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# Trials and Tribulations: The Trial Tax and the Process of Punishment

## ABSTRACT

The jury trial has long been a keystone of the American criminal justice system. Few defendants exercise their right to trial, however, and those who do tend to receive significantly harsher punishments if convicted. This phenomenon, known as a trial tax or, conversely, as a guilty plea discount, is one of the most profound and consistent findings in the empirical sentencing literature. Estimates of its magnitude differ across studies and jurisdictions, but it typically involves a two- to six-times increase in the odds of imprisonment and a 15–60 percent increase in average sentence length. Recent changes to American sentencing policy may have exacerbated plea-trial disparities, raising a host of moral, legal, and procedural questions about fair and equal treatment of defendants who exercise their right to trial.

Juries are often portrayed as bulwarks of democracy, the backbone of the American criminal justice system. Criminal defendants are constitutionally guaranteed the right to a jury trial, yet research on sentencing consistently indicates that trial convictions result in harsher sentences (King et al. 2005). This phenomenon, alternatively labeled a trial tax for those convicted after a trial or a plea discount for those who plead guilty, presents a fundamental tension between defendants' constitutional rights and the organizational realities of courts. The trial penalty is consistently found

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across jurisdictions, offense types, and over time, and it is among the most robust findings in the empirical sentencing literature. In recent decades, guilty plea rates have grown dramatically, and plea-trial disparities have worsened.

In early colonial America, juries decided nearly all criminal cases (Hans, Vidmar, and Zeisel 1986). Today, the story is much different. The disappearance of the jury trial is one of the defining characteristics of the modern American justice system. Few defendants exercise their constitutional right to trial. Even for very serious crimes involving lengthy prison sentences, the vast majority of defendants plead guilty. Guilty pleas have become the *sine qua non* of criminal case processing. As Supreme Court Associate Justice Anthony Kennedy observed in *Lafley v. Cooper*, 132 S. Ct. 1376, 1388 (2012), “criminal justice today is for the most part a system of pleas, not a system of trials.”

The rising prevalence of guilty pleas has diverse causes, but there is little doubt that changes in sentencing law are part of the explanation. Sentencing reform in the 1970s and 1980s focused on reducing judicial discretion but did little to constrain prosecutorial discretion. Mandatory minimum, truth in sentencing, three-strikes, and similar laws enhanced the power of the prosecutor to influence and determine punishments. Contemporary prosecutors carry many punishment hammers in their toolboxes that can be used to threaten long sentences and convince defendants to forgo trial (McCoy 2005; Wright 2005; Lynch 2016).

The eclipse of the jury trial is a product of the increased power of the prosecutor, along with growing risks of lengthy trial sentences and a lack of procedural or other controls on plea bargaining. Defendants convicted at trial consistently receive harsher punishments than defendants who plead guilty. Estimates of the trial tax vary but typically involve two- to sixfold increases in the odds of imprisonment with 15–60 percent longer sentence lengths. Trial defendants are also less likely to receive mitigated sentences, such as downward departures from applicable guidelines, and are more likely to receive sentence enhancements, including mandatory minimums. Plea-trial disparities have contributed to the booming guilty plea rate and can result in disproportionately severe punishments for trial defendants. Trial taxes are also associated with racial disparities. Racial differences in who goes to trial may reflect different plea offers, plea negotiation resources, or defendants’ levels of trust in the justice system. Large trial penalties may also contribute to false guilty pleas; when plea-trial disparities are large enough, some innocents are likely to plead guilty.

Plea-trial disparities also raise numerous philosophical, moral, and legal questions about defendants' procedural rights and the ways the trial tax shapes court actors' and defendants' decisions.

Empirical research on the trial tax is extensive but beset by fundamental methodological challenges. Guilty plea and trial cases are difficult to compare because they often differ in important ways. Jury trials are more likely to involve serious violent crimes, repeat offenders, and minority defendants, and counterfactual outcomes are unobservable. Estimates of the trial tax depend on basic analytical choices, including the modeling of related punishment processes. Moreover, conviction charges are often altered during plea bargaining, and some defendants who go to trial are acquitted.

Despite these complications, there are persuasive reasons to believe the trial tax is real and substantial. Quantitative studies consistently unearth large plea-trial disparities, qualitative research confirms their existence, and attempts to address sample selection issues do not explain it. Most likely, common methodological problems result in systematic underestimation of the size of the trial tax.

Section I of this essay places plea-trial sentencing disparities in historical context. I discuss key changes in sentencing policy and various explanations for growth in guilty plea rates. I argue that modern sentencing reforms increased prosecutors' influence on sentencing and contributed directly to growing trial penalties and increased reliance on plea bargaining. In Section II, I survey empirical research on the magnitude of trial penalties and their effects on racial disparities and wrongful convictions. I also discuss key differences between viewing plea-trial differences as a trial tax and as a plea discount and conclude that conceiving of it as a trial tax is more consistent with philosophical notions of justice. In Section III, I discuss common limitations of empirical approaches used to estimate plea-trial disparities. Existing work likely produces underestimates because it fails to account for differences in who pleads guilty and who goes to trial. Finally, in Section IV, I consider moral and ethical issues raised by plea-trial disparities and discuss policy proposals that aim to reduce the trial tax, restore the balance of power between judges and prosecutors, and create a fairer, more just, and more equitable sentencing system.

### I. Criminal Justice Reform and the Rise of Guilty Pleas

To appreciate the contemporary landscape of plea-trial disparity, it is useful to begin with the rise of modern sentencing reforms. In the 1970s, a sea change occurred. Against the historical backdrop of the Vietnam War and

the civil rights movement, rising civil discord and waning public trust fueled deadly race riots in American cities (Kerner Commission 1968). Prison uprisings garnered national attention and drove concerns about inequalities in the justice system. Scholars criticized excessive judicial discretion (Frankel 1973) and the ineffectiveness of rehabilitation (Martinson 1974), which led to a new “just deserts” philosophy that prioritized deservedness, proportionality, and fairness in punishment (von Hirsch 1976). Both liberals and conservatives lobbied for change; liberals focused on justice, fairness, and equality and conservatives on rising crime and the need for tougher sentences. With bipartisan political support, sentencing reforms proliferated. Sentencing guidelines were promulgated in nearly half the states and the federal government, mandatory minimums flourished along with habitual offender and three-strikes laws, discretionary parole release was partly or fully abolished in many jurisdictions, and new truth-in-sentencing laws required many prisoners to serve at least 85 percent of their sentences (Tonry 1996).

Modern sentencing reforms altered the scale of American punishment (Travis, Western, and Redburn 2014). The United States today has the world’s highest incarceration rate: it accounts for 5 percent of the world’s population but 25 percent of its prisoners. People of color have been disproportionately affected, constituting more than 60 percent of US prisoners, and one in 10 young black men in America are incarcerated (Bureau of Justice Statistics 2016; The Sentencing Project 2017). Changes to sentencing law played a major role in the rise of mass incarceration (Blumstein and Beck 1999), shifted the balance of discretionary power between prosecutors and judges, and contributed to the modern decline of the jury trial.

#### *A. The Rise of Guilty Pleas and the Decline of the Jury*

The right to a jury trial is embedded in the American democratic ethos. Article III of the US Constitution declares, “The trial of all crimes . . . shall be by jury.” In colonial America, jury trials were the norm, providing a means of maintaining democratic representation and ensuring public legitimacy. Although other Western democracies also guarantee a right to trial, estimates suggest that 80 percent of jury trials worldwide occur in the United States (Hans, Vidmar, and Stevenson 1986). By the late nineteenth century, guilty pleas emerged as a competing form of case disposition in major urban jurisdictions, and by the early twentieth century, they were commonplace.

Smith (2005) identifies several factors that contributed to the rise of guilty pleas, including escalating caseload pressures, longer and more complex trials, and increased professionalization of prosecution. Plea bargaining is often viewed as an expedient developed to manage extreme caseloads, but a number of scholars challenge this (Alschuler 1983; Meeker and Pontell 1985; Feeley [1979] 1992; McCoy 2005). Empirical evidence is inconsistent and has yet to resolve the controversy (Wooldredge 1989). In all likelihood, Mather (1973, p. 187) was correct when she asserted that “while caseload pressures are doubtlessly important, they may be overemphasized in the current literature.” Far less empirical work examines other explanations. Langbein (1979) argues that early trials were summary affairs that provided little incentive for circumvention, and Feeley (1997) suggests that increased vigor and complexity in the trial process popularized guilty pleas. Related work emphasizes institutional changes in the roles of police and prosecutors. Advances in policing, for example, led to improvements in the quality of evidence (Friedman and Percival 1981). The shift in the mid-nineteenth century from central appointment to local election of prosecutors may have also created new incentives for high conviction rates (Ellis 2012).

Failed legal challenges throughout the twentieth century also played an important role.<sup>1</sup> The centrality of plea bargaining was strengthened in the 1970s when the US Supreme Court in *Santobello v. New York*, 404 U.S. 257, 260 (1971), concluded that plea bargaining was “an essential component of the administration of justice,” which when properly administered “is to be encouraged.” Subsequent decisions solidified the supremacy of plea bargaining. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Court held that prosecutors may constitutionally enhance charges if a defendant refuses to agree to a plea bargain.<sup>2</sup> More recently, in *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), Justice Kennedy opined that “plea bargaining ...

<sup>1</sup> Early court opinions highlighted legal concerns. In 1958, a federal court of appeals judge argued that “justice and liberty are not the subjects of bargaining and barter” (*Sheldon v. United States*, 242 F. 2d 101 [5th Cir.] [1958]). A few years later, another appeals court declared, “It is clear ... that a plea of guilty induced by a promise of lenient treatment is an involuntary plea and hence void” (*Scott v. United States*, 349 F. 2d 641, 643 [6th Cir.] [1965]).

<sup>2</sup> In this case, a trial defendant received a mandatory life sentence under a newly filed habitual offender charge, which the Court ruled was “constitutionally legitimate” because “the simple reality” is that “the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty” (*Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 [1978]).

is not some adjunct to the criminal justice system; it *is* the criminal justice system.” These rulings effectively immunized prosecutorial charging decisions from judicial review, even when harsher sentences are explicitly threatened.

On its face, plea bargaining benefits all actors in the system. For prosecutors it ensures convictions, streamlines case processing, and conserves limited resources. For defendants, pleading guilty can lessen punishment. For judges, it assists in clearing crowded dockets. Judges rarely use their limited powers to curb plea bargains, tending to “rubber-stamp” rather than vigorously scrutinize them (Alschuler 1976). Although denounced by critics as “coercive,” “disastrous,” and even “pathological” (Schulhofer 1992; Alschuler 2003; McCoy 2005), plea bargaining is firmly entrenched in the American justice system.

The prosecutor’s ability to craft plea negotiations that determine punishments, however, has grown considerably in recent decades. Estimates are that 97 percent of convicted felony offenders in large urban courts plead guilty, up from 90 percent just two decades ago (Reaves 2013). Approximately every 2 seconds during regular business hours, someone somewhere in the United States pleads guilty, and some county prosecutors have never taken a case to trial (Colquitt 2001; Turner 2017; Stemen and Escobar, forthcoming). Trials in misdemeanor cases are even rarer (Kutateladze and Lawson 2018). As figure 1 demonstrates, the federal guilty plea rate increased steadily throughout the 1990s, with the percentage of cases settled by trial falling from 12.3 percent in 1990 to 2.7 percent in 2016. The increased power of the prosecutor to threaten defendants with protracted terms of incarceration if they exercise their trial right offers one compelling explanation for this trend.

### *B. The Growing Power of the Prosecutor*

Prosecutors have always exercised broad discretion. However, by focusing narrowly on judges, sentencing reforms concentrated additional power in the hands of prosecutors (Miethe 1987). Unlike sentencing decisions, charge determinations are largely immune from procedural review, formal legal challenge, and public oversight (Bibas 2001).<sup>3</sup> Some commenta-

<sup>3</sup> Although public elections in theory provide a check on prosecutorial misconduct, district attorneys often run unopposed for reelection and are reelected at very high rates (Wright 2009). Some research has shown that elected officials become more severe as elections approach (Gordon and Huber 2007; McCannon 2013).



FIG. 1.—Federal guilty plea rates over time in US district courts. Source: USSC annual reports, 1990–95, and USSC Sourcebooks of Federal Sentencing Statistics, 1996–2016. Color version available as an online enhancement.

tors have likened the process to ordering from a menu of punishments (Stuntz 2004). Prosecutors have become the most powerful actors in the American justice system (Johnson, King, and Spohn 2016). Their discretionary powers have expanded so much that charging decisions are often de facto sentencing determinations (Bibas 2001).

Recent sentencing laws increased prosecutors' negotiating leverage. They can often threaten enormous sentences if defendants refuse to plead. This is especially true in federal courts, where US Attorneys can pressure reluctant defendants with an array of mandatory sentencing laws and enhancements. As the US Sentencing Commission (USSC 2004, p. 30) recognized, "Department policies allow prosecutors to invoke statutory minimum penalties and statutory enhancements as further incentives for guilty pleas." According to Lynch (2016, p. 80), once a defendant opts

for trial, “all the options to worsen the client’s situation [are] typically put into play.” Mandatory minimums imbue prosecutors with immense plea-bargaining power and place considerable sentencing discretion in their hands (Nagel and Schulhofer 1992; Rehavi and Starr 2014).

Prosecutors can file superseding indictments if a defendant refuses to cooperate, and they control access to various types of mitigation, such as federal substantial assistance departures, which are available only at the prosecutor’s request, and eligibility for “safety valve” provisions, which authorize sentences below statutory minimums (Stith and Cabranes 1998). As Federal Court of Appeals Judge Gerald Lynch (2003, pp. 1403–4) lamented, the prosecutor has largely replaced “the judge as arbiter of most legal issues and of the appropriate sentence to be imposed.”

Although pleas bargaining dates back to the nineteenth century, it was less ubiquitous and less consequential before recent sentencing law changes. Prosecutors had less power, defendants were less at risk of excessive trial penalties, and parole release was available to mitigate punishments. Today, sentences imposed after trials often can be so severe that reasonable people, even if factually or legally innocent, may find it hard to refuse a proposed plea deal (McCoy 2005). “The distance between what is being offered and the potential sentencing exposure for those who go to trial” has become “so large that few defendants take the risk of turning down the offer” (Lynch 2016, p. 39). The empirical literature on the size and scope of the trial tax largely supports this observation.

## II. The Size, Scope, and Impact of Trial Penalties

Defendants who plead guilty receive substantial sentence discounts. The evidence is overwhelming (Smith 1986; Johnson 2003; King et al. 2005; Ulmer and Bradley 2006; Ulmer, Eisenstein, and Johnson 2010; Bushway, Redlich, and Norris 2014; Johnson, King, and Spohn 2016). Diverse explanations have been offered, including offender remorse, concern for victims, and courtroom efficiency. One common argument is that guilty pleas are an expression of contrition that warrants sentencing leniency, in part because it is relevant to desert and culpability. Kramer and Ulmer (2009, p. 8), for instance, note that “a defendant’s choice to plead guilty” has clear “ramifications for how court actors define his or her blameworthiness.”

Although remorse is a legitimate sentencing consideration, there is little evidence that guilty pleas reliably indicate repentance. Defendants



plead guilty for many reasons, including the expected punishment discount, making it difficult to isolate the effects of contrition from other considerations. At a minimum, high rates of guilty pleas (Ulmer, Eisenstein, and Johnson 2010) juxtaposed with high rates of recidivism (Bureau of Justice Statistics 2018) suggest that the plea itself is not a powerful marker of reformation.

A second rationale invokes victim hardship, arguing that guilty pleas enable victims to avoid the unpleasantness of testifying at trial. This argument is also unconvincing. If victim considerations were paramount, large plea-trial differentials would be expected only for crimes with victims, but this is not what research indicates. For example, Klein, Petersilia, and Turner (1990) found larger trial effects for burglary cases than for assaults or robberies in California courts. Moreover, large trial penalties exist for victimless crimes such as drug offenses in various states (King et al. 2005) and in federal courts (Lynch 2016).

A related claim is that plea-trial differences reflect “bad facts” that come out only at trial, when detailed offense behavior is dramatized to emphasize defendant culpability and dangerousness (Brereton and Casper 1982; Ulmer and Bradley 2006). This claim suffers from a similar shortcoming; it is difficult to imagine how “bad facts” explain the trial tax in garden variety property or drug cases. Moreover, bad facts are likely to encourage guilty pleas (Alschuler 1981), so cases with the “worst facts” may be less likely to go to trial.

By far the most common explanation for the trial tax is organizational efficiency: trial penalties incentivize guilty pleas to prevent high trial rates from immobilizing the justice system (Dixon 1995). A number of scholars have challenged this explanation, noting that the rise of plea bargaining was not associated with consistent increases in caseload pressure (Nardulli, Eisenstein, and Flemming 1988; Feeley 1992; McCoy 2005). Moreover, recent empirical work finds only modest associations between caseloads and trial rates (Ulmer and Bradley 2006; Ulmer, Eisenstein, and Johnson 2010). Overall, the weight of the evidence is tenuous and inconsistent (Wooldredge 1989).

Contrarily, some suggest that guilty pleas may produce more prosecutions, in the same “way that widening a highway can bring more traffic” (Sklandsky 2018, p. 455). Whether or not this is the case, interviews with court actors repeatedly reveal a shared understanding that trial penalties are meant to encourage guilty pleas (e.g., Nardulli, Eisenstein, and Flemming 1988; Lynch 2016). As one trial judge in Chicago famously opined,

“He takes some of my time, I take some of his. That’s the way it works” (Alschuler 1976, p. 1089).

#### *A. The Plea Discount–Trial Tax Debate*

There is disagreement over whether plea-trial disparities are plea discounts or trial penalties. Champions of discounts maintain that plea defendants receive rewards for admitting guilt and cooperating. Proponents of penalties argue that trial defendants are unfairly punished for exercising a constitutional right. This debate is more than semantic; it conveys implicit value judgments about appropriate punishments. The discount perspective assumes that appropriate sanctions are reflected in sentences after trial, whereas the penalty perspective treats sentences imposed after guilty pleas as the appropriate sanction.

The key question is whether differential treatment produces excessive sanctions for those convicted at trial. As Church (1979, p. 520) acknowledged in his spirited defense of plea bargaining, “trial sentences must be objectively *deserved*,” which means the debate hinges on whether higher sentences following trial equate to warranted punishment or whether the trial tax itself exists primarily as a mechanism to encourage guilty pleas.

The idea of a plea discount made sense when trials were the norm, but that is no longer the case. Because the overwhelming majority of criminal defendants plead guilty, pleas have become the normative baseline. Bibas (2011, p. 1387) equates the guilty plea to buying a car in which “only an ignorant, ill-advised consumer would view the full price as the norm and anything less as a bargain.” As Justice Anthony Kennedy observed in *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), trial defendants often receive “longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.” This implies that the trial tax constitutes undue severity.

Court actors clearly rely on guilty pleas as benchmarks for appropriate punishment (Sudnow 1965), and plea-trial disparities are routinely justified by their plea-inducing powers (Alschuler 1968). Some suggest “that trials take place in the shadow of guilty pleas” rather than plea bargaining occurring in the shadow of judicial sentencing decisions (Wright and Miller 2003, p. 1415). The implication is that plea-trial disparities often result in excessive severity for trial defendants.

The choice of an appropriate baseline punishment is critical in estimating the magnitude of plea-trial disparities. Consider a case in which

the expected sentence at trial is 10 years, and the expected sentence after a guilty plea is 5 years. Conceived of as a plea discount, the defendant receives a 50 percent reduction from the trial sentence; conceptualized as a trial penalty, he or she receives a 100 percent increase. Estimates of trial penalties will always be larger than equivalent plea discounts. One implication is that sentencing systems, as in England and Wales, that provide for explicit plea discounts underestimate potential trial penalties. The standard 33 percent sentence plea discount in the English system, conceptualized as a trial tax, becomes 50 percent.

### *B. The Magnitude of Contemporary Trial Penalties*

Many studies provide point estimates for sentencing differences between plea and trial sentences, though few focus explicitly on explaining plea-trial disparities. Most include a measure of the mode of conviction while investigating other substantive issues. Much of this work examines the likelihood and length of incarceration; more recent work also considers additional sentencing decisions. Some studies focus on incarceration (e.g., Smith 1986), others separate jail and prison (e.g., Warren, Chiricos, and Bales 2012), and still others investigate only sentence lengths (Ulmer, Eisenstein, and Johnson 2010). Despite these and other differences, evidence demonstrating the trial tax is remarkably consistent.

Table 1 presents a selection of relevant work published in this century. It offers only a snapshot, not an exhaustive compilation, but it is useful for highlighting several findings. First, research on plea-trial differences is extensive. Most sentencing studies offer estimates of plea-trial disparity even when their focus lies elsewhere. Second, this work captures a wide array of jurisdictions that include many cities, different states, and the federal system. Some jurisdictions such as Pennsylvania and the federal courts are overrepresented because they have available, high-quality data. Third, the majority of studies focus on incarceration, sentence length, or, to a lesser extent, departures from sentencing guidelines. Only a few examine other outcomes such as charge reductions or use of community-based punishments. Finally, a stunning majority of studies report evidence of disadvantage for trial defendants. Figures 2 and 3 summarize typical effect sizes for trial conviction for the two most commonly examined outcomes: incarceration and sentence length. The evidence offers a clear and consistent pattern of harsher trial punishments.

It is important to acknowledge, however, that significant empirical issues complicate efforts to estimate plea-trial disparity. The standard

TABLE 1  
Plea-Trial Differences in Criminal Punishment, Select Empirical Studies (2000–2018)

Authors	Year	Sample	Jurisdiction	Outcomes	Effect of Trial Conviction
Engen and Gainey	2000	$n = 36,949$ convicted offenders	Washington State	Sentence length	Average prison sentences are reduced between 6 and 13 months for defendants who plead guilty
Spohn and Holleran	2000	$n = 6,638$ convicted offenders	Chicago, Miami, Kansas	Imprisonment	Odds of a prison sentence are 2–7 times greater for trial defendants
Steffensmeier and Demuth	2000	$n = 89,637$ convicted offenders	Federal system	Imprisonment; sentence length	Trial conviction increases odds of imprisonment and results in 32–69 additional months of incarceration
Kautt	2002	$n = 21,474$ drug offenders	Federal system	Sentence length	Defendants convicted at trial receive sentences that are 39.5% longer on average
Johnson	2003	$n = 150,525$ convicted offenders	Pennsylvania	Guidelines departures	Jury trials reduce the odds of downward departure and increase odds of upward departures
Engen et al.	2003	$n = 51,844$ convicted offenders	Washington State	Departures; alternatives to incarceration	Guilty pleas are twice as likely to result in downward departures and more likely to involve alternatives
Ulmer and Johnson	2004	$n = 108,169$ convicted offenders	Pennsylvania	Incarceration; sentence length	Trial conviction increases odds of incarceration by 77%; average sentence lengths are 6 months longer

King et al.	2005	5 samples of convicted criminal cases from 5 states	5 states	Incarceration; sentence length	Plea-trial differences vary across offense types and jurisdictions but consistently suggest more severe penalties for trial defendants
McCoy	2005	$n = 2,772$ prison sentences	State Court Processing Statistics (SCPS)	Prison length	Defendants convicted by jury receive sentences that are 44.5 months longer on average
Wright	2005	$n = 704$ district-years	Federal	Guilty plea rates; acquittal rates	Guilty plea and acquittal rates are related to use of substantial assistance and acceptance of responsibility
Johnson	2006	$n = 148,590$ convicted offenders	Pennsylvania	Incarceration; sentence length	Odds of incarceration are 2 times greater for trial defendants and average sentence lengths are 60% longer
Ulmer and Bradley	2006	$n = 8,685$ serious violent offenders	Pennsylvania	Incarceration; sentence length	Odds of incarceration are 2.6 times greater for trial defendants and average sentences are 57% longer
Woodredge	2007	$n = 2,954$ convicted felony defendants	24 Ohio counties	Incarceration; sentence length	Defendants who plea-bargain are about 1/3 as likely to be sentenced to prison and receive average prison lengths that are 16% shorter
Johnson et al.	2008	$n = 169,561$ convicted offenders	Federal system	Judicial departure; sub. asst. departure	The odds of judicial departure are .70 times lower for trial defendants and trial conviction all but precludes substantial assistance departures

TABLE 1 (Continued)

Authors	Year	Sample	Jurisdiction	Outcomes	Effect of Trial Conviction
Johnson and Betsinger	2009	$n = 188,937$ convicted offenders	Federal system	Incarceration; sentence length; departures	For trial defendants, odds of incarceration are twice as large, average sentence lengths are 19% longer, and guidelines departures are much less likely
Anderson and Spohn	2010	$n = 2,784$ imprisoned offenders	Minnesota, Nebraska, S. District of Iowa	Sentence length	Defendants who plead guilty receive sentences that are 4.1% or about 5 months shorter on average
Ulmer et al.	2010	$n = 115,440$ convicted offenders	Federal system	Sentence length	Average sentences are 37% longer for trial defendants
Abrams	2011	$n = 42,522$ criminal cases	Cook County, Illinois	Incarceration; sentence length	Plea defendants are twice as likely to be incarcerated and have sentences that are more than 1 year longer when trial acquittals are included in the sample
Bushway and Redlich	2012	$n = 1,808$ male burglary and robbery cases	5 cities	Incarceration	Predicted probability of prison at trial is 29.6% greater than in guilty plea cases
Johnson and DiPietro	2012	$n = 200,982$ convicted offenders	Pennsylvania	Probation; jail; prison; intermediate sanction; sanction;	Trial conviction reduces the odds of an intermediate sanction by 1/5 compared to prison and by 1/3 compared to jail.

Warren et al.	2012	$n = 501,027$ convicted offenders	Florida	Jail; prison; community supervision	Trial conviction increases odds of a jail sentence by 1.5 times and odds of a prison sentence by 6 times
Sutton	2013	$n = 11,505$ male defendants	State Court Processing Statistics (SCPS)	Pretrial detention; guilty pleas; sentence severity	Pleading guilty lowers the proportional odds of a more severe sentence by a factor of 2/3
Bushway et al.	2014	$n = 1,664$ judges, prosecutors and defense attorneys	All 50 states and Washington, DC	Plea sentence; conviction probability; expected trial outcome	Plea deals are 60% shorter on average than expected sentences following trial conviction
Kim	2015	$n = 207,352$ federal offenders	Federal system	Sentence length (ln)	Sentence lengths are 64% longer for trial defendants after accounting for acceptance of responsibility
Kim et al.	2015	$n = 2,686$ federal offenders	Minnesota, Nebraska, S. District of Iowa	Sentence length (ln)	Sentence lengths decrease by 17% for defendants who plead guilty
Roberts and Bradford	2015	$n = 43,108$ Crown Court Sentencing Survey	England and Wales	Plea-based sentence reductions	The modal sentence reduction for pleading guilty is equal to a 1/3 discount on sentence length.
Hester and Sevigny	2016	$n = 17,671$ felony and serious misdemeanors	South Carolina	Incarceration; expected sentences	Odds of incarceration are 9 times greater for defendants convicted at trial
King and Johnson	2016	$n = 866$ black and white felony offenders	Minnesota	Sentence type; sentence length	Trial conviction increases the odds of an executed prison sentence by nearly 15 times but produces no difference in sentence lengths

TABLE 1 (Continued)

Authors	Year	Sample	Jurisdiction	Outcomes	Effect of Trial Conviction
Ulmer et al.	2016	$n = 192,446$ convicted offenders	Pennsylvania and federal system	Imprisonment; sentence length	Trial conviction quadruples the odds of prison and results in 27% longer sentences in PA; it doubles the odds of prison and results in 16% longer sentences in federal court
Zottoli et al.	2016	$n = 55$ adolescents and 42 adults	New York City	Qualitative data on plea discounts	Adults report average sentencing discounts of 80%, and adolescents 90%, relative to trial sentences
Johnson and King	2017	$n = 1,119$ convicted offenders	Minnesota	Sentence type	Trial conviction increases the odds of an executed prison sentence by 9.4 times relative to guilty pleas
USSC	2017	$n = 59,160$ convicted offenders	Federal system	Sentence length (ln)	Trial conviction increases average sentence lengths by 53%
Breen and Johnson	2018	$n = 2,473$ military courts-martials	US Air Force	Sentence severity; clemency	Defendants convicted by trial receive less sentence severity and are more likely to be granted clemency
Kutateladze	2018	$n = 170,572$ misdemeanor and felony cases	New York County	Charge decrease; charge increase	Cases disposed of via guilty pleas are more likely to result in cumulative decreases in charge severity
Metcalfe and Chiricos	2018	$n = 907$ (409 trials and 498 pleas)	Florida (1 county)	Type of conviction; plea value	Probability of receiving a charge reduction is significantly greater for defendants who plead guilty



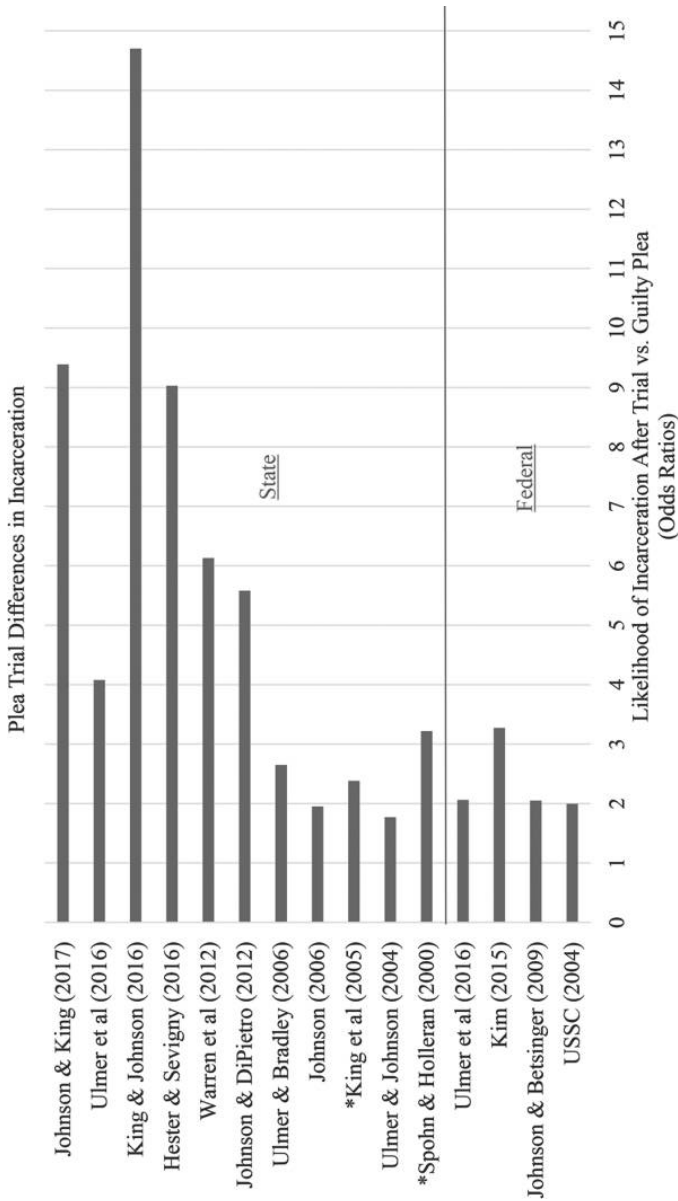


FIG. 2.—Plea-trial differences in incarceration across state and federal studies (2000–2017). Reported estimates are limited to jury trial/guilty plea comparisons. Average trial effects are shown for studies denoted by an \* that report information for multiple subsamples. Color version available as an online enhancement.

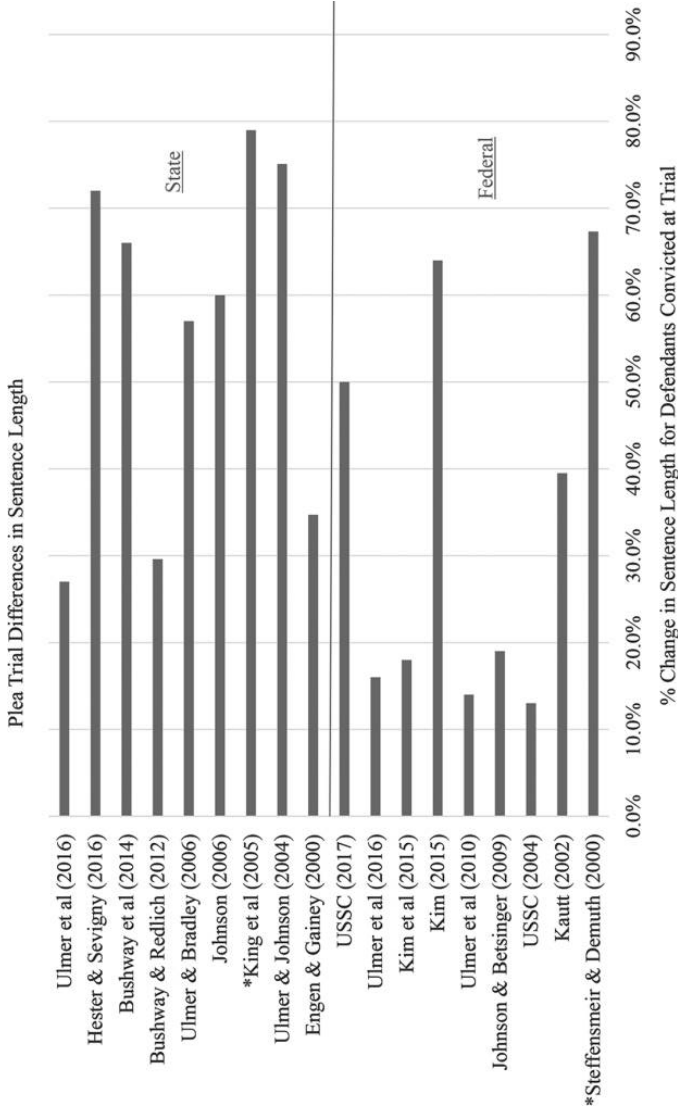


FIG. 3.—Plea-trial differences in sentence length across federal and state studies (2000–2017). Reported estimates are limited to jury trial/guilty plea comparisons. Average trial effects are shown for studies denoted by an \* that report information for multiple subsamples. Color version available as an online enhancement.

approach compares defendants convicted by plea to defendants convicted by trial, after statistically controlling for other factors. This type of comparison is imperfect for several reasons: it does not account for selection processes that sort defendants into pleas and trials, it risks omitted variables related to mode of conviction and sentence severity, and it often fails to capture intermediate processes that condition trial effects in punishment. Despite these limitations, which I discuss in Section III, the consistency of results and the sheer magnitude of trial effects clearly support the existence of a substantial trial tax. Trial effects vary across offenses, jurisdictions, and individual studies, but they appear with remarkable consistency in both state and federal courts.

1. *The Trial Tax in State Courts.* Most empirical work has concentrated on a small number of states, usually early guidelines states in which sentencing data are readily accessible. The vast majority of studies investigate the likelihood and length of incarceration. Early work reported modest trial effects. For example, Miethe and Moore (1985) found that trial conviction in Minnesota increased the likelihood of incarceration by only 9 percent (cf. Moore and Miethe 1986; Frase 1993). Subsequent work, however, shows larger plea-trial disparities. Dixon (1995) found that trial conviction increased the odds of imprisonment by a factor of four and resulted in an extra year of incarceration. The most recent studies report even larger effects, from a nine- to 15-fold increase in the odds of imprisonment for trial defendants (King and Johnson 2016; Johnson and King 2017). Frase (2005*a*, pp. 178–79) has observed that “evaluations by outside researchers have revealed the continued existence of plea-trial disparities,” which reflect “tacit or explicit sentence bargaining that causes reduced sentence severity for defendants who plead guilty.”

In Pennsylvania, another early guidelines state, dozens of studies conclude that trial conviction increases the likelihood and length of incarceration. Steffensmeier, Ulmer, and Kramer (1998) estimated that the odds of incarceration were three times greater after jury trials than guilty pleas and that average sentences were more than a year longer. Ulmer and Johnson (2004) found odds of incarceration 77 percent greater for trial defendants and average incarceration terms that were 6 months longer. Ulmer and Bradley (2006) focused on serious violent offenders and reported similar-sized estimates, and Johnson (2006) found that trial cases were roughly twice as likely as guilty pleas to result in incarceration with terms of imprisonment that were 60 percent longer.

Studies from other states and local jurisdictions are less abundant but remarkably consistent. Early work in California reported that trial defendants were more likely to receive prison sentences, and for longer terms, in a number of different courts (Brereton and Casper 1982) and for various offense types (Klein, Petersilia, and Turner 1990). In Washington State, Engen and Gainey (2000) reported that average prison sentences were between 6 and 13 months less for defendants who pled guilty. In Maryland, Bushway and Piehl (2001) found that guilty pleas were among the strongest predictors of incarceration. Recent work from South Carolina, a state without sentencing guidelines, demonstrates that trial conviction is associated with a ninefold increase in the odds of incarceration (Hester and Sevigny 2016). Significantly, this large South Carolina trial penalty coexists with state trial rates of less than 1.5 percent. Research from Florida also reports large plea-trial differences; compared with sentences after guilty pleas, defendants convicted at trial are one and one-half times more likely to be sentenced to jail and over six times more likely to receive prison (Warren, Chiricos, and Bales 2012).

Even studies that compare diverse jurisdictions report consistent plea-trial disparities. Early work by LaFree (1985) examined robbery and burglary cases in six locales and discovered consistent evidence of trial disadvantages after controlling for strength of evidence, case severity, and various offender and offense characteristics. Recent multijurisdictional studies reach similar conclusions. Spohn and Holleran (2000) investigated sentencing disparities in three cities, Chicago, Miami, and Kansas City, and found large trial penalties in two of the three, with trial defendants between two and seven times more likely to be sentenced to prison. King et al. (2005), in a comparison of five guidelines states, found that the magnitude of trial effects varied across offense types and jurisdictions but concluded there was a consistent pattern of trial disadvantage with regard to both incarceration and sentence length.<sup>4</sup>

Recent work at the state level has investigated additional punishment outcomes, such as departures from sentencing guidelines (Johnson 2003),

<sup>4</sup> The five states were Kansas, Maryland, Minnesota, Pennsylvania, and Washington. Especially large trial penalties were found in Kansas for drug offenses involving depressants/stimulants, resulting in sentence lengths five times longer for trial defendants. In Maryland, trial conviction for cocaine distribution had the largest trial effects, increasing the odds of incarceration by 6.5 times. In Pennsylvania, assault offenses convicted by trial demonstrated the largest plea-trial disparities, increasing the odds of incarceration by 3.7 times. In Washington State, child molestation offenses received especially long sentences at trial, on average more than five times longer than following guilty pleas.

use of alternative sanctions (Engen et al. 2003), application of mandatory minimums (Ulmer, Kurlychek, and Kramer 2007), and charge reductions (Metcalf and Chiricos 2018). Controlling for a wide range of relevant sentencing factors, defendants who go to trial are less likely to receive downward departures, which significantly mitigate punishment (Engen et al. 2003; Johnson 2003, 2005). Moreover, Engen et al. (2003) show that sentencing alternatives are more likely to be used following guilty pleas. Johnson and DiPietro (2012) report similar results for intermediate sanctions. Defendants convicted at trial are also more likely to receive mandatory minimums (Ulmer, Kurlychek, and Kramer 2007) and less likely to benefit from charge reductions (Metcalf and Chiricos 2018). Collectively, this work suggests that traditional studies that focus only on incarceration and sentence length are likely to underestimate the cumulative trial tax.

2. *The Trial Tax in Federal Court.* Findings on federal plea-trial sentencing differentials are similar. Most studies indicate that tried cases are about twice as likely as guilty pleas to result in incarceration, with imprisonment terms between one-sixth and two-thirds longer (USSC 2004, 2010, 2017; Johnson and Betsinger 2009; Ulmer, Eisenstein, and Johnson 2010; Ulmer, Light, and Kramer 2011; Kim 2015; Kim, Spohn, and Hedberg 2015). Early research by the USSC (2004) reported a twofold increase in the odds of imprisonment for trial defendants. Recent work shows that average trial sentences are about 50 percent longer, even after controlling for a wide range of sentencing considerations (USSC 2017). A number of studies focus on drug offenders. Kautt (2002), for instance, found average plea-trial sentencing differentials of more than 2 years for federal drug traffickers, and Steffensmeier and Demuth (2000) reported trial penalties of 32 months for nondrug offenses and 69 months for drug offenses.

One complication with federal studies is that plea-trial differentials are closely related to intermediate case processing decisions, including acceptance of responsibility and downward departures. The federal system is unique in providing an explicit sentencing discount for “acceptance of responsibility.” Defendants who plead guilty usually receive a two- or three-level reduction in their federal guidelines level, which equates to a sentence reduction of 25–35 percent (Schulhofer and Nagel 1989, 1997; O’Sullivan 1997).<sup>5</sup> Ironically, the federal sentencing commission made acceptance of

<sup>5</sup> The magnitude of the discount for acceptance of responsibility depends on the offense level of the current crime as well as the criminal history category of the defendant. For example, an offender charged with a level 26 offense who has no criminal history and receives

responsibility an independent reason to discount sentences because of concern that overt plea discounts would violate the constitutional right to trial. In practice, though, the reduction is nearly automatic in guilty pleas (Wilkins 1988; O'Hear 1997; Kim 2015).<sup>6</sup>

Federal plea-trial disparities are closely tied to other sentencing discounts, such as "substantial assistance departures" that are awarded for cooperation in the prosecution of another criminal case.<sup>7</sup> Research indicates that pleading guilty is effectively a requirement for receipt of the substantial assistance discount (Johnson and Betsinger 2009; Ulmer, Eisenstein, and Johnson 2010). The magnitude of federal plea-trial disparities depends on how researchers address these and other case processing factors (Kim 2015).

As in state courts, earlier studies of federal sentencing tend to find smaller trial effects than more recent work. Research conducted by the USSC suggests that plea-trial disparities have worsened in the wake of recent policy changes. After controlling for a wide range of sentencing variables, including guidelines departures and mandatory minimums, the commission reports that trial penalties increased from 24 percent in the post-PROTECT Act period (2003), to 36 percent in the post-*Booker* period (2005), to 51 percent in the post-*Gall* period (2007) (USSC 2010; Ulmer, Light, and Kramer 2011).<sup>8</sup> This final estimate is very similar to commis-

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a three-level reduction for acceptance of responsibility would have his or her minimum recommended sentence under the guidelines reduced from 63 months to 46 months, or roughly 27 percent. At lower offense levels, acceptance of responsibility can be the difference between more than a year of prison and no incarceration at all.

<sup>6</sup> In its 15-year report on federal sentencing, the USSC (2004, p. 29) noted that the original commission established acceptance of responsibility so that "defendants retained sufficient incentive to plead guilty and the number of trials facing an already overburdened federal court system would not be increased"; it was intended "as a reward for offenders who plead guilty and also as a recognition of the reduced culpability of offenders who acknowledged guilt." Kim (2015) reports that 97 percent of defendants who plead guilty receive the discount.

<sup>7</sup> Upon motion of the government that a defendant has provided "substantial assistance" in the investigation or prosecution of another federal offense, the court may depart below the recommended range of the federal guidelines. The Assistant US Attorney must file a motion requesting this discount.

<sup>8</sup> The PROTECT Act was passed in 2003 and discouraged downward departures. It refers to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (Pub. L. No. 108-21, 117 Stat. 650 [2003]). *United States v. Booker*, 543 U.S. 220 (2005), made the federal sentencing guidelines advisory. *Gall v. United States*, 552 U.S. 38 (2007), held that courts of appeal must review all sentences using a deferential "abuse of discretion" standard.

sion analyses of the most recent data (USSC 2017). At least on the surface, then, the federal trial penalty is substantial and has increased inversely with declining trial rates. These results are consistent with the argument that the trial penalty drives the plea-bargaining machine (Brereton and Casper 1982).

US military courts provide a notable exception in the trial tax literature. Breen and Johnson (2018) show that trial conviction in the military justice system is significantly associated with sentence leniency and with increased odds of clemency, which they attribute to the military's distinctive organizational structure and culture. Jury trials are much more common in military courts, jury sentencing is often employed, and plea bargains provide only sentencing caps; bargaining chips and sentence discounts thus are less influential. This suggests that alternative approaches to structuring plea bargaining can have important consequences for plea-trial disparity.

Outside of this anomaly, though, research in state and federal courts finds consistent evidence of less favorable outcomes for trial defendants. This is consistent with early observations of the National Academy of Sciences panel on sentencing reform: "The strongest and most consistently found effect of case-processing variables is the role of guilty pleas in producing less severe sentences" (Blumstein et al. 1983, p. 18).

### *C. The Trial Tax and Social Inequality in Punishment*

The pervasiveness of the trial tax has broader implications for social equality. Given the large effects trial conviction has on sentencing, it is important to consider who goes to trial and how this shapes patterns of disparity. Research indicates that certain types of defendants are more likely to exercise their right to trial. Defendants of color, in particular, are more likely than similarly situated white defendants to go to trial (LaFree 1980; Albonetti 1990; Frenzel and Ball 2008; Metcalfe and Chiricos 2018). According to Alschuler (1976, p. 1125), this is part of a broader phenomenon in which the guilty plea process is influenced by "penologically irrelevant considerations" including "defense attorney charm," "past favors," "friendship," and the "race, wealth or bail status of the defendant." Despite the storied legacy of empirical research on race and sentencing (Spohn 2000; Tonry 2011; Ulmer 2012), relatively little empirical work focuses on the intersections of race, guilty pleas, and trial penalties.

Albonetti (1990) showed that defendant race, along with certain case characteristics, predicted the likelihood of a guilty plea. African Amer-

ican defendants and those with serious criminal histories were more likely to go to trial, as were defendants whose cases involved weaker evidence and more serious charges. Other studies provide additional support for these findings (Frenzel and Ball 2008; Sutton 2013; Metcalfe and Chiricos 2018). Metcalfe and Chiricos, for instance, show that black defendants, and black men in particular, are less likely to plead guilty and receive less return on their guilty pleas.

Researchers have identified a number of reasons for this, including differential bargaining power (Savitsky 2012), quality of plea offers (Kutateladze et al. 2014), and perceived trust in the justice system (Hurwitz and Peffley 2005). Minority defendants often have less bargaining power because race and ethnicity are tied to broader patterns of social stratification, such as social and economic disadvantage (Sampson and Lauritsen 1997). At the same time, less favorable plea offers may induce more minority defendants to go to trial. This could result from several factors, including implicit racial biases on the part of prosecutors (Smith and Levinson 2012), racial differences in the timing of guilty pleas (Hood 1992), or differences in the quality or type of defense representation (Kutateladze and Andiloro 2014; Stemen and Escobar, forthcoming).

Differential trust in the criminal justice system may also be important. Plea bargains often involve a confusing and ambiguous process that requires defendants to trust in representatives of the state (Tata and Gormley 2016). Lower perceptions of the justice system's legitimacy likely translate into reluctance to cooperate with prosecutors. It is not surprising that defendants who perceive the justice system to be less equitable would be disinclined to enter into plea negotiations (Albonetti 1990). This logic aligns closely with broader perspectives on procedural justice that suggest that perceived legitimacy of the legal system is closely associated with compliance and cooperation with the law (Tyler 2006).

Finally, guilty plea outcomes may be affected by differential treatment at earlier stages of the justice system, such as biases in police interactions, enforcement patterns, and arrest behaviors (Kochel, Wilson, and Mastrofski 2011; Kurlychek and Johnson, forthcoming). Defendants who are mistreated at earlier stages are less likely to be cooperative at later stages, and they may be negatively affected by the accumulation of significant criminal histories. Minority status tends to be associated with less frequent and later guilty pleas, both of which likely contribute to racial disproportionality in punishment. If minority defendants are more likely to opt for trial and trial convictions result in harsher sentences, then disparities in



guilty plea behaviors could contribute directly to racial inequalities in sentencing.

#### *D. The Trial Tax and False Guilty Pleas*

Large plea-trial sentencing differentials may coerce innocent defendants to plead guilty. Immense sentencing exposure at trial generates extreme pressure for defendants to consider the risk-reducing benefits of plea deals. Although it may seem counterintuitive that an innocent defendant would plead guilty, there are compelling reasons why it happens. Many defendants are passive participants in plea negotiations, are inexperienced in convoluted criminal procedures, and are challenged by a legal argot they do not fully understand. Often they have limited educational, social, and financial resources, and their decisions are shaped by the pressure, stress, and anxiety of facing criminal charges (Tata and Gormley 2016; Zottoli et al. 2016). In some cases, it may be rational to plead guilty because the costs of a trial clearly outweigh a lenient bargain.

Some scholars argue that false guilty pleas are particularly likely in low-level offenses and when trial penalties are especially large (Blume and Helm 2014). This is consistent with work by Feeley (1992, pp. 30–31), who argued that pleading guilty to low-level misdemeanors often makes sense because it avoids the “time, effort, money and opportunities lost as a direct result of being caught up in the system.” For minor crimes, a small but certain punishment is often preferable, whereas for serious offenses, high ceilings for trial punishments provide strong inducements to plead guilty (Dervan and Edkins 2013; Bushway, Redlich, and Norris 2014).

Research demonstrates that innocent defendants do plead guilty when trial penalties are large enough (Alschuler 1968; Scott and Stuntz 1992; Garrett 2011; Bushway, Redlich, and Norris 2014; Redlich et al. 2014). False guilty pleas are most likely when plea-trial disparities are large, when incarceration or capital punishment is at stake, and when defendants are detained pretrial (Gross et al. 2005; Wright 2005; Blume and Helm 2014). Dervan and Edkins (2013, p. 17) argue that, although precise numbers are elusive, “it is clear that plea bargaining has an innocence problem.” They found that more than half of innocents in vignette scenarios were willing to admit guilt falsely when plea discounts were large. Interviews with convicted defendants support these findings. Zottoli et al. (2016) asked offenders about their guilty plea decisions and found that roughly one in five adults and one in four juveniles reported that they pled guilty only because of the substantial discounts they were promised.

Additional evidence comes from exonerations (Blume and Helm 2014). The National Registry of Exonerations reports that about 18 percent of exonerated defendants pled guilty to crimes of which they were factually innocent. Other research shows that large plea discounts are the primary reason (Turner 2017), and it is likely that many more false guilty pleas escape detection.

This raises fundamental questions about whether trial penalties produce perverse incentives to plead guilty. As the “magnitude of the discount increases, so too, does the likelihood that innocent defendants will enter a guilty plea” (Roberts and Bradford 2015, p. 188). This implies that actual innocence will be most likely when trial penalties are most pronounced. If prosecutors scale plea discounts to the strength of the case, as evidence suggests (Bushway, Redlich, and Norris 2014), weaker cases will result in larger plea discounts, greater plea-trial differentials, and increased incentives for innocent defendants to waive their Sixth Amendment rights. This is consistent with theoretical arguments from the “shadow of the trial” perspective, which suggests that prosecutors are incentivized to offer larger discounts when conviction is less certain. If plea incentives are increased in cases with greater factual and legal doubt, it suggests that trial taxes contribute to false guilty pleas. Assessing the evidence, Zottoli et al. (2016, p. 257) conclude that “findings of deep discounts . . . bring into question the true voluntariness of plea decisions and speak to the need for a closer examination of the plea-bargaining process with respect to its potential to be coercive.”

These concerns are especially strong for defendants held in pretrial detention, when a guilty plea can often resolve the charges and lead to immediate release. On any given day, two-thirds of American jail inmates are detained awaiting trial rather than because of a conviction (Bureau of Justice Statistics 2015). Monetary bail systems require financial resources for release and systematically disadvantage poor and indigent defendants (Demuth 2003; Schlesinger 2005; Wooldredge et al. 2015; Stevenson and Mayson 2017). Plea offers to “time served” in misdemeanor cases often mean defendants can go home, stacking significant personal, family, and economic pressures on the guilty plea decision (Heaton, Mayson, and Stevenson 2017). There is strong and consistent evidence that pretrial detention increases the likelihood of a guilty plea, the odds of trial conviction, and the severity of sentencing (Schlesinger 2005; Wooldredge et al. 2015; Stevenson and Mayson 2017). Financial release mechanisms thus enhance the significance of trial penalties, exacerbate pressure to plead guilty, and con-

tribute to false guilty pleas among detained defendants (Bibas 2004). This highlights the potential for broader criminal justice reforms, such as restricting the use of monetary bail, to have salutary effects on other outcomes, including guilty plea decisions.

### III. Conceptual and Empirical Issues in Estimating the Trial Tax

Defendants convicted at trial face a stark sentencing disadvantage, but its magnitude and meaning depend on how it is defined and operationalized. Estimates of the size of the trial tax vary along several dimensions. These include conceptual distinctions in questions asked, differences in analytic approaches, the data and jurisdiction under study, and whether and how estimates are adjusted for other factors, such as intermediate case processing decisions or the possibility of acquittal at trial.

First, disciplinary differences have led to a fundamental confusion between two related but distinct research questions. The first is “whether it is just to penalize defendants who assert their constitutional right to trial by jury and are convicted” (LaFree 1985, p. 292). This is consistent with analyses of conviction samples, the predominant approach, which report large and consistent trial penalties (Johnson 2003; King et al. 2005; Ulmer, Eisenstein, and Johnson 2010). The second is whether it “pays to plead guilty.” This focuses on rationality in the decision-making processes of defendants and court actors. Studies asking this question often find that plea-trial disparities are small or nonexistent when acquitted defendants are included in analyses (Rhodes 1979; LaFree 1985; Smith 1986; Abrams 2011; Bushway and Redlich 2012; Bushway, Redlich, and Norris 2014). Early work by Smith (1986), for example, showed that defendants were almost 30 percent less likely to be incarcerated if they pled guilty, but that the majority of this effect was offset by the probability of acquittal at trial. Smith concluded that plea-trial disparity represents a rational balance between certain but discounted plea punishments and uncertain but severe trial sentences. LaFree (1985) and Bushway and Redlich (2012) also demonstrate how the possibility of acquittal counterbalances plea discounts.

Abrams’s (2011) study of Cook County, Illinois, illustrates how these two questions can become muddled. After adjusting for the likelihood of acquittal at trial, he concludes that “a risk-neutral defendant seeking to minimize his or her expected sentence would do substantially better by rejecting a plea bargain,” leading him to question the significance of the

trial tax (p. 200). However, as Alschuler (2013) observes, acquittals do not change the pronounced sentencing disparities between those convicted by plea or trial.<sup>9</sup>

Much of the disagreement in the conceptual debate surrounding plea discounts and trial penalties reduces to a misunderstanding of these conceptual issues. When comparing outcomes of convicted offenders there is a pronounced and compelling trial tax in punishment. When considering whether it is “rational” to plead guilty, evidence often supports the hypothesis that plea discounts produce punishments roughly equivalent to trial sentences discounted by the probability of acquittal (Bushway, Redlich, and Norris 2014). Different empirical approaches are related to disciplinary norms: criminologists tend to focus on whether it is just to penalize individual trial defendants, whereas economists mostly focus on rationality in plea bargaining. Even an economist must admit, though, that it is little solace to trial defendants serving elongated prison terms to know that their added punishment is balanced out by the possibility of acquittals in other cases.

Second, the relative magnitude of plea-trial differences depends on how empirical analyses address other case processing factors. The decision to go to trial affects other factors related to punishment severity. Trial defendants are less likely to receive favorable charge reductions (Metcalf and Chiricos 2018) or beneficial guidelines departures (Johnson 2005), and they are more likely to be affected by mandatory minimums and other sentence enhancements (Ulmer, Kurlychek, and Kramer 2007; Lynch 2016). In the federal system, they are effectively precluded from discounts such as “acceptance of responsibility” and “substantial assistance” (Johnson, Ulmer, and Kramer 2008; Ulmer, Eisenstein, and Johnson 2010; Kim 2015).

Studies that incorporate statistical controls for these types of intermediate outcomes almost certainly underestimate the full impact of trial conviction on punishment. For example, Ulmer, Eisenstein, and Johnson (2010) demonstrate that estimates of federal trial penalties shrink from a 37 percent difference in sentence length to a 14 percent difference when intermediate case processing factors are included. Kim (2015) argues that plea-related sentence discounts, such as acceptance of responsibility, are

<sup>9</sup> The Abrams (2011) study has been criticized on empirical grounds. Kim (2015) notes that estimates of conviction rates at trial mistakenly include all defendants whose cases ended without a conviction rather than only trial acquittals.

inseparably tied to the guilty plea process and therefore constitute an important element of the trial tax. He reports that trial sentences are 64 percent longer than guilty plea sentences when these additional influences are considered. Most studies of federal sentencing include controls for some but not all intermediate factors. For example, the USSC controls for guidelines departures in its statistical models but not acceptance of responsibility (USSC 2004, 2017).<sup>10</sup> At least some of the variation in plea-trial disparity, then, reflects analytical choices concerning indirect case processing factors.

Third, a persistent problem is that it is impossible to observe counterfactual punishments for alternative modes of conviction. As LaFree (1985, p. 291) explained, “Comparing sentence severity for guilty pleas and trials is difficult because they represent different processes to which defendants are non-randomly assigned.” Any contrast of plea and trial defendants therefore risks comparing oranges to basketballs, so to speak. Trial and plea defendants often differ in key ways: trial defendants are more likely to be charged with more serious crimes, have longer criminal histories, and be male and minority (Albonetti 1990; Frenzel and Ball 2008; Abrams 2011; Metcalfe and Chiricos 2018). Quality empirical studies include a battery of covariates to account for these differences, but omitted variable bias remains a concern. Moreover, the punishment process itself differs in important ways depending on the mode of conviction. For example, prosecutors have far more control over the outcomes of negotiated guilty pleas, whereas judges tend to have greater influence in bench and jury trials (Johnson 2003).

A closely related issue is that sentences are based on offenses of conviction, whereas plea negotiations revolve around charges at arrest and arraignment. A dynamic process of charge alterations often takes place during the guilty plea process (Spohn, Beichner, and Davis-Frenzel 2001; Shermer and Johnson 2010; Kutateladze 2018). Because prosecutors often offer a reduction in the number, type, or severity of initial charges, the final conviction charge may differ considerably from the underlying offense behavior. Contemporary work in Wisconsin, for example, finds that

<sup>10</sup> The rationale for excluding measures such as acceptance of responsibility or obstruction of justice is that they are already incorporated into the presumptive guidelines recommendation, which is routinely included as a control variable; however, this approach precludes examination of the indirect influences these factors might have on plea-trial disparities in punishment (Ulmer, Eisenstein, and Johnson 2010).

one in three defendants plead to a lesser charge (Stemen and Escobar, forthcoming). Research in New York County shows that about 40 percent of felony arrests involve charge reductions between arrest and filing, and another 60 percent are reduced during plea bargaining; moreover, two-thirds of felony arrests in that jurisdiction end in misdemeanor convictions (Johnson and Larroulet, forthcoming). Because charge reductions are common, analyses that statistically “control” or match on the offense at conviction may end up comparing very different defendants. Newman (1956, p. 780) made this observation long ago pointing out that a “man’s conviction record is assumed to be a quasi-automatic legal stamp which defines those activities which make him a criminal,” yet “very few researchers would treat a person such as Al Capone as merely an income tax violator.”

Comparisons of guilty pleas and trials are further complicated because defendants who go to trial may be acquitted while those who plead guilty forfeit this possibility. This is another bias that can skew comparisons of convicted defendants. Although the full scope of selection bias in trial tax research is difficult to quantify, it seems likely that it works to underestimate plea-trial disparity.

Because defendants who negotiate guilty pleas are often convicted of lesser crimes, they represent relatively more serious offenders, relative to their offenses at conviction. In theory, this should suppress estimates of the sentencing differential between plea and trial defendants.<sup>11</sup> This suggests that trial disparities would be even greater if we were able truly to compare oranges to oranges (or basketballs to basketballs), by restricting analyses of plea-trial differentials to offenders who *commit* the same offenses rather than compare offenders who are *convicted* of comparable crimes.

Little empirical research directly examines this issue, but several studies attempt to adjust for this form of sample selection bias. Abrams (2011) used an instrumental variable to address selection and found that it increased disparity estimates by 3–7 months. Other promising methods include counterfactual approaches, which generate estimates of expected plea or trial sentences for the same sets of defendants (Smith 1986; Bushway and Redlich 2012; Johnson and Larroulet, forthcoming) and exper-

<sup>11</sup> Consider a robbery defendant who pleads guilty and is convicted only of assault. When compared to a trial defendant who was originally charged and convicted for assault, the former is likely to be a relatively more serious offender.

imental case vignettes that allow for direct manipulation of the mode of conviction.<sup>12</sup>

Bushway and Redlich (2012) estimated plea discounts on the basis of what would have likely happened if plea defendants had gone to trial. They found that guilty plea sentences averaged 77 percent of expected trial sentences. Related work employing survey data from a large sample of prosecutors, judges, and defense attorneys found that court actors sentenced a hypothetical robbery case to 10 years following a trial conviction and to 6 years following a plea; this suggests a 40 percent plea discount or a 66 percent trial penalty (Bushway, Redlich, and Norris 2014). Overall, findings from alternative analytical approaches support the trial effect found in more traditional studies.

*Future Directions for Research on the Trial Tax.* Additional research should address a number of unresolved issues. Little work examines how other salient offense, offender, and case processing factors affect trial penalties. Some work suggests that larger trial penalties occur in serious cases facing the harshest punishments (Clark and Kurtz 1983; Ulmer and Bradley 2006; Ulmer, Eisenstein, and Johnson 2010). Wright and Engen (2006) argue that the magnitude of plea discounts depends fundamentally on the “depth and distance” of the legal code, which implies that trial penalties will vary with the seriousness of the offense. Few studies investigate this issue, but those that do find variation in trial penalties across offenses (Rhodes 1979; Clark and Kurtz 1983; Klein, Petersilia, and Turner 1990; King et al. 2005). Future work should try to establish how and why trial effects differ by crime type.

Other research points to the importance of timing (LaFree 1985; Tonry 2012; Kutateladze, Andiloro, and Johnson 2016). Plea discounts may be especially pronounced for defendants who plead earlier in the process. LaFree (1985) found no evidence of this, but Kutateladze, Andiloro, and Johnson (2016) reported that plea offers became less favorable over time in misdemeanor marijuana cases. That study was conducted in a jurisdiction with a “first-best” plea policy under which prosecutors provided the most favorable plea offer at arraignment, suggesting that the impor-

<sup>12</sup> The implicit assumption in this work is that the sentencing process does not differ for defendants who go to trial compared with those who plead guilty. Statistical coefficients are generated on the basis of one group (e.g., plea defendants) and then applied directly to the other group (e.g., trial defendants). Research has yet to test the validity of this underlying assumption.



tance of timing may differ across jurisdictions. In some countries, including England and Wales, parts of Australia, and New Zealand, plea discounts progressively decline with time in order to reward defendants who plead guilty sooner (Roberts and Bradford 2015; Brook et al. 2016).

The importance of the strength of evidence also warrants further study. Theoretically, cases with weaker evidence should result in more favorable plea offers, which should lead to larger plea-trial disparities. Early work consistently showed that the strength of the evidence influenced plea outcomes (LaFree 1985; Albonetti 1986, 1987; Spohn, Beichner, and Davis-Frenzel 2001). Recent scholarship reports less consistent results (Bushway and Redlich 2012; Kutateladze, Lawson, and Andiloro 2015).

Bushway and Redlich (2012) found that for defendants who pled guilty, evidentiary measures had small and inconsistent impacts on the expected probability of trial conviction. Kutateladze, Lawson, and Andiloro (2015) showed that charge bargains were less favorable when specific types of evidence were present, but that strength of the evidence mattered more for initial case acceptance than for plea bargaining. Bushway, Redlich, and Norris (2014) reported that weaker evidence was consistently associated with more favorable plea offers—a finding consistent with legal perspectives that emphasize the overarching importance of evidentiary problems, unsympathetic victims, and Fourth Amendment issues (Alschuler 1968, 1981; Spears and Spohn 1997; Bibas 2004; Sklansky 2018). Overall, relatively few studies examine quality measures of the strength of evidence.

Most scholars agree that quality of evidence is important, but it is unclear how it shapes plea-trial disparity. It may be, for instance, that defendants who go to trial in cases with strong evidence, or “dead bang” cases, are penalized more than defendants who go to trial when there are legal or evidentiary questions, but more research is needed on the topic.

Additional work should also investigate racial differences in guilty pleas, including why race matters and how guilty pleas shape broader patterns of inequality. One promising approach is to engage individual decision makers more directly. Early research tackled this challenge directly. Alschuler (1976) reports judicial anecdotes of the plea process, Newman (1966) and Casper (1972) offer analyses of defendant perspectives, and Alschuler (1968) and Mather (1973) provide insights from prosecutors and public defenders. This early work painted a detailed portrait of how principal actors understood and justified plea-trial sentencing differences,



and it offered unique insights into defendant decision making. With few exceptions, though, this approach has seldom been applied in work on modern-day defendants or court actors.

Zottoli et al. (2016) is a noteworthy exception. The authors interviewed juvenile and adult offenders in New York City and illustrated the importance of the trial tax in defendants' decision making. On average, prosecutors offered trial sentences of 5 years to juveniles, though guilty pleas resulted in only 2 months of confinement. In adult cases, prosecutors threatened more than 12 years of prison at trial, but defendants received less than 3 years after pleading guilty. These numbers equate to roughly an 80 percent plea discount for adults and a 90 percent discount for juveniles, suggesting huge differences between threatened and actual sentences.

Unfortunately, this type of ethnographic approach has become an endangered species with the rise of the "big data" movement in sentencing research. Analyses of large-scale sentencing databases are invaluable but should be coupled with a return to more defendant-centric and qualitative approaches examining how and why defendants plead guilty, what they do and do not understand about the process, and how other external pressures shape their decision making (Lynch 2016; Zottoli et al. 2016).

Important differences may also characterize different types of pleas and trials. Although much of the rhetoric surrounding guilty pleas focuses on plea bargaining, defendants often plead guilty without a guarantee of formal concessions. These "nonnegotiated" pleas may occur when there is little doubt about factual guilt, or they may signify a form of "implicit plea bargaining" that involves assumptions of reduced punishment (Padgett 1985). Research findings show that the largest discounts occur in negotiated pleas, with smaller reductions in nonnegotiated cases (Johnson 2003).

The type of trial is also consequential. A number of studies find larger, more consistent trial penalties associated with jury than with bench trials (Kramer and Ulmer 2002; Johnson 2003; King et al. 2005). In his classic research on Philadelphia, Schulhofer (1984, p. 1063) showed that "expectations of leniency" led to frequent bench trials and that the "system of judicial assignments . . . encourage[d] and reinforce[d] such expectations." Differential trial taxes for bench and jury trials are consistent with organizational efficiency arguments and with use in some jurisdictions of bench trials as an alternative mechanism for accepting "slow pleas" (Mather 1973; Eisenstein and Jacob 1977).

Finally, we know little about the broader sociopolitical contexts that shape plea-trial disparities. Only two studies explicitly focus on jurisdictional variation in trial effects, one in federal courts (Ulmer, Eisenstein, and Johnson 2010) and one in Pennsylvania (Ulmer and Bradley 2006). Both report significant jurisdictional variation in the effect of trial conviction, but neither explains much of this difference. Future work might benefit from expanding the range of predictors. For example, much discussion has focused on the importance of court cultures (Eisenstein and Jacob 1977), but few studies explicitly measure local norms (Ulmer and Johnson 2018). Moreover, contextual variation in trial penalties is complicated because “when differentials are most effective, they are least observable,” so that “the strongest evidence for differentials” may be the absence of trial cases altogether (Brereton and Casper 1982, p. 50).

Interjurisdictional comparisons can be hazardous and require caution—differences in criminal procedures, criminal codes, sentencing structures, and local case processing norms all shape punishment in ways that are difficult to capture—but some work hints at contextual differences. Piehl and Bushway (2007), for example, investigated plea bargaining in two states, one with voluntary sentencing guidelines and one with stricter presumptive guidelines. They found larger plea discounts under presumptive guidelines, where judicial discretion was more constrained and trial sentences were more predictable. More work of this kind is needed, along with research that examines changes in trial penalties and trial rates over time. The presumption is that large trial penalties will lower the trial rate (Brereton and Casper 1982; McCoy 2005; Wright 2005), but little work examines these relationships over time or across courts.

Future work should also expand beyond its ethnocentric focus on US courts. As Turner (2017, p. 75) notes, plea bargaining has become “an increasingly popular feature of criminal justice reform” in countries “as diverse as France, Germany, India, Japan, Nigeria, Russia, and South Africa.” However, the scope and salience of plea bargaining remain uniquely American. In most nations, the same arsenal of sentencing enhancements is not available, judges and prosecutors are career civil servants, prosecutorial powers to dismiss charges and recommend sentences are limited, and judicial determinations of facts are invariably required (Tonry 2012). Unlike other nations, the United States relies heavily on negotiated guilty pleas, meaning defendants explicitly bargain over the terms of their plea discount. This is distinct from nations that have institutionalized plea discounts in formal sentencing policies. In England and Wales, for exam-

ple, defendants who plead guilty at the first opportunity receive a reduction of one-third of their custodial sentence and successively smaller discounts as the trial approaches (Roberts and Bradford 2015). In New South Wales, Australia, and in New Zealand, guilty pleas carry recommended sentence discounts of 10–25 percent (Brook et al. 2016). These process discounts are universally applied, with the discount scaled to the timing of the plea. This limits the magnitude of trial penalties but raises difficult questions about formally structured trial taxes and their effects on fairness and proportionality.

#### IV. Philosophical Debates and Policy Recommendations

Arguments about plea-trial disparities mirror ongoing debates over the merits and demerits of plea bargaining (Alschuler 1979, 1981; Bibas 2004; Stuntz 2004). Proponents maintain that plea bargaining streamlines case processing, saves time and resources, provides flexibility in punishment, ensures witness cooperation, and helps settle cases with difficult legal issues (Rosett and Cressey 1976; Church 1979; Easterbrook 1992; Wilkinson 2014). Critics counter that plea bargaining divests defendants of procedural safeguards; threatens transparency, accountability and proportionality in punishment; and amounts to a system of institutionalized coercion that forces defendants to accept pleas regardless of their guilt (Alschuler 1976, 1981; McCoy 2005; Wright 2005; Covey 2008; Stuntz 2011). Critics question how guilty pleas under the threat of extreme punishment at trial can be truly voluntary and argue that plea-trial sentencing differentials undermine the presumption of innocence (Tata and Gormley 2016). For the most part, these issues are normative and deontological in nature: they reflect value judgments at the nexus of core issues of justice, juxtaposed with the everyday organizational realities of the criminal courts.

##### *A. Philosophical Debates on the Trial Tax*

Frase (2005*b*) notes that widely accepted purposes of punishment include providing fair, just, and proportionate sentences; serving community protection and public safety; and striving to achieve uniformity and consistency, along with more traditional crime control goals such as deterrence, incapacitation, and rehabilitation. It is difficult to justify a significant trial tax on any of these bases. One of the most troubling features of the trial penalty is its potential to contribute to false guilty pleas (Blume

and Helm 2014; Dervan 2015); but even when defendants are factually guilty, plea discounts can obscure transparency, reduce legitimacy, and thwart the goals of deterrence and proportionality in punishment.

Turner (2017, p. 75) notes that plea bargains contribute to “incomplete investigations, inadequate disclosure, limited adversarial testing,” and “perfunctory judicial oversight.” She worries that this reduces legitimacy in the justice system for defendants, victims, and the public alike—a concern consistent with survey research showing low levels of public support for plea bargaining (Herzog 2004). Smith (1986, p. 949) explains that plea-trial disparities can also “undermine the deterrent effectiveness of punishment” because they introduce uncertainty into the sentencing process. Roberts and Bradford (2015, p. 188) argue that large plea discounts often “have the effect of undermining ordinal proportionality in sentencing.” Moreover, because the guilty plea decision is unrelated to retributive notions of desert and culpability, Alschuler (1981, p. 652) maintains that it “turns major treatment consequences upon a single tactical decision irrelevant to any proper objective of criminal proceedings.”

All of this suggests that trial penalties are defensible only on utilitarian grounds related to organizational efficiency, because the *raison d'être* of American plea bargaining is penologically limited to the principle of expediency (Langbein 1979).<sup>13</sup> As Alschuler (2013, p. 686) argued, if trial sentences are “imposed simply for the purpose of inducing guilty pleas,” they may benefit defendants but only as “a gunman’s demand for your money . . . benefits you as well as the gunman.” Plea discounts provide apparent rewards to defendants, but only in relation to the threat of more severe outcomes at trial. This poses the question whether expediency is a valid purpose of punishment or whether, as Darbyshire (2000, p. 901) argued, the trial tax represents a “stunning hypocrisy” for a legal system that “trumpets the right to trial.”

Plea negotiations are an opaque form of administrative justice that requires defendants to sacrifice due process rights to gain putative sentencing leniency. The US Supreme Court in *North Carolina v. Alford*, 400 U.S.

<sup>13</sup> The American Bar Association standards for guilty pleas recognize that plea discounts may be appropriate in the “interest of the public in the effective administration of justice,” but explicitly provide that “the fact that a defendant has entered a plea . . . should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence” and that “the court should not impose upon a defendant any sentence in excess of that which would be justified . . . because the defendant has chosen to require the prosecution to prove guilt at trial” (American Bar Association 1999, 14-8(b)).

25 (1970), held that courts may accept guilty pleas from people who insist on their innocence if in the court's view there is strong evidence of guilt. Recent Supreme Court decisions require assistance of counsel in guilty plea cases and require defense counsel to inform defendants about plea offers and the rights they waive (*Padilla v. Kentucky*, 559 U.S. 356 [2010]; *Lafler v. Cooper*, 566 U.S. 156 [2012]; *Missouri v. Frye*, 566 U.S. 134 [2012]). However, those decisions do almost nothing to regulate prosecutorial power or protect the constitutional rights of defendants.

This is important because guilty plea discounts routinely require defendants to forfeit procedural rights in addition to the right to trial. Defendants are often required to waive their rights against self-incrimination, to confront witnesses or request a presentence report, to appeal the plea agreement or request postconviction review, and to challenge ineffective counsel (King and O'Neill 2005). In federal court, Hofer (2011) found that defendants often were required to waive their right to detention hearings, contest guidelines calculations, file motions to suppress evidence or request downward departures, and challenge errors in guidelines calculations. None of these limitations concern philosophical purposes of sentencing; they aim only to ensure administrative efficiency, insulate plea deals from judicial review, and prevent convictions from being overturned. Many defendants are unlikely to comprehend fully the rights they waive, suggesting that waivers contribute to uninformed pleas (Podgor 2011).

A final concern is that trial penalties may contribute to insufficient fact finding. The ability of public defenders to provide a high-quality defense is often limited by heavy caseloads, inadequate staffing and resources, and legal rules that restrict comprehensive defense investigations (Brown 2005). Encouragement of swift and certain guilty pleas may both enable and camouflage inadequate defense counsel. Prosecutors often expedite plea agreements in ways that make discovery of evidence difficult; criminal procedure rules require full disclosure before trial, but not before a guilty plea (Turner 2017). Federal Court of Appeals Judge Gerald Lynch (2003, p. 1404) observed that the ubiquity of plea discounts has enabled prosecutors to replace the judge and jury as the "central adjudicator of facts" in American courtrooms. In some jurisdictions, prosecutors use "exploding plea offers" that force defendants to accept pleas quickly with limited opportunity to investigate the strength of the case against them (Zottoli et al. 2016). In theory, judges could assure fair, accurate, and informed plea outcomes, but in practice their role is limited (Alschuler 1976).

*B. Reforms and Policy Recommendations*

Critics have proposed numerous remedies. They include calls for total or partial bans on plea bargaining (Langbein 1978; Alschuler 1981; Schulhofer 1984; Gazal-Ayal 2005), fixed plea discounts (Covey 2008), and tighter prosecutorial regulation (Guidorizzi 1998). Not every criminal case can be decided at jury trial, but even in the absence of sentence discounts, the vast majority of defendants would likely plead guilty when there is clear and compelling evidence. Trials could be reserved for cases in which there are doubts about the defendant's guilt.<sup>14</sup> Several possible policy reforms offer promise.

First, the balance of power in plea negotiations should be restored. Prosecutorial domination of contemporary plea negotiations raises problems of injustice equivalent to earlier concerns about excessive judicial discretion (Frankel 1973). Increased transparency and accountability are needed in charging and plea negotiations, as is greater judicial oversight. One solution is to weaken prosecutors' ability to threaten severe punishments by repealing mandatory sentencing and similar laws that enable prosecutors to coerce guilty pleas. If the political will to do so existed, judges could be given other powers to review, revise, and reject proposed bargains (Tonry 2014).

A second partial solution is to require that guilty plea offers and subsequent alterations be reliably reported, accessible to the public, and subject to judicial review. Detailed reasons for charging decisions should be recorded and made reviewable by the trial judge, and ultimately by appellate judges (Miller and Wright 2008; Bibas 2009). This would make the plea-bargaining process more scrutable, fair, and transparent, and it would help prevent strategic overcharging.

Caldwell (2011, p. 65) points out that prosecutors have "a powerful incentive to begin the inevitable negotiating process from a position of strength, which often results in overcharging." Overcharging provides leverage to extract guilty pleas, allows for a broader range of negotiated concessions, and shapes implicit expectations of trial penalties (Alschuler 1968; Meares 1995). Although data on overcharging are elusive, the prac-

<sup>14</sup> It is important to acknowledge that the jury trial is no panacea for the ills of the criminal justice system. A separate corpus of work identifies many troubling issues with juries, from problems of eyewitness testimony to how juries are selected and how they make decisions (Hans, Vidmar, and Stevenson 1986; Vidmar and Hans 2007). These are distinct issues, however, and are unrelated to a defendant's constitutional right to a jury trial.

tice is believed to be commonplace. Improved record keeping is therefore a key requirement for advancing research and reform on prosecution (Johnson, King, and Spohn 2016). Better plea bargaining data could reveal aberrant charging practices and facilitate periodic audits to ensure fair and equal application of plea discounts. This would parallel the use of racial impact statements in some states (Mauer 2007).

A number of scholars have argued that it would be beneficial to have greater judicial oversight of negotiated guilty pleas (Turner 2006; O'Hear 2008). Although judges have authority to accept or decline plea agreements, in practice they seldom possess sufficient information to evaluate the merits of negotiated plea agreements. Sklansky (2018, p. 460) observes that a more thorough process is needed with expanded "judicial supervision over prosecutorial decisions regarding . . . whether to file charges, what charges to file, what information to disclose to defense," and "what kinds of plea bargains to offer or to accept." That could rein in prosecutorial discretion and make prosecutors more accountable for their plea offers.

Creation of statutory caps on plea discounts to minimize the effects of trial penalties is a third reform possibility. This could further institutionalize discounts, but given their ubiquity, there is clear need to restrict their size. This might emulate the English model, which limits the size of discounts (Ashworth and Roberts 2013; Roberts and Bradford 2015). Covey (2008) proposes an alternative system of punishment ceilings in which trial sentences cannot exceed plea outcomes by more than a modest, fixed amount. This would ensure that trial sentences are not overly punitive rather than preventing leniency in plea offers.

These approaches would require additional limits on prosecutors' authority to shift defendants into new offense categories. American plea bargaining often involves charging manipulations that directly affect punishment, in contrast to other countries where prosecutors cannot dismiss or alter charges without judicial approval, and where judges are not bound by charging decisions (Tonry 2012). Companion reforms are therefore needed to limit the effects of charge bargaining on sentencing.

A final, more ambitious proposal is to develop binding guidelines for charging and plea bargaining, paralleling presumptive sentencing guidelines for judges. Many prosecutors' offices have internal charging policies, and some have independent "conviction integrity" units (Sklansky 2018). However, no US jurisdiction has developed comprehensive, legally bind-



ing, presumptive charging guidelines.<sup>15</sup> Such a system could provide standards governing what prosecutors can charge; how, when, and why charges can be amended; and what sentences are reasonably expected following plea bargaining (Pfaff 2017). This would shine a light into the shadowy realm of plea bargaining; rather than attempt to eliminate plea negotiations, it would structure them. It would also balance the playing field for prosecutors, defendants, and defense counsel by establishing clear benchmarks for plea deals that meet minimum standards of just punishment. Guidelines could increase transparency and accountability in charging decisions while structuring prosecutorial decision making, providing improved legal recourse to defendants, and limiting the coercive pressure of trial penalties.

### *C. Concluding Thoughts*

It is difficult to justify a system of punishment that consistently metes out harsher punishments to defendants who exercise their constitutional right to trial. Yet the existence of plea-trial sentencing differentials is one of the most robust findings in empirical sentencing research: Across space, time, and offense, defendants convicted by judges or juries receive harsher sentences than if they had pled guilty. This represents a delicate balance between the organizational realities of everyday courts, striving to expedite cases and ensure the conviction of the guilty and acquittal of the innocent, and broader issues of procedural fairness and just and effective punishment.

Trial rates have fallen to unprecedented levels, largely because sentencing law changes have enhanced prosecutors' negotiating leverage by allowing them to threaten lengthy sentences if convicted at trial. The trial tax is large, contributes to broader patterns of social inequality, and increases pressure on innocent defendants to plead guilty.

Trial penalties have grown inversely with declining trial rates, threatening the eclipse of the American jury trial. This raises important questions about the voluntariness of guilty pleas, use of coercion in plea bargaining, and observance of principles of fairness, equality, and proportionality in punishment. The time has come to incorporate greater transparency and accountability in prosecution. The aims should be to structure charging

<sup>15</sup> Prosecutorial guidelines have been in use in other nations such as the Netherlands since the mid-1980s (Tak 2001; Tonry 2012).



practices, reduce excessive trial sentences, and create greater proportionality and equality in sentencing, regardless of whether a defendant pleads guilty or goes to trial. Criminal justice policy should never accept the false premise that “what is familiar” is “what is right” (Alschuler 2013, p. 707).

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