissal of one or

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173. See *Demographics*, CITY OF DURHAM, <https://perma.cc/L7RR-2BYB> (archived May 1, 2023) (to locate, select "View the live page"). For the current population of Durham County, see *Resident Population in Durham County, NC*, FED. RSRV. ECON. DATA, <https://perma.cc/2EZZ-726V> (archived May 1, 2023).

174. For an overview of charging data, see Jessica Smith, *Detailed North Carolina Statewide & County-Level Criminal Charging Data*, UNIV. N.C. SCH. OF GOV'T: N.C. CRIM. L. (June 8, 2020, 10:00 AM), <https://perma.cc/E7H2-KDYV> (to locate, select "View the live page," then select "here" at the end of the first paragraph) (detailing 2019 North Carolina charging data by county). In examining the data from 2019, we find that, of almost 33,000 charges filed, only about 5,700 were felonies. See *id.*

175. Durham Dist. Att'y's Off., *About the Durham DA's Office*, MEDIUM: DURHAM DIST. ATT'Y'S OFF. (June 15, 2021), <https://perma.cc/257E-2T6D>.

176. See DURHAM CNTY. DIST. ATT'Y'S OFF., JULY 2019 PROGRESS REPORT 14 (2019), <https://perma.cc/XNK2-QV92>.

177. See *id.* at 433-35. District Attorney Deberry pledged to "ensure necessary resources are directed to prosecute the most serious crimes," in contrast to "minor property crimes and minor drug offenses." *We Deserve Better: A Platform for a Fairer and Safer Durham*, *supra* note 172.

178. See *We Deserve Better: A Platform for a Fairer and Safer Durham*, *supra* note 172 (stating that it will be a priority to increase resources to "divert people with addiction and mental health issues to treatment not jail" (capitalization altered)); see also Press Release, Durham Cnty. Dist. Att'y's Off., Statement from District Attorney Deberry on Mental Health Court Expansion Initiative (Dec. 22, 2021), <https://perma.cc/6AS5-YN9V>.

179. For an overview, see 133.1 *Plea Agreements: Negotiation and Terms*, N.C. PROSECUTORS' RES. ONLINE, <https://perma.cc/GSX3-8XQR> (last updated July 13, 2021).

180. See, e.g., *Punishment Grids*, N.C. JUD. BRANCH, <https://perma.cc/8C8T-TE4C> (last updated Aug. 29, 2018) (to locate, select "View the live page," then select "Felony Punishment Chart and Minimum/Maximum Table for Offenses Committed on or after October 1, 2013").

more offenses.<sup>181</sup> If the defendant is entering a plea to multiple offenses, the prosecutor can decide whether to seek back-to-back (consecutive) sentences, overlap the sentences (concurrent or consolidated), or impose additional conditions, such as community programs or electronic monitoring.<sup>182</sup>

These prosecution choices are generally not systematically tracked or studied. The North Carolina Administrative Office of the Courts (N.C. AOC) maintains data regarding the sentences imposed in criminal cases.<sup>183</sup> N.C. AOC data also reflect screening and charging decisions.<sup>184</sup> However, there is no administrative data collected regarding plea offers made during negotiations. A written document setting out the terms of a final plea, called a “plea transcript” in North Carolina, is filed in court.<sup>185</sup> Before the current study, however, plea transcripts were not typically retained by prosecutors. As a result, the Durham County District Attorney’s Office had no system for collecting data on plea outcomes.<sup>186</sup> There was no way to easily evaluate whether prosecutors’ actions were aligned with the goals of the elected district attorney, whether prosecutors were consistent among themselves, or whether disparities existed based on race, gender, age, quality of representation by defense counsel, pretrial detention, or other arbitrary or invidious factors. For those reasons, the office enthusiastically supported data collection to permit policy development, evaluation, and supervision of outcomes.

## 2. Studying plea transcripts in Durham County, North Carolina

As an initial step toward understanding the plea process, we requested access to all felony plea transcripts in Durham County. As discussed, most prosecutors’ offices—including Durham County—do not retain this information. In spring 2019, the Durham County District Attorney’s Office issued a statement to all prosecutors requiring that adult felony plea transcripts—including both draft and final transcripts—be retained in files.<sup>187</sup> The plea transcripts were recorded using the standard form provided by the N.C. AOC.<sup>188</sup> These transcripts provide a record, in each adult felony case, of what offers were made on what offenses, the total maximum punishment, the type of plea, and the details of the

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181. See N.C. GEN. STAT. § 15A-1021 (2023).

182. See N.C. GEN. STAT. §§ 15A-1021, 15A-1354 (stating that sentences may run “either concurrently or consecutively”).

183. See N.C. ADMIN. OFF. OF THE CTS., ACIS CITIZEN’S GUIDE: SEARCHING THE AUTOMATED CRIMINAL/INFRACTIONS SYSTEM 5, 15 (2017), <https://perma.cc/MS4L-ZS4Q>.

184. See *id.* at 13.

185. See State of N.C., *supra* note 81, at 2-3.

186. See Grodensky et al., *supra* note 175, at 4, 25.

187. See *id.* at 25 (noting the new office policy of saving plea transcripts).

188. See State of N.C., *supra* note 81, at 1-4.

agreement.<sup>189</sup> The remainder of the transcript is designed to ensure an informed waiver of rights and plea.<sup>190</sup>

We asked the Durham County District Attorney’s Office to retain all drafts of plea offers and document any revisions that were made, along with brief notations providing reasons for the revision (for example, “mitigation evidence received”). As of the end of May 2021, prosecutors had shared in digital form 442 initial and 112 revised felony plea transcripts (plus an additional five that reference an earlier deal that was not recorded), amounting to 559 transcripts for 447 different cases. This demonstrated their capacity to preserve and share records of plea deals, which had not been the office’s practice in the past.

The plea transcripts shed some light on the degree of back-and-forth negotiation. Based on the plea transcripts, 79% (442 of 559) of felony cases involved only one plea offer, which was accepted. There were ninety-six cases that had one revised plea offer after the initial offer, fifteen cases with two revised offers, and just one with three revised offers. A limitation of these records, however, is that the transcripts may not reflect informal conversations not recorded in writing.

Complete charging information—including specific charge names, the level of the charge, and sentencing information—was available for 89% of the transcripts (499 of 559 transcripts). The majority of these transcripts (423) involved only felony charges, while seventy-six involved only misdemeanor charges, and forty-seven involved both. Only seven felony pleas were *Alford* pleas, so-called after the U.S. Supreme Court case *North Carolina v. Alford* approved the practice, which are pleas that contain a formal claim of innocence.<sup>191</sup> Plea transcript forms in North Carolina do not contain a section for defendant demographic information, including race.<sup>192</sup> By cross-referencing pleas with other documents, however, we were able to record information on race for 56% of the transcripts (311 of 559 transcripts). In 80% of the plea transcripts for which race information was available, the defendant was Black (249 of 311 transcripts), in 15.8% the defendant was white (49 of 311 transcripts), and in 4% the defendant was Hispanic (13 of 311 transcripts).<sup>193</sup>

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189. *See id.*

190. The transcript form asks the defendant to sign and represent that they understand their right to a sentencing hearing and the nature of the offer, that the Court has been informed of all terms and conditions of the plea, and that they agree to make the plea, accept its terms, and affirm that there are facts to support the plea and any sentencing enhancements. *See id.*

191. *See* 400 U.S. 25, 37-38 (1970).

192. *See* State of N.C., *supra* note 81, at 1-4.

193. N.C. AOC forms record Latinx as “Hispanic” in the race category, rather than as a separate ethnicity, *see* N.C. ADMIN. OFF. OF THE CTS., *supra* note 183, at 94, and the U.S. *footnote continued on next page*

We documented sentences imposed and compared them with applicable sentencing guidelines ranges. Many cases involved sentences other than incarceration, including no-contact orders (104 pleas), treatment plans (152 pleas), and victim restitution (81 pleas). Only a few dozen cases had optional prosecution notations regarding aggravating and mitigating circumstances. Further, just thirteen pleas included information about the defense making an offer, and that information was only present if the prosecutor chose to include it in the open-ended section of the transcript.<sup>194</sup> Quite a few charges were dismissed during plea negotiations. In our preliminary analysis of charges, we observed that defendants pled to a median of two charges.

We also examined the extent to which pleas involved reduced sentences, or any plea discount, by comparing the pled active sentence to the maximum sentence exposure faced under the North Carolina sentencing guidelines.<sup>195</sup> Across cases where the defendant was not facing a sentence of life without parole (LWOP), the average plea discount was 101.4 months (the median was 53.5 months). In cases where an active sentence was pled (a total of 294 cases, excluding LWOP sentences), the difference between the maximum exposure and the pled sentence is even greater: an average discount of 125.1 months (the median was 63.75 months). For the twenty-six defendants facing LWOP as a maximum punishment, none pled guilty to an LWOP sentence, and the pled sentence averaged 283.6 months (the median was 282 months).

Most felony dispositions did not involve active sentences or prison time. Of these pleas, 58% did not involve active sentences (326 of 559 transcripts).

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Census records “Hispanic or Latino” as one race category, see *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://perma.cc/GSB9-XXU6> (archived May 1, 2023). Only 15 of the plea transcripts involved defendants who were minors at the time of commission.

194. For many transcripts, we were able to ascertain the defendant’s criminal history, which is relevant to sentencing; we knew the defendant’s felony prior record level for 459 pleas (348 had a record of 2 or higher, roughly corresponding with at least one prior felony conviction). In eighty-one pleas, the person had one or more prior misdemeanor convictions.

195. The pled sentence is recorded as a range for all felony charges and some misdemeanor charges. Here, we took the average of the listed range. On every transcript, the prosecutor records the sentence exposure, which is the sum of the maximum possible sentences for each charge. We note that this value is possibly misleading. In North Carolina, sentencing ranges are calculated by considering the prior criminal record level and the level of the current felony or misdemeanor charge. In these transcripts, the maximum sentence range listed is for the *highest* criminal history level, regardless of the defendant’s *actual* prior record. Although our data are incomplete for prior record levels, only forty-four defendants had the maximum felony prior record level, and only forty-seven defendants had the maximum misdemeanor prior record level. Thus, for the vast majority of persons reflected in these data, the maximum sentence they would face if they went to trial and were found guilty is substantially less than what is listed on the plea transcript and calculated here. Separately, we calculate the true exposure per person and the implications of the difference.

Half of the pleas (277 of 559 transcripts) involved suspended sentences or mixed sentences (which could include time already served in jail). A minority of the pleas (35% or 194 of 559 transcripts) required entirely active sentences. Almost all of those were for cases in which the defendant pled guilty to multiple felonies.<sup>196</sup>

A series of insights into the plea process flowed from this initial year of data collection. Based on the transcripts, it appeared that formal, written plea offers were not commonly revised. Moreover, prosecutors frequently used suspended sentences, and the difference between a defendant's maximum exposure and their pled sentence was considerable, averaging around a decade of avoided prison time. While this information provided a novel window into the plea negotiation process in felony cases, it did not include details concerning prosecutors' reasons for selecting plea options and the forces driving plea negotiations. We turn next to our follow-up work to pilot and then implement a plea tracker in Durham County to obtain richer data.

### 3. Implementing plea tracking in Durham County, North Carolina

In July 2020, we presented our preliminary aggregated plea-transcript data to the Durham County District Attorney's Office. The office agreed that currently available records lacked critical information needed to assess policies and practices, including defendant and victim race, pretrial detention status, presiding judge, defense counsel, and aggravating or mitigating reasons for making offers. Based on that feedback, we sought to collect more comprehensive information about felony pleas in the Durham office.

To further inform our work before launching the plea tracker, we interviewed all of the assistant district attorneys in the Durham office about their approaches and priorities regarding plea negotiations.<sup>197</sup> There already is a strong body of qualitative research examining certain aspects of prosecutors' work.<sup>198</sup> Our work was novel in that we explored the transition of an office

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196. Only twenty-six pleas required the defendant to serve concurrent sentences; 111 involved consecutive sentences (although the majority of transcripts (357) did not specify, and four included elements of both consecutive and concurrent requirements).

197. See Catherine Grodensky, 4/2/20 Revised Durham County Plea Deal Study Interview Guide: Prosecutors 1-3 (Apr. 2, 2020) (unpublished manuscript) (on file with authors).

198. For leading work, see, for example, Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1122-24 (2012) (describing how unwritten social norms and office structures guide prosecutors); and Wright & Levine, *supra* note 94, at 1099 (exploring how new prosecutors view their roles). See also Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW & SOC. INQUIRY 648, 650 (2017) (describing qualitative work suggesting that prosecutors become more balanced and less adversarial over time).

toward a progressive approach deemphasizing reliance on incarceration.<sup>199</sup> Based on prosecutors' answers to our questions, we probed for additional details to obtain a contextual understanding of plea deals. Interviews were audio recorded and transcribed verbatim, and a team of research assistants coded interview text to identify themes.

The interviews generated several important findings. First, prosecutors in each specialized unit described factors they considered in developing pleas, allowing us to design tracker questions that would capture and quantify these factors. Such factors included victim factors (i.e., level of harm, victim participation in the case, and victim preferences), defendant factors (particularly the involvement of mental illness or substance use), and the office's prioritization of the case (several prosecutors stated that District Attorney Deberry had communicated verbally that cases with known victims and violent crimes should receive higher priority than victimless cases and low-level drug possession charges). Second, prosecutors often relied on the defense to provide them with information about mitigating factors that could justify a reduction in sentence, but they occasionally encountered challenges in obtaining that information. Third, some prosecutors desired more opportunities for feedback from colleagues about plea offers, for the purposes of calibrating with the rest of the office. Prosecutors also desired more quantitative feedback on their decisions and case outcomes to ensure these did not reflect bias. In particular, they wanted to know whether persons with similar prior records and similar criminal charges were receiving different sentences based on factors irrelevant to the case, especially the race and ethnicity of the defendant and victim.

The transition in the office was not just one of policy and culture, but also involved a change in staffing. As of October 2020, only 7 of the 21 prosecutors in the office were hired under the previous administration, with 14 hired by District Attorney Deberry. At the time of the initial qualitative interviews, the vast majority of line prosecutors agreed with the platform District Attorney Deberry outlined during her candidacy. Many expressed that their task was to translate the larger priorities of the district attorney into everyday practices.

We designed the initial tracker for Durham County to record the following information for every charged felony case: basic case information; demographics of the victim and defendant; the charges and their maximum penalty under North Carolina sentencing guidelines (including the "distance travelled" between the charges indicted and the plea); the terms of the initial

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199. The interviews primarily included open-ended questions, such as "How do you decide on the specifics of a plea?" and "What information do you need from defense attorneys to develop a plea?", along with some closed-ended questions, such as "What proportion of your cases are ultimately dismissed?"



plea offer; the factors considered in selecting those terms; and process information, such as communication with the victim and defense attorney. In particular, prosecutors noted both mitigating<sup>200</sup> and aggravating factors<sup>201</sup> they considered when making a plea offer. We also collected the terms of any subsequent plea offers and the reasons for the revision of the plea (for example, the receipt of mitigating evidence or the loss of a key witness for the State).

We aimed to strike a balance between the need to not overly burden prosecutors by collecting too much information beyond what occurred during a plea negotiation with the desire to record and study other factors that may influence the plea process. While most of the items on the tracker reflected basic case information at each stage in the plea process, other factors were included based on our research priorities and a series of conversations with the office. For example, the tracker asks prosecutors to record any mitigating factors they considered during the plea process. Prosecutors expressed strong interest in documenting whether mitigating evidence was shared with them, particularly by defense attorneys, and whether it was considered in the negotiation and other interactions with the defense.

We administered the plea tracker using an online survey platform, which reduces data entry costs, allows for the incorporation of skip logic and logic checks to minimize the burden on persons entering data, and helps reduce data irregularities.<sup>202</sup> A prosecutor can record information about a plea from any device that is connected to the internet. Before launching the plea tracker, we piloted it for several weeks with the two prosecutors who had been appointed as office liaisons and facilitators.<sup>203</sup> During the piloting and development process, changes were made in response to feedback from prosecutors. Specifically, we made minor clarifying changes, including by revising questions that prosecutors felt were ambiguous or unclear, and we eliminated

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200. Mitigating factors included defendant age, cooperation, IQ, minor role in crime, good record, mental health, substance abuse, social background, collateral consequences, and other.

201. Aggravating factors included criminal history, the seriousness of the offense, confession, major or leadership role in the crime, the presence of firearms, recidivist, violent nature of the crime, and other.

202. For examples of Qualtrics survey templates like the ones used for this study, see *Survey Template*, QUALTRICS, <https://perma.cc/38QA-QPNJ> (archived May 2, 2023).

203. These two prosecutors completed the tracker on their own using their own cases as examples, purposefully using cases that varied in complexity and other key factors. Over a period of several months, the prosecutors provided specific written and verbal feedback to the study team. Based on this feedback, the study team revised the Qualtrics instrument for further testing. Once the two prosecutors felt that the instrument was developed enough for formal piloting, they enlisted one prosecutor from each unit to enter between three and five cases into the tracker and provide written and verbal feedback to the research team. This pilot was conducted in January 2021.

several questions that proved to be time-consuming for prosecutors and not sufficiently valuable.<sup>204</sup> Other feedback resulted in more substantive additions to the plea tracker. For example, prosecutors suggested that several questions be added to provide more relevant information about the decisionmaking process. One prosecutor noted that the tracker did not ask about the most important factor influencing the lenience or severity of the sentence, which could provide more insight into the rationale behind the plea offer.<sup>205</sup> Finally, we streamlined how prosecutors used the tracker, including by pulling basic information from the plea transcripts and asking prosecutors to only fill out the plea tracker once a plea was finalized.<sup>206</sup>

#### 4. Plea tracking results in Durham County, North Carolina

On April 12, 2021, the Durham County District Attorney's Office began using the plea tracker for all adult felony cases. The data were aggregated and periodically shared with the office. Here, we describe our results from the first year of data collection.<sup>207</sup> We found the results informative and surprising, even after the initial interviews and analysis of the written plea transcripts.

During the first year of data collection, from April 12, 2021, to April 11, 2022, prosecutors finalized 325 pleas in adult felony cases. These 325 cases involved a total of 1,874 charges, including both felony and misdemeanor charges. There was an average of six pled charges per case. Many cases involved dismissals of some charges, confirming what we observed in our initial analysis of plea transcripts. Almost two-thirds of the charges were dismissed, or 65% (1,219 of 1,874 charges). Of the dismissed charges, 81% (987 of

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204. We cut questions that required time-consuming research. For instance, questions asking for exact dates (for example, the dates of arrest or the length of pretrial detention) were changed to allow the prosecutor to select from a short list of ranges (for example, less than one week, three to six months). This allowed prosecutors to answer questions without searching through their files.

205. Other questions were added to better capture the decisions prosecutors made in response to changes requested by the defense. These questions asked about the reasons the defense provided for the changes, the extent to which the prosecutor agreed with the changes, and how significantly the plea was modified.

206. During pilot testing, we requested that prosecutors complete the tracker any time a plea deal was offered, and then again when the plea was finalized. After pilot testing, we replaced the "initial," "revised," and "final" versions of the plea tracker with one version that was designed to capture the final plea and all modifications that occurred throughout the process. We cut questions that provided the same information that was recorded in the plea transcript. Instead, this information was captured using a program to scrape data from the plea transcripts and link this with the tracker data.

207. We shared reports regarding the first six months of data collection and the first year of data collection, as well as the results of the qualitative interviews we conducted, with the Durham County District Attorney's Office.

1,216 charges) were in cases in superior court.<sup>208</sup> In total, 35% of charges (655 of 1,874 charges) resulted in guilty pleas, with each case averaging two pled charges. Turning from charges to cases, the vast majority of cases, 89% (290 of 325 cases), involved a person pleading guilty to a felony offense. A small number of cases, thirty-five in total, were initially brought as felony cases but resolved in pleas to misdemeanor charges only. *Alford* pleas were used in five cases, and there were no pleas of no contest. In twenty cases, prosecutors attempted restorative justice, which included participation in treatment and reconciliation with victims. Table 1 below summarizes these data regarding charges and cases.

**Table 1**  
Charges and Cases in Durham County, North Carolina

	Number (%)
Total Charges	1,874
Charges Pled	655 (35%)
Charges Dismissed in Superior Court	987 (53%)
Charges Dismissed in District Court	232 (12%)
Total Cases	325
Cases Indicted on Felony Charges	320 (98%)
Cases Pleading Guilty to Felony Charges	290 (89%)
Cases Pleading Guilty to Only Misdemeanors	35 (11%)
Cases with at Least One Dismissed Superior Court Charge	255 (78%)
Cases with at Least One Dismissed District Court Charge	55 (18%)
Cases with an <i>Alford</i> Plea	5 (1%)
Cases with a No Contest Plea	0
Cases Attempting Restorative Justice	20 (6%)

A question of central importance to us and to the Durham County District Attorney’s Office was whether there were racial or other demographic disparities in plea-bargaining outcomes. As an initial matter, the demographic data in the plea tracker showed that charged persons were largely male, Black, and averaged thirty-six years of age. Nearly 75% were indigent. This included 79% of Black people charged with crimes, as compared to 67% of white people. Indigency is determined by the court when assessing an individual’s eligibility

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208. In North Carolina, district courts handle most criminal misdemeanors, while felonies (apart from probable cause hearings) are handled in superior court. See *Judicial Branch*, NC.GOV, <https://perma.cc/UQU9-5NJB> (archived June 25, 2023).

for a public defender. About three-quarters, or 73% (238 of 325 persons), had at least one prior conviction, and 57% (185 of 325 persons) had been previously convicted of felonies. About 24% (78 of 325 persons) were eligible to be convicted in their current case as a habitual felon.<sup>209</sup> In contrast, 27% (88 of 325 persons) had no criminal record at all.

Prosecutors reported their perceptions of a person's threat to public safety, property, and themselves. After considering all available information about the person charged and the current case, prosecutors reported these judgments on the following scale: no threat, minor threat, moderate threat, high level of threat, and the highest level of threat. Prosecutors' ratings of a person's threat to safety and property averaged between "minor" and "moderate." Nearly a quarter of people were categorized as a high level of threat to property. Prosecutors did not deem any of these persons the highest level of threat in any category.

Regarding the victims in pled cases, prosecutors reported 191 cases involving at least one victim (59% of 323 cases). In these cases, prosecutors recorded at least 329 individual victims. Nearly 56% of cases involved Black victims (107 of 191 cases), 28% involved white victims (53 of 191 cases) and, regarding ethnicity, 14% involved Hispanic victims (27 of 191 cases). In addition, 59% of cases involved female victims (112 of 191 cases).<sup>210</sup> Prosecutors communicated with the victim in the vast majority of cases, or 77% (147 of 191 cases). They discussed the plea with the victim before making the offer in 82% of cases (79 of 96 cases for which this information was available).

We also learned quite a bit about what types of information influenced initial plea offers. Prosecutors were asked to select from a list of factors—developed through our familiarity with plea bargaining and sentencing practices, and our discussions, qualitative interviews, and piloting—to indicate what influenced them to recommend a particular sentence in the initial plea offer and whether they considered any collateral consequences in developing the plea. This set of factors—which included aggravating, mitigating, and collateral consequence-related factors—goes to the heart of the plea-tracking work. It allowed us to describe the reasoning behind plea offers, and it required prosecutors to structure and record their own reasoning as they worked on cases.

Prosecutors considered at least one mitigating factor in 84% of cases (272 of 325 cases). Table 2 shows how frequently each factor was selected by prosecutors. Commonly considered mitigating factors were the person's criminal record (32% of cases), substance use (29%), and age (20%). The factor influencing sentence leniency that prosecutors selected second most often was

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209. See N.C. GEN. STAT. § 14-7.1 (2023) (defining "habitual felon").

210. Victim demographics and communication were documented in 80 of those 90 cases. Victims were listed as a business or corporation in 12% of cases and as the state of North Carolina in 30%.

“other” (31%). This category included health concerns, minor damages, and the age of the case.

Commonly considered aggravating factors were the seriousness of the offense (54% of cases), criminal history (40%), past recidivism (30%), the presence of firearms (26%), the violent nature of the offense (24%), and “other” factors (20%), which included the presence of children, the total number of charges, and the dangerousness of the drugs involved.

Across all racial groups and gender categories, a person’s criminal record and the seriousness of the offense were the most-cited factors. However, more mitigating factors were considered in cases involving white defendants, and more aggravating factors were considered in cases involving Black defendants.

**Table 2**  
Mitigating and Aggravating Factors Influencing Durham County Pleas

<b>Factors Increasing Leniency</b>	<b>Number (%)</b>	<b>Factors Increasing Severity</b>	<b>Number (%)</b>
Person’s Record	103 (32%)	Seriousness of Offense	177 (54%)
Substance Use	95 (29%)	Criminal History	131 (40%)
Person’s Age	65 (20%)	Recidivist	99 (30%)
Mental Health	43 (13%)	Presence of Firearms	84 (26%)
Cooperation	34 (10%)	Violent Nature of Crime	79 (24%)
Social Background	32 (10%)	Major or Leadership Role	24 (7%)
Minor Role in Crime	11 (3%)	Forensic Labs	3 (1%)
Forensic Labs	4 (1%)	Other	64 (20%)
Other	102 (31%)		

*Note:* The total number exceeds 325 because prosecutors could list multiple mitigating or aggravating factors for each case.

In addition to the considerations discussed above, prosecutors may consider collateral consequences and the nonsentencing impacts of a conviction on a defendant, which might also militate in favor of a more lenient plea. When noting collateral-consequence considerations, prosecutors most often selected the mental and/or physical health of the defendant (31% of pleas), the defendant’s ability to contribute positively to the community (30% of pleas), the defendant’s ability to return to daily life after their sentence (28% of pleas), and the defendant’s ability to seek or maintain employment (26% of pleas). Table 3 displays these data in more detail below.

**Table 3**  
Collateral Consequences Considered in Durham County Pleas

Collateral Consequence	Number (%)
Mental and/or Physical Health of the Person	100 (31%)
Ability to Contribute Positively to the Community	98 (30%)
Ability to Return to Daily Life Once Fines and Sentences Are Fulfilled	91 (28%)
Ability to Seek or Maintain Employment	85 (26%)
Creating Family Hardship for the Person	41 (12%)
Debt/Poverty	38 (12%)
Requiring the Person to Register as a Sex Offender	15 (5%)
Suspending the Person's Driver's License	10 (3%)
Other	26 (8%)

*Note:* The total number does not equal 325 because prosecutors could list multiple collateral consequences for each case.

The data concerning the plea negotiation process provided unexpected insights, in contrast to the more limited written plea transcripts that we had earlier studied, which rarely reflected a second or modified plea offer. The plea tracking uncovered a much greater number of common, substantive, and impactful interactions between the prosecution and the defense. Public defenders represented the largest share of cases (46%, or 148 of 325 cases). About one-third of defendants were represented by court-appointed lawyers, and about one-fifth were represented by private attorneys.

Defense attorneys were reported to influence the initial plea offer “a lot” in 9% of cases and “not at all” in 42% of cases, but influence varied depending on the type of defense attorney. For instance, 14% of public defenders had “a lot” of influence, compared with 6% of court-appointed attorneys and 4% of private attorneys. Defense attorneys provided mitigation evidence, or information speaking to why the defendant might deserve a more lenient sentence, before prosecutors made their initial offer in more than a third of cases. This mitigation evidence had at least a little influence on the initial offer in the vast majority (93%) of those cases. Public defenders and private counsel provided mitigation evidence before the initial offer more often than court-appointed counsel. Generally, prosecutors communicated with the defense before the first offer in most cases (73%) and after the initial offer in nearly all cases (95%).

This communication affected plea results. The defense attorney requested changes to the initial plea offer in most cases (60%), and in the vast majority of those cases (83%), at least some changes were made before the final offer. We display these data in detail in Table 4 below. Most commonly, requested changes were related to sentence length. These findings shed new light on the

plea negotiation process. They suggest that the mitigation evidence supplied by defense counsel, as well as defense requests for plea modifications, resulted in frequent and meaningful changes to the ultimate results.

**Table 4**

Durham County Defense Attorney Influence and Mitigation, by Attorney Type

	All Cases n = 322 (100%)	Public Defender n = 148 (46%)	Court-Appointed n = 105 (33%)	Private Counsel n = 69 (21%)
<b>Amount Attorney Influenced Initial Offer<sup>a</sup>:</b>				
A lot	29 (9%)	20 (14%)	6 (6%)	3 (4%)
Somewhat	62 (20%)	31 (21%)	11 (12%)	20 (29%)
A little	88 (29%)	37 (26%)	32 (34%)	19 (28%)
Not at all	129 (42%)	56 (39%)	46 (48%)	27 (39%)
<b>Provided Mitigation Evidence Before the Initial Offer<sup>b</sup>:</b>				
Yes	119 (38%)	61 (42%)	29 (30%)	29 (42%)
No	179 (58%)	75 (52%)	65 (68%)	39 (57%)
Not sure	11 (4%)	8 (6%)	2 (2%)	1 (1%)
<b>Amount Mitigation Evidence Influenced Initial Offer<sup>c</sup>:</b>				
A lot	17 (14%)	10 (16%)	5 (17%)	2 (7%)
Somewhat	38 (32%)	18 (30%)	6 (21%)	14 (48%)
A little	56 (47%)	30 (49%)	16 (55%)	10 (34%)
Not at all	8 (7%)	3 (5%)	2 (7%)	3 (10%)
<b>Prosecutor Corresponded with Defense Before Initial Offer<sup>a</sup></b>	224 (73%)	112 (78%)	61 (64%)	51 (74%)
<b>Prosecutor Corresponded with Defense After Initial Offer<sup>d</sup></b>	295 (95%)	137 (95%)	93 (96%)	65 (94%)

*Note:* Data for the type of attorney were missing in three cases.

<sup>a</sup>Data were missing for ten cases with a court-appointed lawyer and four cases with a public defender.

<sup>b</sup>Data were missing for nine cases with a court-appointed lawyer and four cases with a public defender.

<sup>c</sup>Percentages shown are out of cases where mitigation was provided (n = 119).

<sup>d</sup>Data were missing for eight cases with a court-appointed lawyer and four cases with a public defender.

Finally, we conducted analyses to understand how often prosecutors “reduced” charges (i.e., selected charges of a less severe class) between the indictment and the final guilty plea. For the most serious charges in non-drug-trafficking cases, we found that indicted charges were reduced to a lower class in 47% of cases (136 of 291 cases).<sup>211</sup> Table A1 in Appendix A displays these data in detail. This vividly illustrates how plea negotiations result in felony charge reductions during the plea-bargaining process in Durham County, North Carolina.

To conclude, the plea-tracking data have already resulted in a range of surprising new insights into the degree to which outcomes change during the plea negotiation process, as well as the factors and interactions that produce those changes. We plan to conduct still more detailed analyses with additional data, as well as to refine the plea tracker to focus on the most interesting, useful, and surprising data: the factors supporting plea offers, prosecutors’ interactions with the defense, and changes to the terms of pleas during the negotiation process. The findings from the first year of plea tracking already show how informative and effective an open-prosecution approach can be.

## B. Tracking Plea Negotiations in Berkshire County, Massachusetts

### 1. The Berkshire District Attorney’s Office

In 2018, Andrea Harrington was elected district attorney in Berkshire County, Massachusetts, a jurisdiction that handles “more than 7,500 criminal cases per year in Berkshire Superior Court, three district courts, three juvenile courts,” and appellate courts.<sup>212</sup> When running for office, Harrington emphasized the need for increased availability and use of diversion programs, mental health and veterans courts, reentry programs, restorative justice, cultural-competency training, and varied approaches to sentencing.<sup>213</sup> Harrington also emphasized the need to implement “data tracking systems so that we can measure our success.”<sup>214</sup> During Harrington’s tenure, the Berkshire District Attorney’s Office adopted a range of new policies, including policies

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211. The lowest-level felonies had lower average reductions, which likely does not reflect a lack of reductions in lower-level felonies by the office; rather, most lower-level felonies are reduced to misdemeanors in district court and therefore are not represented in the plea tracker.

212. See *Berkshire District Attorney’s Office*, MASS.GOV, <https://perma.cc/2X2V-FA7W> (archived May 2, 2023); Josh Landes, *Harrington Wins Berkshire DA Race, First Woman to Hold the Seat*, WAMC (Nov. 7, 2018, 12:30 PM EST), <https://perma.cc/DUH2-VHKV>.

213. See *What a Difference a DA Makes, Candidate Name: Andrea Harrington (2018)*, <http://perma.cc/6VSV-4BTZ>.

214. *Id.*



geared toward transparency, such as an open-file policy regarding discovery and a presumption against prosecuting, or for dismissing, certain low-level, nonviolent offenses.<sup>215</sup> Prior to its involvement in this project, as is the case in many other jurisdictions, the Berkshire District Attorney's Office had no system for collecting data about plea negotiations.

## 2. Implementing plea tracking in Berkshire County, Massachusetts

Many aspects of the plea process in Massachusetts resemble those in North Carolina, but there are key structural differences. In Massachusetts, judges can participate in the plea-bargaining process,<sup>216</sup> whereas in North Carolina, judges may inform the parties whether they would concur with a sentencing recommendation but do not have any active or formal role in plea negotiations.<sup>217</sup> Massachusetts rules permit a considerable amount of judicial involvement in plea negotiations even after the plea deal has been agreed upon and presented in court—called a “tender of plea” in Massachusetts.<sup>218</sup> Judges are given the power to alter the final sentencing decision, particularly if the parties do not reach an agreement.<sup>219</sup> While further participation of a judge in plea negotiations is technically permitted, the Supreme Judicial Council has emphasized that doing so is discouraged.<sup>220</sup>

In Massachusetts, a judge is required to impose an agreed-upon sentence and charge concession only if *both* parties agree to these elements of the plea agreement *and* the judge accepts the plea agreement.<sup>221</sup> When a plea does not include both an agreed-upon sentence and charge concession, the judge may

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215. See Andrea Harrington, Opinion, *Andrea Harrington: How the District Attorney's Office Seeks to Minimize Harm in the Berkshire Criminal Justice System*, BERKSHIRE EAGLE (Dec. 16, 2021), <https://perma.cc/E776-4RM4>; Press Release, Berkshire Dist. Att'y's Off., Berkshire DA's Office Adopts Brady Policy (July 28, 2020), <https://perma.cc/D8EA-CZL3>.

216. See MASS. R. CRIM. P. 12(b)(2).

217. See N.C. GEN. STAT. § 15A-1021(c) (2023); see also *In re Fuller*, 478 S.E.2d 641, 643 (N.C. 1996) (“It is the responsibility of the trial judge to accept or reject a tendered plea negotiated between the district attorney and defendant. It is not within the trial judge’s province to negotiate a plea or enter judgment on a plea to a charge which is not a lesser included offense of the charge at issue.”).

218. See MASS. R. CRIM. P. 12(b)-(c) (capitalization altered).

219. See MASS. R. CRIM. P. 12(c)(4).

220. See MASS. R. CRIM. P. 12(b). The commentary to the Massachusetts Rules of Criminal Procedure advises that “[j]udges should not ‘participate as active negotiators in plea bargaining discussions.’” See MASS. R. CRIM. P. 12 reporter’s notes (2004, Revised) (quoting *Commonwealth v. Gordon*, 574 N.E.2d 974, 976 n.3 (Mass. 1991)); see also *Commonwealth v. Ravenell*, 612 N.E.2d 1142, 1143 n.1 (Mass. 1993) (“[P]articipation by a trial judge in plea bargaining, although not proscribed in Massachusetts . . . is discouraged.” (quoting *Commonwealth v. Johnson*, 543 N.E.2d 22, 24 (Mass. App. Ct. 1989))).

221. See MASS. R. CRIM. P. 12(d)(4).

impose a different sentence.<sup>222</sup> If they plan to impose a different sentence, judges sometimes need to give the defense an opportunity to withdraw approval of the plea.<sup>223</sup>

The Massachusetts plea process works slightly differently in district court as opposed to in superior court. The two courts have different dockets. District courts handle misdemeanors, as well as some felonies, particularly those punishable by up to five years in custody.<sup>224</sup> Superior courts have general criminal jurisdiction, but in practice, as our data show, handle the comparatively more serious felony dockets not handled in district court.<sup>225</sup> When certain types of plea offers are tendered, district court judges may seek to impose a different sentence.<sup>226</sup> However, if the sentence will be greater than what the *defendant* requested, the judge must first give the defendant an opportunity to withdraw the plea.<sup>227</sup> In superior court, the judge can impose a sentence that exceeds the *prosecutor's* request but, again, only if the judge provides an opportunity for the defense to withdraw the plea.<sup>228</sup> Finally, if the judge chooses to reject a plea containing recommendations agreed to by both parties, as well as a charge concession, the judge can inform the parties what sentence would be imposed instead, and either party can withdraw from that agreement.<sup>229</sup>

The Massachusetts sentencing guidelines, unlike those of North Carolina, are purely advisory.<sup>230</sup> While the guidelines are advisory, however, the parties and judge lack discretion in another important respect: Massachusetts also has

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222. See MASS. R. CRIM. P. 12(d).

223. See MASS. R. CRIM. P. 12(c)(6)(B).

224. See *District Court*, MASS.GOV, <https://perma.cc/4ZV4-DZHK> (archived May 3, 2023) (“District Court criminal jurisdiction extends to all felonies punishable by a sentence up to 5 years, and many other specific felonies with greater potential penalties, all misdemeanors, and all violations of city and town ordinances and by-laws.”).

225. See *Superior Court*, MASS.GOV, <https://perma.cc/B9JB-AXZY> (archived May 3, 2023). A district court judge has authority to sentence an individual to a house of correction, but not prison, while superior court cases can carry state prison sentences. See MASS. GEN. LAWS ch. 218, § 27 (2023) (“The district court may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison . . .”).

226. See MASS. R. CRIM. P. 12(c)(6)(B).

227. *Id.*

228. *Id.* The rule does not provide for a judge to recommend a more lenient sentence. Three justices of the Massachusetts Supreme Judicial Court opposed the revision of the rule that eliminated this possibility. See MASS. R. CRIM. P. 12 statement of opposition to the adoption of revised Mass. R. Crim. P. 12.

229. See MASS. R. CRIM. P. 12(d)(4)(B)(i)-(iii).

230. See MASS. SENT’G COMM’N, ADVISORY SENTENCING GUIDELINES 108 (2017), <https://perma.cc/M6Z5-JZ5V> (“Sentencing guidelines were first established in 1994, have not been revised since, and are advisory.”).

a large number of mandatory-minimum sentences defined by statute, both in lower-level and comparatively more serious cases.<sup>231</sup>

There are two ways that a person in Massachusetts can avoid a conviction even if they are charged and sentenced. First, a “continuance without a finding” (CWO) permits the charged person to avoid a guilty disposition provided that they comply with specified terms and conditions.<sup>232</sup> Second, a person may receive a type of diversion called a 276/87 disposition, after the statutory provision.<sup>233</sup> The person charged is placed under the supervision of a probation officer, and their charges are dismissed if they complete their probation time without violating any of the terms and conditions of that sentence.<sup>234</sup>

We incorporated the Massachusetts sentencing and statutory structure in the plea tracker design, along with other information of particular interest to the Berkshire District Attorney’s Office. The office was interested in delays in case resolution and their effect on case processing and negotiations, especially during the COVID-19 pandemic. In Berkshire County, where prosecutors told us they often lack resources to divert persons to treatment alternatives, we included a place for prosecutors to note when they would have sought diversion or referral to a treatment or rehabilitation program, had it been available. As in Durham County, the Berkshire District Attorney’s Office asked to track communication with victims of crimes and the defense.

After approximately six months of planning and collaboration, the Berkshire District Attorney’s Office began collecting data on April 1, 2021, with the goal of collecting data for every case resolved with a plea agreement in the office, including both misdemeanors and felonies, for one year. Prosecutors recorded data about drafted and entered plea agreements, the plea negotiation process, victim demographics and involvement, defendant demographics, the perceived risk posed by the defendant, and the reasons for the prosecutor’s sentencing recommendations. They also recorded the ultimate resolution of each case, along with information about defense representation, communication with the defense, any defense tenders of plea, and any judicial involvement in the final disposition and sentence. We next turn to our initial findings.

### 3. Plea tracking results in Berkshire County, Massachusetts

The plea-tracking data presented here represent data collected in Berkshire County for just over one year, from April 1, 2021, through April 30, 2022. These

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231. *See id.* at 61-67.

232. *See* MASS. R. CRIM. P. 12 reporter’s notes (Revised, 2004).

233. *See* MASS. GEN. LAWS ch. 276, § 87 (2023).

234. *See id.*; *Commonwealth v. Tim T.*, 773 N.E.2d 968, 971-72 (Mass. 2002) (“Nothing in G.L. c. 276, § 87, prevents the use of pretrial probation as one component of an agreed-on disposition of a case. . . . This is a permissible—and indeed common—use of § 87.”).

data include misdemeanor and felony cases, filed in both district and superior courts. Cases for which all charges were dismissed, cases that resulted in a trial, and cases that the office declined to prosecute are not included. In this analysis, we primarily offer descriptive information, such as the numbers of pleas and charges, the features of the cases and charges, and information about the people charged with crimes. We also look at the plea-bargaining process, focusing on the reasons why prosecutors offered pleas and the negotiation process. Finally, we examine the roles of defense lawyers and judges.

We collected information about 1,012 district court cases and 81 superior court cases. The dispositions, as one would expect, were more serious in superior court. The most frequent disposition was a conviction, which occurred for at least one charge in 25% of pleas entered in district court (256 of 1,012 cases) and 81% of pleas entered in superior court (66 of 81 cases). A CWOFF occurred in 29% of pleas in district court (292 of 1,012 cases) and 10% of pleas in superior court (8 of 81 cases). The 276/87 dismissals occurred only in district court, comprising 5% of district court pleas (48 of 1,012 cases). Table 5 below summarizes these data.

**Table 5**  
Dispositions by Court for Berkshire County, Massachusetts Pleas

Disposition	District Court	Superior Court
Guilty	256 (25%)	66 (80%)
CWOFF	292 (29%)	8 (10%)
276/87	48 (5%)	0 (0%)
Guilty Filed	60 (6%)	5 (6%)
Dismissed as Part of Plea	46 (5%)	2 (2%)
Nolle Prosequi	6 (<1%)	16 (20%)
<b>Total Number of Cases</b>	<b>1,012</b>	<b>81</b>

*Notes:* Percentages do not total 100% as some cases involved multiple charges, each associated with a disposition. The values indicate the number of cases in which at least one charge in that case was resolved with the disposition.

We examined the racial and demographic characteristics of persons entering pleas in Berkshire County. In both district court and superior court, people charged with crimes were most often white men, who were approximately thirty-six years of age on average. Most also had at least one prior conviction or CWOFF. A greater proportion of cases in superior court involved Black people (36%, or 29 of 81 cases), as compared to those in district court (12%, or 110 of the 897 cases in which these data were reported). Hispanic people appeared in 2% of both district (19 of 897 cases) and superior court cases (2 of 81 cases). The percentage of Black and Hispanic persons arrested in Berkshire County is far higher than the representation of these groups in the

general population. Only about 3% of people in Berkshire County identify as Black and about 5% identify as Hispanic.<sup>235</sup>

We sought to assess whether the racial makeup of persons entering pleas reflects in part the racial makeup of persons arrested in Berkshire County. We examined data submitted by the State of Massachusetts to the Federal Bureau of Investigation for the 2020 Uniform Crime Report (UCR). These data indicate that 18% of arrestees in Berkshire County were Black, 6% were Hispanic, and 73% of arrestees were white.<sup>236</sup> Focusing on superior court, the percentages of Black and white persons charged with crimes involving firearms, as reported in the plea tracker, were approximately equal to the proportions seen in the Berkshire 2020 arrestee data, with both groups each comprising 46% of arrests and 45% of pleas.<sup>237</sup> However, a larger share of persons charged with drug offenses in superior court by the Berkshire District Attorney's Office were Black than in the arrestee data.<sup>238</sup> These data do not provide any conclusive explanations, particularly in superior court, but they suggest that arrests may play a role in explaining the racial demographics of those who later plead guilty.

Prosecutors reported that the person charged had at least one prior felony conviction in 18% of cases (201 of a total of 1,093 cases in both courts), and lower-level criminal history—a misdemeanor conviction or a CWOFF—in 38% of cases (418 of 1,093 cases). Finally, 19% of persons charged had no criminal record (209 of 1,093 cases). Note, though, that data on a person's criminal history were missing in some district court cases, so these are underestimates of the true values. In district court, many individuals were perceived by prosecutors as only a minor threat to public safety, with 39% of defendants perceived in this way (224 of 578 the defendants for whom this information was available). In addition, 28% were considered no threat at all to public safety (163 of 578 defendants). District court cases also involved a defendant who presented no threat to property in 41% cases (238 of 578 defendants).

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235. Jenn Smith, *At Pittsfield Forum, a Look at 'Being Black in the Berkshires' in the Past and Present*, BERKSHIRE EAGLE (Sept. 22, 2018), <https://perma.cc/62PB-9SG4>.

236. See QUIGLEY-MCBRIDE & GARRETT, PLEA TRACKING IN BERKSHIRE COUNTY PART ONE, *supra* note 16, at 7.

237. *See id.* at 7-9.

238. For drug crimes, the 2020 UCR arrest data reports fifty-eight arrests, of which thirty-five were of white people, nineteen were of Black people, and four were of Hispanic people. The plea data from Berkshire County included forty-six drug charges in superior court, for which twenty-four persons were white, nineteen were Black and two were Hispanic. We note that, compared to the 2020 UCR arrest data, there was a higher percentage of Black persons, and a lower percentage of white persons, charged with violent crimes in superior court. The UCR data, however, included 301 violent crimes. With just thirty-four violent crimes in superior court, the UCR data clearly include quite a few district court cases, making for an uneven comparison. *See id.* at 9 tbl.2.

In superior court, by way of contrast, prosecutors judged 28% of defendants to pose a high level of threat to public safety (20 of the 71 defendants for whom this information was available) and 24% to pose a moderate level of threat (17 of 71 defendants). That said, superior court defendants were often perceived to be only a minor threat to property (28% or 20 of 71 defendants) or no threat at all (41% or 29 of 71 defendants).<sup>239</sup>

a. The plea negotiation process

The most novel data we collected explores how pleas are negotiated, what factors influence decisions made by prosecutors, and how plea outcomes change during the plea-bargaining process.<sup>240</sup> As noted, the plea tracker asks prosecutors to record how they communicated with the defense, what charging and sentencing options they felt were most important when negotiating a case, and what mitigating, aggravating, and other case factors they considered when offering the plea. Not only are these data unique, but they also add structure to, and ideally improve the quality of, prosecutors' deliberations as they make plea offers.

We obtained rich data concerning charge bargaining during the plea negotiation process. There were two ways that charges could be altered in Berkshire County: (1) by dropping a charge or declining to prosecute a charge brought by police; or (2) by reducing the charge to a less severe offense. In district court, prosecutors reported dismissing a charge or charges, or declining to prosecute a charge, in 20% of cases (118 of the 585 district court cases for which these data were available). In 49% of superior court cases (40 of 81 cases), either a charge brought by the police was not prosecuted or a charge was dropped after some investigation. In 11% of superior court cases (9 of 81 cases), at least one charge brought by the police was not prosecuted. Compared with district court cases, there was a much higher proportion of superior court cases in which charges were dropped after some additional investigation by the prosecutor assigned to the case. At least one charge was disposed of in this way in 46% of superior court cases (37 of 81 cases) compared with 20% of district court cases (118 of 585 cases for which we have these data).

We also obtained data on charges that were reduced during negotiations. Plea bargaining affected charges in district court less frequently than in superior court. In 9% of district court cases (45 of the 522 cases with these data available), charge bargaining was reported for at least one charge. Prosecutors were asked to indicate why that approach was taken in a case. The most common reason for

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239. *See id.* at 9-10, 10 tbl.3.

240. *See generally* QUIGLEY-MCBRIDE & GARRETT, PLEA TRACKING IN BERKSHIRE COUNTY PART TWO, *supra* note 16.

charge bargaining was to avoid a felony conviction on the record of the person charged. This reason was selected for 38% of pleas (17 of the 45 cases involving charge bargaining). In superior court, at least one charge was subject to charge bargaining in 46% of cases (37 of 81 cases), and a total of sixty-two charges were reduced via this practice. Bargaining for a reduced charge in superior court was usually for the purpose of avoiding a mandatory-minimum sentence associated with the original charge (25 of 37 cases, or 68%), but avoiding a felony conviction was also sometimes a reason (7 of 37 cases, or 19%).

We found substantial differences in defense representation in district court versus superior court. In superior court, the public defender represented just 17% of persons (14 of 81 defendants), with 63% of persons represented by court-appointed lawyers (51 of 81 defendants), and 18% by private attorneys (15 of 81 defendants). In contrast, in district court, 26% of cases were handled by public defenders (230 of the 890 cases for which this information was available), 61% were handled by court-appointed attorneys (539 of 890 cases), and 12% were handled by private attorneys (107 of 890 cases). We also found that Black defendants worked with a court-appointed lawyer more frequently than with a public defender or a private attorney, especially in superior court. White defendants had a private attorney more often than any other racial or ethnic group. Appendix B, Table A2 summarizes these data.

In general, prosecutors in Berkshire County did not extensively communicate formally with the defense, perhaps because the Massachusetts plea process involves each side tendering separate plea offers to the judge, thereby reducing some of the benefits associated with negotiating a joint deal in advance. In addition, there were no strong associations between the amount of communication between the parties and plea outcomes. In other words, the amount of communication with the defense, as reported by prosecutors, did not affect the amount of change in sentencing outcomes between the time of indictment and the determination of the pled sentence.<sup>241</sup>

We asked prosecutors to report the mitigating and aggravating factors they considered in each case, and the other factors and collateral consequences that they felt influenced their sentencing recommendations. The top five mitigating factors reported in district court were:

1. a good past record (138 of the 585 cases for which these data were available, or 24%);
2. the age of the accused (76 of 585 cases, or 13%);
3. the potential for the defendant to be rehabilitated (75 of 585 cases, or 13%);
4. whether the defendant expressed remorse (69 of 585 cases, or 12%); and

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241. *See id.* at 28-29.

5. whether the defendant cooperated with police and the prosecutor (58 of 585 cases, or 10%).

In contrast, the five most common mitigating factors reported in superior court were:

1. the demographic background of the defendant (16 of 71 cases, or 23%);
2. whether the defendant cooperated with police and the prosecutor (15 of 71 cases, or 21%);
3. the existence of a weak case (14 of 71 cases, or 20%),
4. the mental or physical health of defendant (14 of 71 cases, or 20%); and
5. whether the defendant played a minor role in the offense (12 of 71 cases, or 17%).

The top five aggravating factors in district court cases were:

1. the nature and circumstances of the crime (163 of 585 cases, or 28%);
2. the defendant's criminal history (108 of 585 cases, or 18%);
3. the need for deterrence (102 of 585 cases, or 17%);
4. public safety concerns (95 of 585 cases, or 16%); and
5. the defendant's risk of recidivism (60 of 585 cases, or 10%).

The five most common aggravating factors in superior court cases were:

1. the nature and circumstances of the crime committed (32 of 71 cases, or 45%);
2. the need for deterrence (26 of 71 cases, or 37%);
3. public safety concerns (25 of 71 cases, or 35%);
4. the defendant's criminal history (19 of 71 cases, or 27%); and
5. the use of a firearm in the commission of the offense (16 of 71 cases, or 23%).

These factors reflect the relative severity of the cases in each court and are roughly similar to the factors cited by the prosecutors in Durham County, North Carolina.<sup>242</sup>

Finally, we asked Berkshire County prosecutors to report any collateral consequences of a conviction or sentence that they considered. The top three collateral consequences in district court cases were: (1) the suspension of the defendant's driver's license (109 of 585 cases, or 19%); (2) the defendant's ability to contribute positively to the community (94 of 585 cases, or 16%); and (3) the defendant's ability to seek employment (73 of 585 cases, or 12%). In superior court, the top two collateral consequences influencing prosecutors were: (1) the defendant's ability to contribute positively to society (20 of 71 cases, or 28%), and (2) the defendant's ability to seek employment (17 of 71 cases, or 24%). Tied

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242. *See id.* at 11-14; *supra* Table 2.



for third were the avoidance of increased hardship for the defendant and their family and the ability of the defendant to return to their life once the case was resolved (14 of 71 cases, or 20%, each).

b. Sentencing and the role of judges

By combining the charging information with the sentencing information, a richer picture emerges regarding what changed during the plea negotiation process in Berkshire County, Massachusetts.

First, we examined whether people were held in pretrial detention and whether that factored into sentencing. In district court, 19% of cases (109 of the 585 cases for which the information was reported) involved pretrial detention averaging sixty days, or two months. In about half of those cases, the ultimate sentence was for time served. In superior court, this category included 49% of cases (35 of 71 cases), with an average jail time of eight months. Prosecutors reported that about half of superior court defendants (42%) received credit for time served. Similarly, a much higher percentage of superior court cases included a prison sentence. In district court, 75% of pleas included probation sentences (761 of 1,012 cases), while 26% included prison sentences (259 of 1,012 cases). In superior court, 52% of pleas included a probation sentence (42 of 81 cases), and 81% of pleas included a prison sentence (66 of 81 cases).

Next, we examined the “sentence travel,” or the changes in sentence severity from the initial plea to the final plea. In superior court, we observed substantial discounts in sentencing from the initial charges and possible sentences to the final charges and final sentences. We observed sentence travel in two-thirds of cases (54 of 81 cases) in superior court. The average sentence imposed at the conclusion of a case ranged from twenty-seven to thirty-three months. The average discount from the initial sentencing range to the final sentencing range was quite substantial: 49–104 months. Dismissing charges played a key role in reducing sentences in superior court. In Appendix B, Table A4, we illustrate this data, showing how dismissals reduced sentencing ranges and how final sentences were typically at the low end of those ranges.

In superior court, judges modified plea outcomes in 17% of cases (14 of 81 cases) by changing the disposition, sentence, or probation terms and conditions for at least one charge. In 8 of these 14 cases, the altered plea was more lenient; in five cases, it was unclear whether the new plea outcome was more or less severe. One case resulted in a more serious outcome. In district court, judges altered plea outcomes in 24% of cases (138 of the 585 cases for which these data were reported by prosecutors). Most of the time (in 103 of 138 cases, or 75%), the defense had submitted a tender of plea with a more lenient outcome, and the judge imposed a sentence somewhere between the defense and prosecution recommendations. Thus, the imposed outcomes were usually more lenient than what the prosecutor recommended (110 of 138 cases, or 80%), and only

occasionally more severe (10 of 138 cases, or 7%) or different but not clearly more or less severe (18 of 138, or 13%). These results show how plea tracking can shed important light on how other actors, such as judges and defense counsel, influence case outcomes.

### **III. The Implications of Open Prosecution for Plea Negotiations and the Criminal System**

In this Part, we turn to the democratic-legitimacy and consequentialist arguments for an open-prosecution approach. These arguments are connected. Without public reason-giving by prosecutors, as John Rawls would call it, their work lacks democratic accountability.<sup>243</sup> Neither prosecutors nor the public can examine prosecutorial work, evaluate outcomes, or make better policy choices without transparency.

The longstanding democratic deficit in prosecution, which is a global problem, raises deep concerns beyond the work of prosecutors, given the interconnectedness of court actors.<sup>244</sup> An ACLU report recommending legislation to require prosecutorial transparency (which no state has enacted) noted that there exist “few public statistics on prosecutorial decision-making,” which makes it “nearly impossible to uncover individual abuses, systemic discrimination, or patterns that do not align with office policies.”<sup>245</sup> Yet the costs of nontransparency in plea negotiations extend from prosecutors to defense attorneys, judges, and the public. In particular, without information concerning the plea process, the public cannot be fully aware of what the “trial penalty” may be for failing to accept a plea offer, or conversely, what leniency prosecutors may offer in plea negotiations.<sup>246</sup>

In this Part, we first discuss the benefits of plea tracking for prosecutorial accountability and quality. The internal collection of data to inform discretionary decisions concerning plea bargaining has real advantages, and the disclosure of at least some of these data to the public has additional advantages. Second, we discuss reasons why defense lawyers should similarly track plea negotiations, as well as the unique insights that could result from defense lawyers doing so. Third, we describe ways in which judges would benefit from the information provided by plea tracking, including to inform their own exercise of discretion and their broader docket management. Fourth, we assess

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243. See Rawls, *supra* note 10, at 765-66.

244. See Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1590 (2010).

245. See FORTIER, *supra* note 86, at 8; see also *supra* notes 113-16 and accompanying text.

246. For a discussion of the distinctions between trial penalties and plea discounts, see Grunwald, *supra* note 50, at 264.

the potential implications of plea-tracking for public awareness, public policy, and efforts to reduce both reliance on incarceration and racial and other disparities in criminal outcomes.

### A. Prosecutorial Accountability and Quality

While researchers have documented that convictions at trial increase sentence lengths, without adequate data, it is not possible to readily assess whether a “trial penalty” results from a person asserting their trial rights, foregone offers of leniency, or other considerations.<sup>247</sup> Most prosecutors in the United States are locally elected to serve four-year terms.<sup>248</sup> When voters seek to hold prosecutors accountable in elections, they have very little information on which to base their decisions. As Stephanos Bibas has noted, anecdotes often drive prosecutor elections:

Part of the problem . . . is that juicy, salient anecdotes are more memorable and powerful than dry numbers. Part of the answer may be that voters lack clear, comprehensive, and meaningful statistics about arrests, charges, pleas, and sentences. If, for example, statistics revealed racial charging and sentencing disparities, the public might clamor for more equality, or at least explanations.<sup>249</sup>

Information about crime rates or conviction statistics alone do not adequately inform voters.<sup>250</sup>

As Ronald Wright has detailed, we need additional accountability mechanisms in “the period in between quadrennial elections” to improve public decisions and prosecutors’ own decisions.<sup>251</sup> The data collected through plea tracking can be examined in statistical analyses and also be shared immediately in simpler formats through tools like data dashboards. Such a dashboard can provide a dynamic display so that prosecutors can, for example, examine how sentences vary based on demographics or how often formal communication is used to negotiate various types of plea deals. We have

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247. See, e.g., Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT’G REP. 256, 257 (2019); Nancy J. King, David A. Soulé, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973-75, 992 (2005).

248. See STEVEN W. PERRY, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ No. 213799, PROSECUTORS IN STATE COURTS, 2005, at 3 (2006), <https://perma.cc/F3PV-TW3T>; Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598-99 (2014) (“All but five states elect their prosecutors at the local level . . .”).

249. Bibas, *supra* note 35, at 987.

250. See *id.* at 986.

251. Wright, *supra* note 248, at 593; see *id.* at 594 (“These techniques for publicizing data about prosecutor performance and collecting community feedback might promote a form of prosecutor accountability that goes beyond the blunt force of elections.”).

drafted such dashboards to provide offices with this basic information. Ideally, mechanisms that permit community feedback regarding data that is made public will also be adopted. Our plea-tracking efforts include public data sharing so that patterns can be understood and examined by the public; thus, we have shared detailed reports regarding the first year of plea-tracking work.

We note that the open-prosecution system we have described does not make public individual and case-level information, so it would not satisfy the need for reason-giving in specific cases. Full case-level data concerning plea agreements could expose information concerning cooperators and informants, for example, and may be harmful if released. Nevertheless, internal documentation and reason-giving can have an important influence on prosecutors. As Judge Harold Leventhal put it, “Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice.”<sup>252</sup> Or as Frederick Schauer has written, “[W]hen institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies.”<sup>253</sup> Thus, there is a strong consequentialist case for requiring reason-giving, and that case is particularly strong in the plea negotiation context. After all, a person waives a range of important constitutional rights, including trial rights, when pleading guilty. Anecdotally, prosecutors have told us they value the opportunity to document the reasons supporting the plea offers they have made.

Through the plea tracker, we have built reason-giving into the decision to offer a plea. The plea-tracking approach does not require prosecutors to write detailed, legalistic opinions, but it does call upon them to document the steps in the process and the reasons behind their decisions. The insights from such data can spark changes in internal decisionmaking and policy. Aggregate data documenting disparities can result in internal communications and ultimately changes, as occurred in the Milwaukee County District Attorney’s office after data there documented “an unexpected racial disparity in drug cases.”<sup>254</sup> Similarly, the Charlotte-Mecklenberg office discovered that charges were filed in almost all drug cases but large numbers were subsequently dismissed; in response, the office changed its policies, which increased declinations, or decisions not to bring charges, in drug cases.<sup>255</sup>

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252. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

253. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657-58 (1995).

254. See McKenzie et al., *supra* note 130, at 6-7.

255. *Id.* at 7.

While prosecutors' offices traditionally have not had quality-control programs, in contrast to programs maintained in crime laboratories and hospitals, plea tracking can provide such a quality-control function.<sup>256</sup> A plea data system could enable the identification of outcomes that raise quality-control concerns. The metrics for quality assessment will depend on the office and may include adherence to written office policies or to legal requirements. For example, there may be cases that should have been recommended for dismissal or diversion but were not. There may be cases in which procedures were not followed, such as instances where prosecutors did not disclose exculpatory evidence, did not document adequate reasons for a plea, or failed to confer with the defense regarding potential mitigation evidence. Offices could use plea tracking to identify these failures. While researchers review only aggregate and anonymized data, offices can choose to review individual case information. If cases reflect departures from policies or practices, they can be identified as process failures and result in corrective action or training. Even absent clearly identifiable errors, "quality" can involve examination of aggregate metrics, such as sentencing ranges, timeliness in contacting victims, racial disparities in outcomes, and the degree of use of diversion.

Going still further, prosecutors could be rated on metrics, such as internal consistency, consistency with colleagues, adherence to office policies, and level of bias in sentencing across groups of persons based on race or other characteristics. As part of routine oversight, supervising prosecutors could randomly select cases to independently review and then discuss with the line prosecutor. The specifics of such a quality program could "grow out of [the] typical management needs" in a given office.<sup>257</sup>

## B. Defense Data

Defense lawyers may have far more to gain from data collection concerning plea bargaining, and public defenders can adopt similar systems. Our plea-tracking program with prosecutors has shown that defense attorneys often obtain beneficial results for their clients during plea negotiations.<sup>258</sup> A better understanding of that process can assist the defense. As Stephanos Bibas has put it: "Defendants and defense counsel are valuable sources of information about prosecutorial behavior, ones that we have not tapped well."<sup>259</sup> Defense lawyers are obligated to convey plea offers to their clients, and these

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256. For an overview of quality-control functions and failures in such settings, see BRANDON L. GARRETT, *AUTOPSY OF A CRIME LAB: EXPOSING THE FLAWS IN FORENSICS* 139-55 (2021).

257. See Wright, *supra* note 95, at 71.

258. See *supra* Part II.

259. See Bibas, *supra* note 35, at 995.

obligations can be supported by better-documented plea practices; as the Supreme Court put it in *Missouri v. Frye*, “[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”<sup>260</sup> Defense lawyers can use data to situate what a prosecutor represents as the “going rate” for a type of charge. They can better evaluate how typical an offer is or whether it is an outlier. Thus, defense lawyers can improve the quality of their advocacy during plea negotiations by using systematic data concerning the plea-bargaining process and outcomes.<sup>261</sup>

In addition, specific abuses can occur during the plea negotiation process that may be of special concern to public defenders. The National Association of Criminal Defense Lawyers (NACDL) has documented concerns about the “trial penalty,” whereby people who reject plea offers and proceed to trial may be penalized with far more punitive outcomes.<sup>262</sup> The NACDL has called for better data collection regarding plea offers and subsequent outcomes, since the organization had to rely on interviews and existing case-processing information to describe unfair practices in New York State (the focus of the most recent NACDL study) as there was “limited data available.”<sup>263</sup> Specifically, the organization recommended that “[a]gencies involved in criminal cases should collect data on at least (1) the best plea offered; (2) the final plea offered; and, if applicable, (3) any final sentence.”<sup>264</sup> It also noted that, with trials in dramatic decline in jurisdictions like New York, it is particularly important to examine potential abuses in the plea negotiation system.<sup>265</sup>

Crucial information can only be obtained by focusing on the plea process from the defense perspective. The effect of caseload pressures on plea outcomes could be documented directly or measured indirectly by examining attorney caseloads and outcomes by attorney. Defense attorneys also have unique access to their clients. Therefore, they can more fully track evidence of innocence, mitigation evidence, and other evidence favorable to the defendant, and after discussing it with their client, consider whether to share that evidence with the

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260. 566 U.S. 134, 145 (2012).

261. See Turner, *supra* note 85, at 994 (“[T]he lack of searchable plea records inhibits proactive efforts by defense attorneys to improve the assistance they provide during plea negotiations.”); see also Levine et al., *supra* note 85, at 655 (suggesting the benefits of “crowdsourcing” information to advance parties’ positions in plea negotiations).

262. See NAT’L ASS’N OF CRIM. DEF. LAWS. & N.Y. STATE ASS’N OF CRIM. DEF. LAWS., THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK 11 (2021), <https://perma.cc/M5PJ-U87Q>.

263. See *id.* at 12.

264. *Id.* at 10.

265. See *id.* at 11, 15.

prosecution during plea negotiations.<sup>266</sup> The defense lawyer is in the best position to track the defendant's preferences, including their risk preferences, and the lawyer should be communicating with the client regarding whether the client is willing to negotiate or risk a trial.<sup>267</sup> The defense lawyer can also more fully document client preferences and concerns regarding the collateral consequences of a plea on health, housing, employment, and immigration,<sup>268</sup> although some of these insights will be sensitive client information.<sup>269</sup> The impact of resource constraints or caseloads on defense attorneys can also be documented. As one lawyer quoted in the NACDL report commented, "Excessive caseloads for attorneys leads to [the] client's belief that the attorney is too busy to handle the case and too busy to adequately prepare their case for trial leading to pressure to enter a plea."<sup>270</sup>

More broadly, Pamela Metzger and Andrew Ferguson have called for the creation of defense-lawyering databases: "[T]here has been no widespread effort to develop a data-driven approach to the highly adversarial practice of public defense, in part because public defense presents unique challenges for a data-driven systems approach."<sup>271</sup> One obstacle, they note, is that outcomes are defined by client interests, not the budgetary and caseload information that is typically collected in public defender offices.<sup>272</sup> Another obstacle is cultural:

Although most defenders handle the same types of cases, in the same courts, with the same law, using the same methods, defenders do not see a larger defender system at work. By oath and ethics, defenders devote themselves to one client above all other considerations. As a result, defenders tend to view systemic data as unnecessary and errors as anomalous occurrences that occur in individual cases; they do not see errors as institutional failures that affect multiple clients in broad and often undiscovered ways.<sup>273</sup>

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266. See CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-3.7(d) (AM. BAR ASS'N, 4th ed. 2017) (describing the obligation of defense attorneys to discuss evidence of innocence, evidence of mitigation, or other favorable evidence with the client and decide what is in the best interests of the client).

267. See *id.* Standard 4-6.2 ("Once discussions with the prosecutor begin, defense counsel should keep the accused advised of relevant developments.").

268. See *id.* Standard 4-5.4 ("When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence, and if so, how to best pursue or prepare for them.").

269. See Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1080-81 (2015).

270. NAT'L ASS'N OF CRIM. DEF. LAWS. & N.Y. STATE ASS'N OF CRIM. DEF. LAWS., *supra* note 262, at 58 (alteration in original).

271. Metzger & Ferguson, *supra* note 269, at 1061.

272. See *id.* at 1062-63.

273. *Id.* at 1078.

However, a system can be set up to examine plea outcomes from the defense perspective. Indeed, we have piloted a defense plea tracker in one jurisdiction. Kay Levine, Ronald Wright, Nancy King, and Marc Miller have argued that defense organizations should create such databases to “crowdsource” plea-bargain information, and that “the pricing for pleas would become more transparent” as a result, “particularly for newcomers to the profession.”<sup>274</sup> Many of the same questions regarding the terms of plea offers exchanged and ultimately accepted would be asked and answered in such a database. Other outcomes, such as successful efforts to suppress evidence or obtain a diversion or a reduced sentence, could also be documented.<sup>275</sup> Open defense lawyering should accompany open prosecution.

### C. Judicial Review

Judges cannot exercise effective oversight over plea bargains if they are not privy to relevant information concerning the process, both in a particular case and across cases. They may not be aware of what charges were dropped or reduced or added, and they may not be in any position to document key information concerning plea offers exchanged between the parties. In some jurisdictions, judges are involved in plea negotiations, and those negotiations are recorded.<sup>276</sup> Judges serve a key democratic function in making reasons and outcomes public. Thus, as Micah Schwartzman has explained, the case for judicial reason-giving includes the normative and consequentialist arguments that “transparent decisionmaking constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts.”<sup>277</sup>

Further, the U.S. Supreme Court has expressed real separation-of-powers concerns about inquiring into the exercise of prosecutorial discretion generally. As noted, the Supreme Court has emphasized that doing so would entail certain “systemic costs of particular concern,” including the potential to delay proceedings, “chill law enforcement,” and “undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”<sup>278</sup> Under an

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274. Levine et al., *supra* note 85, at 655.

275. Efforts would have to be made, however, to safeguard any confidential client information, as well as attorney work product, such as assessments of the strength of the evidence, a measure which is also present in the prosecution databases. *See id.* at 669-70.

276. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 338-42 (2016).

277. Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 989 (2008).

278. *See* *Wayte v. United States*, 470 U.S. 598, 607 (1985).



open-prosecution regime, prosecutors themselves reveal their enforcement policies, but only in the aggregate. Further, prosecutors are able, without delaying case processing, to collect internal case-specific data in real-time, which can allow them to evaluate whether they are following their own policies. This does not undermine the effectiveness of prosecutors but rather allows them to evaluate their effectiveness instead of relying on a more general sense of how plea negotiations are faring.

This plea-tracking work can also place judges in a better position to evaluate the exercise of prosecutorial discretion. Judges may have far less reason to step in, however, if prosecutors themselves can identify outlier exercises of discretion and remedy them before any judicial review becomes necessary. Thus, an open-prosecution framework can empower judicial review if there are abuses, but most significantly, it can detect and prevent any abuses or departures from policy before they affect the rights of defendants. In so doing, as described, the open-prosecution framework has the potential to create a self-regulating system for prosecutorial accountability.

Such a system can shed light on a range of constitutional violations that may be currently disguised by the “black box” that is today’s state of data collection and documentation. Thus, as both Jenia Turner and the Supreme Court have noted: “[I]t is difficult to ensure that defendants are receiving effective assistance if plea bargaining occurs off the record.”<sup>279</sup> We have discussed concerns that prosecutors may penalize defendants who seek to assert their trial rights, or the “trial penalty.” Without documentation of plea offers, the “trial penalty,” or any other such practices, may remain disguised.

Further, judges may currently be analyzing the wrong kind of data and consequently focusing their review on the wrong types of information. Judges often do have data concerning their own dockets. As a result, they may try to push cases toward plea outcomes in order to clear dockets, without any information about what dynamics may result in what outcomes for defendants. The NACDL points out that, “while prompt resolution of criminal cases is an important constitutional right . . . pressure on judges to resolve cases quickly (and thereby avoid trials) may incentivize judges to discourage criminal defendants from exercising their right to litigate cases up to and including a trial.”<sup>280</sup> An open-prosecution approach may help judges better evaluate their own dockets and case management. For example, if improved communication between the defense and the prosecution leads to more informed pleas, judges may make better use of settlement conferences. If

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279. See Turner, *supra* note 85, at 994 (citing *Missouri v. Frye*, 566 U.S. 134, 146 (2012)).

280. NAT’L ASS’N OF CRIM. DEF. LAWS. & N.Y. STATE ASS’N OF CRIM. DEF. LAWS., *supra* note 262, at 56.

inadequate discovery hinders the defense's ability to consider a plea bargain, then judges may consider more robust pretrial discovery.

#### D. Open Prosecution and Progressive Prosecution

One early justification for enhanced data collection by prosecutors was the desire to improve prosecution legitimacy to “enhance public confidence in the fairness of the prosecutorial function.”<sup>281</sup> However, the ambition of more recent efforts to increase prosecutorial transparency has been to use data collection to catalyze far deeper changes in the approach to prosecution. Some prosecutors have consciously adopted, to some degree, an agenda that reconsiders reliance on incarceration.<sup>282</sup> In pursuing this agenda, they have sought to document and evaluate existing policies using data. Plea tracking has the potential to help offices and outsiders assess whether prosecution goals are being met. As a research review summarized, “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.”<sup>283</sup>

The plea-tracking effort builds more time and holistic considerations into the plea negotiation process. It has the potential to introduce what Jennifer Eberhardt calls “friction” into the plea-bargaining process, which could operate as a check against racial and other invidious biases.<sup>284</sup> Future work could examine whether the plea-tracking process itself has such effects. More fundamentally, plea tracking can document patterns in case outcomes that might not otherwise be apparent, in order to potentially detect invidious bias.

We note there is another important part of the plea negotiation process that is still unexamined: affected individuals’ own experiences with plea bargaining. Unlike attorneys, persons charged as defendants are not normally professional, legally trained actors. They may face pressures, including from pretrial detention, to plead guilty regardless of whether they are innocent or guilty.<sup>285</sup> We believe that affected individuals are indispensable to any model of plea negotiations that aims to speak to justice and outcomes in our legal system. Few studies have interviewed or surveyed affected individuals about their experiences in plea negotiations; there is evidence that many individuals

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281. See McKenzie et al., *supra* note 130, at 8.

282. For an overview, see generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

283. See SUBRAMANIAN ET AL., *supra* note 7, at 49.

284. See Eberhardt, *supra* note 26, at 184-86.

285. See Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1124 (2005).

do not meet with their defense lawyers for long and may not understand what they are pleading guilty to or the consequences of doing so.<sup>286</sup>

#### E. Public Reason, Ethics, and Prosecutors

A core feature of democratic accountability is that government officials provide publicly stated reasons for their actions.<sup>287</sup> Administrative agencies and courts commonly provide public reasons for their decisions.<sup>288</sup> In contrast, enforcement officials, like prosecutors, have tended not to do so with respect to key decisions, including those reached largely out-of-court, such as plea deals.<sup>289</sup> While judges should “show that their decisions are justified according to the law,”<sup>290</sup> we acknowledge that a wide range of negotiated dispositions need not be fully justified by the law, nor are they subject to searching judicial review or regulatory oversight.<sup>291</sup> The American Bar Association’s *Model Rules of Professional Conduct* set out ethical obligations for prosecutors, including during the plea negotiation process.<sup>292</sup> Those rules do not address transparency or the documentation of key steps during the negotiation process.<sup>293</sup> An open-prosecution approach would revise the rules, given the benefits from a consequentialist perspective and the democratic accountability goals of public reason-giving in criminal cases, so many of which are now resolved through plea bargains.

### Conclusion

In *McCleskey v. Kemp*, a landmark decision rejecting as insufficient the results of two substantial empirical studies of prosecutorial discretion in death sentencing practices, the U.S. Supreme Court emphasized that prosecutorial discretion is “at the heart of the State’s criminal justice system.”<sup>294</sup> The Court’s constitutional criminal procedure rulings, and state and local rules, have not incentivized efforts to open the lid on what occurs during plea negotiations, treating the entire domain as within the unique purview of prosecutors. Yet

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286. See, e.g., Zottoli et al., *supra* note 123, at 252.

287. See Rawls, *supra* note 10, at 765-66.

288. See Jerry L. Mashaw, Lecture, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 22 (2001).

289. See *supra* Part I.A.

290. See Schwartzman, *supra* note 277, at 1026.

291. For a critique of settlements, and plea bargaining, as expedient but not necessarily just, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

292. See MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 1983).

293. See *id.*

294. See 481 U.S. 279, 286-87, 297 (1987).

prosecutors have begun to see the value of collecting such data as a means to inform themselves and improve their work.

The black box of plea bargaining has been opened. In our plea-tracking projects, which involved very different jurisdictions and an interdisciplinary team of researchers, we collected systematic plea-bargaining data. In this Article, we have described how this data collection system was designed, piloted, and implemented. We also detailed the data we collected during the first year of plea tracking. This data has taught us a great deal about how the plea process proceeds, what types of communications occur between prosecutors and the defense, how productive that communication is, what factors motivate prosecutors in arriving at plea offers, and what role judges play in reviewing plea outcomes. We uncovered patterns not apparent before, including by showing how dramatically outcomes change during the plea process, with large numbers of charges dismissed and sentences reduced, not only because of the factors that prosecutors found important in cases, but also because of the role of defense lawyers in negotiating more favorable outcomes for their clients. Indeed, we believe that criminal defense lawyers can benefit substantially from collecting similar data.

So long as plea bargaining remains a central, defining part of criminal justice in the United States, it is imperative that plea outcomes be tracked and documented. The system we have developed can readily be adapted across jurisdictions. We seek to provide a national model for criminal lawyers to document plea negotiations in all cases. An open-prosecution approach is feasible, and, for the first time in the United States, it is in operation.

**Appendix A: Durham County Plea Tracking**

**Table A1**

Indicted vs. Pled Charge Classes (the Most Serious Charge in Each Case) in Non-Drug Trafficking Cases

Indicted Charge	Pled Charge	B1	B2	C	D	E	F	G	H	I	Misd.	Total	Avg. Reduction
A	N	2 (18%)	5 (45%)	1 (9%)	3 (27%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	11 (3.8%)	2.5
B1	N	5 (45%)	1 (9%)	3 (27%)	0 (0%)	1 (9%)	0 (0%)	0 (0%)	0 (0%)	1 (9%)	0 (0%)	11 (3.8%)	1.7
B2	N	0 (0%)	3 (37.5%)	2 (25%)	2 (25%)	1 (12.5%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	8 (2.7%)	1.1
C	N	0 (0%)	0 (0%)	2 (9%)	2 (9%)	9 (39%)	3 (13%)	1 (4%)	3 (13%)	2 (9%)	1 (4%)	23 (8.0%)	2.9
D	N	0 (0%)	0 (0%)	0 (0%)	7 (19%)	7 (19%)	2 (5.5%)	11 (30.5%)	5 (14%)	1 (3%)	3 (8%)	36 (12.4%)	2.4
E	N	0 (0%)	0 (0%)	0 (0%)	0 (0%)	8 (35%)	5 (22%)	3 (13%)	3 (13%)	0 (0%)	4 (17%)	23 (8.0%)	1.7
F	N	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	12 (75%)	0 (0%)	1 (6%)	1 (6%)	2 (12.5%)	16 (5.5%)	0.8
G	N	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	50 (69%)	13 (18%)	2 (3%)	7 (10%)	72 (24.7%)	0.5
H	N	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	62 (75%)	6 (7%)	15 (18%)	83 (28.5%)	0.4
I	N	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	6 (75%)	2 (25%)	8 (2.7%)	0.25
	Total	7 (2.4%)	9 (3.1%)	8 (2.7%)	14 (4.8%)	26 (8.9%)	22 (7.6%)	65 (22.3%)	87 (30.0%)	19 (6.5%)	34 (11.7%)	291	

*Note.* The parentheses contain the percentage of the total number of pled nontrafficking cases (n = 291). Data are missing for five cases. Class reduction is computed as one unit from a given felony class to the next lowest class. B1 and B2 are counted as one class apart from each other, as are I and misdemeanor.

## Appendix B: Berkshire County Plea Tracking

**Table A2**

Type of Defense Attorney and Race of Person Charged

Court	Type of Lawyer	Count	%*	Race of Person Charged	Count	%#
District Court (n = 890)	Private Attorney	107	12%	White	92	86%
				Black	6	6%
				Hispanic	2	2%
	Court-Appointed Lawyer	539	61%	White	447	83%
				Black	67	12%
				Hispanic	10	2%
	CPCS	230	26%	White	188	82%
				Black	32	14%
				Hispanic	6	3%
Superior Court (n = 81)	Private Attorney	15	18%	White	12	80%
				Black	2	13%
				Hispanic	0	0%
	Court-Appointed Lawyer	51	62%	White	24	47%
				Black	24	47%
				Hispanic	1	2%
	CPCS	14	17%	White	10	71%
				Black	3	21%
				Hispanic	0	0%

*Notes:* Some cases are missing race or attorney information.

\*These percentages were calculated using the number of cases for which defense attorney information was reported (district court = 890, superior court = 81).

#These percentages were calculated using the total counts presented.

**Table A3**

Frequency of Prison and Probation Sentences in District Court as a Function of Race

Race	Number Who Received a Prison Sentence (%)	Number Who Received a Probation Sentence (%)
Any Race/Ethnicity*	259 (26%)	761 (75%)
White#	193 (26%)	576 (77%)
Black#	32 (29%)	82 (75%)
Hispanic#	5 (26%)	15 (79%)
Other/Unknown#	2 (7%)	22 (81%)

\*These percentages were calculated using the total number of defendants as the denominator (n = 1,012 in district court).

#These percentages were calculated using the number of people of each race as the denominator: n<sub>white</sub> = 746; n<sub>black</sub> = 110; n<sub>hispanic</sub> = 19; n<sub>other/missing</sub> = 27. Note also that for seventy-nine cases (8%), both a prison and a probation sentence were reported, and for seventy-one cases (7%), neither a prison nor a probation sentence was reported.

**Table A4**

Sentencing and Charging in Superior Court

	Number of Cases	Average Sentencing Range Presented			Average Discount (Months)
		Potential Sentence Pre-Dismissal (Months)	Potential Sentence Post-Dismissal (Months)	Pled Sentence (Months)	
All Superior Court Cases	81	75 – 137	42 – 81	26 – 33	49 – 104
<i>Superior Court Cases Categorized According to the Offense Level of the Most Serious Charge</i>					
Level 1	0	-	-	-	-
Level 2	4	5 – 33	0	6	-2 – 27
Level 3	3	8 – 23	0 – 11	10	-2 – 13
Level 4	24	51 – 126	10 – 51	17 – 20	34 – 106
Level 5	22	68 – 125	41 – 82	24 – 33	43 – 92
Level 6	13	52 – 90	41 – 76	20 – 23	32 – 67
Level 7	10	168 – 255	103 – 156	29 – 47	139 – 209
Level 8	4	186 – 270	100 – 174	75 – 96	111 – 174
Level 9	1	300	300	300	0

## Appendix C: Berkshire County, Massachusetts Plea Tracker

### Questions

#### Summary of Support Staff Data Entry

- Docket number of the case being reported
- Other relevant docket numbers and associated notes/details

#### Defendant Information

- Basic information:
  - Full name, age (current and at time of offense), race, and gender
  - Whether English is the defendant's second language?
    - If yes, does the defendant need a translator?
  - Names of any codefendants
- Your opinion regarding the defendant's threat to people, public safety, and property:
  - *Options:* "no threat at all," "a minor threat," "a moderate threat," "a high level of threat," or "this has yet to be determined"

#### Criminal History

- Prior complaints with felony charges, misdemeanor charges, and CWOPs
- The type(s) of crime(s) the defendant has been charged with in this case:
  - *Options:* crimes against people, crimes against property, drugs/narcotics offenses, traffic offenses, crimes involving a firearm, violent crimes, and financial crimes
- Has the defendant been charged with this type of crime before?
- Has the defendant been incarcerated before?
  - If yes, where, and under which court was the defendant convicted/sentenced?
- Has the defendant served probation before?
  - If yes, has the defendant violated probation before?

#### Victim Information

- Option to indicate if this was a victimless crime or a crime against a business
- If there were victims, enter the following for each victim:
  - Age, whether they are a member of a vulnerable population (minor, elderly, physically or mentally disabled, or other), race, and gender
  - *Impact on the victim:* Rate from 1 to 7. A higher rating means a more negative impact.
  - Whether there has been communication with the victim and, if so, how much
  - *Other involvement of the victim:* right to be heard, impact statement, came to court, or testified



### Charge Information

- For each charge, enter the following:
  - *Details of charge*: what charge/offense, date of offense and indictment, chapter/section of charge, docket number, and counts
  - *Sentence Type*: life, state prison, house of corrections, county/split, probation, filed, policy amendment, or other
    - Enter mandatory minimum/maximum or other details where applicable.
  - Financial Sanctions: fine, restitution, victim/witness fee, rehabilitation or treatment fee, probation supervision, or bar advocate fee
    - Indicate amounts and whether fees were waived or imposed.
  - Any additional notes about this charge
  - Which emails should the report be distributed to?

### Summary of ADA Responses

- Docket number of cases being reported and other relevant docket numbers/notes/details

### Previous Tender of Plea (if entering a modified or final tender of plea)

- Did the defense or judge reject the previous tender of plea?
- Did the judge attempt to impose a sentence? If yes, did the defense withdraw approval?

### Tender of Plea Information

- Arrest date, date plea was offered to defense, and date plea was presented to court
- Any charges being dropped and why
- The procedural event associated with this tender of plea
- Details of the following aspects of sentences, where applicable:
  - Pretrial detention, suspended sentencing, “time served” incorporated into sentence, community service, rehabilitation/treatment, “no contact” orders, and how multiple sentences will be served
- For each charge:
  - Reasons for any changes to the charge during negotiations or since the last tender of plea, and the status of the charge
  - If probation, specify any terms and conditions and the length of probation.
  - If prison, specify total length of time recommended.
  - If charge was amended, why?
  - What did the defense and judge recommend for sentencing and fines/fees?

Questions About Decisionmaking

- Was this within the sentencing guidelines? If no, how and why?
- What mitigating, aggravating, and other factors influenced sentencing in this case?
- How were negotiations conducted (email, phone, etc.)?
- How important was consistency with previous, similar cases?
- To what extent were the following potential aspects of a plea negotiated in this case (reducing the number of charges, sentence length, rehabilitation potential)?
- Were any collateral consequences considered in this case?
- What incriminating and exonerating evidence was available in this case, and how was it relevant to your sentencing recommendations/plea negotiations, if at all?