

THE PROBLEM WITH PLEA BARGAINING: DIFFERENTIAL SUBJECTIVE
DECISION MAKING AS AN ENGINE OF RACIAL DISPARITY IN THE UNITED
STATES PRISON SYSTEM

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Over the last three decades, the rate of incarceration in the United States has risen at an unprecedented rate. This is true while the rate of criminal activity has dropped steadily. Further, while the rate of much criminal activity is equal across races, the rate of incarceration for Blacks has risen far faster than for whites. The United States now incarcerates more than 1 in 100 American adults. This makes the United States the current world leader in both prison population size, and percentage of citizens in prison. While the reasons for this are numerous and complicated, the hypothesis of this project is that plea bargaining is a cause in fact for both high prison populations and the high levels of racial stratification in prisons.

Plea bargaining has become ubiquitous as the primary method of criminal case disposition in the United States. Indeed, the vast majority of criminal convictions are obtained through a plea bargain. Plea bargaining lowers the transaction cost of criminal prosecutions which combines with political policies favoring large scale incarceration to drive up prison populations. Further, plea bargaining indirectly pits defendants against each other in a multiplayer Prisoner's Dilemma that induces defendants to take worse bargains than they otherwise might. Moreover, the decrease in transaction costs is generally larger for cases against poor defendants which correlates to a decrease in transaction costs for prosecuting Black defendants. Since prosecutors are interested in maximizing successful prosecutions and minimizing

costs, they are encouraged to prosecute a disproportionate number of Black defendants.

Additionally, a defendant negotiates based upon his subjective views of the criminal justice system and his expectation of conviction. He bases these views on objective reality as well as on social, cultural, and economic factors. This analysis leads African American defendants to bargain with a more pessimistic estimate of how they will fare as compared to white defendants, resulting in overall worse, bargains. Finally, a norm of plea bargaining as the accepted method of case disposition has emerged as an institution. This norm perpetuates the social factors that facilitated the disparate bargains in the first place.

BIOGRAPHICAL SKETCH

Douglas Savitsky received his B.A. in 1997 from Indiana University with a double major in mathematics and religious studies and a minor in physics. He received a J.D. in 2003 from the University of Chicago Law School, and his M.A. and Ph.D. from Cornell University in 2006 and 2009 respectively. He currently resides, with his wife Erika, and cat Bolivia, in Chicago.

For Erika, Mani, and Bolivia

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TABLE OF CONTENTS

Biographical Sketch	iii
Dedication	iv
Acknowledgements	v
List of Figures	vii
List of Tables	viii
Chapter 1 – Introduction	1
Chapter 2 – A Sociological Model of Plea Bargaining	8
Chapter 3 – Plea Bargaining in Context	44
Chapter 4 – Economic Models of Plea Bargaining	72
Chapter 5 – America’s Incarceration Exceptionalism	86
Chapter 6 – Institutions and Context-Bound Rationality	114
Chapter 7 – The Boundaries of Plea Bargain Decision Making	122
Chapter 8 – Direct Evidence	143
Chapter 9 – Conclusion	165
List of Cases	167
References	168

LIST OF FIGURES

Figure 2-1, Cost versus Sentence for a Plea Bargain and Trial for a Prosecutor	22
Figure 2-2, Prosecutorial Payoff versus Investment	23
Figure 2-3, Prosecutor and Defendant Interaction in Normal Form	25
Figure 2-4, Prisoner's Dilemma Interaction Between Two Defendants	27
Figure 2-5, Prisoner's Dilemma Example Interaction	28
Figure 2-6, Comparison of Confidence in the Criminal Justice System	38
Figure 6-1, An event with risk but no uncertainty	117
Figure 6-2, An event with risk and uncertainty	118
Figure 6-3, A constraint which eliminates uncertainty from the choice set	119
Figure 8-4, Black versus White Prison Admission for 2003	145
Figure 8-2, Increases in Prison Admissions for Alaska and the U.S. 1978-1993	157

Chapter 1 – Introduction

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. ... He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation ... For depriving us in many cases, of the benefit of Trial by Jury.

– The Declaration of Independence, 1776

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country.

– Winston Churchill, 1910

In July of 2001, a bailiff escorted Randall Alexander¹ into a Federal District Courtroom in Indiana. Mr. Alexander, a 19-year-old Black man from Richmond Indiana, had been arrested several months earlier after a friend from Los Angeles shipped him a compact disc player packed with crack cocaine. Mr. Alexander allegedly intended to sell the drugs in the greater Richmond area, as he had done with similar shipments in the past.

The purpose of Mr. Alexander's trip to the courthouse was to formally enter a guilty plea before the presiding judge. After his indictment, he had entered a plea of not guilty, and unable to post bail he had been remanded into custody. Since that time, after minor wrangling between his public defender and the prosecutor, a plea bargain had been reached. Mr. Alexander would plead guilty in exchange for a more lenient sentence than he might expect at trial.

The only witnesses to this event were the defendant's mother and two law students who were interning for the judge and who happened to be in the courtroom observing. The judge questioned the defendant in order to get Mr. Alexander's acknowledgment that the plea agreement he was entering into was with his consent.

¹ Not his real name.

As required by the Federal Rules of Criminal Procedure,² Mr. Alexander agreed that he had not been coerced, that he understood he had a right to a trial, the right to force the government to prove beyond a reasonable doubt that he had indeed engaged in the activities he was accused of, and that by entering a plea of guilty he was relinquishing any right he might have to contest his guilt in the future. The judge then entered the guilty verdict and Mr. Alexander was led away to await sentencing. The Federal mandatory minimum sentence for first offense possession of just 5 grams of crack cocaine is 5 years in federal prison. For 25 grams, it is 10 years.³

Mr. Alexander's situation is not unique. Over the last three decades, the rate of incarceration in the United States has risen at an unprecedented rate (Warren 2008). The United States now houses more than 1 in 100 American adults, or about 2.3 million people, in prisons and jails (Id). This is true even while the rate of criminal activity, particularly violent and property related criminal activity, has dropped steadily (U.S. Department of Justice, Violent Crime Trends 2008, Western 2006). Further, while the rate of much criminal activity has remained equal across races,⁴ the rate of incarceration for African Americans and Hispanics has risen far faster than the rate for whites. Indeed, African Americans and Hispanics are considerably more likely to spend some portion of their lives incarcerated than are whites (Scalia 2001,

² See chapter 3.

³ Sentencing policy is such that there is a 100 to 1 ratio in quantities of powder cocaine versus crack cocaine necessary to trigger these mandatory minimums. That is, a defendant need only be caught with one percent as much crack as powder cocaine in order to receive the same prison sentence. Much has been made about this policy being racist, and many people argue that it has resulted in many more Blacks being incarcerated than whites (Blumstein 2002). Disagreeing with Blumstein, Kennedy (2007) suggests that the sentencing disparity may in fact be justified by the actual differences between the two drugs as well as the typical methods of distribution. However, lost in the debate is that statistics suggest Blacks do not actually use or distribute crack at rates that are considerably higher than whites, certainly not at rates high enough to account for the rate that Blacks are imprisoned for doing so (SAMHSA 1998, Western 2006). This suggests that the racial bias may lie elsewhere.

⁴ This is the case for drug related crime (see SAMHSA 1998, Western 2006). For other crime, this is a more controversial claim that is addressed in chapter 5.

Western 2006). For 20 to 24 year olds, while 1 in 9 Black men and 1 in 24 Hispanic men are currently behind bars, only 1 in 60 white men are (Warren 2008). In addition, 1 in 3 African American males will be incarcerated at some point in his life, as opposed to only 1 in 17 whites, if current incarceration rates continue (Bonczar 2003). For African American males without a high school education, the number is predicted to be almost 3 in 5 (Western 2006).

While these numbers, or some version of them, are widely known and shocking in their own right, they do not necessarily tell the whole story, which is actually worse. For instance, the enormous increase in rates of imprisonment is not due to increased sentence length. That is, the prison system is not simply keeping prisoners around longer allowing their numbers to build up. Instead, the increase in prisoners is due to an increase in prison admissions with sentence length only increasing a small amount (Wacquant 2008a). Additionally, if people on probation and parole are considered in addition to those in prison, the number of people controlled by the United States prison system is nearly 7 million, or one in thirty adults (Wacquant 2008b). Moreover, in order to administer such a system, the prison system has become the third largest employer in the United States, behind only Manpower and Wal-Mart (Id).

These numbers make the United States the current world leader in both prison population size, and percentage of citizens in prison (Western 2006).⁵ The reasons for the sheer numbers, as well as the racially biased numbers, are numerous and complicated. These numbers are partially attributable to the so-called war on drugs, which began in earnest in 1980. At the outset of the war on drugs, arrests on drug

⁵ While China reports, as of 2004, a prison population of approximately 1.5 million or about 0.12% of its population (Warren 2008), others have estimated that it could be as high as 16 to 20 million (Adams 2004). Other countries that may have, or may have had, similarly large prison populations include North Korea, The Soviet Union, apartheid era South Africa, Nazi Germany, and Cambodia under the Khmer Rouge (Id).

related charges comprised just under 6% of all arrests (King, 2008). By 1990, that rate had increased to over 11%, and today is over 12% nationwide (Id). From 1980 to 2003, the prison population of drug offenders increased from approximately 40,000 to nearly half a million (Id). Moreover, over this 23 year span, the total number of arrests for drug offenses was over 30 million with increases in arrests for African Americans outpacing arrests for whites at a rate of over 3 to 1 (Id). Other reasons given for the prison explosion include a changing political landscape, increases in crime, and the coming of age of the Baby Boomers (Blumstein 1988), as well as economic disparity along racial lines (Irwin and Austin 1994). This project will argue that plea bargaining is an essential element of both prison growth as well as the racially disparate state of American prisons.

Plea bargaining has become ubiquitous as the primary method of criminal case disposition in the United States. By 1920, it was thought that 88 percent of convictions in New York were via guilty pleas, up from 22 percent just 80 years earlier (McDonald 1985). Most modern commentators consider the number to be around 90 percent (Newman 1966) though it may be higher (Friedman 1993). Indeed, in one misdemeanor court, Feeley (1979) found the rate to be 100 percent. Although nobody knows the exact number, what is known is that for the vast majority of defendants, the criminal justice system does not involve a jury trial, the presentation of evidence, or any sort of dramatic courtroom scene. Instead, it involves bargaining for justice.

As one of the interns fresh out of my first year of law school, sitting in the courtroom watching Mr. Alexander's plea entry, I was amazed that anyone would ever agree to plead guilty. After all, the Constitution, in two places no less, guarantees a

trial.⁶ The burden of proof is on the prosecutor, and proof must be beyond a reasonable doubt. Even when a defendant is clearly guilty, there is always the chance of a prosecutor making a mistake, forgetting to file a form on time, or losing the evidence. It seemed to me, as a naïve law student, that some chance of going free must be worth something.

More importantly, what really struck me was the thought of what would happen if every defendant refused to plead guilty. Logically, the criminal justice system would become overwhelmed. If every one of the millions of people who are funneled through the court system every year suddenly required a trial, complete with attorneys, judges, full jury boxes, court reporters, court rooms, and witnesses, the whole system would shut down. The resources required would be staggering. Clearly, it seemed, if every defendant received the criminal procedure that the law guarantees him, the number of prosecutions would need to drop precipitously which would necessarily lead to a smaller prison population.

Moreover, it occurred to me that this scenario would likely result in less prosecutions for low-level crimes, and for poor defendants. The reason is that it is much more expensive for a prosecutor to prosecute a murder or an embezzlement case involving a lengthy investigation and trial than a case like the crack distribution case above. A prosecutor who wants to show she is effective by winning a large number of convictions does well to focus on the easy cases. However, if the easy cases were to become harder with the hard ones staying about the same, then the prosecutor's incentives would shift. She would do better to prosecute cases with real social importance, especially when these cases cost the same, or only slightly more, to prosecute than the ones that are less important. Defining what constitutes a socially

⁶ The requirement of a jury trial is in Article III as well as the 6th Amendment. It is the only thing that is mentioned twice in the Constitution. For more, see chapter 3.

important case and what does not is subject to disagreement. However, in the wake of Enron, Bernie Madoff, and the sub-prime meltdown, it is difficult to argue that the prosecution of a smalltime crack dealer is more important than the prosecution of a white-collar criminal.

However, it is unlikely that defendants are going to be able to cooperate and all refuse to plea bargain. Indeed, it is unlikely that communication between defendants would even be possible. Further, since each defendant has an incentive to plea bargain, even if collectively all defendants are better off if none of them do, expecting defendants to unilaterally stop plea bargaining is unrealistic. However, turning around the original insight that if every defendant refused to plea bargain it would result in a smaller and more equitably distributed prison population suggests that plea bargaining is in part responsible for the state of American prisons. This is not to say that plea bargaining causes inequality in prison populations as such. It is to say that the institution of plea bargaining is a necessary factor. Additionally, if plea bargaining as an institution leads to such a large level of racial disparity in prisons, then this social fact likely feeds back on defendants, influencing the decisions they make, and thus exacerbating the problem. These two concepts are the focus of this project. The project argues that plea bargaining is the essential factor that has resulted in the large and racially disparate American prison system.

The structure of this project is as follows: Chapter 2 sets out a formal model of the above argument. Chapter 3 explores the institution of plea bargaining. Several alternative models of plea bargaining are examined in chapter 4. These models, mostly conceived by economists, largely deal with the interaction between a defendant and a prosecutor during a plea bargain. While this project is primarily concerned with

how these interactions aggregate, it will argue that the existing plea bargaining models are incorrectly formulated, and that they do not account for important social factors. Chapter 5 considers various theories of why the United States prison system is both so large, and so racially disparate. Many of these theories have considerable merit. However, none of them account for the institution of plea bargaining as a necessary factor. Chapter 6 reviews sociological theory of institutions. It then explores how this institutional structure guides the decision making process for prosecutors and defendants. Chapter 7 then explores the limits to rationality in the plea bargaining process, examining why institutions are necessary in making plea bargaining decisions. Chapter 8 examines data from several districts that eliminated plea bargaining in the 1970s. While the data is limited, it is suggestive that the model outlined is realistic. Chapter 9 concludes.

Chapter 2 – A Sociological Model of Plea Bargaining

Plea bargains account for more than 90 percent of guilty verdicts (Friedman 1993). Their use lowers the transaction cost of criminal prosecutions, facilitating the growing prison population, which has grown to over 2.3 million people (Warren 2008). The literature on plea bargaining is vast.¹ However, it has largely centered on either the debate of whether plea bargaining is proper in an ethical sense, or on exploring models of the plea bargaining interaction, modeling how individual bargains are made. Left out of this literature is an analysis of how the micro level interactions involved in plea bargains aggregate into a macro level social phenomenon. This project seeks both to fill in this gap as well as to refine the interactional level plea bargaining model. It explores how and when a plea bargain is reached, how plea bargains aggregate into a macro level social phenomenon, and how this phenomenon feeds back to influence the interactional level bargain.

The hypothesis of this project is that plea bargaining contributes to the racial inequality found in the American prison population by disproportionately impacting African American defendants. Plea bargaining lowers the transaction cost of criminal prosecutions which combines with political policies favoring large scale incarceration to drive up the prison population. It does this by indirectly pitting defendants against each other in what is in essence a multiplayer Prisoner's Dilemma that induces defendants to take worse bargains than they otherwise might. Moreover, the decrease in transaction costs is generally larger for cases against poor defendants which correlates to a decrease in transaction costs for prosecuting Black defendants. Since prosecutors and the police are interested in maximizing successful prosecutions and

¹ As early as 1977 it was suggested that the literature had “become characterized by repetitiousness and even sterility” (Baldwin and McConville 1977: 1).

minimizing costs, they are thus encouraged to prosecute a disproportionate number of Black defendants.

Additionally, this project hypothesizes that in the plea bargaining process, a defendant negotiates based upon his subjective views of the criminal justice system and his expectation of conviction. He bases these subjective views both on objective reality as well as on social, cultural, and economic factors. This subjective analysis leads African American defendants to bargain with a more pessimistic estimate of how they will fare as compared to white defendants, resulting in overall worse, from the defendant's perspective, bargains. Thus, the combination of the prosecutor's effort to conserve resources and the defendant's evaluation of his own risk aggregate into a system that produces racially biased prison populations. Finally, not only has the imprisonment of Black men created a norm of acceptance in some Black communities of prison being a way of life (Western 2006), but the norm of plea bargaining as the accepted method of case disposition has emerged as an institution. These norms help perpetuate, and even increase, the very social factors that facilitated the disparate bargains in the first place.

The proposed model consists of three interwoven elements. First, a plea bargain is an institutional arrangement that enables a prosecutor to secure a conviction at a lower cost than if she were to take the case to trial. As her incentives are generally both to obtain the maximum number of convictions as well as to minimize costs, plea bargains offer a way to do this, and this gives her an incentive to use them. Similarly, plea bargains seemingly offer a defendant the best way to minimize his expected costs, both in terms of the transaction costs of a trial and in terms of his expected sentence. Plea bargains are thus generally seen as being in an individual defendant's interest. However, plea bargaining as an institution has a collective action

aspect to it. Over the entire set of defendants, plea bargaining induces comparatively bad bargains that, coupled with its efficiency, lead to a larger prison population.

Second, this project argues that the bargains struck by Black defendants tend to be worse than those struck by similarly situated white defendants. There are two reasons for this. Black defendants are generally poorer, and they are thus less able to afford a competent defense. Second, Black defendants tend to be in a position of lower power than are white defendants.

Plea bargains are a convergence of the expectations of the two sides to a negotiation. In order for both sides to agree to a bargain, both must believe that they are better off by making the bargain. The prosecutor must believe that the certainty of a conviction and the cost savings of avoiding a trial are worth the concessions made to the defendant, and the defendant must believe that the sentence is lower than his expected sentence at trial. However, because a Black defendant is more likely than a white defendant to view the criminal justice system as biased against him, his subjective expected sentence is higher than that of a white defendant. That is, Black defendants will tend to be more risk averse than white defendants, owing to a cultural and historical distrust in the criminal justice system. Plea bargains offer a risk averse defendant a way to avoid extreme punishment, often seen by the defendant as inevitable, by accepting costs that are more modest. Consequently, Black defendants will ironically tend to accept bargains with comparatively worse outcomes.

Further, because large numbers of Black defendants are “found guilty” through plea bargains, to a Black defendant first entering the criminal justice system, trial likely appears hopeless. Indeed, one in three African American men will spend some portion of his life in prison, and a social norm of acceptance of prison as a part of life has emerged in portions of the Black community (Western 2006). This, in addition to an historical distrust of the criminal justice system, acts to increase the perceived

probability of conviction, increasing the expected costs, which lowers the amount a prosecutor must concede in a bargain. Thus, the fact that others have already been convinced to plea bargain is itself a factor that pushes a defendant in the same direction. Thus, the set of all bargains that a Black defendant will be willing to agree to includes higher sentences than for a similarly situated white defendant.

The third component of this model is that a prosecutor tries to make the best bargain she can. Because of the weaker bargaining position in the case of a Black defendant, the prosecutor needs to make fewer concessions to reach a plea bargain. Additionally, it is less expensive to convict a Black defendant than a white one. The reasons for this, in addition to the differential perception of the criminal justice system, are that Black defendants tend to have less resources with which to defend themselves, have lower expected future earnings, and are more likely to be involved in crimes for which the prosecution is relatively inexpensive.

The sum total of these three components of the model is that plea bargaining aggregates to high levels of imprisonment and a disproportionately high rate of Blacks in prison. This imbalance feeds back on defendants fostering perceptions of the criminal justice system that convinces minorities that they are indeed more likely to have higher costs than whites. The crux of the argument is that each defendant and prosecutor in a criminal prosecution must make a subjective evaluation of risk. The bargain that is reached relates directly to this evaluation. For a defendant, this evaluation differs based upon his experience with, and perception of, the criminal justice system. Blacks have been shown to fare worse in the criminal justice system (Blumstein 1982, 1993), and survey data indicates that African Americans are more distrustful of the criminal justice system than whites (see e.g., Weitzer and Tuch 1999, Myers 1996).² Thus, the bargains Black defendants are able to make tend to be worse

² This is explored more fully in chapter 6.

than the bargains whites are able to make. For a prosecutor, prosecutions that are less expensive are more desirable. These less expensive prosecutions tend to correlate with prosecutions of Black defendants.

Conversely, in a system where judges and juries make the decisions, the defendant's perception of his guilt, his risk, and the fairness of the system do not influence the outcome to the same extent. Thus, there is the potential for different outcomes at both the micro and macro level depending upon whether a case is disposed of at trial, or via a plea bargain. Cases that prosecutors might otherwise lose at trial, or that might not be brought in the first place, whether due to insufficient evidence, lack of witnesses, lack of resources in terms of time, staff, or money, lack of political will, or any number of other reasons, can be won simply by granting sufficient concessions that a defendant will be unlikely to turn down. Indeed, studies have shown situations with 100 percent guilty plea rates over hundreds, or even thousands of cases (Feeley, 1979), where it is simply inconceivable that every defendant would have been convicted at trial. As Alschuler has noted, the notion that in some cases a bargain will not happen is akin to thinking that, "some secret force will presumably hold every defendant back, despite the fact that the concessions he was offered were deliberately calculated to overbalance his chances of acquittal" (Alschuler 1968: note 43).

The interactional aspect of this plea bargaining model, that is, the one on one bargaining process, builds upon other plea bargaining models. However, in addition to making changes to these models on the interactional level, this project also considers how aggregating large numbers of plea bargains changes how individual level bargains work. While on the individual level, one might simply analyze the costs and benefits each party to the plea bargain might consider, on the aggregate

level, there are positive feedback loops and other factors that influence the decisions made by each party. Put another way, in addition to the first order influence of plea bargaining on the criminal justice system, plea bargains also influence n^{th} order decision making.

Specifically, because some defendants bargain, this frees up the prosecutor's resources for additional cases. A prosecutor uses plea bargains as a way to minimize her resource expenditure while maximizing her effectiveness. A prosecutor must decide how to allocate resources to receive the maximum reward, which may mean weighing total convictions over long convictions. For a prosecutor who campaigns on a "tough on crime" platform, obtaining one conviction with a ten year sentence is not equivalent to obtaining two convictions, each with a five year sentence, though both cases share the same number of total man-hours of prison time. Both in terms of a defendant's and the public's discount rate, and in terms of the public's perception of prosecutorial effectiveness, the two shorter sentences are more valuable. If a prosecutor can win two mild convictions for the same or lower cost than one severe one through plea bargaining rather than proceeding to trial, it is clearly in her interest to do so. Further, prosecutorial cost savings made through plea bargaining increases the prosecutor's bargaining power in other cases. Indeed, Posner (2003) suggests, "Given a fixed prosecutorial budget, average sentences [given at trial] will probably be heavier rather than lighter if plea bargaining is allowed, because the prosecutor can use the money saved in plea bargains ... to build a stronger case when bargaining fails" (Posner 2003: 578). In Posner's example the cost of a plea bargain and the cost of a trial are at issue, but the point remains that plea bargains, being less expensive and less risky than trials, are generally in the prosecutor's interest. Finally, plea bargains keep the court system as a whole from becoming backlogged, thus allowing large numbers of cases to move through it.

The structure of the remainder of this chapter is as follows: First, it will briefly explore prior plea bargaining models. Second, it will present a new model of the plea bargaining interaction that is based on the earlier models but which explores the collective action nature of plea bargaining. It will argue that this collective action structure results in high levels of incarceration because it induces plea bargains. Third, it will argue that plea bargaining is more detrimental for Black defendants than white defendants. This is in part because Black defendants tend to be poorer than white defendants, and they are thus less able to afford a competent defense. Further, this is also because this relative poverty makes Black defendants less expensive to convict than white defendants. Additionally, it is because Black defendants tend to have less confidence in the criminal justice system, which negatively influences the bargains they are able to make. These factors aggregate into a large prison population where Black defendants receive harsher sentences than white defendants. Finally, the model will argue that an outcome of this differential is an institutional structure that feeds back on future defendants reinforcing the factors that caused the differential in the first place.

Plea Bargaining Model Background

The economic analysis of the criminal justice system stems largely from Gary Becker's seminal paper on the topic (Becker 1968), which appeared about the time that Law and Economics was getting a foothold as a serious discipline (Rhodes 1976). Prior to that, criminal justice had been considered largely outside the realm of economic analysis. Since that time, economists and legal scholars have developed several models of plea bargaining. These models are generally based upon neo-classical economic and rational choice concepts. The models assume rational decision

making on the part of the agents involved, general access to relevant information and knowledge, and a lack of transaction costs. Indeed, the models offer few, if any, social considerations of defendants beyond their being rational actors. Chapter 4 contains a more detailed literature review of the economic modeling of plea bargains. However, some background on the structure of these models is necessary here in order to place this project's model into a proper context.

Posner (2003) offers an overview of the economic analysis of plea bargain decision making. He does not present a formal model of plea bargaining as such. Instead, he presents an analysis of many of the issues involved in plea bargaining from several perspectives. Posner begins his analysis by arguing that the standard criticisms of plea bargaining are incorrect. These criticisms are that, from the defendant's side, it denies a defendant's right to trial, and that from the prosecutor's side, it leads to shorter sentences. Posner suggests that these criticisms are both incorrect as, "If a settlement did not make both parties to a criminal case better off than if they went to trial, one or the other would invoke his right to trial" (Posner 2003: 578)

Additionally, Posner argues that an abolition of plea bargaining would lead to longer waiting times for criminal defendants. This, he argues, would increase expected costs for those defendants held without bail before trial, common under the Bail Reform Act of 1984,³ especially for those who are actually innocent. It would also decrease expected costs for those who did receive bail. Additionally, Posner argues that while overall sentences would likely remain constant, the variance, and thus the economic risk involved would increase. Finally, he argues that, with all of the safeguards set up for criminal defendants, the reality is that most defendants are actually guilty, and many guilty defendants end up going free. Thus, Posner suggests, a little pre-trial detention, even for defendants who ultimately are acquitted, or against

³ Specifically, under 18 U.S.C. § 3142(e).

whom charges are ultimately dropped, is a good thing as it still provides some punishment and thus deterrence even without a conviction (Posner 2003).

Posner's insights reflect the prevailing wisdom regarding the structure and beneficence of plea bargains contained in most of the formal models. However, at face value, some of Posner's assertions are problematic. For instance, the notion that all of the parties to a plea bargain are better off, lest they would not agree to bargain, is an oversimplification. There are numerous examples, such as the standard Prisoner's Dilemma, or indeed any collective action problem, where individuals bargain to positions that, while they may seemingly be the individual's best option in the short run, are categorically not their overall best option. Additionally, Posner vets his concern about the possibility of innocent people serving some time noting that most defendants really are guilty. While it may be true that most defendants are guilty, this is logically not enough to justify Posner's argument. The fact that many defendants are guilty does not necessarily balance the fact that many guilty people also go free. That is, the criminal justice system actually does a poor job of selecting who will be a defendant, focusing on the poor and minorities in higher proportions than it should.⁴ Posner's reasoning is akin to suggesting that just because people who score highly on the GRE do well in graduate school, that this implies that people who score poorly on the GRE will do badly. The second statement, the logical inverse of the first, is not necessarily true.

The Model in Detail

As an addition and an alternative to the economic plea bargaining models, this project argues for a model of plea bargaining that incorporates sociological ideas. Like in the economic models of plea bargaining, in this model, a prosecutor and a

⁴ See chapter 5.

defendant will agree to enter into a plea bargain when they each *believe* they are better off to do so. That is, parties will agree to a plea bargain when it is perceived that the benefits outweigh the costs for each party. Leaving aside the difficulty of assessing these costs, particularly for the defendant,⁵ this model will begin like the typical plea bargaining model by simply weighing the defendant's assessment of his risk of conviction times the cost of conviction, usually the expected prison sentence, against the cost of the bargain. In other words, as a starting point, the defendant weighs his expected trial sentence against the bargain he is offered, and he chooses the option that reduces his costs. In the defendant's case there is little "benefit" to consider, only the reduction in costs. That is, from the defendant's perspective, in the best of all worlds, he will merely be back where he was before the process started.⁶ With all other possible outcomes, including acquittal at trial, the defendant still incurs substantial costs.

As a stylized example of a plea bargain decision, assume a defendant has been charged with a crime that carries with it a requisite 10 year prison term. If the defendant expects that his chances of being convicted at trial are 90 percent, then any offer from a prosecutor for less than 9 years makes him better off than if he goes to trial. Obviously, the decision process is more complicated as information and procedures have costs as well. However, this serves as a baseline to how this model, and indeed all published models, assume that a plea bargaining decision is made.

From the prosecutor's perspective, the calculation is similar with the addition of a benefit component. The prosecutor is interested in obtaining convictions while reducing her risk of losing at trial, all while minimizing her allocation of resources. In

⁵ See Chapter 7.

⁶ This considers any gains from crime to be exogenous to the process of plea bargaining. This is reasonable as these gains will generally be lost after conviction, and they represent the situation the defendant was in at the beginning of the criminal justice process.

essence, if the prosecutor determines that the cost savings of not having to go to trial plus the possibility of losing makes up for the reduced sentence, then bargaining makes sense.

In addition to the formal plea bargain where concessions are explicit, it is worth noting that in some cases the concessions are more implicit. For example, these concessions may come in the form of a defendant simply anticipating that sentences are shorter for those who plead guilty. Indeed, many judges make certain it is known that defendants who plead guilty will get lighter sentences (Alschuler 1976). Moreover, the fact that a defendant who pleads guilty does not need to pay for an attorney, or have the details of his crime publicly aired, is a form of concession in exchange for a plea.

As an example of this, one might consider the timely case of Bernie Madoff. Madoff plead guilty to fraud charges after being accused of conducting a Ponzi scheme worth over \$50 billion. For this, he received a prison sentence of 150 years. At first blush, it is difficult to see how this would be considered a plea bargain as the prosecutor made no formal concession in exchange for the guilty plea, and the judge essentially gave Madoff a life sentence. However, Madoff is 71 years old. Considering the scope of the crime and the public outrage, it is unlikely that there was any chance he could have actively bargained his way to a non-life sentence. Thus, a prosecutor could offer him little that would induce a plea bargain. From Madoff's perspective, however, by pleading guilty, he spared himself the embarrassment of a public trial. More importantly, while there are numerous people angry at Madoff, there is also presumably a small number of people that he illegally made rich. By forgoing a trial, Madoff cut off at least one of the government's routes for investigating these people, namely his trial, and thus offered those people the last bit of power he had. Thus, the implicit concession the government made by accepting

Madoff's guilty plea was to stop at least one aspect of its investigation into his compatriots.

Indeed, it should be noted that historically courts did not necessarily accept guilty pleas, valuing the process of the trial in determining guilt. That is, while a defendant has always been free to confess, historically a trial, albeit often a short one, was still necessary for a conviction (Alschuler 1979). Additionally, some commentators have considered the existence of pockets of guilty pleas in historical situations to be evidence of plea bargaining, regardless of the absent records of explicit plea bargain agreements (Cockburn 1978).⁷ Thus, even without any formal concessions from a prosecutor or a court, for the purposes of an analysis of plea bargains, any guilty plea is in reality a plea bargain.

With that as background, the next step is to consider how the plea bargaining interaction manifests with regard to the greater institution of plea bargaining. Like many interactions where macro level structures are dependent upon the aggregation of micro level events, plea bargaining is in essence a collective action problem. This is not necessarily obvious, as people do not view defendants as a group with collective interests. However, defendants do have similar interests. In particular, defendants are interested in staying out of prison. Further, if every defendant refused to plea bargain, this would likely clog the court system. Owing to the high cost of prosecutions and trials, it would reduce the total number of criminal dispositions that the system could absorb.

However, the existence of plea bargaining gives each defendant an incentive to defect from the collective's most powerful strategy which is akin to a general strike. This is to say, plea bargaining presents to each defendant a sort of Prisoner's

⁷ Some commentators such as Alschuler reject this interpretation.

Dilemma. In its simple form, a Prisoner's Dilemma is a situation where two individuals must choose between two different actions. Collectively, they are better off cooperating and making one choice. However, individually, each is better off defecting from cooperation. Ironically, if both defect, they are collectively in the worst possible position. Thus, individual defendant's decisions influence how the criminal justice process plays out for other defendants.

The Prisoner's Dilemma gets its name from how it is typically illustrated (See Baird et al. 1994). Consider two co-defendants⁸ charged with a crime for which the requisite sentence is 10 years. In this scenario, if neither confesses, each will be charged with and convicted of a lesser crime, each receiving a sentence of 3 years, for the sake of an example. The intuition as to why the sentence would be lower is that the prosecutor lacks evidence, or resources, to prosecute for the maximum crime, or that the probability of a conviction is considerably lower. However, if one defendant confesses and provides information to the prosecutor, he will receive only a light sentence of 1 year as a reward for his testimony, while the other will receive the maximum sentence of 10 years. If both confess, the prosecutor will not seek the maximum sentence, and each will instead receive a 6 year sentence. From a collective view point, both defendants keeping quiet leads to the lowest total sentence of 6 total years between them. However, if one defendant does keep silent, the other defendant's best option is to confess, as he will receive a modest 1 year sentence rather than 3 years. Additionally, if one defendant knows that the other will confess, then it is also in his best interest to confess as it will reduce his sentence from 10 years to 6. In other words, regardless of what the other prisoner does, each prisoner has an incentive to confess as he is always better off doing so. In the end, this outcome results in the highest total number of years in prison, 12 being greater than 11 or 6.

⁸ The prisoner's dilemma might more correctly be called the defendant's dilemma.

In addition to being a dilemma between two individuals, the Prisoner's Dilemma can also be expanded to encompass larger collective action problems (see generally Baird et al. 1994, Hardin 1971). In that case, often referred to as a Tragedy of the Commons, the dynamic is much the same as it is in each individual's interest that everybody else cooperates. However, it is also in each individual's interest to defect from the cooperation. The Tragedy of the Commons moniker comes from the concept of a shared field for the grazing of animals—a commons. It is in each farmer's general interest to limit every other farmer's animals' grazing, thus distributing the pasture evenly and maintaining it for future grazing. It is also in each farmer's individual interest to defect from the collective and overgraze his own animals thus increasing his own yield while presumably not doing enough damage to destroy the pasture. However, like in the two player Prisoner's Dilemma, if every farmer opts to defect from the collective interest and “free ride” by overgrazing his animals, it will deplete the pasture and ultimately lead to the starvation of everybody's animals. Eliminating this so-called free rider problem has been the subject of some research. For instance, it has been noted that strategic-interaction can be used to eliminate free riders in medium sized groups, while in larger sized groups sanctions or norms are generally required (Heckathorn 1996).

Plea bargaining can be seen to work in much the same way as these collective action scenarios. Indeed, as plea bargaining is defined in this project with any self conviction made in exchange for any sort of benefit being considered a plea bargain, the typical explanation of the Prisoner's Dilemma is in fact a plea bargaining dilemma. However, in order to see why plea bargaining is generally a Prisoner's Dilemma, one must take a step back and consider the relationship between prosecutorial cost and sentence length. As shown in Figure 2-1, in general, obtaining longer sentences costs

prosecutors more.⁹ However, this is not a linear relationship. Making a plea bargain allows a prosecutor to obtain a high payoff for a low investment. There is, however, a limit on the plea bargain sentence, which is necessarily lower than the limit on a possible trial sentence. While an expected trial sentence can be higher than a plea bargain sentence, trials require increased expenditure by the prosecutor. Thus, there is a point in the plea bargaining process where a prosecutor's resource expenditure becomes inefficient. That is, there is a point of maximum efficiency for a prosecutor, and increased expenditure by the prosecutor beyond this point is either wasteful, or it corresponds to trial preparation. This point, it should also be noted, also corresponds to increased expenditure by the defendant.

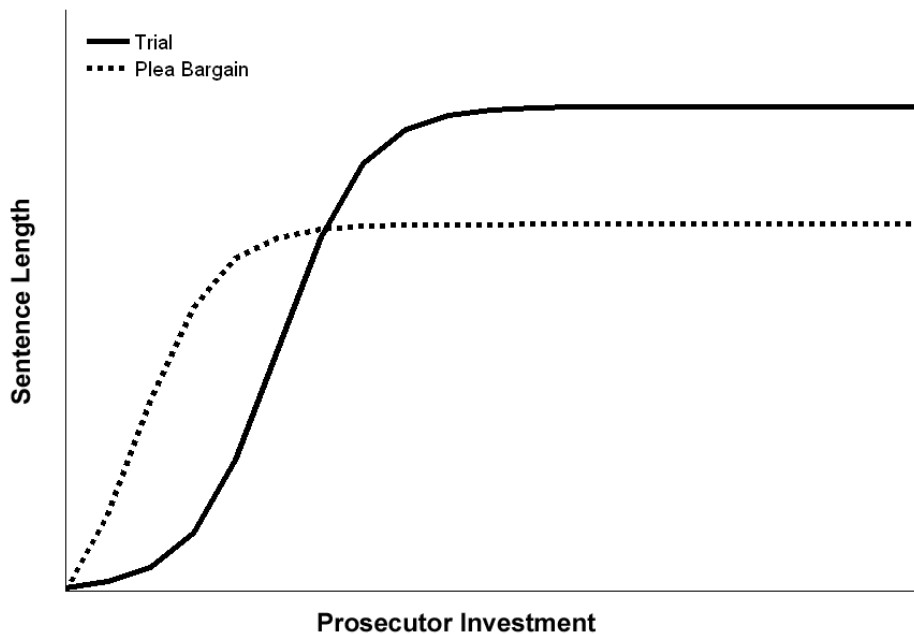


Figure 2-1, Cost versus Sentence for a Plea Bargain and Trial for a Prosecutor

It is not necessarily clear where this tradeoff occurs as it will vary from case to case. However, what is clear is that a large increase in expenditure beyond what is

⁹ This figure, as well as Figure 2-2, are highly stylized. They are simply intended to convey the intuition of the relationship between sentence length and prosecutorial expenditure.

generally necessary for a plea bargain is necessary for a trial at which a prosecutor expects to win the largest sentence. Further, as shown in Figure 2-2, if the cost is integrated into the prosecutor's payoff, there are two peaks corresponding with the optimal plea bargain and the optimal trial outcome.

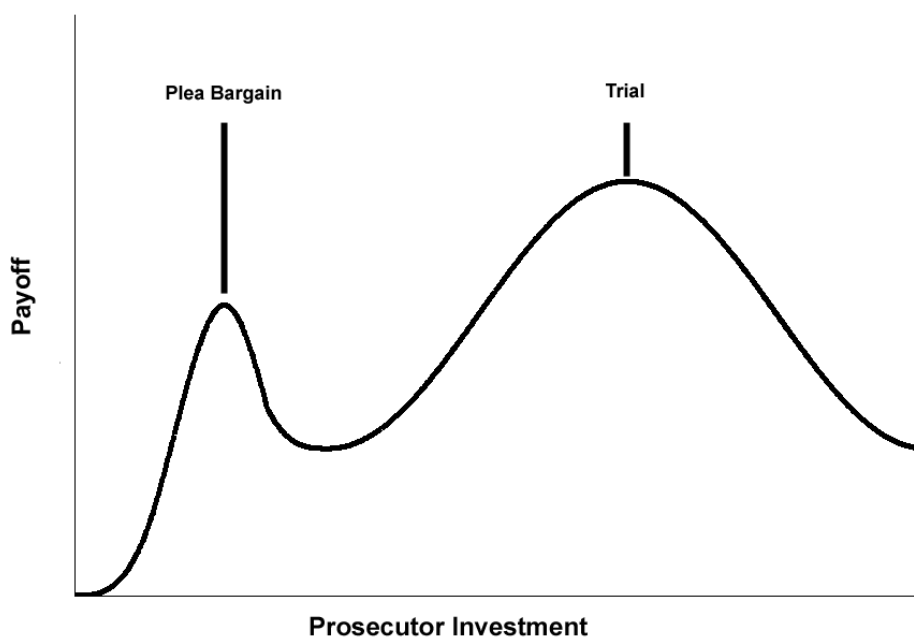


Figure 2-2, Prosecutorial Payoff versus Investment

Additionally, a prosecutor considers many factors when charging a defendant. These factors include the resources necessary for a conviction as well as the resources at her disposal. As such, while the cost versus sentence structure in Figure 2-1 holds for any given prosecution, each particular prosecution may have several functional ranges. That is, one can assume that a prosecutor has an option to either charge high or charge low.¹⁰ A high charge, if successfully prosecuted, will result in either a conviction for a long sentence or a plea bargain for somewhat less than the maximum

¹⁰ This can be in the form of charging for different crimes which are more or less serious, or it can be purely semantic. For instance, Chapter 7 notes the crimes of aggravated assault and intent to kill or maim, which are indistinguishable yet, which require different types of proof.

sentence. A low charge in the same case, if successfully prosecuted, will similarly result in a relatively long sentence from a trial, or a slightly lower sentence from a bargain. When a prosecutor has an option, she clearly prefers the longer sentence. However, if she cannot afford to see a high charge through, and she knows that a trial will be necessary, she prefers to charge low to avoid the costly, in terms of reputation, scenario of losing a case due to insufficient resources.

Thus, there is an interaction between a prosecutor and a defendant that can be modeled in simple game theoretic terms. The prosecutor must decide whether to charge high or low, and the defendant must decide whether to go to trial or to plea bargain. Whether the charge is high or low, the defendant always believes he is better off accepting a plea bargain. Indeed, as Alschuler notes, “The guilty plea system is so engineered that a recommendation of a guilty plea almost always reflects a plausible evaluation of the defendant’s interests” (Alschuler 1975:1203). Since the prosecutor knows that the defendant will nearly always agree to a bargain, it is the prosecutor’s best strategy to always charge high, even when she lacks the resources to actually participate in a full trial. Presumably, while a trial for a high charge is considerably more expensive than a trial for a low charge, a plea bargain for a high charge is only slightly more expensive than a plea bargain for a low charge. Thus, while a prosecutor prefers a low charge in the case where a defendant demands a trial, the prosecutor also knows that regardless of the charge, a defendant nearly always prefers a plea bargain. As such, it is nearly always a better strategy for the prosecutor to charge high and push for a plea bargain. Consequently, a high charge and a plea bargain is the single Nash equilibrium to the interaction.

This cost structure is illustrated in Figure 2-3. For the prosecutor, for each defendant, she must choose between charging high, and charging low. Her payoff for a trial with a high charge is the expected sentence (S_H) minus the cost of the trial (C_H).

Similarly, for a low charge, her payoff is the expected sentence in the trial for the low charge (S_L) minus the cost of the trial (C_L). In the case of a plea bargain, for a high charge her payoff is (S_{PH}) minus (C_{PH}) while for a low charge her payoff is (S_{PL}) minus (C_{PL}). As explained above, if the prosecutor expects that a trial is required, her preference is to charge low as she is more interested in convictions than long sentences. The expected sentence from a trial with a high charge is higher than the expected sentence from a trial with a low charge, but the expected cost is also higher which reduces the prosecutor's ability to prosecute other defendants. Since additional prosecutions are generally worth more to the prosecutor than additional years, for the prosecutor, $S_L - C_L > S_H - C_H$.

		Defendant	
		Trial	Plea Bargain
Prosecutor	Charge High	$S_H - C_H, A$	$S_{PH} - C_{PH}, B$
	Charge Low	$S_L - C_L, C$	$S_{PL} - C_{PL}, D$

Figure 2-3, Prosecutor and Defendant Interaction in Normal Form

However, in the case where a prosecutor expects a defendant to plea bargain, then the calculation is different. While a sentence for a plea bargain entered under a high charge (S_{PH}) is considerably higher than the sentence entered under a low charge (S_{PL}), the cost to the prosecutor of a plea bargain entered to a high charge (C_{PH}) is nearly the same as the cost of a plea bargain entered to a low charge (C_{PL}). Thus, in this case, $S_{PH} - C_{PH} > S_{PL} - C_{PL}$, and the prosecutor's payoff is higher for a plea bargain entered into for the higher charge.

For a defendant, regardless of the charge, a plea bargain always appears to represent a better deal, regardless of whether the prosecutor charges high or low. Indeed, as suggested by Alschuler, *supra*, prosecutors calculate plea bargain offers in

order to ensure that this is the case. Thus, from the defendant's perspective, the appearance is that $B > A$, and likewise that $D > C$. As such, the defendant can nearly always be expected to plea bargain, which means that the prosecutor can charge high with little fear of this leading to large numbers of trials.

Finally, this project argues that from a defendant's perspective, $C > B$. That is, it argues that the sentence for a plea bargain to a high charge is higher than the trial sentence for a low charge. The justification for this is twofold. First, because defendants have little leverage, plea bargains generally represent a high percentage of the expected trial sentence. As Posner (2003) notes, most defendants are, in fact, guilty. Thus, for a given charge while the sentence for a plea bargain is less than for a trial, in order for a prosecutor to entice a defendant to accept a plea bargain, it need only be slightly less than the expected trial sentence times the probability of conviction, which is quite high. Second, if the expected trial sentence for the low charge were close to the trial sentence of the high charge, due to the increased resources necessary for a prosecutor to prosecute for the high charge, she would never be able to make a credible threat to bring a high charge. That is, while it is clear that the prosecutor's cost benefit analysis favors trials for low charges rather than high charges, in order for a high charge to pose a credible threat, this preference for low charges needs to be a weak one. Thus, while the differential benefit of a trial with a high charge lags behind the differential cost, the difference must be small, meaning that the sentence increase must be close to being commensurate with the cost.

This initial interaction between the prosecutor and the defendant is what creates the Prisoner's Dilemma between defendants. Consider that a prosecutor has a fixed level of resources with which to prosecute all of her cases. She does not have enough resources to prosecute all possible defendants for the full extent possible, and in order to obtain the maximum possible payoff, she must make bargains to conserve

resources. As an example, assume there are two defendants. Further, assume that the prosecutor has sufficient resources such that if she must pay for trials in both cases, that she only has sufficient resources to afford a more limited trial for each one but that she is able to afford one full trial. That is, if one defendant agrees to accept a plea bargain, or if the prosecutor simply drops one case, then she will have enough resources to try the other defendant for the higher charge. Structurally, this creates an interaction between two defendants, shown in normal form in Figure 2-4, with the payoff structure of a Prisoner's Dilemma where $D > C > B > A$ from above.

		Defendant 2	
		Trial	Plea Bargain
Defendant 1	Trial	(C, C)	(D, A)
	Plea Bargain	(A, D)	(B, B)

Figure 2-4, Prisoner's Dilemma Interaction Between Two Defendants

Like in the standard Prisoner's Dilemma, in the situation where one defendant is taking a plea bargain, for the other defendant the best option is to also accept a plea bargain as this will result in his shortest sentence. Further, if the second defendant is not plea bargaining, the first defendant's incentive is to take a plea as it leads to his shortest sentence. Here, if both defendants opt for a trial, each will receive the sentence for a low charge. This is because, in the example, the prosecutor lacks the resources to engage in two full trials. However, knowing that the other will opt for a trial, each individual defendant has an incentive to take a plea bargain for a shorter sentence. Indeed, acceptance of the plea bargain must reduce a defendant's sentence or else he would not make it. The prosecutor will then be able to use her saved resources for the prosecution of the other defendant, which allows her to afford a full trial resulting in a long high charge sentence. This gives the second defendant the

incentive to also plea bargain in order to avoid the higher sentence now faced due to the prosecutor's additional resources. This, in turn, rewards the prosecutor by giving her the maximum amount of resources allowing her to extract stricter plea bargains from each defendant.

To put this in context, assume a situation where two defendants are to be charged with a crime, and that a high charge carries with it a requisite sentence of 10 years while a low charge would result in a trial sentence of 5 years. Further assume that in the case of either a high or low charge that a plea bargain worth 80% of the original charge will be offered. Finally, it should be assumed that the prosecutor lacks the resources to commit to two full trials for high charges. In this case, assuming that each defendant expects to be convicted, each would have an incentive to plea bargain. Indeed, this is true regardless of the charge. Importantly, because the prosecutor would know this,¹¹ the prosecutor would be able to charge each high and extract a plea bargain to the high charge, resulting in both defendants receiving 8 year sentences (see Figure 2-5).

		Defendant 2	
		Trial	Plea Bargain
Defendant 1	Trial	(-5, -5)	(-10, -4)
	Plea Bargain	(-4, -10)	(-8, -8)

Figure 2-5, Prisoner's Dilemma Example Interaction

The applicability of this model is that prosecutors are always working within resource limitations. Statistically, while rates of incarceration and prosecution have increased dramatically in recent decades¹² they still lag far behind rates of crime. As

¹¹ Indeed, it might be noted that prosecutors can adjust charges up or down.

¹² See Chapter 5.

such, a prosecutor, who has limited financial resources as well as limited time, must pick and choose the cases she invests in. It is this resource limitation, and the effect that individual defendant's decisions have on other defendants that makes the criminal justice system akin to a collective action problem.

Like in many collective action problems, one defector will not change the dynamic of the interaction as a whole. Rather, it is a cascade of defectors that does this. In the plea bargaining collective action problem, nearly all of the players are already defectors. That is, each defendant is effectively up against the mass of the rest of the defendants who will all nearly always defect by pleading guilty. Thus, unlike in a free rider situation, a defendant is not free riding by defecting, but he is instead making the only reasonable play. The commons, as it were, has already been fully consumed. Each defendant is, in essence, caught in a Catch-22 in that there is no real option to collude.¹³

This structure places prosecutors in a strong position of power over defendants. It has been argued that if the various low-power actors could collude in such a situation that they might overcome the power imbalance (Simpson and Macy 2001). However, as noted, people do not generally consider defendants to be a group with collective interests. Nor do defendants likely think of themselves as such.¹⁴

¹³ "Would you like to see our country lose?" Major Major asked.

"We won't lose. We've got more men, more money, and more material. There are ten million men in uniform who could replace me. Some people are getting killed and a lot more are making money and having fun. Let somebody else get killed,"

"But suppose everybody on our side felt that way."

"Then I'd certainly be a damned fool to feel any other way. Wouldn't I?"

(Heller 1955:113)

¹⁴ Professor Michael Macy has noted in conversation that groups of arrested war protestors during the Vietnam War were able to avoid prosecution by collectively refusing to plea bargain. However, this is the proverbial exception that proves the rule. That is, in this case the defendants had a collective goal and determined that a collective payoff could be obtained if all agreed to a collective action. The defendants knew, in this case, that prosecuting them would be expensive, and that it was not in the prosecutor's interest to do so. Indeed, merely ending the protest was likely the only benefit the police saw in making the arrests in the first place. However, this example shows how, without a perceived collective interest, that defendants are unlikely to be able to make such binding agreements with each other.

Moreover, the sheer number of defendants is overwhelming, and communication between them seems unlikely. The implication is that, whatever the mechanism, social norms, or any other sort of social organization that could break defendants out of the paradox are not likely to arise without the benefit of the law.

As Posner (2003) notes, plea bargaining saves resources for the prosecutor, which ultimately drives sentences up. Plea bargaining represents an enormous resource savings, and allows for large expenditures on the occasional case for which a defendant will not bargain. Indeed, this boost in resources strengthens the prosecutor's hand and increases her bargaining position in other cases by giving a defendant an unrealistically high impression of the length of sentences in the cases that do go to trial. That is, a defendant can only observe the few cases that do go to trial, not the situation where they all do. Thus, these higher sentences induce defendants to accept plea bargains by setting an artificially high standard for trial outcomes. If, on the other hand, all defendants acted collectively, each demanding a full trial, they could effectively clog the court system, leading to the minimum prison sentences in terms of man-years. In such a situation, this would force prosecutors to expend maximum resources for each trial in order to cover all of the costs of modern criminal process. However, of course, each defendant would be in a difficult bind. While this situation would presumably lead to the release of many defendants, the few that remained would have an incentive to plea bargain. That is, once a defendant was given the signal from the prosecutor that he was one of the few who was going to be prosecuted and taken to trial, his incentive structure would be to make a plea bargain in order that his sentence be reduced. This would be in his interest, as it would presumably reduce his sentence. However, collectively, it would increase the prosecutor's power by

saving her resources for other cases leading to a cascading collapse of the defendants' collective action.

Returning to the plea bargain interaction between a prosecutor and a defendant, in its most simple elucidation, this standard model of plea bargaining expects near perfect separation between guilty and innocent defendants, with the guilty always accepting a bargain, and with innocent defendants never doing so (Grossman and Katz 1983). The intuition behind this assessment is based on the idea that a defendant knows whether he is innocent or guilty,¹⁵ and that he expects the courts to reach the

¹⁵ As will be explored in chapter 6, nearly all existing economic models of plea bargaining, and of criminal justice decision making in general, are based upon this idea. However, it is likely not true. Indeed, not only is knowing what constitutes guilt (what might be termed legal knowledge) difficult, but so is knowing what particulars might rise to the level of constituting such guilt (factual knowledge.) As an example of the difficulty of legal knowledge, the following is an actual, and not particularly difficult, question from the Multistate Bar Exam:

Jack and Paul planned to hold up a bank. They drove to the bank in Jack's car. Jack entered while Paul remained as lookout in the car. After a few moments, Paul panicked and drove off.

Jack looked over the various tellers, approached one and whispered nervously, "Just hand over the cash. Don't look around, don't make a false move—or it's your life." The teller looked at the fidgeting Jack, laughed, flipped him a dollar bill, and said, "Go on, beat it." Flustered, Jack grabbed the dollar and left.

Paul's best defense to a charge of robbery would be that:

- (A) Jack alone entered the bank.
- (B) Paul withdrew, before commission of the crime, when he fled the scene.
- (C) Paul had no knowledge of what Jack whispered to the teller.
- (D) The teller was not placed in fear by Jack.

The correct answer is D. The reason is that in order to convict someone of robbery, like many crimes, the prosecution must prove that the defendant did more than simply take something. Rather, the prosecution must prove several specific elements of the crime charged. Among those for robbery is the inducement of fear in the victim. Note, however, the defendant in the question may be guilty of other crimes. This means several things. The first is that a prosecutor may originally bring a charge of robbery and then "bargain" down to a lesser charge meaning that the defendant did not get a bargain at all. Second, if a judge were to get this definition wrong, the defendant would need to be able to pay for an appeal and a trial to correct the record. Plea bargains generally cannot be appealed and thus if the defendant entered a guilty plea, he would be unable to appeal. Third, the defense attorney may be,

correct verdict the majority of the time. When charged with a crime, a guilty defendant should accept any plea offer that is lower than his assessment of his chances at trial. Similarly, an innocent defendant should not be willing to accept any offer greater than his assessed risk at trial times the sentence. Following the example where a defendant is charged with a crime for which the requisite sentence is 10 years, assuming that a court is 90 percent likely to reach the correct result in a trial, a guilty defendant will accept offers less than 9 years, and an innocent defendant will not accept any offer greater than 1 year.¹⁶ Thus, under such reasoning, any offer that is between 1 and 9 years will be perfectly separating of innocent and guilty defendants. Indeed, a 5 year offer only requires the court to be slightly better than a coin flip in either case.

To add an element of complication to this calculation, Grossman and Katz (1983) suggest that risk aversion may alter a defendant's calculus. In their analysis, they model risk aversion as how likely the defendant thinks it is that the court will reach the right decision, with risk averse defendants expecting higher sentences than non risk averse defendants, all other things being equal. In the Grossman and Katz model, risk aversion is spread randomly across defendants merely interrupting the separation.

Under Grossman and Katz's model where risk aversion is random, defendants are either risk averse or risk seeking, and either guilty or innocent, resulting in four types of defendant to consider. For a guilty defendant, if he is very risk averse, then

wittingly or unwittingly, complicit with a prosecutor in that he looks like a better defense attorney if he is able to "bargain" down from robbery to a lesser charge. Finally, if the prosecutor does not budge, the defense attorney has no financial incentive to continue on to trial, meaning that the prosecutor, the defense attorney, and the judge may all be incentivized to convince the defendant to plead guilty to something that he is demonstrably not guilty of. Thus, the takeaway point of the example is that criminal law requires specialized knowledge. Most defendants without such knowledge would presumably not know that they were not guilty of the particular charge, and why.

¹⁶Note that there is no reason to think that courts error symmetrically. That is, just because there is a 90 percent chance of convicting a guilty defendant does not imply that there is a 10 percent chance of convicting an innocent one. For this example, it is not important, however.

he will believe that the court's chances of convicting him are very high. This increases the sentence he is willing to accept in a bargain as he expects a higher sentence than a statistical analysis might suggest. Similarly, for an innocent defendant who is not risk averse, he has confidence in the courts, and thus expects that he will not be convicted. As such, his expected sentence, and thus what he would be willing to accept as a bargain from a prosecutor, is lower than what a statistical analysis might suggest. Neither the risk averse guilty defendant nor the risk seeking innocent defendant greatly changes the Grossman and Katz model.

However, for Grossman and Katz's model, risk aversion for each type of defendant in the opposite direction does have an important effect. A guilty defendant who is not risk averse will lower his expected outcome at trial. For instance, from the above example, rather than accepting any offer lower than 9 years, as he is less and less risk averse, the level above which he will not accept a bargain gets lower and lower. If, in the example, he believes that he has only an 80 percent chance of conviction, he will only accept a bargain below 8 years. Similarly, as an innocent defendant becomes more and more risk averse, the level at which he will accept a bargain also becomes higher. Thus, if an innocent defendant believes that he is 20 percent likely to be convicted regardless of his guilt, then in the example, he may accept bargains offered up to 2 years.

As an extreme example, assume that an innocent defendant is so risk averse that he believes there is a 60 percent chance of being convicted. Further, assume that a guilty defendant is so risk seeking that he only believes there is a 40 percent chance of conviction. In this situation, a plea offer of 5 years for a crime carrying a requisite ten year sentence will induce the innocent defendant to plead guilty while the guilty defendant will reject the plea offer. That is, the example is perfectly separating, with only innocent defendants pleading guilty.

Thus, when the variable of a defendant's risk aversion is included, the acceptance of a plea bargain is not a perfect indicator of guilt. That is, it is not perfectly separating as some guilty defendants are likely not risk averse at all, and some innocent defendants are likely very risk averse. This means that some innocent defendants may be willing to accept offers that some guilty defendants will reject. Contrary to Grossman and Katz's initial economic intuition, one can see that, with the proper risk aversion characteristics, there are offers that only innocent defendants will accept. This is troubling on several levels, however, for purposes here it is important in that it shows that a defendant's subjective assessment of the world can come into play in whether he accepts a guilty plea.

Kobayashi and Lott (1996) expand this analysis. They note that rather than risk aversion being randomly distributed across defendants as assumed by Grossman and Katz, innocent defendants are generally more risk averse than guilty ones. The intuition for why this would be the case is rooted in the decision to engage in criminal activity. Criminal justice policy is predicated on the concept that crime should not pay (Becker 1968). That is, from a rational choice perspective, in order to prevent people from engaging in criminal activity, the costs of crime must exceed the benefits. Otherwise, simply put, it would be irrational not to be a criminal. Thus, assuming a criminal justice system where the costs of crime are higher than the benefits, anyone who does commit a crime is, by definition, more risk seeking than is a similarly situated person who does not commit a crime. In fact, there is some empirical evidence to back up this intuition. Block and Gerety (1995), for instance, administered a test used to determine a tendency to engage in risk seeking behavior to a group of students and a group of convicted felons. They found that the felons were indeed more risk seeking than the students. What this suggests, beyond the obvious

concept that plea bargaining may be flawed as a determinant of guilt,¹⁷ is that risk aversion can have a strong influence on the sort of bargain that a defendant will be willing to accept.

The model in this project takes the analysis of risk aversion one step further in considering risk aversion at the individual level. From a defendant's point of view, in calculating whether to bargain, his view of the court's reliability is subjective rather than objective. That is, how a defendant views the criminal justice process rather than how the process actually works matters more in his negotiation and ultimate plea bargain. This project argues that in addition to being correlated with guilt and innocence, risk aversion, at least with regard to the criminal justice system, is also correlated with race. In particular, Black defendants are more risk averse with regard to the criminal justice system than are white defendants. As such, the bargains they are able to make are worse than those made by similarly situated white defendants.

Numerous studies have shown that African Americans, other minorities, and the poor generally have a lower opinion of the criminal justice system than do middle and upper class whites. As a group, Blacks believe that the system is unfair, and that it disproportionately burdens them (See, e.g., Weitzer and Tuch 1999, Myers 1996). This is important because a defendant's subjective perception influences the type of plea bargain that he will be able to make. That is, the bargaining position that a person believes he is in directly influences the bargain he can make. Indeed, it is the importance of subjective perception, and of risk aversion, that makes the plea bargaining system, in part, more detrimental to African American defendants than to white defendants.

¹⁷ Kobayashi and Lott consider this to be among several factors that influence how well plea bargaining determines actual guilt, arguing that other factors are more important. Their analysis is covered in more detail in chapter 4.

For instance, in the earlier examples, if a defendant believes that he has a 90 percent chance of being convicted and sentenced to a 10 year sentence, he will generally be willing to accept any plea deal for less than 9 years. Further, if the defendant believes that there is only an 80 percent chance of conviction, then he will only be willing to accept sentences under 8 years. Finally, if there are two classes of defendants, one of whose members have an expected sentence of 9 years, while the other's members have an expected sentence of 8 years, the members of the first group will, on average, come away with longer sentences. That is, assuming that a defendant will accept any bargained sentence lower than his expected trial sentence, a defendant with a higher expected trial sentence will generally agree to a bargain for a higher sentence than a defendant with a lower expected sentence.

Further, in the model in this project it is not necessarily critical whether there is actually a differential in the criminal justice system based on race. Instead, what does matter is whether there is a differential in perception based on race. This can work in several ways. First, if an African American defendant believes that the prison sentence he is likely to receive for a particular infraction is higher than what a white defendant believes he will receive, this would constitute such a difference. Second, if there is a common social belief that Blacks receive harsher sentences than whites, then a Black defendant who accepts this conventional wisdom may be willing to accept worse deals than whites, as he may assume that his costs are likely to be higher anyway. This suggests that there may be an effect even in a district without a large racial differential. Third, while an actual differential is not necessary for this argument, if there in fact is an objective differential, then this would certainly go a long way to convincing defendants that one exists. This is an obvious yet important point. Indeed, even if Blacks actually participate in crime at higher levels than whites,

and even if the makeup of the criminal justice system reflects this to an extent,¹⁸ this could still give the impression to a particular Black defendant that his chances in the criminal justice system are comparatively low.

Finally, there is another distinction at issue here. While differential could mean that in being sentenced for a crime, similarly situated Black and white defendants are sentenced to different punishments, it could also mean that Black defendants are simply more likely to be sentenced. In other words, holding crime rates equal, if Black defendants are more likely to be sentenced at all, it could lead to the perception by a Black defendant that he is likely to fare worse in the criminal justice system because of his race. This again may seem like an obvious point to make, but it is clear that African Americans do indeed fare worse than whites and that crime rates are more or less equal across races, or at least not as divergent as the prison population would lead one to believe.¹⁹ Nevertheless, most commentators consider the criminal justice system to be more or less race neutral.

For a point of reference, there are numerous other models of social behavior which purport to show how small preferences can aggregate into large unwanted and or unanticipated social phenomena. Perhaps one of the most well known is the so-called Schelling (1971, 1978) model. In that model, Schelling demonstrates through a simple thought experiment how a mild preference for similar neighbors can aggregate into hard segregation. In this experiment, Schelling suggests placing an arrangement of coins, some dimes and some pennies, on a checkerboard. Each coin, an agent, is considered to have a preference for how many like coins are in its immediate surroundings. Coins whose “neighborhoods” stray from the preferred mix are moved

¹⁸ See chapter 5 for further discussion.

¹⁹ See chapter 5.

to the nearest empty square meeting the agent’s preference criteria. In this model, even if the preference is “moderate”²⁰ in that the agent only wants a minimum of 1/3 of the immediate neighbors to be the same, nearly every initial arrangement of coins will lead to segregated neighborhoods.

To understand how differences in perception can aggregate in this project’s model, one might consider that there are four possible groups a defendant can be in. First, for the sake of simplicity, a defendant either believes that he is innocent, or that he is guilty. Second, he can either believe that he will be treated fairly by the criminal justice system, or he may believe that he is likely to be treated unfairly by the criminal justice system. Thus, there are four permutations of defendants to consider, shown in Table 2-1.²¹ If one breaks down which defendants occupy each category, a pattern emerges whereby, holding other things equal, Black defendants are more likely than white defendants to plea bargain, and are indeed likely to reach worse bargains.

	Confident in CJ System	Not Confident in CJ System
Innocent	White Risk Averse (no bargain)	Black Risk Averse (bargain unclear)
Guilty	White Risk Seeking (bargain unclear)	Black Risk Seeking (bargain)

Figure 2-6, Comparison of Confidence in the Criminal Justice System

²⁰ Moderate in Schelling's words. One might consider that any preference for living near people of a certain race is not moderate.

²¹ Black and innocent, Black and guilty, white and innocent, and white and guilty.

To begin, innocent whites, have little outside incentive to plea bargain. A white defendant who believes himself to be innocent has confidence that the criminal justice system will work to his advantage, and he is unlikely to accept a plea bargain. Interestingly, this is in accord with most plea bargaining models (See Grossman and Katz 1983). On the other side of the equation, a guilty Black defendant has every incentive to bargain. In accord with the economic models, he believes he is guilty. He also believes that the system is stacked against him. As such, any concession he can get in exchange for a guilty plea likely lowers his expected sentence from what might be received at trial.

However, the two other categories are more interesting. First, for a guilty white defendant, there are incentives cutting both directions. While he considers himself guilty, he also is more likely to be a risk taker. Thus, he may choose not to plea bargain hoping for a win at trial. However, even if he does plea bargain, he is likely able to win greater concessions from prosecutors than a Black defendant who is guilty because he is in a better bargaining position to begin with. That is, a white defendant has more faith in the criminal justice system that he will receive a fair trial, and thus he believes that it takes more than simply guilt to be found guilty. It takes a trial with evidence which is honest, fair, and comports with principles of justice and due process. Thus, this belief puts the white defendant in a relatively strong bargaining position making whether he will bargain unclear.

Finally, the case for an innocent Black defendant is also not quite clear. As with innocent whites, an innocent Black defendant is also pushed to not bargain due to the expectation of winning at trial. However, several factors mitigate against this. First, as discussed, there is a cultural bias against the criminal justice system among African Americans which suggests that a Black defendant will likely expect the worst. Additionally, there is a likelihood of risk aversion. How these factors might balance is

impossible to predict. However, what is predictable is that an innocent Black defendant is more likely than a similarly situated innocent white one to accept a guilty plea. Further, when compared against an innocent white defendant who does accept a guilty plea, he is comparatively likely to accept a worse bargain.

The contention that differential bargaining power exists, or that it is tied to race, is not new. In a 1991 study, for instance, Ayres found that when purchasing cars, after bargaining Blacks paid substantially higher prices than whites (Ayres 1991). In that study, Black and white testers approached car salespeople in Chicago and attempted to bargain for the best possible purchase price. On average, while the best price offered to white males was approximately \$360 above dealer cost, the best price offered to Black males was \$780 over cost.²² Indeed, even before any bargaining took place, the initial offers offered to Black men were nearly twice as high as the initial offers made to white men (\$1534 over cost versus \$818.) Plea bargaining is not the same as purchasing a car, but the example is illustrative that a person, a prosecutor or a car dealer, will take advantage of the best bargain he can make. When the person he is bargaining with is in a relatively weaker position, this position of power allows him to increase his own payoff.

Next, it is necessary to return to the prosecutor's side of the bargain. As mentioned previously, a prosecutor's incentive is to maximize convictions while minimizing cost. The Prisoner's Dilemma discussion above explained why it is in a prosecutor's interest to pursue plea bargains at all. Additionally, for a variety of reasons, it is also more cost effective for a prosecutor to pursue cases against Black defendants than against white ones. First, due to the lower socio-economic status of

²² White women fared slightly better than Black men, paying \$500 over cost while Black women fared worst of all being asked to pay nearly \$1240 over the dealer's cost.

Blacks with respect to whites, a Black defendant's expected future earnings are relatively lower, meaning that the cost of a conviction for a Black defendant, in absolute terms, is generally lower than for a white defendant. Additionally, due to the lower expectations of Black defendants, a prosecutor is able to reach better deals, from her perspective, for less cost against Black defendants than against white defendants. That is, the conviction of a white defendant is more costly than the conviction of a similarly situated Black defendant.

Because of their lower socio-economic status, Black defendants lack the same resources that white defendants have to mount a competent defense. However, it is the case that public defenders are free for indigent defendants. Additionally, as will be discussed in chapter 3, private attorneys have incentives that push them toward making deals rather than taking cases to trial (Alschuler 1975). Both of these facts would seem to suggest that indigent defendants could mount as high quality of a defense as wealthier defendants. However, public defenders are relatively overworked, and while private attorneys have incentives to push for plea bargains, they have incentives that push them to make good bargains as well as it improves their reputation as attorneys. Moreover, a defense involves more resources than just attorneys' fees, such as paying for research, witnesses, etc. A disadvantage in covering these costs results in a disadvantage in bargaining power.

For an individual prosecutor, it is likely impossible to make comparisons across cases. That some defendants will drive harder bargains than others would not necessarily suggest to a prosecutor a systematic problem. It is a curious aspect of this model that what seems like a race neutral system on an interactional level can lead to such disparity. While a prosecutor is likely evaluating cases individually, in the aggregate her incentives likely lead to the disproportionate prosecution of African American defendants. Plea bargaining lowers the transaction cost of most

prosecutions, and it generally lowers the transaction cost of prosecuting a Black defendant more than for a white one. Without plea bargaining to alter the cost structure, expensive prosecutions would be expected to stay expensive while inexpensive prosecutions would likely become more expensive. In the absence of plea bargaining a prosecutor would need to reallocate resources toward more important cases.

As a final piece of the model, it is important to consider the aggregation and feedback of the differential decision making dynamic explored above. The model, with differential decision making along racial lines is enough to lead to a racial imbalance in prisons. However, if one considers that the aggregation of decisions will feedback, influencing the next round of decisions, the process will accelerate. As differential plea bargains begin to result in differentials in prisons, this information will influence how future defendants make decisions.

Western (2006: 29) notes, “Not only did incarceration become common among young black men at the end of the 1990s, its prevalence exceeded that of the other life events we usually associate with passage through the life course.” That is, for young Black men, prison became a normal part of life. Indeed, for the rest of America, prison *for* young Black men became a normal part of life. Further, due to its ubiquity, plea bargaining has become the expected method of case disposition for all parties involved. Judges, prosecutors, defense attorneys, and defendants all know how the system works, and the system involves a plea bargain.

In the United States there is a political will to incarcerate large numbers of people (Blumstein 1988). There are many reasons for this, but for many commentators it ultimately hinges on the political climate that began in the 1970s. While the change in political tone is important for understanding the rise in

incarceration rates, without plea bargaining as a mechanism to bring it about, the political will would have been unable to create so drastic a change in the prison population. In essence, while the political will to incarcerate represents the *mens rea*, the mental state, for mass incarceration, plea bargaining is the *actus reus*, the physical act of carrying it out.

Chapter 3 – Plea Bargaining in Context

Plea bargaining is a ubiquitous part of the American criminal justice system. Indeed, many commentators cannot imagine a criminal justice system devoid of plea bargains. Heumann suggests that “[T]o speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy” (1978: 162). This is notwithstanding the fact that many legal systems, including those of most of Western Europe, do without plea bargains (Langbein 1979b, Langbein 1979a),¹ and that the American criminal justice system did without them for the first half of its history (Langbein 1979b, Padgett 1990). In contemplating eliminating plea bargains, Chief Justice Burger once surmised that reducing the number of guilty pleas from 90 percent² to 80 percent would increase the demand for judges, jurors, court reporters, bailiffs, clerks, and courtrooms by 100 percent (Burger 1970).³

The debate over plea bargaining swirled around legal and academic circles in the late 1960s and 1970s. In 1973, the U.S. National Advisory Commission on Criminal Justice Standards and Goals called for the abolition of plea bargaining by 1978 (USNAC 1973). Supporters of plea bargaining, or at least those who disagree with the contention that plea bargaining should be eliminated, tended to argue, like Justice Burger, that eliminating plea bargains would be prohibitively expensive, and

¹ This is debatable. In recent history, according to Langbein (1979a) Germany did without plea bargains, but there is some debate about how well other countries managed without them. Goldstein and Marcus, (1977) argue that while there were no official plea bargains, that the unofficial, and often officially prohibited, concessions granted in European cases where defendants admit guilt amounts to unofficial plea bargains. The numbers on how prevalent these concessions might have been are not readily available, so it is difficult to say how large of a factor this was. However, while there may have been concessions, even with a guilty plea, a trial, albeit an often-short one, was still held (Langbein 1979a). Recently, this trend has changed. Italy (Olin 2002) and India in limited situations (The Hindu 2006) have formally legalized plea bargaining. In Germany, it is controversial, though apparently still common, while both Scandinavia and Japan maintain a prohibition against it (Olin 2002).

² This is the number that is most often cited (see Newman 1966), but the actual number may be higher (Friedman 1993).

³ Burger further notes that reducing guilty pleas to 70 percent would require a tripling of these resources -- the implication being that the criminal justice system could not handle such an increase.

that, in practicality, eliminating plea bargains would simply drive them underground. Additionally, some commentators argue that plea bargaining is not only beneficial to the criminal justice system, but also to defendants themselves.

On the other hand, the litany of reasons argued as to why plea bargaining is problematic is enough to fill a book of its own. The contentions of this debate are explored below. However, it is first relevant to understand some background on both the history and the prevalence of plea bargaining in the United States.

As a primary matter, it is worth defining what constitutes plea bargaining. Alschuler (1979: 213) defines plea bargaining as, “[T]he exchange of official concessions for a defendant’s act of self-conviction.” He expands this noting that these concessions can take the form of a shorter sentence, a reduction in the charged offense, or other situation specific concessions such as leniency for co-conspirators, withholding of damaging information, etc. Further, these concessions can be either implicit or explicit.

Many commentators do not consider simple guilty pleas, given with no perceived concessions, to be plea bargains as such. Indeed, Friedman (1979) criticizes Heumann (1975) for his finding that plea bargaining dates back to at least the late nineteenth century because, “[H]e has no *direct* evidence of plea bargaining and can only infer it from a high rate of guilty pleas” (italics in original: 247). However, this is likely too narrow of a definition. Indeed, Padgett (1990) suggests that, “[T]he definition of plea bargaining includes the reliable exchange of sentence benefit for plea,” suggesting that explicit bargaining is not necessary for plea bargaining to exist (417). Additionally, it has been noted by commentators that for a defendant, one of the benefits of not facing trial is that his indiscretions are not publicly aired.

Further, while the focus in the legal literature has been on the defendant's right to a trial guaranteed in the 6th Amendment (Harvard Law Review 1970), trials are also guaranteed under Article III § 2 Clause 3 of the Constitution.⁴ Based on the text of the clause, this additional guarantee of a trial is arguably for the benefit of society.⁵ Thus,

⁴ "The trial of all crimes ... shall be by jury."

⁵ The idea that a jury is to sit in judgment in a criminal trial is included in the Constitution two times. Moreover, it is the only thing in the Constitution twice. Article III § 2 Clause 3 of the Constitution states, "The trial of all crimes ... shall be by jury." Supreme Court decisions interpreting this clause are few and far between, and in general give it only a cursory examination. Indeed, the only modern era cases to directly address this clause are several district court decisions from the first half of the twentieth century, long before the Due Process revolution or even the right to counsel was settled (See *O'Grady v. Hiatt*, 52 F.Supp. 213 (M.D.Pa. 1943) (affirmed 142 F.2d 558) ("The constitutional right of trial by jury is waived by voluntary plea of guilty."); *Bardwell v. Hiatt*, 50 F.Supp. 913 (M.D.Pa. 1943) ("A defendant's constitutional right to a "trial by jury" has no application where there is a voluntary plea of guilty.")).

Instead, what the Court has interpreted is the jury clause of the 6th Amendment, which states, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This, the Court has considered an individual right that, while not always waivable (see *Lynch v. Overholster*, 369 U.S. 705 (1962) (criminal defendants have no inherent right to have guilty pleas accepted by the court.)), is generally a defendant's to do with as he pleases. While it is not germane to this project, the reasoning behind the Court's holdings in this regard is logically inconsistent with other Court holdings. For instance, the language in the 6th Amendment regarding jury trials is essentially the same as the language in the same Amendment ensuring a right to counsel. However, the Court has found the right to counsel so important that it is guaranteed. While the right to counsel was initially interpreted, like the rest of the bill of rights, to be a negative right, by 1938, in *Johnson v. Zerbst* (304 U.S. 458 (1938)) the Court found that the right to counsel was a positive right. The Court stated:

[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer--to the untrained layman--may appear intricate, complex, and mysterious (Id. At 462).

Thus, the Court recognized that simply allowing a defendant to utilize an attorney was not sufficient to guarantee that the minimal due process guaranteed by the Fourteenth Amendment was met. Instead, in order that the process due was supplied, the Court required that an attorney be paid for by the court. However, the Court has not made the same application to the right to a jury trial. While convenient, this interpretation is strained for a number of reasons. First, the phrase "shall enjoy" does not imply waiver. Second, it is inconceivable that the Court would allow a defendant to trade the right to an attorney for a guaranteed concession from a prosecutor, even though the outcome would be much the same to trading a jury trial.

When dealing with the Article III requirement of a jury trial, the Supreme Court, while stating, "When this Court deals with the content of this guarantee--the only one to appear in both the body of the Constitution and the Bill of Rights--it is operating upon the spinal column of American democracy" (*Neder v. U.S.*, 520 U.S. 461 (1999)), has nonetheless failed to give even a cursory examination to the meaning of the article. However, while not doing a careful analysis of the Constitutional text, the Court did offer the following platitudes:

William Blackstone, the Framers' accepted authority on English law and the English Constitution, described the right to trial by jury in criminal prosecutions as "the grand

even guilty pleas made without explicit concessions are still given for the concession that the details of the defendant's crimes remain free from public view. While most of the discussion of plea bargaining in the literature has focused on the narrower definition, this project will use the broader one which includes all freely given guilty pleas. That is, this project will use an expanded definition from the majority of the existing literature of what constitutes a concession. This definition is similar to one proposed by Newman (1966).

bulwark of [the Englishman's] liberties ... secured to him by the great charter." One of the indictments of the Declaration of Independence against King George III was that he had "subject[ed] us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws" in approving legislation "[f]or depriving us, in many Cases, of the Benefits of Trial by Jury." Alexander Hamilton wrote that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this, the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in the constitution of every State to enter the Union thereafter. By comparison, the right to counsel--deprivation of which we have also held to be structural error--is a Johnny-come-lately: Defense counsel did not become a regular fixture of the criminal trial until the mid-1800's. The right to be tried by a jury in criminal cases obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged. And since all crimes require proof of more than one element to establish guilt (involuntary manslaughter, for example, requires (1) the killing (2) of a human being (3) negligently), it follows that trial by jury means determination by a jury that all elements were proved. (See *Id.* (internal citations omitted)).

The importance of the fact that the guarantee of a jury trial appears twice, besides the obvious emphasis, is that a standard canon of textual interpretation is that provisions of text should not be interpreted in such a way as to not render other provisions with similar text superfluous (Eskridge et al., 2001). What this means is that if seemingly similar provisions appear in the same body of law, they are interpreted to mean different things. Thus, even if the Court's interpretation that the 6th Amendment jury right is waivable is a correct interpretation, it is far from clear that this should have any bearing on the Article III clause. Indeed, the fact that the Sixth Amendment's guarantee of an individual defendant's right to a jury trial was added after the ratification of the Constitution, and that the Bill of Rights was included in order to solidify rights not otherwise granted by the Constitution together imply that Article III's requirement for a jury trial should be interpreted differently from the Sixth Amendment.

Finally, other canons of interpretation include the idea that words should mean what they say, and that "shall" is interpreted to mean mandatory (Eskridge et al., 2001). Thus, it is difficult to argue that "The trial of all crimes ... shall be by jury" means anything other than what it says. While the Sixth Amendment's jury clause clearly deals with individual rights, Article III clearly does not. The rest of Article III all deals with the structure and powers of the judicial branch of the government, and the definition of treason. Thus, it is overreaching, at the very least, to read any right to waiver into the Article III jury clause.

History and Foundation of Plea Bargaining

The history of plea bargaining is, in legal terms, a relatively short one. At least one commentator has found examples from as early as seventeenth century England where plea bargains were apparently used as a means to mitigate harsh sentences (Bond, 1975). Alschuler (1979) refutes this assertion arguing that writers who make this claim assume facts to fit the evidence. However, Cockburn (1978) shows that for a short period from 1587 to 1590 guilty pleas, previously almost unknown, shot up to as much as 50 percent of all criminal dispositions in some English courts. Further, this change seems to coincide with various charge reductions that would have resulted in lightened sentences for those convicted. However, there is little systematic evidence that plea bargaining caught on in the larger sense at this time. Indeed, Friedman notes that until the late nineteenth century, at the earliest, there is little direct evidence of a prevalence of plea bargaining at all (Friedman 1979).

It is also the case that plea bargains, or even freely given guilty pleas, were not always accepted by courts. Alchuler (1979) notes that while in Anglican law confessions of guilt extend back at least as far as the Norman Conquest, that early common law treatises from 1189, 1250, and 1290 fail to note any procedure similar to the guilty plea. Even in the face of confessions, trials were still considered necessary. Indeed, Alschuler notes that into the late 17th century, guilty pleas were frowned upon by courts (Id). Even in the mid 18th century, a court's acceptance of a guilty plea was considered "backwards" and a court would generally advise a prisoner to "retract it" (Blackstone 1769: 329).

Further, Alschuler (1979) notes that Anglo-American courts actively discouraged guilty pleas for centuries. While acceptance of guilty pleas goes back at least as far as Roman law, throughout Europe a confession was not considered sufficient to convict without corroborating evidence (Alschuler 1979). Further,

Friedman (1979) argues that while there are examples of plea bargaining being used in the second half of the nineteenth century, specifically with charge reduction and thus sentence reduction for defendants, it is not until the early twentieth century that it became common, and not until the 1920s and 1930s that it became a topic of study. As late as 1930, survey data indicated a strong bias against plea bargains among legal professionals (Alschuler 1968).

Despite the historical reticence to allow plea bargaining, by the early to middle of the twentieth century, plea bargaining was entrenched as a means of case disposition. Exactly what changed at this time such that plea bargaining became so common, is not entirely clear. However, there are several theories that seek to explain plea bargaining's emergence. They are not mutually exclusive, and most commentators seem to believe that some combination is responsible for plea bargaining's institutional emergence. Further, as Smith (2005) notes, all of these explanations are based on the cost-benefit analysis done by prosecutors, judges, and defendants.

One theory is that increased caseload pressure on judges led to plea bargains as a way to clear their dockets. In the second half of the 19th century courts saw an enormous increase in their caseload. This was due in large part to an increase in prosecutable criminal statutes such as those dealing with liquor traffic, and financial and building regulations (Smith 2005). Additionally, there was also an increase in tort suits brought about by the industrial revolution which competed for courts' resources (Fisher 2003). Moreover, Padgett found that beginning in 1918 with a spike in draft resistance cases, and continuing in the 1920s with a rash of prohibition cases, the number of criminal cases in the United States skyrocketed. From 1917 to 1920 there was a nearly 5-fold increase in the number of criminal cases, and from 1917 to 1932,

the increase was almost 900 percent (Padgett 1990). Courts' ability to handle this increase is more complicated, but Padgett does find that this increase contributed to the rise in plea bargaining. Finally, Alschuler (1968) notes, during the 1960s, the caseloads of criminal courts doubled while there were little to no new expenditures made on courts, judges, and other resources for the criminal justice system.

Similarly, a second hypothesis argues that rather than there simply being more cases, that cases also became more complicated and more resource intensive at the same time. This added complexity required more resources for each trial which pushed the parties to resort to plea bargains as a cost savings measure. While this hypothesis seems reasonable, a measure of what makes one case more complex than another has not been clearly defined, and thus it is difficult to substantiate (Smith 2005).

However, while complexity may not be easily quantifiable, the constitutional changes in criminal procedure mandated by the Supreme Court during the mid-twentieth century can clearly be seen to have increased the scope of not only trials themselves, but also of the range and volume of pre-trial motions, post conviction proceedings, appeals, and other legal maneuvers (Alschuler 1968). These changes increased the amount of work necessary in a criminal trial which further consumed courts' time. Thus, ironically, the development of criminal justice procedures intended to protect defendants may well be, at least in part, responsible for counter developments such as plea bargaining, which actually reduce the amount of procedure that defendants use.

A third theory, offered by Friedman and Percival (1981) and by Heumann (1978), suggests that improvements in policing and evidence gathering increased the use of plea bargains by reducing uncertainty about the outcome of a possible trial. They argue that prosecutors were able to increase the strength of their cases and thus

increase the certainty of the outcome. Prosecutors and defendants were consequently less in need of a judge and jury to reach, presumably, the same inevitable outcome. This theory, like the increased complexity theory suffers from the difficulty of measurement problems. However, by looking at indirect variables, Padgett (1990) was able to reach the conclusion that due to improvements in investigation, the rate of plea bargaining did indeed increase.

Padgett (1990) offers an additional theory whereby increases in plea bargaining is a form of positive feedback brought about by lighter sentences given for plea bargains. He theorizes that as judges gave lighter sentences to defendants who pled guilty, this acted as a signal to future defendants that there was an implicit promise that a guilty plea would lead to lighter sentences. This in turn induced more guilty pleas. Padgett found, in Federal courts in the prohibition era, that sentences were indeed more severe for those convicted at trial than for those convicted through a guilty plea even though plea bargaining was explicitly prohibited. For non-liquor related cases, increases in sentence length ranged from 50 percent to 400 percent higher, while for liquor related cases they were on the order of 200 percent to 1000 percent higher for defendants who were convicted at trial over those convicted via a guilty plea.

A final theory is based on social changes rather than changes within the legal system itself. McConville and Mirsky (1995) argue that plea bargains are emblematic of a shift from individualized justice, where prosecutions are for the good of a victim, to aggregate justice, where prosecutions are for the good of society (McConville and Mirsky 1995). Finally, other theorists have suggested that plea bargains emerged as a tool to help elites maintain social control (Vogel 1999).

The Process of Plea Bargaining

A plea bargain is, in its most general form, an agreement between a prosecutor and a defendant. A prosecutor agrees to bring particular charges or recommend a particular sentence to the judge, and the defendant agrees to not contest the charges. Defendants may either plead guilty, or may enter what has become known as an Alford plea. An Alford plea is named after the case *North Carolina v. Alford* (400 U.S. 25, 1970) where the Supreme Court found that it was acceptable for a defendant to enter a plea of guilty while still maintaining his innocence. Once an agreement is reached, the defendant must appear before a judge to enter his plea of guilty. The judge generally questions the defendant in open court to ensure that the agreement was made willingly and without coercion.⁶ Exactly what constitutes coercion is a large subject unto itself, with many commentators feeling that the Supreme Court has been

⁶ Every state has its own rules of what a plea agreement must entail as does the federal system. However, as an example, under the Federal Rules of Criminal Procedure (2009), rule 11 states, in pertinent part:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant.

Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel -- and if necessary have the court appoint counsel -- at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary.

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

too lax in its definition (Kipnis 1976).⁷ Once the judge accepts the plea agreement, the guilty plea is as binding as a guilty verdict reached at trial.

There are generally two types of what might be deemed *active* plea bargaining.⁸ These are sentence bargaining, and charge bargaining. Sentence bargaining, as the name implies, occurs when the concessions made by the prosecutor are in terms of sentence concessions. In that instance, the prosecutor will generally agree to make a recommendation for a specific sentence to the judge in exchange for the defendant's cooperation. Charge bargaining, on the other hand, occurs when a prosecutor agrees to reduce the charge against the defendant. For example, this would mean agreeing to lower a charge such as from second degree murder to manslaughter. Since lower level charges carry with them lower level sentences, this largely amounts to the same thing.

⁷ There are a number of Supreme Court opinions that consider what might constitute coercion in the plea bargaining context. A limit on coercion was set in *United States v. Jackson*, 390 U.S. 570 (1968). In that case, the Court invalidated a federal kidnapping statute where the death penalty could only be imposed by a jury. The Court reasoned that as a judge alone could not impose the death penalty, a defendant might be inclined to avoid exercising his 6th Amendment rights in order to avoid the possibility of death. However, just two years later, in *Brady v. United States* (397 U.S. 742, 1970), the Court held that guilty pleas entered under the statute previously invalidated because it coerced guilty pleas were not invalid, as, the Court found, *Jackson* did not in fact do what it clearly says it does. Instead, the *Brady* Court found that *Jackson* merely invalidated death penalties imposed under the invalidated statute. That is, the Court in *Brady* effectively overruled *Jackson*, making exactly what constitutes coercion in a plea bargaining situation difficult to ascertain. Further, *Jackson* officially remains good law. Additionally, in *Bordenkircher v. Hayes* (434 U.S. 357, 1978) a defendant was charged with forging a check for \$88.30, a charge that carried with it a requisite 2 to 10 year prison term. Due to his prior record, the defendant was eligible, under Kentucky's Habitual Criminal Act, for a life sentence. The prosecutor offered the defendant a 5 year sentence in exchange for a guilty plea. He also informed the defendant that if the defendant wasted the court's time by demanding a jury trial, that he would seek the maximum possible sentence. When the defendant refused the offer, he was convicted at trial and received a life sentence. The Supreme Court upheld the constitutionality of the law, and, as Alschuler (1979) notes, "[T]hus gave its imprimatur to a bizarre system of justice in which the crime of uttering a forged \$88 check is worth five years while the crime of standing trial is worth imprisonment for life" (internal punctuation omitted: 242).

⁸ As noted, the definition of plea bargaining in this project considers *passive* concessions made to defendants, such as not having evidence publicly aired, or giving shorter sentences to defendants who do not invoke their right to trial, to also be plea bargaining.

However, the existence of charge bargaining does have some interesting consequences. First, it makes the analysis of prisoner data difficult. This is because many prisoners are convicted of charges that are different from what they were originally charged with, or indeed, what they may have actually done. A good example of this is that many people arrested for drug trafficking ultimately plead guilty to possession charges. Thus, while prisons may appear to be filled with casual drug users, many of those users may have actually been traffickers (Robinson 2002). Additionally, commentators have noted that charge bargaining actually encourages prosecutors to overcharge (see e.g., Alschuler 1983). That is, in order to increase her bargaining position, a prosecutor may charge a defendant with a higher charge than could actually be proven at trial. She uses this as a position to bargain down from, making it appear to the defendant that he has actually made larger concessions than he really has.

There is some disagreement as to the exact prevalence of plea bargaining. The numbers vary by region, by court system, e.g., state versus federal, by the crime being considered, by court rules, by crime rates, by the temperament of the prosecutor, and by the socioeconomic background of the accused. However, while there is disagreement and variation as to the exact rates, the numbers are uniformly large, and seem to be increasing over time. As early as 1966, the overall rate of bargained pleas was pegged at 90 percent (Newman 1966). Rates may range from slightly lower in the courts of judges who do not always follow prosecutor's sentence recommendations (Johnson 1972) to as high as 100 percent in some misdemeanor courts (Feeley 1979). Friedman found that, as early as the 1920s, plea bargaining rates in northern California for non-liquor cases were 93.5 percent, while rates in liquor cases were 98.3 percent (Friedman 1993). By most accounts, this rate has increased since the 1960s.

However, plea bargaining rates can be misleading. While rates of plea bargaining in white collar crime cases are as high as in street crime cases, the number of cases that are disposed by a verdict of any sort is lower. That is, a higher percentage of white collar cases simply end with charges being dropped, or never brought in the first place (Bibas 2005).

Moreover, while the methods of plea bargaining may vary, this does not reduce their number. This was illuminated by a number of negative results from a plea bargaining study conducted by Jones (1978). Jones hypothesized that, because of their sympathy with defendants from minority and/or socio-economically depressed backgrounds, “Prosecutors from lower class or ethnic ... and religious ... minority groups will engage in plea bargaining at a higher rate than their colleagues from non-minority and middle or upper class backgrounds.” (italics removed from original: 404). Jones further hypothesized that prosecutors whose legal educations were obtained from less prestigious law schools, those with more experience, and those who value efficiency and cooperation, were more likely to engage in plea bargaining. However, Jones found that none of his hypotheses were borne out by evidence. Instead, the only correlation he found was between rates of plea bargaining and a prosecutor’s valuing of cooperation, but even this was only a slight correlation. Indeed, what Jones really found was that while a prosecutor’s background, values, and opinions might influence how he went about the bargaining process, it had almost no influence on whether he did it, or at what rate he did it.

Additionally, the processes by which those bargains are arrived at is as varied as the districts in which they occur. The structure of the process depends on not only the official procedures and formal rules for the district, but also on the informal course of dealing among the parties, their personalities, the local customs, and the norms of the district. Indeed, it is nearly impossible to describe the actual process of plea

bargaining. It is informal, follows few, if any, rules. Further, differences in the structure of plea bargains depend upon the districts in which they takes place, the parties involved, the crime the defendant is accused of, and on the particular circumstances in the case. In some cases, primarily misdemeanor cases, pleas are so routine that literal courtrooms full of defendants will accept them all at once (Feeley 1979). Other times, defense attorneys and prosecutors will meet in the hallways outside of courtrooms, or over lunch to discuss a number of cases. In other instances, they will meet in a judge's chambers,⁹ generally without the presence of the defendant. Or, sometimes the meeting will be in an office, or over the phone (Alschuler 1968, 1975, 1976, 1979). This is all to say that the important "process" of plea bargaining does not rest on the manner in which the bargaining is conducted. Instead, what is more important is the set of incentives of the various parties to the bargain.

The most important and thorough research on the process of plea bargaining was conducted from the late 1960s through the middle 1970s and reported in a series of articles by Alschuler (primarily in 1968, 1975, and 1976, but also in the various other Alschuler articles cited herein, as well as several additional ones). Alschuler, through interviews in ten urban jurisdictions¹⁰ primarily with judges, prosecutors, defense attorneys, and other officials, provides a rich picture of the plea bargaining processes from the perspective of each of the primary participants.¹¹

⁹ Alschuler (1976) notes that the American Bar Association, as well as other legal commissions, opposes this practice.

¹⁰ Boston, Chicago, Houston, Los Angeles, Manhattan, Oakland, Philadelphia, Pittsburgh, and San Francisco.

¹¹ Alschuler (1968) notes that by the criteria of either legal or sociological research, his research is sloppy amounting to what he refers to as legal journalism. He further notes that while there were not set interview questions or a set format, and that everything he reports is hearsay, it is valuable nonetheless as a way to understand the process of plea bargaining. Those caveats aside, the research is singular in its scope as well as depth, and it has been relied upon ever since by people studying contemporary plea bargaining and criminal justice procedures.

Alschuler (1968) notes four primary roles that a prosecutor takes on when she is engaging in plea bargaining. First, she may be acting as an administrator attempting to dispose of cases efficiently. Second, she may be acting as an advocate attempting to maximize her success. Third, she may be acting as a judge attempting to make correct decisions. Finally, she may be acting as a legislator granting concessions where she believes the law is too harsh. In all of these cases, the prosecutor is not only attempting to act in a way that is of the greatest benefit to her office, she is also responding to the market conditions of the criminal justice system.

In the criminal justice context, prosecutors note that much of the “action” takes place before the trial through various stalling tactics – some legitimate, some not – from defense attorneys. Through the filing of motions, jury demands, etc., defense attorneys force prosecutors and courts to expend valuable time, often simply as a means to obtain better plea agreements (Alschuler 1968).¹² While Alschuler found that many district attorneys claimed that they did not bargain due to administrative pressures, his interviews with their subordinates – those who actually bring cases – did not agree with this (Alschuler 1968). Additionally, prosecutors were most likely to bargain in cases where their case was weak in order to secure some conviction. Indeed, Alschuler describes a kidnapping and forcible rape case where both the defense attorney and the prosecutor believed the defendant was innocent. In response to why he would prosecute the case at all if he believed the defendant was innocent, the prosecutor noted that he was doing the will of the people, and that the victim claimed that the defendant was guilty. Rather than drop the charge and “lose” the case, the prosecutor offered a plea bargain for simple battery with a likely thirty day

¹² Indeed, my own experience working on cases for indigent tenants facing eviction is that this same tactic is used in the civil context. A routine eviction can be stretched out for months and cost a landlord thousands of dollars. The cost in time and money is enormous in comparison to the financial loss from a few late rent payments. As such, many landlords will settle rather than face the burden of litigation.

imprisonment. Even knowing a jury would likely find him not guilty, the defendant accepted the deal claiming that he could not take the chance of conviction on the greater charge (Alschuler 1968). When asked about trying cases where they thought the defendant might not be guilty, prosecutors for the most part seem to have told Alschuler that their job was to do the people's (typically the victim's) will and leave the decision up to a jury, not to act as judge. The irony, of course, is that since most cases of this sort end in a plea bargain, the jury generally plays no part.

From the defendant's point of view, Alschuler notes that the plea bargaining process typically begins when the defense attorney first meets his client. He describes such a meeting thusly:

Almost invariably, the lawyer describes the attorney-client privilege and adds a strong appeal for an honest answer. If the client admits his guilt, the lawyer may report at the following interview that the prosecutor has an unbeatable case and that the defendant's only hope lies in a plea agreement. The lawyer may, in addition, extol the "special character" of the bargain that his connections have enabled him to obtain, contrasting this bargain with the severe treatment that he is certain will follow at trial. (Alschuler 1975:1191)

Alschuler further notes that for those defendants who deny being guilty, defense attorneys will do almost anything to "cajole" a confession out of them. Often, regardless of obtaining a confession, the defense attorney will tell the defendant that he does not stand a chance at trial. Additionally, defense attorneys will use friends and family of the defendant to attempt to elicit a guilty plea (Alschuler 1975).

In some sense this scenario seems implausible. However, a defense attorney has numerous incentives, some legitimate, some not, to behave in such a way. The

primary incentive is that private defense attorneys are nearly always paid a fixed amount in advance. This is for the very practical reasons that most defendants are poor, most will have little incentive to pay after his case is disposed of, and most will face fines and court costs that could prevent an attorney from collecting on a bill. This means that an attorney who takes a case to trial works for far less money per hour than one who does not. That is, the amount of time spent preparing for trial, and participating in a trial, is enormous compared to the time spent plea bargaining. Indeed, Alschuler notes that some defense attorneys will simply refuse clients who will not plea, unless they pay a far higher rate (Alschuler 1975).

For appointed attorneys, money can still be an incentive as they are sometimes private attorneys who obtain extra criminal defense work through court assignments. For defense attorneys who work through the public defender's office, however, the incentives are slightly different, but generally lead to the same outcome. The first incentive, similar to the incentives faced by judges and prosecutors, is that the attorneys need to clear their schedule backlog. There are, quite simply, too few attorneys for too many defendants. Plea bargains thus offer a defense attorney a convenient way to accomplish a reduction in workload while obtaining a victory of sorts.

Second, because a defense attorney is a repeat player who is often assigned to a particular courtroom, and who may work day in and day out across from the same prosecutor, his incentive is to work cooperatively (Alschuler 1975). Indeed, former Chief Justice of the Supreme Court Earl Warren, who as District Attorney of Alameda County, California, helped establish the county public defender's office, wrote about his relationship with the public defender saying that they had an arrangement such that when the public defender truly believed a defendant was innocent, even in the presence of the prosecutor's evidence, that he would agree to dismiss the case

(Warren 1969). This allows public defenders to dispel with cases they feel sure to lose in order to spend their limited time on cases where they have some chance of success.

Additionally, Alschuler (1975) found that, while it is illegal and unethical, some public defenders will, at times, trade one defendant for another. Bargaining in one case gives the defense attorney leverage in other interactions with a prosecutor. That is, if a defense attorney shows willingness to bargain in some cases, it increases his social capital with prosecutors which may allow him to obtain better deals in other cases. If he has one case that he believes strongly in for one reason or another, he may use an agreement to plea bargain in another case as a bargaining chip to ask for concessions from the prosecutor in the first.

Further, there are other incentives for defendants, and defense attorneys, to plead guilty. As Alschuler notes, “The guilty plea system is so engineered that a recommendation of a guilty plea almost always reflects a plausible evaluation of the defendant’s interests” (Alschuler 1975:1203). That is, when a prosecutor’s case is weak, he will offer enormous concessions determined to outweigh a defendant’s evaluation of his probability of acquittal. As a simple example, if a defendant believes he has a 50 percent chance of conviction for a crime that carries an expected 10 year sentence, he should, logically, accept any plea offer of less than 5 years.¹³ There is little hard evidence on this point, and indeed such evidence is likely impossible to gather reliably, but according to Alschuler’s interviews, the anecdotal evidence that this is the case, and that innocent, or at least non-convictable defendants, will take plea offers, is quite strong. For example, in explaining why he took the plea when acquittal was almost assured, the defendant in the kidnapping and forcible rape case, *supra*, stated, “I can’t take that chance” (Alschuler 1968:61). Even when the possibility is

¹³ This simplified example assumes that the perceived severity of a sentence increases linearly with time. This is probably not true (Posner 2003), but for the sake of a simple example, it is a sufficient assumption.

remote, conviction for a serious crime carries with it such severe consequences that defendants often seem to feel they have little choice. Furthermore, many defendants feel, rightly or wrongly, that once they are swept up in the criminal justice system, regardless of guilt, conviction is inevitable, and they might as well try for the best deal.

Finally, defense attorneys also have an incentive to encourage pleas as losing cases is detrimental to their personal reputations (Alschuler 1975). A defense attorney whose clients routinely plea bargain may be seen as an attorney with connections able to wring concessions from a prosecutor. Potential clients, however, will see an attorney who routinely loses cases at trial, as a liability. Thus, trial can be a risky endeavor for both client and attorney.

Judges also have incentives to encourage, and to sometimes engage in, plea bargains. The primary incentive for a judge is to clear his docket. Rates of arrests, and the complexity of trials,¹⁴ have increased dramatically, yet the number of judges, or indeed the number of courtrooms, has changed very little.¹⁵ In order to accommodate these numbers, some judges have become complicit and even active in the plea bargaining process. Alschuler notes that this can take two primary forms. In the majority of districts, while it is explicitly prohibited by the American Bar Association's rules of ethics as well as several other legal ethics' authorities,¹⁶ judges do in fact actively participate in the plea bargaining process going so far as to meet

¹⁴ As noted, *supra*, this is an anecdotal measure of complexity.

¹⁵ Funding for prisons, on the other hand, has dramatically increased by over 800 percent from 1980 to 2000 (Wacquant 2008a).

¹⁶ Rule 2.6(B) of the ABA's Model Code of Judicial Conduct (2007) says, in pertinent part, "A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement." Additionally, Federal Rule of Criminal Procedure (2008) 11(c)(1), which reads, in pertinent part, "An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions," prohibits federal judges from bargaining, making judicial participation a state issue. However, the vast majority of criminal prosecutions are state prosecutions.

with the parties involved and actively bargain with defense attorneys (Alschuler 1976).

One of the most important aspects of this sort of judicial bargaining is that it allows an explicit glimpse into judges imposing extra sentences for defendants who exercise their right to trial. Alschuler recounts an anecdote where a judge, saying “He takes some of my time – I take some of his,” told a defense attorney that if his client, who maintained his innocence, did not plead guilty to a lesser charge and accept a two to five year sentence, that upon a guilty verdict, rather than giving the mandatory minimum of ten years, the judge would give twenty (Alschuler 1976:1089). While this anecdote may be extreme, although it also may not be, it illustrates the reality that judges do sometimes impose harsher sentences on defendants who exercise their right to trial in order to induce them to plea bargain (Brereton and Casper 1981), thus reducing the workload for the system as a whole.

In other districts, judges either bargain implicitly by imposing “unwritten rules” regarding minimum sentences by consistently sentencing defendants who go to trial more severely than those who do not,¹⁷ or they simply abdicate their own responsibility by following prosecutor’s sentencing recommendations. One study, done in a state district where judges tended to not actively engage in the plea bargaining process, found that of 1000 felony cases disposed of through plea bargaining, judges accepted the prosecutor’s sentencing recommendation in approximately 97 percent of the cases (Johnson 1972). Moreover, of the ten judges in the study, three followed the prosecutor’s sentence recommendation in 100 percent of cases. In the court of the judge who had the least inclination to follow the sentencing

¹⁷ This is particularly the case in Federal court where rules preclude judicial participation in plea bargaining, where prosecutors rarely make sentence recommendations, and where the structure of criminal charges makes such negotiating chips as charge reduction less valuable (Alschuler 1976). Indeed, Alschuler notes that increased sentences for standing trial can be particularly harsh in Federal courts.

recommendations (only in 88 percent of cases), anecdotal evidence suggested that fewer defendants entered guilty pleas.¹⁸ Further anecdotal evidence also suggested that this particular judge worked longer hours than his colleagues, yet had a longer backlog of cases (Alschuler 1976).

While clearing the docket is a strong incentive for a judge, there are other incentives as well. Fisher notes that while judges do not necessarily have a stake in the outcome of criminal cases, with plea bargained verdicts, there is little chance that the outcome will be overturned (Fisher 2003). Defendants who plead guilty give up almost all rights to appeal. For a judge, this means that his opinions and procedures can rarely be vetted, and a higher court can rarely rebuke the judge for legal mistakes. Thus, a judge avoids the possibility of damage to his reputation, as defendants who plea bargain have no recourse to courts of appeal.

Additionally, law makers have policy incentives to support plea bargaining as well. For legislators, as for prosecutors, who need to appear tough on crime, plea bargaining avoids the appearance of defendants "getting off" on so-called technicalities. Similarly, for victims of crime, a plea bargained conviction is a sure thing, free from the possibility of a botched police investigation or prosecution.

There is a second major reason for law makers to support the status quo. In 48 of 50 states, prisoners are disenfranchised from voting. Yet, these inmates are counted as residents of the districts where they are imprisoned. One study found over 20

¹⁸ A note about the legal standing of sentencing promises made by prosecutors, and of a judge's refusal to follow said promises is in order: in general, a judge may not be bound by a prosecutors promise. Further, a defendant to whom a prosecutor makes a promise, but which is not followed, may generally withdraw the plea without penalty. However, this right of withdrawal, rather than effectively forcing judges to follow sentence recommendations, has actually simply caused prosecutors to hedge their promises. Instead of promising a five year sentence, for example, a prosecutor will instead promise to recommend a five year sentence, and tell the defendant that the judge follows his recommendations in a high percentage of cases. For more, see Alschuler 1976, note 34.

counties nationally where more than a fifth of the residents were actually prison inmates (Staples 2004). Indeed, fully 30 percent of the people who “moved” from New York City to upstate New York in the 1990’s were actually forcibly moved to prisons as inmates (Id). The result of these policies is districts with large prisons that not only benefit from the jobs those prisons supply, but that also have disproportionate voting power. Additionally, these districts also benefit because the prisoners are considered unemployed which lowers the per capita income and thus increases the amount of federal funds they are able to collect (see Staples 2004). Last, the public also perceives a benefit from plea bargains in that they use fewer public resources than would full trials. However, this short sighted analysis likely ignores the increased costs of housing prisoners (Wacquant 2008a), as well as the social costs of having so many convicted felons (Western 2006), making this economy largely an illusion.¹⁹

Traditional Defenses of Plea Bargaining

Defenses of plea bargaining tend to center on one of several arguments. The first, and most common, is that plea bargaining is simply a necessary institution to keep the wheels of justice moving. This contention does not necessarily argue that plea bargaining is moral, or good, or the best possible system, but instead that, in light of the costs of administering a criminal justice system, that it is the only reasonable choice. Most commentators take this view and consider plea bargaining to be an inherent, if not necessary, component of the criminal justice system.

This primary defense of plea bargaining stems from the belief of the parties involved that plea bargaining is in their interest, but it is often made in terms of systematic efficiency. These parties, which includes prosecutors, defendants, defense

¹⁹ With all of these benefits, it is interesting that almost all sides give lip service to the vices of plea bargains. The left views it as exploitive, and the right views it as not tough enough.

attorneys, judges, legislators, crime victims, and the public, tend to believe that plea bargains gain them more than it costs them, and indeed the primary focus of this project is an exploration of why this is largely untrue. However, as a way of understanding its prevalence, it is worth exploring briefly why parties believe plea bargains to be in their interest.

Fisher notes that, “The sheer efficiency of plea bargaining as a means of clearing cases to some extent has frozen it in place” (Fischer 2003: 176). He continues, “When prosecutors and judges manage to keep pace with fast-growing workloads either with no increase in staffing or with increases that lag behind the growth in case numbers, any appeal they might make to the legislature for more personnel will fall short.” Further, he argues, “And as staffing fails to keep pace with mounting loads, any hope of easing reliance on plea bargaining fails.” Thus, for Fisher, there is a feedback loop where increases in plea bargains suggest an increased efficiency by the criminal justice system, which convinces the legislature that additional funding is unnecessary. Further, this lack of funding necessitates increased reliance by the criminal justice system on plea bargains to push through cases.

The position that plea bargaining is economically beneficial to the point that it is worth keeping has been adopted by the Supreme Court. In *Santobello v. New York* (404 U.S. 257 (1971)), saying that plea bargaining is “an essential component of the administration of justice,” and reiterating that the government would need to invest enormous resources in “judges and facilities,” the Court indicated that plea bargaining was not just acceptable, but was to be encouraged.

Similarly, other commentators have offered support of plea bargaining predicated on the contention that it offers flexibility not available in a jury trial (Heumann 1978). Under this argument, by avoiding the rigid constraints imposed by the criminal justice system, and the rules of law, parties are able to bargain around the

rules to make themselves better off than they otherwise might be. This sort of laissez-faire argument is made in many contexts regarding the appropriate level of government interaction in people's lives. While there are generally persuasive arguments made on both sides, and adherence to those arguments is something of a religious phenomenon, in general, the strongest arguments against this social free-for-all occur in contexts where there is a strong power dynamic. That is, in contexts where one party has a great deal of power over another, Coasian type bargaining tends to break down.

Arguing against the notion that mere efficiency or flexibility offered by plea bargaining was sufficient justification for the support of plea bargains, Church (1979) still supported plea bargains so long as certain requirements are met. These requirements, namely that a defendant has the alternative of a trial with fair consequences, that the defendant is represented by counsel, that the defendant and prosecutor have equal access to the evidence, and that both sides have sufficient resources for trial (Church 1979), while met in an ideal world, are rarely met in practice (see Alschuler 1968, 1975, 1976).

A more affirmatively made argument in defense of plea bargaining is that plea bargaining is actually ultimately beneficial. Rather than arguing that it is inherent and perhaps necessary, this argument suggests that it is in fact good for all of the parties involved. This argument is typically made in two main ways. The first is that plea bargaining is beneficial because of the value it brings to society. The second is that it is beneficial because of the value it brings to the individuals, particularly the defendants, involved.

For defendants, there are two primary stated benefits to plea bargaining. The first is that it allows defendants to lock in shorter sentences than they might otherwise

receive. Defendants, tend to be risk averse.²⁰ Many believe that once they have entered the criminal justice system their chance of prevailing at trial is minimal. This is particularly true if they are poor or a member of a minority group as simply observing their communities' interaction with the criminal justice system is likely to support this belief. Thus, as is argued elsewhere in this project, defendants are sometimes willing to trade what they perceive as a slim chance of acquittal for the certainty of a shorter sentence.

Defendants also have a second incentive in many cases. Alschuler notes that, particularly in misdemeanor cases, the punishment for conviction often costs defendants much less than even the process of contesting their guilt (Alschuler 1983: 953). Feeley gives an example from a misdemeanor court where a general conviction costs a fine of about \$30 (in 1979 dollars) while contesting the charge entails obtaining a bond of as much as \$1000, retaining an attorney for around \$350, plus taking several days off from work which is not only costly but that can result in loss of employment (Feeley 1979). Indeed, Feeley reports that in a sample of 1640 misdemeanor cases not a single defendant invoked his right to a trial (Feeley 1979). It is, of course, simply inconceivable that the police had a perfect record and that everyone facing charges was in fact guilty of what they had been charged, or at least that there was sufficient evidence to convince a jury and that no evidence had been gathered illegally.²¹

Additionally, Judge Easterbrook (1992), states that, "Plea bargains are better than mandatory litigation ... because compromise is better than conflict." He

²⁰ In chapter 2, this project's model argues that the level of risk aversion varies across defendants. However, while there are variations among defendants, prospect theory, which predicts that losses "loom larger" than gains, suggests that all defendants are risk averse to an extent (Plous 1993: 96).

²¹ Illegally gathered evidence is generally excluded from trial under the so-called Exclusionary Rule. The rationale for this is that exclusion acts as a check on police to prevent them from continuing to gather evidence illegally.

continues, arguing that both defendants and prosecutors stand to benefit from this ability to bargain. This, however, simply accepts prosecutions, and the coercive deals offered by prosecutors as a given; a point from which the process begins rather than an integral part to it. Additionally, Judge Easterbrook suggests, “Rights that may be sold are more valuable than rights that must be consumed, just as money ... is more valuable to a poor person than an opportunity to live in public housing” (Easterbrook 1992:1975). Notwithstanding the fact that the argument regarding public housing is controversial, such arguments can be easily collapsed. Like an arms race, or labor bargaining before the enactment of the minimum wage, the ability to sell these rights is, in essence, a race to the bottom. Un-sellable rights maintain a value that sellable rights, in a buyer’s market, may not.

Finally, Easterbrook suggests that the arguments against plea bargaining rest on the assumption that defense lawyers and prosecutors are imperfect agents. Easterbrook’s argument is that, just because defense attorneys and prosecutors have their own incentives which may not correspond with the interests of defendants, and because they may indeed act on those incentives to the detriment of the defendant, this does not imply that the system should be scrapped as a whole. He notes that all agents are imperfect, but that the agency costs incurred due to this imperfection do not imply that consensual transaction relying upon these agents should be abandoned. This may be true, but as Easterbrook earlier notes, “[B]oth sides to a plea bargain operate ... as bilateral monopolists ... in the shadow of legal rules that work ... like price controls” (Easterbrook 1992: 1975). That is, plea bargains are not really consensual transactions at all. Additionally, Easterbrook does not offer a quantifiable level at which these agency costs might be too high, or any comparison which suggests that they are as low as in other contexts. Indeed, the legal system, in principle, offers more protection to criminal defendants than to civil litigants, so it is incumbent to show not just that the

agency costs are low, but that they are, in effect, inconsequential, in order to comport with criminal justice standards.²²

Critiques of Plea Bargaining

The critiques of plea bargaining are numerous. It has long been recognized, for instance, that a guilty plea arrived at through coercion is invalid. In addition to the invalidity of an improperly arrived at plea bargain, Alschuler (1993) suggests the following as just some of the problems inherent in plea bargaining: Plea bargaining makes an offender's sentence depend more upon tactical decisions than upon the actual crime or the offender's personal characteristics; It substitutes a regime of 'split the difference' for a concern with finding guilt beyond a reasonable doubt; It treats human liberty as a commodity; It leads lawyers to act as judges rather than as advocates as well as making figureheads of judges; It diminishes the value of attorney-client privilege and cheapens the profession of lawyering; It substitutes relatively inexperienced, partisan attorneys for relatively experienced, nonpartisan judges; It circumvents the will of the electorate; It perverts the initial charges brought by prosecutors; It circumvents the will of the legislature by allowing defendants to receive sentences of shorter length than those prescribed for various crimes; It promotes perceptions of corruption; It has perverted the Supreme Court's analysis of constitutional waiver; It has eliminated a culture of listening to and understanding defendants; It has undercut the goals of legal doctrines such as the exclusionary rule, the insanity defense, the right to confrontation, and the right of the press to observe

²² One does get the sense that those arguing that plea bargaining is beneficial for defendants are not doing so as advocates for those defendant, but rather, because it is a clever or convenient argument that supports their own interests. Easterbrook is a judge on the Seventh Circuit court of appeals. It is noted, *supra*, that trial judges have an incentive to allow plea bargains because guilty pleas prevent their being evaluated, and possibly overruled, by appellate courts. It should further be noted that appellate judges have a similar incentive, in that in every case with a guilty plea, they are not tasked with carrying out those evaluations.

criminal proceedings; It has frustrated both attempts at sentence reform as well as the Due Process revolution of the Warren Court; It has accommodated lazy lawyers allowing them to cut corners; It has increased the opportunities, and undoubtedly the prevalence, of favoritism and personal influence; It conceals systemic abuses and masks dangers of representation by inexperienced lawyers, as well as putting a roadblock in front of paths for lawyers to gain more experience; It promotes inequalities; It results at times in both unwarranted lenience as well as unwarranted harshness; It merges the tasks of adjudication, sentencing, and administration into a single process; It treats legal rights as bargaining chips; and It increases the number of innocent defendants who are convicted (Alschuler 1983).

Throughout the twentieth century, other American institutions with similarly dismal records, systems of racism, systems of labor, welfare, voting unfairness, environmental devastation, etc., underwent transformations which at least attempted to correct many of the problems. Even other portions of the criminal justice system underwent a revolutionary transformation and democratization. Due at least in part to bad timing and changes in the political climate in the 1970's, plea bargaining did not.

Kipnis equates a prosecutor's plea bargain offer to being robbed by a gunman. Refuting such argument as from Church that, "[I]t is difficult to argue that the state somehow burdens the right to trial merely by posing an alternative that may be more attractive" (1979: 514), Kipnis suggests that one might actually prefer a fair-minded gunman as, "While the law permits one to recover money upon adverting to the forced choice of a gunman, it does not permit one to retract a guilty plea upon adverting to the forced choice of a prosecutor" (Kipnis 1976: 99).

Schulhofer further argues that the "benefit to defendants" argument is not as strong as supporters make it out to be. He argues that, in the absence of plea

bargaining, and assuming the number of prosecutions were stable, “Holding punishment resources constant, abolition of plea concessions would require substantial reduction of post trial sentences” (Schulhofer, 1992: 1993). That is, if plea bargaining’s reduced sentences were not available, then actual sentences would need to be lowered to maintain the same number of inmates serving the same amount of time. Otherwise, the prison population would exceed capacity. Thus, with plea bargaining, defendants receive sentences reduced from the “standard” in an unofficial way. Without plea bargaining, Schulhofer argues, defendants would ultimately receive the same sentence reduction, but it would be done via official legislative channels, or by judges knowing that high sentences would lead to clogging of the prison system.

While there are numerous studies exploring how the institution of plea bargaining may affect individuals, and which lend evidence to many of the above arguments, there is little research on the aggregate effects, and it is these aggregate effects that this project addresses.

Chapter 4 – Economic Models of Plea Bargaining

The model presented in this project uses an economic and game theoretic framework to explore how plea bargaining is responsible for the size and the inequalities in the American prison population. There are several existing market based economic models of plea bargaining. Nearly all of these models make the argument that plea bargaining is efficient and/or socially beneficial. Additionally, these models generally argue that defendants who are not guilty will largely not enter into such bargains.¹ In order to put this project’s model in perspective, these economic plea bargaining models need to be assessed. Indeed, it is necessary to understand many of the assumptions that the authors of these models make in their analysis of plea bargains even though it is contended that many of these assumptions are incorrect.

Economic Interactional Models of Plea Bargaining

One of the first market based plea bargaining models is from Landes (1971). Nearly all subsequent published plea bargaining models are direct descendants of the Landes model. This model, which is really a model of criminal courts in general,² begins with several primary assumptions. The most relevant, and as Landes says “basic” assumption, is that “both the prosecutor and the defendant maximize their

¹ The importance of this issue is that during the high point of research on plea bargaining, the concern over the “innocent pleader” was central to many of the debates. Many of the models attempted to deduce an answer to whether innocent defendants would ever accept a guilty plea. While this project is not specifically concerned with the innocent pleader problem, it is reasonably clear that innocent and unconvictable defendants do sometimes accept guilty pleas.

² This is as opposed to being explicitly about plea bargaining. While the model does cover plea bargaining, it is also a more general model that seeks to explain other aspects of the court system. Specifically, the model is concerned with when parties in a trial will settle rather than go to trial. Indeed, in the appendix, Landes applies the model to settlement bargaining in civil courts. For purposes here, however, the aspects of the model discussed can be considered a plea bargaining model.

utility, appropriately defined, subject to a constraint on their resources” (61). Landes' model begins with two functions

$$P = P (R^*, R ; Z)$$

$$P^* = P^* (R^*, R ; Z)$$

which are defined as the prosecutor's and defendant's respective estimates of the probability of conviction at trial. R represents the resources to be spent by the respective parties (*'s for defendants), and Z represents other factors such as “the availability of witnesses, the defendant's past record, his alibi, etc” (63). In other words, each party to the case makes an estimate of his or her probability of winning, which is a function of each party's expenditure as well as other relevant factors.³ Additional assumptions are that the sentence is independent of resource allocation, and that there are no court costs.⁴

The model continues with prison sentences being considered the price charged by society for various criminal transgressions, and with the prosecutor thus attempting to maximize income by winning convictions. The prosecutor prefers to prosecute crimes which have longer sentences, but she also prefers low hanging fruit. That is, she prefers easy prosecutions which require the fewest resources, and she seeks to balance these preferences for a maximum payoff. Additionally, Landes argues that a prosecutor, in an attempt to minimize resource allocation, will prefer to bargain if her resources are scarce. Landes suggests, “[I]f the prosecutor's transaction costs of a settlement equal [her] optimal resource expenditure on a trial, [she] would be willing to offer the suspect a reduction in the sentence ... in exchange for a guilty plea” (64). Landes continues, “[S]ince trial costs probably exceed these transaction costs, [the prosecutor] would be willing to offer a further sentence reduction as the savings in

³ Landes notes that actual guilt only matters in as much as it influences the actor's perceptions about the probabilities involved.

⁴ Both of these assumptions are highly dubious and likely influence the model.

resources can be used to increase the conviction in other cases” (Id). That is, making a plea bargain not only results in a higher probability of conviction in the immediate case,⁵ but it also increases the probability of conviction in other cases as it frees up scarce prosecutorial resources. Since the prosecutor deals with defendants in a one to many arrangement, where the prosecutor can pool her resources but the defendants cannot,⁶ the prosecutor is at a structural advantage in deciding how best to calculate her allocation. Landes continues, “[For the prosecutor] it is shown that the decision to go to trial depends on the probability of conviction by trial, the severity of the crime, the availability and productivity of the prosecutor's and defendant's resources, trial versus settlement costs, and attitudes toward risk” (70).

From the defendant's perspective, Landes posits that the expected costs are the probability of non-conviction times the costs of trial versus the probability of conviction times the cost of trial and the cost of a sentence.⁷ The defendant is also expected to maximize utility, and he will thus only expend resources where they will help him. Further, he will accept a plea bargain when it is his least expensive option. Finally, Landes points out that most of the transaction costs of bargaining are subsumed in the costs of litigation as the defendant will likely still incur these expenditures in the process of rejecting plea bargain offers.

From these assumptions, Landes derives four main implications. These are (1) a negotiated sentence will tend to be shorter as the probability of conviction at trial

⁵ $P = 1$ as opposed to $P < 1$.

⁶ This is not necessarily true. While each defendant with a private attorney has non-poolable resources, this may not be true for the public defender.

⁷ In Landes' terms, the defendant's expected utility $E(U)$ is

$$E(U) = PU(Wc) + (1 - P)U(Wn)$$

where

$$Wc = W - s \cdot S - r \cdot R$$

and

$$Wn = W - r \cdot R$$

where W is initial wealth, s is the value per unit of jail sentence, r is the price of a unit of R , S is the sentence, and R is the resource input for trial.

diminishes; (2) the shorter the sentence associated with the charged offense, the more settlement is likely; (3) if both the defendant and prosecutor agree on the probability of conviction, settlements will take place in cases where the defendant is risk averse, or risk neutral, however not necessarily when the defendant is a risk seeker; and (4) when the prosecutor and defendant differ in their estimates of conviction at trial, if the prosecutor's assessment of conviction is lower, even risk preferring defendants will settle due to the ability to extract concessions. Thus, only when the prosecutor believes more strongly than a defendant that a conviction is likely will there be a trial. That is, Landes argues, a plea bargain will only occur where it is in the interest of both parties.⁸ Landes' assessment is, at least in part, borne out by statistics and thus useful as a starting point for examining plea bargaining dynamics. However, there are still consequential omissions in his model that need examination. For instance, the model does not incorporate socio-economic factors that may influence how different participants engage in plea bargain negotiations. Moreover, there is no consideration given to how individual plea bargains aggregate.

In an update of the Landes model, Rhodes (1976) argues that with an expanded model, the effect of changes to both prosecutorial and defense budgets can be deduced. He argues that increasing the prosecutor's budget will increase both the number of prosecutions as well as the number of trials, the former because she has the resources to do so, and the latter because she will be less inclined to offer concessions, thus inducing defendants to be more likely to exercise their right to trial. Rhodes also argues that if the cost of trial is increased for defendants, that the number of

⁸ Landes adds several other deductions from his model. He suggests that the greater the cost savings from settlement, the greater the likelihood of settlement; "pecuniary and non-pecuniary" returns for a victorious defendant, or publicity returns for a victorious prosecutor, will both increase the incidence of trial; and actual guilt does not matter other than in how it influences the perception of probabilities.

prosecutions would increase, as more defendants would plead guilty which would thus unlock the prosecutor's budget. Similarly, the number of pleas is likely to increase, and the number of trials to decrease.

Additionally, Rhodes notes that, “[I]t is impossible to predict whether an increase or decrease in the number of settlements will result from an increase in the prosecutor's budget” (316). Essentially, his argument is that while the increased number of prosecutions will encourage guilty pleas, the decrease in concessions will lead to a decrease in plea bargains. However, he does suggest, in accord with Landes, that “the ratio of pleas to trials will decrease.” Rhodes concludes by acknowledging that, “[T]he relationship between overall sentences and the defendants' resources may be more complicated than was previously understood” (318).

In another study, Adelstein (1978), while assuming the basic premise of the Landes model to be sound, begins with a criticism of Landes' contention that increased investment by, or on behalf of, the parties will result in increased incidence of trial. Specifically, Adelstein points out that under the 6th and 14th Amendments,⁹ indigent defendants are entitled to a trial as well as representation at that trial, both at the government's expense, and yet the incidence of trial still remains low. Instead, Adelstein posits that the passage of time, “[used] by both parties as a bargaining tool to impose pretrial costs upon the opposition,” a variable Adelstein says is left out of Landes' analysis, may be “the most critical element of the initial decision problem” (490).¹⁰ Adelstein further notes that time is important for prosecutors as witnesses

⁹ The 6th Amendment guarantees a defendant, *inter alia*, “[T]he right to a speedy and public trial, by an impartial jury ... and to have the Assistance of Counsel for his defence.” The 14th Amendment applies this to the states.

¹⁰ Adelstein makes an assumption in his model that “the District Attorney must account for the possibility that each defendant will exercise his right to trial and refuse to bargain” (490). This assumption is likely untrue. Prosecutors know, in fact, that over 90 percent of defendants will not exercise their right to trial. Indeed, statistically speaking, the prosecutor will likely be better off if she

tend to forget, and that there is a cost to incarcerating defendants prior to trial.

Defendants, he notes, have similar costs from delay such as lost wages from pretrial detention, or uncertainty due to the looming trial.

Adelstein then applies his insight to what he deems the “Cross” model, named for Cross' “Decision/Expectation/Adjustment” model (see Cross 1969). Noting that the model has an inherent limitation in that it “ultimately fails to resolve the classical indeterminacy which has characterized economic analysis of interdependent behavior in bilateral monopoly or duopolist competition” (500), Adelstein nonetheless suggests that there is a mathematical solution to when plea bargains will occur. Additionally, he suggests that his model allows for the possibility that innocent defendants may be induced to plea bargain, which he finds troubling.¹¹ While Adelstein’s application of the Cross model and his deduced result may be important, the assumptions about plea bargaining that Adelstein's analysis relies upon are so far removed from the reality of plea bargaining,¹² that at face value it is difficult to know how much to take from it.

One of the next major revisions to the Landes model is a game theoretic model put forth by Grossman and Katz (1983). They contend that, in addition to the concern with conservation of resources enabled by the plea bargaining system, as argued for in the Landes model and its progeny, there are other benefits to plea bargaining as well. To wit, they argue that “plea bargaining acts as an *insurance device* for both the innocent defendant and the state” as well as a screening device (italics in original:

assumes that no defendant will exercise his right to trial, and instead plays “catchup” in a case where one does.

¹¹ However, it is not clear that the Supreme Court finds this troubling. Indeed, in *North Carolina v. Alford* (400 U.S. 25 (1970)), the Court held that a defendant may plead guilty even while maintaining his innocence.

¹² Adelstein acknowledges as much noting that his model of plea bargaining is far removed from the reality of “whispered and hurried conversations between prosecutor and defense counsel, and defense counsel and defendant, in the corridors of the courthouse on the day the defendant is scheduled to appear for trial” that real plea bargains are in actuality (502).

749). In justification of their insurance device proposition, Grossman and Katz argue, responding to concerns that plea bargains lead innocent defendants to plead guilty, that some innocent defendants are also convicted at trial.¹³ They argue that, “[T]he constitutional mandate to protect the innocent should be interpreted to imply that the state's interest where an innocent defendant is concerned is identical to that of the individual” (749). Unpacking this sentence is a little awkward, but Grossman and Katz seem to be arguing that, in as much as an innocent defendant decides to bargain away his freedom, the state should allow, and even encourage, him to do so. Put in a less flattering light, they seem to argue that a defendant who believes he is likely innocent but terrified that he might spend a long portion of his life in prison due to the overwhelming power of the state to incarcerate him, and vulnerable due to being impoverished or of a historically oppressed racial minority, who nevertheless believes that the deck is stacked against him, might be willing to accept a plea bargain as a hedge against a lost lifetime, that the state, the same state that is possibly going to imprison him in the first place, should fully support, and indeed encourage, that decision.¹⁴

That is to say, Grossman and Katz implicitly argue that the state should be seen as a benign force, and that it should thus be its duty to encourage defendants to make what ever choice each feels is his best bargain. In essence, by their argument, rather than try to correct a system that may accidentally punish an innocent person, Grossman and Katz suggest adding an insurance policy that allows the innocent individual to agree to be punished a little less than he otherwise fears he might be. While an insurance system like this may make sense in cases of ill health or natural

¹³ While this is undoubtedly true (see, e.g., Yardley 1998), the authors offer no data to support the assertion. Moreover, they offer no way to compare whether convicted innocent defendants are more prevalent under a plea bargain or non-plea bargain system.

¹⁴ Alschuler (1979) notes that even Saint Joan of Arc accepted a plea bargain before being allowed to recant.

disaster where blame cannot be assigned, here, the state that would provide the insurance is actually doing the damage.¹⁵

In the context of their paper, however, their plea bargain as insurance suggestion makes some sense as Grossman and Katz ultimately do not seem to believe that innocent parties will ever actually agree to a plea bargain. The second part of their argument is more banal. In it, Grossman and Katz argue that plea bargaining acts as a screening device. They argue, “[T]he accused know whether they are guilty, while the prosecutor never can be certain” (750). Their argument is that plea bargaining separates guilty from innocent by offering incentives that only one group is likely to accept.

Grossman and Katz' model relies, as do most of the economic models, on the assumption that, “[B]oth the defendant and the prosecutor behave rationally, in the sense that each acts to maximize an appropriately defined utility function” (750). They further assume that the prosecutor acts “entirely in the state's interest” (Id), that the state's interest coincides with an innocent defendant's interest, and that a defendant's interest is in minimizing his punishment. They then construct a model where there is bargaining between the prosecutor and defendant, and in the event of a bargain not being reached, a trial that has “some incremental value in determining truth” (751).

Under their model, assuming all defendants are equally risk averse, then plea bargain offers can be used to perfectly separate innocent from guilty defendants. This is done by making an offer that is better than the trial sentence assumed by the guilty defendants, but worse than the one assumed by the innocent defendants. For example, assume two defendants, one of whom is innocent, the other of whom is guilty, charged with the same crime for which the requisite sentence is 10 years. Assuming that the

¹⁵ In other contexts, this arrangement is called “racketeering.”

court is more likely than not to get the verdict right,¹⁶ which means that the innocent defendant has an expected sentence of less than 5 years while the guilty one has an expected sentence of greater than 5 years, an offer of 5 years would be expected to be accepted by the guilty defendant, but not by the innocent one. Under the Grossman and Katz model, plea bargaining separates guilty from innocent without the need for trial as only an irrational guilty person would refuse a bargain, and only an irrational innocent one would accept one.

This does not account, however, for the fact that defendants are not equally risk averse, and that indeed innocent defendants are likely more risk averse than guilty ones (Block and Gerety 1995, Kobayashi and Lott 1996, see also chapter 2 of this project). That is, assuming that the concept behind the criminal justice system is that the costs of crime should outweigh the benefits (Becker 1968, Posner 2003), a person who commits crimes is generally a person who is willing to gamble on his future and try for long shots. This is to say, criminals are largely people who are more risk seeking than others. On the other hand, people who do not commit crimes are people who tend to be more risk averse, or at least risk neutral, who are less willing to gamble on their future, and who instead follow the rules. Thus, all else being equal, including the presumed probability at trial, innocent defendants are actually more likely than are guilty defendants to accept plea bargains. That is, if two defendants, one risk averse and one risk seeking, each believe they have a 50 percent chance of winning at trial, then the risk averse defendant is likely to accept a plea bargain while the risk seeking defendant is not. If, indeed, there is a correlation such that guilty defendants are more likely to be risk seeking than innocent ones, then it is the innocent defendant who will accept the plea bargain offer.

¹⁶ And that the defendant believes in the integrity of the court — an important assumption that will be discussed in chapter 5.

Clearly, the presumed probability at trial is not equal, and guilty defendants are more likely to be convicted than innocent ones. However, the more risk averse a defendant is, the more willing he will be to accept a plea bargain. How much this counteracts the likelihood of the court getting the verdict right, or rather, the defendant's perception that the court will get the verdict right, is impossible to say. Grossman and Katz do consider the case where risk aversion is randomly distributed across all defendants. From this, they find that some innocent defendants are likely to plead guilty, too, though no guilty defendants should go to trial. Thus, while Grossman and Katz recognize that risk aversion may not be the same among all defendants, they fail to recognize the importance of the fact that it may actually correlate to classes of defendants.¹⁷

Other revisions to the Landes' model can be found in Reinganum (1988), Kobayashi and Lott (1996), and Baker and Mezzetti (2001). In Reinganum, the concept of asymmetrical information is added. Like Grossman and Katz (1983) and others, Reinganum argues that only the defendant knows with certainty whether he is guilty or innocent, and that only the prosecutor knows what the probability of conviction is. This information cannot be reliably communicated as both parties have incentives to tell only one story. Additionally, Reinganum suggests that the “objective function of the prosecutor ... involves three goals: appropriate punishment of the guilty, avoidance of punishment of the innocent and the conservation of resources spent on trials” (Reinganum 1988: 717).¹⁸ From her analysis, Reinganum found that

¹⁷ The authors also fail to recognize, among other things, that there are nth order bargaining considerations; that if a guilty defendant knows that only innocent defendants will refuse a plea offer, then it is in his interest to reject it too (see Kobayashi and Lott 1996). Guilty defendants would thus presumably also refuse plea bargains leading to a cascade of refutation.

¹⁸ This is an over simplistic representation of the role of the prosecutor and society of the sort that leads to over simplistic analyses. In addition to these three goals, prosecutors, and society, are also interested in such things as deterring crime, enforcing the law for the benefit of others, making information public,

weak cases will generally be dismissed, and as a prosecutor's case gets stronger, the offered bargain will be closer to the expected trial sentence. Thus, Reinganum argues, the stronger the prosecutor's case, the more likely the probability of trial is as defendants will be less likely to take a "bad bargain."

However, for a number of reasons, this model does not seem to comport with the reality of how the plea bargaining process works. First, while a strong prosecutorial case might imply that the prosecutor will offer a bad bargain from the defendant's perspective, the defendant is also presumably aware of his likelihood of success at trial, and may thus be willing to accept such a bargain. Indeed, anecdotal evidence suggests that courts may extract a penalty from defendants who are obviously guilty and punish them more severely for wasting the court's time (see Alschuler 1976). Moreover, as has been mentioned, the assumption that a defendant knows whether he has actually committed a crime, or what crime he may have committed, is dubious at best. Knowing this requires both legal and factual knowledge.¹⁹ Additionally, just because a defendant may know whether he is guilty, a court may get the law wrong, a witness may lie, or a prosecutor may withhold exculpatory evidence (see e.g., Lewis 2009). While defendants can appeal a court's decisions of law, it is an expensive process with a low likelihood of success.

In Kobayashi and Lott (1996), the authors expand on the Landes expenditure model incorporating it into Grossman and Katz's separation model. They argue that there are essentially three terms to be considered in whether plea bargain offers are

rehabilitating criminals, etc. These may be obvious, and Reinganum's list may not be intended to be comprehensive, but that "conserving resources," a perhaps less important function than some of the unnamed functions, is included with no indication that there are indeed others makes the list appear short sighted. Indeed, Reinganum suggests this herself arguing that "[A] case is never dismissed on account of the resource costs of pursuing it; this decision is based only on the merits of the case" (719).

¹⁹ See chapter 5.

separating of innocent and guilty defendants. First, as considered by Grossman and Katz, if a guilty defendant believes that he will receive a longer sentence than an innocent one, he will accept a plea deal that an innocent defendant will not. Second, and cutting against the first, if an innocent defendant is more risk averse than a guilty one, at some point, if his aversion to risk is sufficiently high, he will accept plea bargain deals that a guilty defendant will not.

Kobayashi and Lott introduce a third term, “differential defense expenditures,” which they argue “can insure that innocent defendants face lower penalties from going to trial” (397). Their basic argument is that if an innocent defendant spends less at trial than a guilty one, “[T]he effects of differential amounts of defense expenditures can serve to offset the negative effect of differential risk aversion” (401). In essence, Kobayashi and Lott argue that as each side to a criminal trial increases its expenditures, it increases its probability of winning. They then argue that a prosecutor will not devote many resources to trials against innocent defendants with strong cases, or guilty defendants with weak cases. Thus, they deduce, for the defendants in the former, victory is assured, and in the latter, defeat is likely. Finally, they argue that it is only in close cases that expenditures will be high. Thus, they conclude that expending relatively large amounts of resources at trial is the way to overcome the innocent pleader problem.

There are several objections to Kobayashi and Lott's model. The first, and simplest, is that “differential defense expenditures” hardly constitutes a third term. Instead, it is simply a subset of risk aversion. That is, if an innocent defendant is more likely to accept a plea offer due to being risk averse, he is also less likely to expend tremendous resources on a trial because he is risk averse. Additionally, Kobayashi and Lott have in essence put the cart before the horse in determining which defendants are likely guilty or innocent. Their model assumes that both sides know the outcome

before a trial even happens. However, for a risk averse defendant, if this is the case, he likely “knows” that he do not stand a chance at trial once embroiled in the criminal justice process. Further, and perhaps most importantly, Kobayashi and Lott ignore all nth order interaction, ironically after criticizing Grossman and Katz for doing the same thing. Once a defendant determines that high expenditure is a clear signal of innocence, he will have a clear path to acquittal. Indeed, this allows wealthy defendants to simply purchase their “innocence.”

Finally, in Baker and Mezzetti (2001), the most recent economic model of plea bargaining predicated on Landes' original work, the authors construct, “a four-stage game of incomplete information” which shows, by the authors' account, that plea bargaining is semi-separating in that only guilty defendants will plea bargain, while not guilty and some guilty ones will refuse (150). The primary focus of the paper is on computing “economic proofs” of the various assumptions about plea bargaining, and showing how the assumptions in various other economically minded plea bargaining papers lead to particular results. However, while the math is interesting, the assumptions do not comport with reality, and thus they do not offer a tremendous amount of insight into actual plea bargaining.

It is worthy of note that there are very few models of plea bargaining that are aggregative. The economic models are generally constructed at the interactional level, and they either fail to consider how aggregation influences the plea bargaining process or the criminal justice system, or they simply assume linear aggregation. None takes on inequalities, be they race or class based, in the criminal justice or correctional systems. Nor do any consider that a defendant’s subjective view will have an influence on the bargain he is able to make. For the most part, other than the

occasional note that there are a lot of prisoners, there is little if any connection made between plea bargains and criminal justice.

One notable exception to this, in a paper responding to a defense of plea bargaining by Scott and Stuntz (1992), Schulhofer (1992) notes that the assumption that the elimination of plea bargaining would overrun the prison system may be incorrect. The assumption is often made that without plea concessions by prosecutors, sentences would be too long, resulting in an overcrowding of the prison system.²⁰ Schulhofer, arguing that, “Abolishing plea concessions without a change in the sentences imposed after conviction at trial would require massive increases in prison capacity” (pg:1993), suggests that the repercussion of eliminating plea concessions would be that sentences, as a whole, would simply need to be reduced by judges. That is, Schulhofer argues that without the concessions from plea bargaining, courts would be forced to lower the sentences on their own as otherwise prisons would become overcrowded. This argument is essentially a market based assumption that the courts will consider whether there is room for the particular defendant in a crowded corrections system. However, this seems doubtful on its face as a standard tragedy of the commons scenario. Further, the evidence that the correctional system will not continue to grow to accommodate any number of prisoners is to the contrary as legislatures have shown little resistance to increasing funding for the correctional system whose budget has been increasing linearly (Stephan 2001, Wacquant 2008). However, Schulhofer’s argument does represent one of the few feedback models of plea bargaining.

²⁰ The much more common concern is that the court system would be overrun (Burger 1970) or that wait times for trials would become too long (Posner 2003).

Chapter 5 – America’s Incarceration Exceptionalism

There are many reasons for the large number of people incarcerated in the United States. Among these is a political will to incarcerate a sizable segment of the population, and a popular belief that deterrence of crime in the guise of severe punishment works. However, while it is also almost undisputed that without plea bargaining the criminal justice system and the courts could not keep pace with demand, it is rarely considered to be factor in the prison explosion. However, without plea bargaining acting to reduce the transaction costs associated with the criminal justice system, and assuming that the procedural and constitutional protections in place would remain, regardless of the political will to incarcerate, the prison population simply could not be as large as it is. While this does not make plea bargaining the cause of the soaring prison population, as such, it does make it an integral part of the mechanism that sends so many people to prison. In essence, the institution of plea bargaining facilitates the expansion of the rest of the criminal justice system.

Additionally, this project argues that plea bargaining is a cause of racial inequality within the prison population. By being increasingly more detrimental to defendants who are either poor or members of racial minorities, plea bargaining facilitates differential treatment by the criminal justice system of people along racial lines. Further, its necessity in the creation and maintenance of the large prison population makes it an important cause of this inequality. However, both because there are other causes of racial disparity in the criminal justice system, and because plea bargaining acts in concert with many of these other causes, it is also important to understand these other causes of prison size and inequality.

Prison Population and its Causes

The American prison system is enormous. By recent estimates, it houses 2.3 million people, or about 1 in every 100 adults (Warren 2008). If one also includes people controlled by the prison system, people on probation or released on parole, the number is closer to 1 in 30, or about 7 million (Wacquant 2008a). By any measure, both in terms of total numbers, and in terms of percent of the population as a whole, the United States houses more of its population in prisons than any other world power (Western 2006). Indeed, it has been noted that the only countries in history to out-incarcerated the United States are places like Soviet era Russia, apartheid era South Africa,¹ Khmer Rouge Cambodia, Nazi Germany, and perhaps China² (Adams 2004).

This is, for most commentators on all sides of the issue, an uncomfortable position for the United States to be in.³ However, understanding how this situation came to be is complicated. For the first three quarters of the 20th century, rates of imprisonment and total numbers of prisoners were relatively stable (Blumstein 1988, Irwin and Austin 1994, Mauer 1999, Western 2006). For that period, the rate of imprisonment hovered at around a tenth of a percent, or about 1 in 1000 adults, reaching as high as about 0.14 percent in the mid 1940s and as low as about 0.09 percent in the early 1970s (Id). In the mid 1970s, however, something changed and the rate of imprisonment began to rise steadily such that by the mid to late 1980s, the rate was approaching a quarter of one percent (Western 2006). Now, at the end of the first decade of the 21st century, the numbers are four times that (Warren 2008).

¹ The prison rate of Blacks in South Africa under apartheid was commensurate with the current overall rate in the United States. However, the rate that Blacks in America are imprisoned is on the order of 6 times higher than the rate that Blacks were imprisoned in South Africa. On the other hand, this does not account for Blacks relocated under the homeland system making the comparison difficult, at best.

² Data on China's prison population is difficult to come by. Official numbers are comparatively modest, though some commentators believe that the actual number may be an order of magnitude higher than the government reports and higher than the United States (Adams 2004).

³ For a contrary opinion, arguing that high prison rates have resulted in declines in crime, and that the benefits of doing so have outweighed the costs, see Scheidegger and Rushford (1999). It should be noted that the argument and supporting data in Scheidegger and Rushford are very one sided.

Indeed, since 1975, the prison population has increased every year (Pettit and Western 2004, Western 2006).

Exactly what changed is the subject of some debate. Part of the increase is clearly due to the so-called war on drugs (Fellner and Vinck, 2008, King 2008). The drug war expanded what activities constitute criminality as well as how much enforcement there would be. It also increased the severity of drug related sentences. From 1980 to 2008, the number of people incarcerated on drug related charges increased from about 40,000 to close to half a million (King 2008). However, while the war on drugs is an important factor, it is not the only factor. The half million people incarcerated for drug law violations represent only 20 percent of the total prison population. Moreover, the war on drugs does not account for the fact that prison rates for all crimes, not just drug related crimes, have been increasing steadily (Western 2006).

Commentators have noted several other reasons for the increase. The most important, and most commonly cited, is a change in the political climate in the 1970s away from rehabilitation and toward punishment (Blumstein 1988). The reasons for this change are numerous. Blumstein (1988), for instance, notes that these factors include, “the decline in faith in the effectiveness of rehabilitative correctional programs” (237), a reduction in the use of parole as a “safety valve” to keep prison populations under control, a generalized public sentiment demanding toughness against perceived criminals, and the coming of age of the Baby Boomer generation and increases in crime that came with it (see also Alschuler 1979). Additionally, Irwin and Austin (1994) ascribe the increase in incarceration, at least in part, to increases in economic disparity. Other explanations include high levels of violent crime (Blumstein 1982, 1993), harsher sentencing laws for non-violent crime than in other countries (Mauer 1999), and increased media reports related to crime (Scott 1975).

Finally, coupled with these social and perceptual changes in crime rates, many commentators cite basic federalist structures as an important reason why the United States' prison population has increased at a faster rate than in other industrialized nations (Jacobs and Kleban 2003).

Beginning in the 1970's there was a shift in the public's perception of the criminal justice system's role in society. According to Blumstein (1988), a series of articles in the 1970s argued that rehabilitation of prisoners was ineffective (Martinson 1974, Lipton et al., 1975, Sechrest et al., 1979), and this helped bring about a movement toward stricter law and order and away from discretion in sentencing. Additionally, policy makers, particularly conservative policy makers, began to look toward economic style neo-classical models (see e.g., Becker 1968) for forming the basis of social policy (Irwin and Austin 1994).

Propelling this movement toward punishment was an increased public fear of crime, which was fueled by increases in so-called “index” crimes, such as homicide, assault, rape, and theft, during the 1960s and 1970s (Blumstein 1988). Politicians used this fear as a political issue that, as Irwin and Austin (1994) point out, is a safe issue because “It is easy to cast in simple terms of good versus evil and no powerful constituency is directly offended by a campaign against street crime” (at 5). In the 1980s and 1990s, politicians used fear of inner city violence and the crack epidemic in a similar way (Kennedy 1997).

However, Blumstein (1988) argues that the United States may not be as exceptional in its willingness to incarcerate as some commentators contend. Suggesting that “comparisons between countries in terms of gross crime rates can [] be misleading” (235), he argues that it makes more sense to compare incarceration for particular crimes across countries. When he considered the number of prisoners per

murder, among a group of countries surveyed,⁴ the United States was sixth with 22.7 behind such countries as England with 66.8, Hong Kong with 55.6, and Singapore with 56.2. For number of prisoners per robbery, the United States was fifth on the list. That is to say, according to Blumstein, the United States' rate of incarceration is actually in line with other nations in terms of prisoner per crime.

However, this analysis may be misleading for several reasons. First, it is likely short sighted. The low number of people in prison per murder may simply be a reflection of the high number of murders compared to low levels of other violent and non-violent crimes. Indeed, the rates of robbery and burglary are lower than for England, Canada, and Australia (Liptak 2008). Additionally, Liptak notes that while the murder rate in New York is considerably higher, the assault rates in New York City and London are actually similar. This difference, according to Liptak, is likely attributable to the easy access to deadly weapons that exists in the United States.

In addition to increased incarceration for the so-called index crimes, the United States is unique in the western world in its willingness to imprison people for more minor infractions. Incarceration in other countries tends to be reserved for violent crimes, which is not the case in the United States (Liptak 2008). In the United States, people are regularly incarcerated for non-violent offenses such as passing bad checks that would rarely lead to incarceration in other countries (Id). As Blumstein notes, "The scope of the criminal law is sufficiently broad that almost everybody violates some aspect of it at some time in their lives; and a reasonable number of people, especially when they are young, violate some serious aspects with high frequency" (Blumstein 2004). Marijuana use, for instance, is decriminalized in many countries while in the United States it can be punished quite severely. Indeed, there are currently

⁴ The list appears to be arbitrary.

hundreds of thousands of prisoners in the United States incarcerated for non-violent marijuana crimes.⁵

Moreover, other studies have flatly contradicted the results reported by Blumstein. Mauer (1999) reports, in accord with Liptak, that other than murder, crime rates in the United States are commensurate with nearly all industrialized countries, except for Japan and Sweden. Thus, Blumstein's argument, while relevant on some level, must be seen as incomplete. In the United States, as noted, in addition to murder and robbery from Blumstein's survey, there are numerous crimes that are punished severely that are simply not punished in other countries. Thus, the low numbers in Blumstein's survey may not show that the United States is less punitive. Instead, they may show that its law enforcement is spread more thinly or that its law enforcement priorities are elsewhere (King 2008). Finally, there is no clear-cut method for evaluating crime rates across countries. This is in part because there are no standard definitions of crime, and in part because record keeping varies from place to place.

However, if one accepts Blumstein's argument and evidence that the United States is not more punitive than other countries, this begs the question of why the crime rate in the United States is comparatively so high. More specifically, it begs the question of whether the economic analysis of crime prevention is actually relevant. If

⁵ There is some discrepancy as to the number of people convicted on marijuana charges in prisons. On the one hand, there are large numbers of arrests of people on marijuana charges, on the order of 13 million since 1970. However, according to a pamphlet released by the federal government entitled "Who's Really in Prison for Marijuana?" only 1.6 percent of state inmates were incarcerated on only marijuana related charges, only 0.7 percent were in for mere possession, and only 0.3 percent were first time offenders. Moreover, the pamphlet suggests that many marijuana convictions are actually legal fictions in that people agree to plea guilty to marijuana charges rather than to more serious offenses. Thus, the major claim of the pamphlet is that it is traffickers who make up the bulk of the people incarcerated for marijuana (Robinson 2002). On the other side, according to the FBI's Uniform Crime Report (2008), in 2007 of the 1.8 million drug arrests made, 42 percent, or about 760,000 were for marijuana possession. This was actually a considerable decline from the previous year. Thus, three quarters of a million people were arrested in one year alone for marijuana possession (Id). To put this into context, if just those people were the sole occupants of American prisons, this alone would constitute a 300 percent increase in the prison rate over the 1900 to 1975 rate.

indeed the United States is commensurate with the rest of the world in how punitive it is, and even if the citizens of the United States engage in crime at a significantly higher rate than in other places, then this suggests that the calculus of whether to engage in crime is significantly different in the United States. That is, for a would be criminal deciding whether it is rational to engage in crime, assuming that Americans are not any more risk seeking than people elsewhere, and that the costs in terms of sanctions are similar to the rest of the world, then either legitimate, i.e., non-criminal, opportunities must be lower in the United States, or the value of the sanctions doled out by the criminal justice system must be perceived to be lower.

Both of these options hold consequences for the model in this project. In either case, a person engaging in crime is one for whom the consequences are of less concern than for others. That is, he is likely a person whose expectation from society is low, and, as a result whose bargaining position with regard to a plea bargain is similarly low.

In addition to explaining why prison rates are so large, there is a second task which is to specifically explain what changed such that they have grown so large since the 1970s. One of the leading explanations is simply that crime increased in the 1970s. However, this does not necessarily explain why this led to such huge incarceration numbers. Indeed, crime increased in other countries without the same prison rate increase (Liptak 2008), and increases in incarceration far outpaced increases in crime (Western 2006). Moreover, as crime rates dropped in the early 1980s and again in the 1990s, rates of incarceration continued to increase (Id). Perhaps the best explanation for this sort of American exceptionalism is that the United States is unusual among industrialized countries in that issues like who goes to prison, and for how long, are political issues (Jacobs and Kleban 2003). In the United

States, the people making decisions on issues of criminal justice are held more directly accountable by voters than in other countries. Legislatures make decisions on crime and punishment that are signed into law by elected executives. Moreover, elected prosecutors enforce the laws, and an often-elected judiciary oversees the implementation. Contrarily, in many European and civil law countries, bureaucrats make these sorts of decisions away from the whims of the electorate.

Coupled with this political structure, political scientists argue that the more conservative and/or Republican the government is, the more people tend to be incarcerated (Caldiera and Cowart 1980, Jacobs and Helms 1996, Sutton 2000). Indeed, conservative individuals, and those with less education, tend to favor incarceration as a method of dealing with crime. Further, numerous studies have found that there is an inverse correlation between how punitively minded a person is, and how much education he has (see Jacobs and Kleban 2003 for a short review). In surveys in the United States, people generally believe that incarceration is beneficial in reducing crime.⁶ Thus, one of the apparent causes of the prison explosion is a political movement that demanded it.⁷ Ironically, and tragically, the fact that mass imprisonment has been largely ineffective in reducing crime has been used as evidence that the criminal justice system was simply not tough enough.

⁶ The literature on whether incarceration reduces crime is all over the map, though for the most part the effect seems to be small if it exists at all. On the one hand, people argue that as prison rates have increased, crime has decreased. The reasoning for why these people think this is the case is in part that people in prison are unable to commit more crimes, and in part that the fear of prison prevents other people from doing it in the first place (Easterbrook 1992). The opposite side tends to argue that crime rates have also been falling in places like Canada where there is not a corresponding high rate of imprisonment, that the crime rate mirrors the economy more closely than the prison rate (Western 2006). Perhaps most controversially, it is argued that crime rates began falling approximately two decades after abortion was legalized (Levitt and Dubner 2005), suggesting that would-be criminals were, in essence, never born and thus unable to commit crimes.

⁷ This leaves open the question of why such a political movement came to be. The discussion is largely beyond the scope of this chapter. However, the answer likely lies in a political backlash against the counter culture of the 1960s.

At the same time that the conservative political movement began pushing for increased punishment, there was also a corresponding movement from the left to eliminate discretion from the criminal justice system. Commentators saw this discretion as inherently unfair and as a source for racial disparity (Mauer 1999). Predominantly orchestrated by people who were less disposed to a strict law and order policy, this movement acted to take away discretionary power from judges to set sentences and to remove the power to release from parole boards, both of which were perceived as being a source for discrimination (Blumstein 1988). The elimination of these powers, powers that according to Blumstein acted as a “safety valve” used to relieve prison crowding, rather than resulting in more evenhanded sentencing, ironically led to further increases in the prison population. Indeed, Blumstein argues that this shift, in taking away discretion from parole boards and judges, actually gave increased leverage to prosecutors who became largely able to set sentences for defendants without review. Through the use of plea bargaining, and as the only party in the criminal justice system left with near absolute discretion, prosecutors were able to determine what sentence a particular defendant would receive. Moreover, once a sentence was doled out, there was little that could be done to change it. Thus, due both to the structure of the government, and due to the reigning political philosophies of the last four decades, the prison rate in the United States was able to increase.

In addition to the general public’s view that increasing punishment is a proper way to deal with crime, there are also powerful interest groups that support the maintenance, and expansion, of the prison system. For many districts, prisons have become a source of economic growth. In fact, the prison system is one of the largest employers in the United States (Wacquant 2008a), and it is consequently a strong political player (Mauer 1999). Since many prisons are located in and provide jobs in

depressed areas, communities have organized around bringing new prisons in for the jobs they will provide (Staples 2004). Moreover, prisons increase the political power of rural districts in which they are situated because under census rules prisoners are counted as residents of the districts but are unable to vote (Id). Thus political power of these districts has been increased by effectively increasing the value of each non-inmate vote through an increase in the number of representatives in the area. Further, by lowering the per capita income of the districts, since inmates are not gainfully employed, it has also increased the federal funds brought into these areas. As an example, 30 percent of people who moved from New York City to upstate New York during the 1990s did so as prison inmates (Id).

Finally, it is generally true that people are much more likely to be imprisoned while they are between the ages of 18 and 30 (Pettit and Western 2004, Blumstein 1988, Farrington 1986). Indeed, the commission of criminal activity generally peaks around age 18 (Blumstein 1988). Thus, Blumstein (1988) argues that there was a correlation between the growing population due to the Baby Boomers and the growth in the prison population in the 1970s. However, while the coming of age of the Baby Boomers may have fueled the rise in prison populations to an extent, it does not explain why there was not a rise between 1962 and 1975 when the Baby Boomers were turning 18.⁸ Additionally, it does not explain why the rise in the prison population continued to accelerate after 1994 when the Baby Boomers had come of age and the number of 20 to 30 year olds began to decline. Indeed, not only did the prison population begin to grow, but the rate of imprisonment grew as well. Thus,

⁸ The exact demarcation of when the Baby Boom began is necessarily fuzzy. However, most commentators consider the boom to have begun between 1944 and 1946. Additionally, while it is even more fuzzy, the Baby Boom is considered to have ended somewhere between 1959 and 1964 (See US Census CB06-FFSE.01-2 2006).

while population growth can be seen to offer some explanation for the high numbers of prisoners, it does not explain rate growth, or even total growth very well.

As a final branch of theory, Marxists have tended to argue that prisons are used as a tool to house the unemployed, and thus prison populations would be expected to correlate with unemployment rates. However, research has not entirely borne this out. Indeed, a review of the literature by Chiricos and Delone (1992) found that only 60 percent of studies investigating this theory, out of 147 analyzed, found this correlation to be true.

Racial Disparity Among Prisoners – Drug Crime

In addition to simply being huge, the prison population in the United States is also remarkable in that it is incredibly unbalanced along racial lines. While the United States houses approximately 1 percent of its population in prison, and while statistically 1 in every 15 adults will go to prison at some point in their lifetime, this probability is not evenly split across racial lines (Warren 2008). Indeed, while 5.9 percent of white males (about 1 in 17) will face incarceration at some point in their lifetime, over 30 percent of Black males, or 1 in 3, will (Id). For Black men without a high school diploma, the number is 60 percent, or 3 in 5 (Western 2006). Overall, though only making up approximately 12 percent of the population, Blacks account for over 50 percent of those incarcerated (Tonry 1995).

There are numerous reasons for this disparity, however. The reasons given in the literature generally fall into one of two categories. The first of these relates to the war on drugs while the second focuses more on crime in general. This distinction makes some sense. The war on drugs alone accounts for over a fifth of the prison population. Further, the disparity within just this portion of the prisoner population is enormous even though drug use is generally even across races (Western 2006). What

that means is that a simple explanation that excludes a systematic failure of the criminal justice system is problematic. That is to say, an explanation that does not address why there is disparity in enforcement cannot explain the problem. On the other hand, rates of non-drug related crime, as far as most statistics indicate, are not even across races, generally being higher among African Americans (Blumstein 1982, 1993). Thus, in explaining why there are more Blacks incarcerated for index crimes than whites, commentators can point to these crime rate distinctions. However, these crime rate distinctions still do not account for all of the racial disparity in prisons (see *infra*).

Why the war on drugs has been so disastrous in terms of prison populations is a multifaceted question. Begun in the early 1970s by the Nixon administration, the drug war hit its stride beginning with the Reagan administration and continued through the George H.W. Bush, Clinton, and George W. Bush administrations (King 2008). In 1980, in the United States, there were approximately 2.6 drug related arrests for every thousand people, accounting for about 6 percent of all arrests made (Id). This was up slightly from 1970, but only by a relatively small amount. Within a decade, however, the annual number of arrests had more than doubled (Id). By 2007, the numbers were up to close to 2 million per year, or about 1 arrest for every 130 adults (FBI Uniform Crime Report 2008). In many cities, over 20 percent of all arrests are for drugs, and in places like Newark, Baltimore, and Chicago, the numbers are close to 30 percent, or higher (King 2008). In other cities, like Tucson and Buffalo, the per capita increase in drug arrests rose over 800 percent between 1980 and 2003 (Id). Additionally, as noted by King (2008) unlike for other crimes, arrests for drugs are rarely offense driven but rather are sought out by law enforcement. In

other words, arrest rates reflect law enforcement priorities, not necessarily actual crime rates.

Perhaps more important than the total number of arrests in the war on drugs is the breakdown in the number of arrests along racial lines. In 1980, Blacks were arrested on drug related charges at a rate of 684 per 100,000 people (about 0.7 percent) while whites were arrested at a rate of 387 per 100,000 (King 2008). As skewed as that was, by 2003 this disparity had expanded considerably. In 2003 whites were arrested at a rate of 658 per 100,000, an increase of 70 percent, and still lower than for Blacks a quarter century earlier. Blacks, on the other hand, were arrested at a rate of 2221 per 100,000, an increase of 225 percent over 23 years (Id).

In terms of incarceration, the numbers are seemingly worse.⁹ The vast majority of people entering prison for drug violations are low level dealers or users (Fellner and Vinck 2008). In New York, for instance, in 1998, 63 percent of new admittees to prison were admitted for low level drug crimes, 37 percent of those being for mere possession (Id). According to a Human Rights Watch report, a survey of state prisoners showed that 58 percent of prisoners incarcerated for drugs had no history of violence or of high level drug activity (Id). Nationwide, in 2003, Blacks made up more than 50 percent of the people entering prison on drug charges (Id). In addition, Black men were nearly 12 times more likely than white men to be incarcerated for drug violations, and among men entering prison, nearly 40 percent of Blacks were doing so because of drugs while only 25 percent of whites were (Id).

Accurate absolute numbers of prisoners are difficult to come by. However, of 34 states reporting data to the National Corrections Reporting Program, state prisons admitted 111,247 adults for drug related crimes in 2003. Of these, 59,535, or 53.5

⁹ It is worth a note that being arrested and not being incarcerated does not necessarily represent a case in which there is no penalty. Even a misdemeanor record for drugs can have serious repercussions.

percent were Black while 37,003, or 33 percent were white. At the high point, Blacks in Wisconsin were over 42 times more likely to be incarcerated than whites on drug charges (Id). While Illinois was slightly less skewed than Wisconsin with Blacks being only 24 times more likely to be incarcerated than whites for drugs, in absolute numbers, Illinois had the highest per-capita rate of drug imprisonment, admitting over 0.6 percent of its population to prison on drug related charges in 2003 (Id).

What is perhaps most curious about these facts is that drug use has been reasonably steady since 1980 (Fellner and Vinck, 2008, Western 2006). Moreover, drug use across races is generally even (Western 2006). That is, Blacks and whites use drugs at roughly the same rates as each other, and at roughly the same rate they did before the start of the war on drugs. Indeed, by some measures, whites actually use drugs at higher rates than Blacks (Id). Additionally, people who deal drugs often arise from the ranks of drug users and tend to service people in their immediate community. In other words, drug dealers tend to look, in terms of demographics, like their customers (Fellner and Vinck 2008). Thus, there is no inherent reason that Blacks should be so over represented in the criminal justice system.

According to data from the Department of Health and Human Services, while Blacks account for approximately 12 percent of the population, they account for approximately 8 percent of people who have used powder cocaine,¹⁰ and 13 percent of those who have used any illegal drug (SAMHSA 1998). From a 2007 Centers for Disease Control survey of high school students, 7.4 percent of white students had tried cocaine compared to 1.8 percent for Blacks. Marijuana and heroin use rates were both close (38 percent versus 39.6 percent, and 1.7 percent versus 1.8 percent.) However, whites had tried methamphetamine at nearly a two and a half time higher rate than Blacks (4.5 percent versus 1.9 percent.) Current cocaine use was also higher among

¹⁰ Blacks account for 22 percent of people who have used crack cocaine.

white high school students (3.0 percent versus 1.1 percent) (Centers for Disease Control 2008).

This, of course, begs the question of why incarceration numbers for drug related crimes are so skewed? The model in this project argues that part of the reason rests with the plea bargaining system. However, there are other explanations as well. Indeed, plea bargaining cannot act alone, but instead acts in concert with the entirety of the criminal justice process. Plea bargaining, in the model, is an institutional construct that facilitates, perpetuates, and exaggerates other inequalities in the system brought about through factors from simple racism, to social and structural characteristics. With plea bargaining in place, other factors, actions, and institutional structures that lead to inequality are able to continue. Without it, many of them likely would not.

These other factors are numerous. First, at the base level is simple racism. Cole, noting that intent is notoriously difficult to prove, shows numerous examples of laws and practices that, if not racist in their intent, certainly are in their results (Cole 1999). For instance, Cole notes the case of *United States v Bell* (86 F.3d. 820 (8th Cir. 1996)) where a Black male, Theophilis Bell, was arrested for riding his bicycle after dark without a headlight in Des Moines, Iowa. In a search incident to the arrest, the arresting officer found drugs on Bell, arresting him for possession with intent to sell. Bell argued that the stop, which the officer admitted was a pretext, was an equal protection violation noting that 98 percent of bicycles in Des Moines were without headlights, and that every person stopped for the same violation in the preceding month had been African American. Noting that, “The Equal Protection Clause precludes selective enforcement of the law based on race,” the court, as Cole put it, “dismissed the claim on the grounds that Bell had failed to prove that white people rode their bikes after sunset” (Cole 1999: 41).

On one hand, Bell was committing two crimes, one of which was visible. On the other, it is also clear that the police were not in the suburbs searching white people on bicycles. It is also clear that, while the court was, perhaps legitimately, concerned that Bell was in a “high-crime area,” since drug use is actually equal across races, Bell was perhaps no more likely than a white person in the suburbs to be carrying drugs. That is, the fact that Bell had drugs does not make the search *not* race based.

The example is not isolated. The Supreme Court has held that traffic stops, even when conducted by officers with no authority to make them, are constitutional (*Whren v. United States*, 517 U.S. 806 (1996)). This, Cole notes, has allowed police to search nearly anyone, using traffic violations as a pretext. In one county, a study found that 5 percent of drivers on a particular highway were dark skinned, while 70 percent of those pulled over for traffic violations were Black or Hispanic, as were 80 percent of those whose cars were searched (Cole 1999). In another case, in a county in Colorado, after having a case thrown out when “Black” was found to be an explicit factor in drug courier profiles used by police in determining what cars to stop, the sheriff, a court found, “[W]ent from being a Drug Task Force officer who went for days at a time without ever concerning himself with traffic violations, to a drug enforcement officer obsessed with traffic enforcement” (*United States v. Layman*, 730 F.Supp. 332, 337 (D.Colo. 1990)). In that case, the lawsuit against the sheriff was successful. However, this case is clearly an exception. These examples are all anecdotal, and thus do not prove a racist system. However, familiarity with the criminal justice system shows a long history of, at best, racial profiling, and at worst outright racism (see generally Kennedy 1997).

A second factor, as will be explored more fully below, is that non-drug street crime rates are higher among African Americans than whites (Blumstein 1982, 1993). Additionally, for numerous historical and sociological reasons, African Americans

tend to live in racially homogeneous, densely populated urban areas (Massey and Denton 1993). From a law enforcement perspective, this means that policing these areas, and thus policing these areas for drugs, is more efficient in terms of manpower than policing suburban and rural areas which have larger white populations (King 2008).

Third, and related to the previous point, drug sales in urban areas tend to be more in “open air” markets. Conversely, drug sales in suburban and rural areas are more often made via word of mouth, and they tend to occur behind closed doors. The reasons for the distinction, according to Tonry (1995), have to do with the close knit nature of blue collar and middle class white neighborhoods, as opposed to the more chaotic nature of poor Black inner city neighborhoods. Further, Tonry notes that with the increases in the number of Hispanic and Black police officers in recent years, it is easier for undercover police officers to penetrate these open air markets. He notes that a stranger trying to buy drugs on the south side of Chicago would fare much better than one making the same attempt in Highland park, a wealthy northern Chicago suburb.

Furthermore, in the 1980s, open air drug markets happened to be located near landmarks and tourist attractions in cities like Washington D.C. and Los Angeles. This proximity, according to King (2008), brought political attention to drug sales, and gave the public a perception, incorrect as it turns out, that these markets represented the majority of drug sales. Based upon this publicity, there was public outcry and a political will to do something about it. Further, because these open markets were easier to infiltrate than more secretive drug markets taking place behind closed suburban doors, they represented a way for law enforcement to appear effective.

Finally, in large part because the criminal justice system is politicized, the political actors in charge of the system must show popular results (King 2008). For

police departments, this means arrests. For prosecutors it means convictions, and for judges it means sentences. There are few powerful interest groups looking out for poor Blacks, and in the political climate of the last 40 years, policies that do so have been repeatedly labeled as discriminatory against whites (see, e.g. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). Thus, institutional and market forces have pushed enforcement in efficient, in terms of cost per arrest, directions which have taken advantage of the greater socio-economic climate.

Racial Disparity Among Prisoners – Other Crime

Drugs, of course, are only part of the issue. Of those incarcerated, only about 20 percent of inmates are serving time for drug law violations. This leaves the other 80 percent of prisoners whose numbers are equally disproportional along racial lines. Further, the scope of this disproportionality along racial lines is a recent development. According to Irwin and Austin (1994), in 1926, blacks only accounted for 21 percent of prison admissions. By 1970 it was 39 percent, and by 1989 it was 46 percent (Id). This raises the questions of not only why is everything else so unequal, but also why is the rate of inequality increasing?

Exploring the reasons why Blacks make up such a large share of the American prison population is, in some ways, the third rail of American criminology. According to Tonry (1995), the topic of the interrelation of crime and race was avoided by scholars for two decades after the publication of Daniel Patrick Moynihan's *The Negro Family* (1965) “because of fierce attacks on Moynihan for 'blaming the victim' and perpetuating negative stereotypes of blacks” as well as fear of being labeled as a racist (viii). Indeed, even into the 1990s the rate of research on the issue progressed at what Tonry describes as “a trickle.” In general, however, the research that has been conducted by criminologists has found the primary answer to the question of why

Blacks make up such a large percentage of the prisoner population to be that Blacks commit crime at higher rates (Blumstein 1982, 1993).¹¹ As with any complex social question, the reasons given are partial, and politically controversial. Indeed, it may well be that explanations for any political and controversial situation are necessarily political and controversial.

In a 1985 paper investigating the reasons for the disproportionate number of Blacks in American prisons, Langan states, “The results ... suggest the following conclusion: the over representation of blacks among offenders admitted to state prisons occurs because blacks commit a disproportional number of imprisonable crimes.” Despite the certitude of Langan's conclusion, a look at his methodology, as well as his results, suggests that while differential crime rates explains some of the disparity, it by no means explains all.¹² To begin, Langan bases his estimates of crime on victims' accounts as described in police records. Leaving aside the issue of the honesty of victims, and the history of racism and false accusations against Blacks by whites,¹³ Langan's estimate still fails to account for many types of crime.

For instance, culling the police reports from crime victims will likely not turn up many cases of white-collar theft. However, according to a 1970s era U.S. News

¹¹ Other disciplines have focused more on unequal enforcement of the criminal law (Cole 1999).

¹² Even if Langan's conclusions are 100 percent correct, and that differential crime rates explained differential imprisonment rates, it would not begin to explain the differential crime rates. As Anatole France famously put it, “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread” (France 1894). This is to say, differential crime rates should not necessarily be seen to justify differential prison rates, particularly of the nature seen in the United States. Indeed, the social science literature exploring this issue is extensive. However, and unfortunately, it is well beyond the scope of this project to delve deeply into this topic.

¹³ Perhaps the most notorious, though certainly not the only, case of this is that of the Scottsboro Boys, a 1930s case where 9 black men were repeatedly tried and sentenced to death for raping two white women whose accusations were, according to nearly every commentator, clearly untrue (see Kennedy 1997). This is but one example, but the commonality of such accusations is a common theme running through the literature. Indeed, Justice Holmes once informally suggested, in a letter arguing that concern over the fate of Sacco and Vanzetti was misplaced, that the prevalence of such cases was in the thousands (see Cover 1982). For a listing of more recent examples, see Russell (1996).

survey of the cost of crime cited by Scott (1982), “organized crime and business and property losses account for almost 2 out of every 3 dollars of the nation [*sic*] crime bill.” Further, “robbery plus theft crimes,” which Scott suggests are associated with Black perpetrators, cost about \$3 billion per year compared to “kickbacks,” associated with white perpetrators, which cost nearly \$5 billion (19). Indeed, according to Scott, the crimes that turn up in reports such as the FBI Uniform Crime Report are nearly all crimes “usually associated with Black, poor, and racial minority persons” (19). Thus, owing to the economic stratification along racial lines, one could presume that even if whites participated in “theft” as often as Blacks, that victims' statements would not indicate this to be the case.

Moreover, though there are many studies, there is little consensus on the amount, or cost of white-collar crime as compared to street crime. The studies that exist focus almost entirely on one or the other (see e.g., Czabański 2008, Cohen 2005). However, Shover, noting that reliable data on white collar crime is particularly difficult to come by, states that, “No one seriously disputes that white-collar crime exacts a heavy aggregate financial toll, one that dwarfs comparable losses to street criminals” (Shover 1998: 139). As examples, the I.R.S. estimates that tax evasion alone cost the federal government \$345 billion in 2007 (Kaufman 2007), and Becker notes on his weblog that 50 percent of farm income, and 40 percent of business income, are not reported (Becker 2007). Additionally, noting that the estimate ignores regulatory fraud and many infractions that are settled in civil court but that still might be considered fraud, Cohen (2005) still estimates the cost of fraud alone at over \$800 billion yearly. In comparison, cost of street crime has been estimated to cost society anywhere from \$19 billion to \$450 billion in 1996 dollars (Cohen 2005). That is, even at the high end of the estimate for street crime, the cost of white collar crime swamps the cost of street crime. Additionally, according to Shover, white-collar crime may be

particularly “wide reaching and destructive” because, “[I]t violates trust ... lower[s] social morale ... and ‘attack[s] the fundamental principles of American institutions’ ” (Shover 1998: 140, quoting Sutherland 1949: 10). Indeed, the recent global economic calamity can be seen as a perfect example of this phenomenon.¹⁴ Moreover, it is clear that its effect is more far reaching than that of street crime.

That being said, even starting with such a biased sample, using victim’s accounts, Langan still only accounts for slightly more than 80 percent of the racial stratification in prisons. That is, a methodology biased to finding that prison stratification is legitimate still did not find this to be the case.

More robust research into the topic, though research still suffering from some of the same biases as Langan’s, has also been conducted by Blumstein. In 1982, and again a decade later (1993), using several different methodologies, Blumstein attempted to determine how much of the racial disparity in the prison system was a result of differential crime rates (Blumstein 1982, 1993). In his 1982 paper, arguing, “If ... the disproportionality [in prison populations] results predominantly from some legally relevant difference between the races, such as a corresponding differential involvement in crime, then the charge of ‘racism’ [in the administration of the criminal justice process] would not be justified” (1261). Blumstein notes several such differences. First, Blumstein compared the arrest rates of Blacks and whites to their respective incarceration rates. Doing so, he found that differential arrest rates could account for 80 percent of the disparity in prison populations. That is, rather than

¹⁴ The argument can be made that much of the activity that brought about the recent economic downturn, a downturn that to date has cost over \$11 trillion in household wealth in 2008 (Bajaj 2009), was in fact legal. However, while legal, much of it was not actually legal until recently. Moreover, the fact that the rules making it legal were written by many of the parties involved still suggests that in terms of behaving in an immoral way, people across all races and classes do so. For more of this sort of argument, see generally Reiman (2001).

comparing victims' reports to prison populations like Langan, Blumstein instead compared arrest rates.

However, there is no reason to think that arrest rates would be any less biased than victims' reports. Indeed, there is every reason to think that they might be even more biased. As previously noted, the density of Black neighborhoods makes patrolling them less costly for police. Moreover, media coverage of the existence of open air drug markets provided public support for these patrols. Indeed, racial profiling, whether engaged in consciously, for efficiency reasons, or due to internal biases, is common nationwide (Cole 1999, Kennedy 1997).

Further, in attempting to explain a portion of the other 20 percent, Blumstein posits that, "[J]ust as blacks are disproportionately represented in the most serious offense *types*, it *may be* that they are also disproportionately represented among the more serious versions *within* each of the offense types" (Blumstein 1982 at 1268, italics in original). This is not to say that Blumstein is unaware that there may be racism in the criminal justice process. Indeed he suggests that it may account for some of the 20 percent otherwise unaccounted for in his study.

Furthermore, Kennedy (1997) offers a strong defense of the argument that Blacks commit more street crime than whites and thus make up a larger proportion of the prison population. He claims that, "The proposition has ceased to be controversial among most careful students of crime in America" (22 note*). Stating that, "Racially discriminatory arrests and investigations probably do play some small role in the racial demographics of crime statistics," Kennedy nonetheless argues that "[R]elative to their percentage of the population, blacks commit more street crime than do whites" (22). In support of this contention, however, Kennedy simply presents evidence of arrest and incarceration rates. Additionally, he claims that incarceration rates are a relatively

good measure of criminal activity since, “[T]he processes that surround convictions and plea bargains, albeit far from perfect, are still more protective than those which surround mere arrests” (23). Besides the fact that it is circular in assuming its own justification—Blacks commit more street crime and thus make up a larger percentage of the prison population as evidenced by the fact that Blacks make up a large proportion of the prison population—Kennedy’s argument is overly simple. It assumes that some increased level of street crime is enough to justify any level of prison disparity, which is simply not the case. Further, it fails to account for why “street crime” should be the metric with which to measure prison populations. That is, Kennedy fails to explain why if Blacks and whites, due to their relative socio-economic situations, commit different types of crimes and yet commit crimes in similar proportions, one sort of crime should form the basis for imprisonment at such a higher rate than the other.

Finally, Western (2006) presents data that, in part, contradicts the concept of high Black crime rates. In an analysis of self reported involvement with crime in the National Longitudinal Survey of Youth, Western found that in youth age 15 to 18, crime rates were actually higher among poor whites than poor Blacks. For instance, while 17 percent of poor white youth had attacked someone with the intent of hurting or killing them, this was only the case for 13.8 percent of Blacks. Similarly, whites had engaged in theft (17.3 percent to 12.9 percent), vandalism (14.6 percent to 8.5 percent), and drugs (8.8 percent to 5 percent) at higher rates than Blacks.¹⁵ The respondents in Western’s data were poor which suggests that even if crime rates are not higher for poor Blacks than poor whites, owing to the correlation between street crime and poverty, and the fact that Blacks are more likely to be poor than whites,

¹⁵ Western compares this data to data from the same survey from 20 years earlier to show that crime is decreasing, and that the decrease is not caused by the increases in imprisonment.

Blacks may still be more likely to engage in street crime. However, poverty rates are approximately three times higher for Blacks than whites (US Census CB04-144 2004) while incarceration rates are closer to 12 times higher. That is, if Western's data is a correct representation of involvement in crime, it casts doubt on the conventional wisdom of "careful students of crime in America."

Interestingly, Blumstein (1982) notes two factors that actually favor Blacks in the criminal justice system. The first is research from LaFree (1980) showing that the victim's race influences the sentence doled out to perpetrators, with perpetrators of crime against Blacks receiving comparatively shorter sentences. Since, as Blumstein notes, the victims of Black offenders tend to be Black, this should mitigate sentences for Black defendants. Additionally, Blumstein notes that sentences for urban offenders tend to be shorter than for rural and suburban ones. Since there are also positive correlations between urban arrestees and African Americans, this should again mitigate against prison disparity. Thus, these factors may suggest that, holding everything else constant, the 80 percent of sentence differentials accounted for by arrest rates is an overestimate.

To investigate this further, Blumstein broke down the arrest and incarceration rates by crime type. In general, as the crime became less serious (i.e., robbery is less serious than murder), the disproportionality in arrest rate and conviction rate became larger (Id). Blumstein posits that this may be related to the increasing amount of discretion with regard to criminal prosecution as crimes become less severe. That is, there is not a lot of discretion in whether or not to fully prosecute someone for murder while there generally is for lower level crimes. This discretion, for Blumstein, allows for disparate handling of cases with regard to race. Indeed, this sort of discretion, used in a biased manner, is what this project's model predicts.

Additionally, Blumstein did consider whether racism in arrest rates might be responsible for the disparity in prison populations. To do this, Blumstein compared arrest rates against victim reports. He notes research by Hindelang (1978) which shows a relatively high correlation in the racial demographics between arrest rates and victims' accounts of perpetrators. On the high end, for robbery, for instance, 62 percent of victims reported Black robbers and 62 percent of those arrested for robbery were Black. On the low end, 39 percent of rape and aggravated assault victims reported Black assailants while 48 percent of arrestees were Black. Earlier data also from Hindelang (1976) showed similar, if not less disparate, results.

Finally, in his 1993 follow up paper, noting that the growth in prison populations since his paper a decade earlier was “astonishing,” and noting that, drug arrests aside, the racial proportions in prison were largely unchanged, Blumstein argues that “differential involvement by blacks in the most serious kinds of crime” accounts for the majority of the disparity in prisons (759). Blumstein does note that racism in the criminal justice process does indeed exist, and that it does matter. However, it is clear that he views the crux of the issue to lie with the crime rate itself.

A second line of research into the racial disparity in prisons has focused on sentencing differentials by race. While the anecdotal evidence, at least historically, of sentencing bias is clear,¹⁶ literally hundreds of studies have been conducted to answer the question of whether sentencing bias still exists with no consensus emerging. In an early review of the literature, Kleck (1981) examined 57 such studies and found that 26 of the studies found no sentencing bias, 15 showed bias, and 16 were inconclusive. Indeed, Hagan's 1974 review of the literature found that most of the studies that did

¹⁶ For instance, between 1930 and 1964, 67 men were executed for rape in 6 southern states. Every one of the 67 was Black (Langan 1994).

show race based differentials used poor controls or statistical techniques that were inappropriate (Hagan 1974).

In order to try to overcome these concerns and answer the question of whether racial discrimination in sentencing is a result of sentencing disparity, researchers have applied increasingly sophisticated statistical methods.¹⁷ Thomson and Zingraff (1981) attempted to sort data by years, and found that while there had been little differentiation in sentencing by race in the early 1970s, by later years such differentials had emerged. To look at the same question, Spohn et al. (1981) used a dataset comprised of a particularly large number of cases and charges. While Spohn et al. did find that Blacks receive harsher sentences than whites, when they controlled for such factors as charge, prior record, and extra legal factors such as the type of attorney, the type of plea, charge reductions, and pretrial bail status, they found that there was little correlation between race and sentencing. In a particularly ambitious study, Kramer and Steffensmeir (1993) analyzed data they describe as being “exceptionally *well-suited* for a study of imprisonment decisions” (358: italics in original). The authors justify this statement on the grounds that the data is particularly complete in terms of demographics. In that study, the authors found that the severity of the crime and the criminal history of the defendant are strongly correlated with sentence length, and that race is weakly correlated at best (Kramer and Steffensmeir 1993).

A flaw in many of these studies, however, is that they fail to account for differential charging, or even charge bargaining. That is, it may be that Blacks and

¹⁷ It should be mentioned that few, if any, of these studies note where sentencing decisions are made. As has been covered, over 90 percent of cases are decided by guilty plea, and generally prosecutors make sentencing recommendations. While judges are not required to follow these recommendations, in the vast majority of cases, they do. The reason for this is that judges benefit from plea bargains, and if a judge refused to follow a prosecutor’s recommendation, the prosecutor would have trouble making deals in future cases.

whites receive the same sentences for particular crimes. However, if the same activity does not result in the same charge, then a bias could exist, yet it would not show up in these studies. Moreover, even if charge bargaining is accounted for, this still does not account for differentials in initial charges. That is, if a prosecutor knows that she is able to convict Black defendants more easily than white ones, it is likely that she will charge them with greater crimes than the white defendants in the first place. Again, this would not show up in the studies of sentencing differentials.

Indeed, in contrast to the above studies, using a different technique, Miethe and Moore (1986) did find race to be an important factor in sentencing. Noting that, “[I]f defendants become more sociologically homogeneous as they move through successive stages of criminal processing, failure to control for this selection process may mask the impact of race and other extralegal factors on sentencing decisions,” Miethe and Moore (1986: 218) suggest using race specific models to tease out such issues. That is, the authors suggest that models that account for discrimination that occurs in the criminal justice system before the sentencing phase may be more reliable than models that only examine the outcomes. Using their methodology, the authors found several race specific effects on sentencing. For instance, being single was a significant risk factor for Blacks, while the utilization of a public defender was significant for whites. Additionally, when compared, while white and Black defendants were within about 4 months of each other on expected sentences, “low-risk” Blacks fared better than “low-risk” whites, while “high-risk” Blacks fared much worse than “high-risk” whites. Finally, and most important for the model in this project, in the Miethe and Moore model, Blacks were found to have a 4.2 percent less chance of receiving a bargained sentence. However, in using the race specific models, Miethe and Moore found that while the likelihood of a negotiated sentence was equal for Black and white “low-risk” offenders, for “high-risk” offenders, “black felons are

... far less likely to receive this concession than a ... white felon” (Miethe and Moore 1986: 228). Indeed, the authors found that expected sentence lengths for Black “high-risk” felons were over 40 percent higher than for white “high-risk” felons. By considering pre-sentence factors, Miethe and Moore’s study is particularly relevant for the model in this project. It is one of the only studies to consider that race could be a factor in such aspects as what charge a defendant is charged with.

How Plea Bargaining Fits In

To conclude this section, it is worth reiterating what this all has to do with plea bargaining. First, while crime, according to Blumstein and others, may account for as much as 80 percent of the racial disparity in prison populations, plea bargaining helps explain the rest. According to the model in this project, plea bargaining is increasingly detrimental to people as their bargaining position deteriorates. A population of people routinely harassed and profiled by the police as being criminals, whose neighborhoods are scrutinized more for behavior that occurs in equal amounts in other neighborhoods, and who are simply expected by authorities to behave as criminals, are in such a position. Second, plea bargaining is argued to be in part responsible for increasing prison populations. Even with the other reasons given, none could have caused the increase without plea bargaining as plea bargaining gives the opportunity for low cost prosecution. Without the cost lowering influence of plea bargains on the criminal justice system, there is simply no way that the system could come up with the resources to funnel so many people through.

Chapter 6 – Institutions and Context-Bound Rationality

This short chapter seeks to couch this project’s model of plea bargaining in the theoretical underpinnings of the new institutionalism. Like the plea bargaining models presented in the economics literature, this project argues that rational choice is indeed the foundation to decisions made by defendants in the plea bargaining process.

However, instead of a mere cost benefit analysis, this project argues that parties make decisions based on subjective perception and within context specific boundaries, what Nee and Ingram (1998) refer to as “cultural beliefs and cognitive processes embedded in institutions” (30).

Plea bargaining can be modeled as social exchange in which a perceived lighter sentence is given in exchange for self-conviction. While the decisions made by defendants in the course of plea bargaining may be rational, they are rational within bounds. These bounds are norms and laws that enforce plea bargaining. Moreover, owing to America’s divided racial history, these norms differ for different racial groups, which leads to differential decision making and thus differential bargaining power. Contrarily, the economic models of plea bargaining do not account for these different norms, and they instead assume that defendants make simple utility calculations (see chapter 4).

Institutions and the Limits of Rational Choice

Rationality forms the basis of both neoclassical economics as well as the new institutionalism. For neoclassical economics, it means the self-interested pursuit of welfare maximization through purposive action, and it is viewed as existing within infinite bounds. Economic theory assumes that a person will make choices to maximize his own welfare, and that his choices will be in his self interest (Posner

2003, Becker 1968). Context bounded rationality as the foundation of new institutionalism builds on this proposition. However, it argues that people are not able to make simply any decision they want, or sometimes even a maximizing one, due to an external limitation on their decision set (Nee 2005, Ingram 1998, Macy and Flache 1995). Instead, decisions are constrained by institutions. Beyond simply limiting decisions, the function of these institutions is to provide structure to everyday life. As Nee (2005) points out, economic theory rarely considers markets at all, instead merely assuming their existence. For new institutionalists, the structure of markets is important.

The institutions at the core of the theoretical framework of the new institutionalism, are “[S]ystems of interrelated informal and formal elements ... governing social relationships within which actors pursue ... [their] interests” (Nee 2005: --, italics removed). These interests are pursued through social exchange (Homans 1974). Additionally, “Institutions are social structures which provide a conduit for collective action by facilitating ... the interests of actors” (Nee 2005). Thus, institutions are structures such as formal laws and informal norms that facilitate social interaction by limiting the possible avenues those actions can take. Additionally, institutions are dynamic structures, adapting to the decisions they constrain. Finally, institutions are formed by aggregating decisions made by actors seeking a maximum reward (Homans 1974). Indeed, Nee notes that “[W]hen formal rules are at odds with the interests and identity of individuals ... [the institutional structure] predicts the rise of opposition norms” fueled by self interested actions (32).

For many economists, norms are little more than unaccounted for transaction costs (Williamson 2000). Indeed, Coase argues that transaction costs facilitate the creation of social structures as a way to reduce those costs (Coase 1937). Further, he maintains that, in the absence of transaction costs, people would bargain their way

around inefficient institutional structures thus leaving transaction costs as the genuine constraint to choice (Coase 1960).¹ However, the new institutionalism argues that social structure is more pervasive, and more important than simply being transaction costs. Instead, as Nee and Ingram (1998) argue, “It is by structuring social interactions that institutions produce group performance, ... even over entire economies” (19). Thus, according to Nee (2003), while “Actors are motivated by interests and preferences” (28), these interests are “context-bound” (28) meaning that the decision set is limited by the very institutional structure the interests and preferences created.

However, the scope of these constraints to rationality is not as clear cut as simply showing ways that certain choices are unlikely, or cost prohibitive. Instead, these institutional constraints range from cognitive processes (Nee and Ingram 1998) to formal and informal social structures to economic structures inherent in micro-economic systems themselves (Nee 2005). Moreover, the constraints include institutions that limit uncertainty by constraining the decision set. In this regard, sociological theory offers something beyond economic theory, which is an explanation of how social structures can be used to mitigate uncertainty. That is, because uncertainty is, by definition, beyond the realm of cost, it cannot be accounted for through cost-benefit analysis. Thus, context bound rationality exists, but it is distinct from cost-benefit analysis structure (North 1990).

Noting that the distinction between formal and informal rules is one of degree, North suggests that formal rules are “rules that human beings devise” (North 1990: 4). Informal rules, or norms, are the “rules that emerge from social forces” (Ellickson

¹ There is a seeming contradiction to these conceptions of transaction costs -- the earlier stressing the importance of structures and the latter stressing the benefits of markets in escaping inefficient structures -- which Guido Calabresi has attributed to Coase being a young socialist in 1937 and a middle aged libertarian in 1960 (Calabresi 1991). Coase, saying he himself did not know what motivated his ideas, considered this to be as good of an explanation as anything else (Coase 1996).

1991:127, see also Nee 2005). Norms are significant because “deviation from [them] within a given social group will result in ... disapproval” (Weber [1922] 1978: 34). Finally, as North notes, while people in developed nations more often think of formal rules such as laws and rights as the more important, informal norms are perhaps more pervasive (North 1990). Indeed, in explaining why it is that informal norms are so much more pervasive than formal rules, Eric Posner suggests, “Most people do not know much about the law [and] do not allow what they do not know to influence much in their relations with other people” (Posner, E. 2000: 15).

As noted, one of the central functions of institutional constraints as part of sociological structure is that they mitigate against uncertainty (North 1990). Uncertainty, as defined by Knight (1921), is distinct from risk in that risk defines a probability where as uncertainty does not. Risk defines some probability that some event will occur which allows a decision maker to calculate choices (see Figure 6-1). Uncertainty, on the other hand, lacks a well defined probability function such that calculated decision making is impossible (see Figure 6-2), representing a situation for which a rational cost-benefit analysis cannot be done. That is, exactly what makes something uncertain is that one cannot know the costs or the benefits of choosing one thing over another.

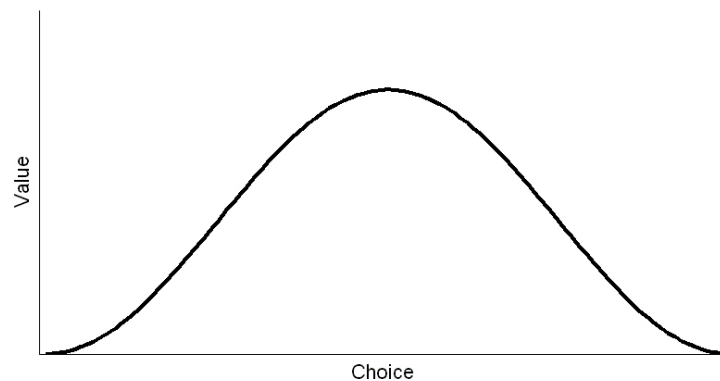


Figure 6-1, An event with risk but no uncertainty

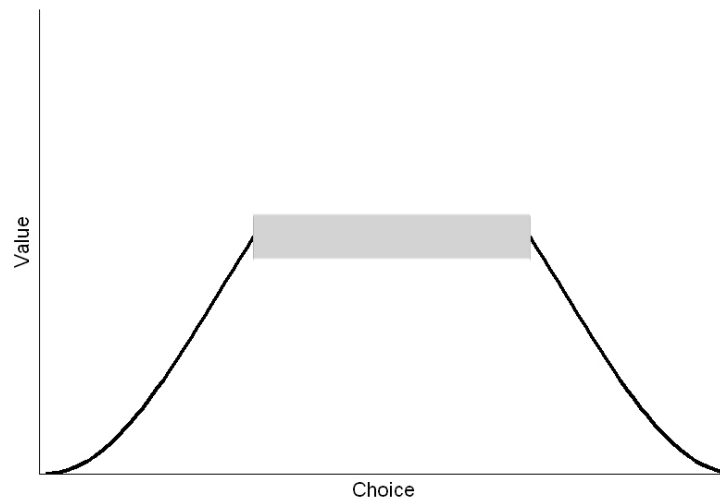


Figure 6-2, An event with risk and uncertainty

However, a person can make a rational decision if there is a structure between the uncertainty and the decision maker that limits choices to within certain bounds in such a way that those choices are rational. Additionally, the constraints which reduce uncertainty by removing from a choice set possible uncertain outcomes can be said to exist outside of rational choice structure. In essence, institutions lend bounds to decisions. By reducing possibilities, these bounds reduce uncertainty in outcomes. Thus, by inserting an institutional structure in between decision makers and decisions as a way to constrain choices, people are able to make rational decisions across the limited decision set because, one can better assess a probability to any particular choice eliminating uncertainty from the choice (Figure 6-3). However, while the uncertainty still exists, it is excluded from the possible choices a person can make. Similar to a river which flows faster when the banks are narrower and slower when the banks are wide, "The more unconstrained the environment, through lack of an effective artifactual structure, the more difficult it is for people to make choices or to implement their choices in effective ways" (North 1990: 8). Thus, it is through sociological structure that uncertainty is resolved.

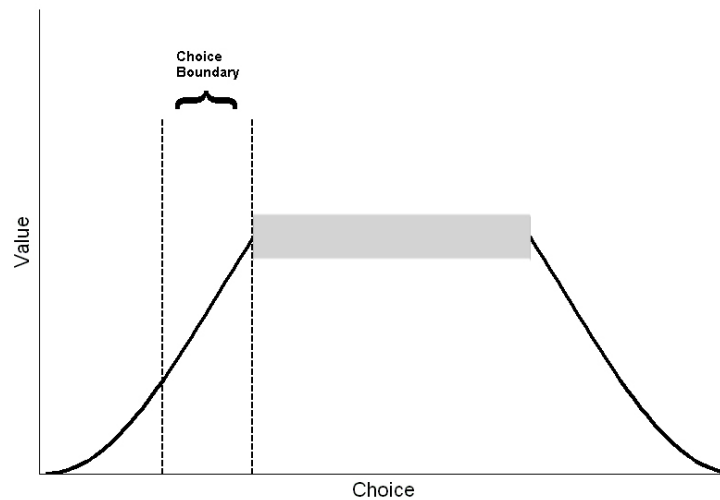


Figure 6-3, A constraint which eliminates uncertainty from the choice set

Finally, changes to institutional structures are path dependent. These changes come about due to purposive action engaged in due to the preferences of organizations and individuals (Nee 2005), purposive action that is nonetheless constrained by the existing institutional structure (Burt 1992). These purposive actions of individuals are encouraged and discouraged through rewards and punishment doled out by the institutional structure (Nee and Ingram 1998). Moreover, “When the formal norms of an organization are perceived to be congruous with the preferences and interests of actors in subgroups, the relationship between formal and informal norms will be closely coupled” (Id: 33, italics removed). That is, when actors operating in an institutional environment’s preferences are in line with the formal rules defining that institution, what Nee and Ingram deem “closely coupled,” the informal and formal rules will be “mutually reinforcing” (34). Thus, the new institutionalism is focused on an institutional structure that is made up of formal and informal elements that constrains rational actions, and that responds dynamically to social changes.

Plea Bargaining as an Institution

Plea bargaining can be seen as an example of this institutional structure. It is an institutional arrangement based on both laws and informal rules. As an institution, it traces its creation to the benefits it provided to the parties in the criminal justice system (Padgett 1985). Its original evolution came about informally primarily as a way to keep courts' dockets clear amid increased caseloads brought on by the industrial revolution, prohibition, and World War I (see Alschuler 1979 and Chapter 3 in this project). While originally controversial and frowned upon by legal authorities, due to its overall efficiency for prosecutors, defense attorneys, and judges and indeed defendants, the norm of plea bargaining became closely coupled with, and formally enshrined, in the law. This is because for all parties, plea bargaining reduces transaction costs while eliminating the uncertainty central to the criminal justice process. Moreover, plea bargaining created such an efficient criminal justice system that it became capable of absorbing even higher number of defendants than existed when plea bargaining first become common. That is, the efficiency of plea bargaining served to not only clear dockets, but it also to opened space that facilitated the public's increasingly punitive attitude that came about decades later.

Further, due to the certainty and efficiency of plea bargaining, norms evolved for defendants whereby plea bargaining became the standard method of behavior in the criminal justice system such that all sides in the process expect cases to end with a plea bargain. Alschuler (1968, 1975, 1976) highlights how the various parties "cajole" defendants into accepting plea bargains. Judges impose longer sentences to defendants who refuse to plead guilty, prosecutors charge these defendants with more severe charges, and defense attorneys push defendants to accept pleas and often refuse to accept these cases when defendants fail to comply. On the other hand, defendants who do plead guilty are rewarded with a lighter sentence. This dynamic has created

scripted behavior leading to a social norm being closely coupled to a law. That is, the de facto law and the social norm in the criminal justice system are that defendants plead guilty. When a defendant does not plead guilty and is convicted at trial, the higher sentence he receives is an effective legal sanction for not following the plea bargaining rules. Further, defendants assume that they must plea bargain as conviction at trial is seen as inevitable. The major contention of this project is that while all defendants share this norm to plea bargain, the structure of this norm differs along racial lines. Indeed, based on history and observation, Blacks assume the outcome of involvement with the criminal justice system to be worse than do whites. The net effect of this is that Blacks are placed in a worse bargaining position, and as a consequence, prosecutors can secure convictions of Black defendants for lower resource expenditure. This exacerbates the differential norms feeding forward on future defendants.

Thus, the application of the same legal rules and processes differ based upon an individual defendant's socio-economic status and background. Additionally, by being an efficient process, plea bargains aggregate to foster the very institutional structure that bounds plea bargaining decision making in the first place. Without these bounds, the criminal justice system is fraught with uncertainty. However, by bounding decision making, plea bargaining alleviates uncertainty.

Chapter 7 – The Boundaries of Plea Bargain Decision Making

The previous chapter argues that there are limits to rational decision making due to uncertainty in the decision making process. Further, it argues that institutions provide contextual bounds to enable rational decision making when uncertainty would overpower the process. How these institutions operate is the model structure explored in chapter 2 and briefly in chapter 6. The purpose of this chapter is to make the limits to decision making, the reason that the institutional structure is necessary, explicit. In particular, this chapter outlines the plea bargaining decision process for both defendants and prosecutors examining the limits to rationality for both. Additionally, it briefly explores the research on differential views of the criminal justice system held by Blacks and whites, which leads to distinct approaches to the decision process.

Plea Bargain Decision Making

In every published model of plea bargaining, it is assumed that a defendant will agree to plea bargain anytime the expected costs of plea bargaining are lower than the expected costs of trial. In symbolic form,¹ a plea bargain will take place whenever

$$B_{\Delta C} < P_{\Delta C} \cdot C_{\Delta C} + T_{\Delta C}$$

where $B_{\Delta C}$ is the cost to the defendant of a plea bargain, $P_{\Delta C}$ is the defendant's perceived probability of being convicted, $C_{\Delta C}$ is the expected cost of conviction, and $T_{\Delta C}$ is the cost of a trial. The various economic models presented in chapter 4 differ by emphasizing different parts of this basic calculation. In the Landes (1971) model, for instance, these terms are dynamic in that by investing resources, the defendant can influence the outcome. While not formally modeled here, this necessary investment is

¹ In general, a Δ subscript is used to denote that a term applies to the defendant, and a Π subscript is used to denote that the term applies to the prosecutor.

subsumed in \mathbf{T}_{AC} . While this seems straightforward enough, determining when a plea bargain is in fact less costly than a trial is difficult. The primary reason is that each term contains considerable complexity and thus cost benefit analysis may simply not be the right way to address the issue. That is, it may not be that the calculation is simply difficult, but instead it may be rife with uncertainty. Furthermore, expected value, while intuitive, has been shown to be problematic in predicting human behavior. Thus, understanding plea bargaining is not simply a matter of solving a system of equations. Instead, it is a matter of understanding the constraints on the decision process faced by a defendant.

Before exploring the difficulty of the defendant's cost benefit analysis, it is useful to consider the prosecutor's calculus as well. For a prosecutor, she will generally consent to a plea bargain whenever the expected benefits of bargaining minus the expected costs are greater than the expected benefits of trial minus the expected costs. Symbolically,

$$\mathbf{B}_{PB} - \mathbf{B}_{PC} > \mathbf{P}_{PC} \cdot \mathbf{C}_{PB} - \mathbf{T}_{PC} + \mathbf{T}_{PB}$$

where \mathbf{B}_{PB} is the benefit of a bargain to the prosecutor, \mathbf{B}_{PC} is the prosecutor's cost of the bargain, \mathbf{P}_{PC} is the prosecutor's perceived probability of a trial conviction, \mathbf{C}_{PB} is the benefit the prosecutor receives from a trial conviction, \mathbf{T}_{PC} is the cost of a trial to the prosecutor, and \mathbf{T}_{PB} is the benefit of a trial for the prosecutor.

Further, while the interaction between a prosecutor and a defendant appears to be a market type of interaction, there are important differences. First, as a general rule, a defendant does not have benefits to consider in his cost benefit analysis. That is, a defendant only has costs, and his analysis is one of determining what option costs the least. For a defendant, the only costless outcome is to never be arrested in the first place; to never actually be a defendant. Once the criminal justice process has started, however, the defendant will necessarily incur costs, even if the ultimate outcome is

that the charges against him are dropped. Additionally, a prosecutor can be considered a monopolists of sorts in that a defendant does not have the ability to shop around for the best bargain (Easterbrook 1992). Indeed, a prosecutor need not bargain at all unless she deems it to be in her interest. That is, unlike in a market transaction, if the prosecutor decides not to bargain, the defendant is still forced to partake in the transaction.²

The Defendant's Cost-Benefit Analysis

While the cost-benefit analysis is simple in theory, in practice it is overwhelmingly complicated and fraught with uncertainty. For the defendant, his initial cost consideration, $B_{\Delta C}$, is what the cost of a plea bargain will be. This includes the actual prison time which is what most of the economic models consider. However, it also includes numerous other factors that are rarely considered.

For instance, the defendant's costs include such economic costs as lost wages for time served as well as from the inability to obtain future employment due to having a conviction on his record (Western 2006). Convicted felons are prohibited by state and federal law from holding certain jobs, such as those that include contact with children, some health services, or certain security services (Holzer et al. 2004). Additionally, owing to the possibility of liability for employee actions, many employers simply refuse to employ convicted felons (Id). Indeed, Holzer et al. found that while 92 percent of employers interviewed would consider hiring applicants on welfare, and 96 percent would consider hiring applicants with a GED, only 38 percent said they would consider hiring an applicant with a criminal record (Id). The bias against hiring convicted felons is so strong that due to the high rates of African

² In fact, with the aid of judges, prosecutors can threaten to heap more costs on defendants if they attempt to force the prosecutor to carry out a trial (Alschuler 1975).

Americans with prison records, some employers discriminate against all Black applicants with unexplained gaps in their employment history (Id).

Additionally, the costs of a conviction include the psychic costs associated with not only separation from family, friends, and community, but also the emotional scarring associated with serving time in prison and losing one's freedom. For instance, Nurse (2004), in a finding echoed by Edin et al. (2004) and Western et al. (2004), argues that incarceration is instrumental in severing ties between many fathers and their children. Further, conviction also includes physical costs as prison can contribute to numerous physical illnesses and premature death. Hammett et al. (2002) estimate that in the United States, during 1997, 20 to 26 percent of people with HIV, 29 to 43 percent of people infected with hepatitis C, and 40 percent of people with tuberculosis were incarcerated at some point that year. Additionally, Robertson (2003) found that between 7 and 12 percent of male inmates surveyed had been raped at least 9 times while in prison exposing them directly to these diseases. Robertson additionally notes that in 1998, for instance, 11.5 million people were released from prison, making diseases caught in prison a public health concern.

Moreover, in many states, the right to vote is forfeit from a felony conviction. The loss of the right to vote is particularly interesting in terms of calculating the cost of a conviction as its value is so abjectly difficult to estimate. On the one hand, the pure economic value of one's vote has been cynically estimated to be worth less than the shoe leather worn away in the process of casting it (see, e.g., Riker and Ordeshook 1968; for an opposite view, see Edlin et al. 2007). However, the right to vote is also seen as so important, that countless people have given their lives ostensibly in its protection, giving it, at the very least, tremendous symbolic importance. Further,

while one vote is unlikely to sway an election³ the aggregate effect of an entire community losing the right to vote is quite significant. According to the Sentencing Project, over 5.3 million Americans, and greater than 1 in 8 Black men have lost the right to vote due to felony disenfranchisement which is significant enough to influence the outcome of elections (Fellner et al. 1998). Indeed, it has been estimated that had felons not been disenfranchised in Florida, Gore would have carried the state in the 2000 presidential election (Wagner 2001).

These costs are incurred by not just the defendant, but can be spread to many people. Heckathorn (1990) notes that since “virtually all individuals are members of groups,” sanctions against individuals also affect other members of these groups (367). Indeed, Alschuler (1975) suggests that defense attorneys use this very fact to induce family members to help wrangle confessions from defendants in order to spare the family. Further, Robertson (2003) argues that the diseases incurred in prison have become a public health crisis. Moreover, the inability of convicted felons to obtain gainful employment has led to a cycle of poverty and crime which has decimated many communities (Western 2006). All of this is not just to suggest that prison is bad – it clearly is, and is generally intended to be so. Rather, it is intended to suggest that, for a defendant, it is incalculably bad.

On the other side of the equation, a defendant must consider T_{AC} , the cost of a trial. The cost of trial is made up of several elements. First, there are the obvious costs such as attorney’s fees. For indigent defendants, these do not apply as attorneys are appointed. However, even indigent defendants face large costs in a trial. First,

³ Though not always; the race in Indiana's 1986 Third Congressional District was decided in John P. Hiler's favor over Thomas W. Ward by 47 votes, 75,979 to 75,932, and the Second District of Connecticut's 1994 race was decided by 4 votes out of 186,000 cast. On a smaller scale, after a tie vote, 22 to 22, the 2008 mayoral race in Goodridge, MN was decided by a coin flip.

defendants generally must miss work, often giving up wages for not only the time they must appear in court, but also commonly losing jobs due to absence (Fisher 2003). Additionally, even though a defendant receives a court appointed attorney, he must still pay court costs which can be prohibitively high.⁴ This may not seem like a burden given that, for an innocent defendant, the court costs are considerably lower than the cost of a false conviction. However, there are numerous examples, from expensive abortions (MacKinnon 2000) to large monthly credit card payments (Warren and Tyagi 2003), where people “irrationally” put off a small expense, even knowing they will later be sidled with a large one, simply because they are unable to meet the immediate burden. Finally, unless he wants to serve prison time before his trial, a defendant must also generally post bond⁵ to secure his pre-trial freedom.

The final valuation a defendant must consider is what the cost of a conviction would be. The way this is generally modeled in plea bargaining models is to consider the probability of conviction multiplied by the expected sentence. In simple terms, this means that if one commits a crime for which the expected sentence is 10 years in prison, and one thinks that there is a 90 percent chance of being convicted, the expected sentence is nine years. In short hand, $P_{\Delta c} \cdot C_{\Delta c}$. This seems simple, but like the other terms a defendant must consider, both the probability and the cost of conviction are far deeper and more difficult to calculate than by simply looking at the sentencing guidelines.

First, the cost of conviction includes not just the prison term, but also all of the costs associated with a conviction outlined above. The standard economic model

⁴ Fees vary by case and requirements, but they can easily reach from several hundred dollars to over \$1000 (Brown 2009).

⁵ Bond can now be posted via credit card in Cook County, IL (Brown 2005). This has reduced overcrowding considerably suggesting that bail represents a considerable hardship. This is the case even though in the long run, not paying bail can result in lost employment and overall higher costs.

would generally argue that whether these costs include just prison time, or all of the outlined costs, the same term is still on both sides of the equation and thus does not matter from a rational choice calculation standpoint. The problem with this argument is that the cost term is uncertain. That is, with discounting, a ten year sentence is not twice as costly as a five year sentence. In some ways it is less than twice as costly due to the discounting of future time (Posner 2003). However, in other ways it might be seen as more than twice as costly as certain relationships can be maintained over short times but not over long ones (Nurse 2004, Edin et al. 2004, Western et al. 2004). A long sentence can be increasingly detrimental, that is, it can have a negative discount rate, as social ties can only survive for a limited amount of separation. Thus, while the cost terms on both sides of the equation appear similar, one is not just a longer version of the other.

Additionally, there is the psychic cost of actual conviction by a jury, of being told by one's peers that one is a bad person. Psychological research has indicated that emotional pain is more than a metaphor, and that it may in fact be akin to real physical pain (MacDonald and Leary 2005). Additionally, psychologists have theorized that social ostracism, referred to as *relational devaluation*, is painful as an evolutionary mechanism, because for animals, inclusion in a group is often a key to survival (Id). Moreover, research has indicated that individuals tend to overemphasize the importance of negative predicted future events on their overall happiness (Savitsky, K. et al. 2001). That is, "There is a tendency to focus on that particular event, underestimating the influence of other, nonfocal events" (Id: 45). Thus, a defendant would likely expect a guilty plea to be considerably less painful than a jury's finding of guilty, as the former is a type of assimilation with society while the latter is a form of ostracism from it. Additionally, a defendant would also be likely to overestimate how painful the jury's finding would be. This suggests that

absent guilt, or expected value calculations, defendants are, in a sense, coerced into guilty pleas by fear of differential emotional punishment.

However, most important here is that the calculation of the probability of conviction is less straightforward than it might seem. It is generally taken as exogenous that a defendant knows whether or not he is actually guilty. Indeed, many of the economic models of plea bargaining are predicated on the idea that “[T]he accused know whether they are guilty, while the prosecutor never can be certain” (Grossman and Katz 1983: 750, see also Landes 1971, Rhodes 1976, Reinganum 1988, Kobayashi and Lott 1996).

However, the reality is that many defendants are ignorant not only of the law (Roberts and Stalins 1997), but of the burden of proof required to convict them. Indeed, as the Supreme Court noted in *Johnson v. Zerbst* (304 U.S. 458, 463 (1938)):

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence.

Further, what constitutes guilt or innocence in many cases is uncertain. Indeed, defendants may simply not know whether they have done anything illegal. This may sound preposterous as a premise as it seems easy to know if one has stolen something, or killed somebody. However, actual guilt can be a complicated concept. Chapter 2 includes an example of a Multistate Bar Exam question that demonstrates how tricky the concept of guilt can be. The following section will briefly explore some of the complex aspects of criminal law.

In order to be convicted of a crime, a court must find that there is both *actus reus*, or an actual physical act, and *mens rea*, or the requisite mental state to commit the crime (see generally Kadish and Schulhofer 1995). To prove *actus reus*, the government must prove beyond a reasonable doubt that the defendant indeed engaged in each and every element of the crime in question. Doing so is not necessarily easy as most crimes have fairly specific elements and distinctions that are often glossed over in media representations. For instance, the primary distinction between larceny and robbery is whether something was taken via force. Additionally, false pretenses is distinguished from larceny by whether the title of the taken good passed to the taker, which is likely not a distinction the average defendant will make. These distinctions matter because the sentence lengths for each crime are vastly different. Sentences differ by state, but as an example, in Massachusetts the sentence for first offense larceny is relatively short, and a second offense carries with it a minimum sentence of 2 years. In contrast, first offense robbery carries a minimum of 5 year sentence, with a second offense carrying a requisite 15 year term.⁶

Additionally, the defendant must be shown to have the requisite mental state to commit a crime, the so-called *mens rea*. Exactly what constitutes *mens rea* has always been a subject of philosophical debate as deducing a defendant's mental state is likely impossible. Returning to the larceny versus robbery example, both of these crime require an intent to permanently separate the victim from the item being taken. Thus, a person who takes something with the intent of giving it back, even if he never actually does, may lack the mental state to have committed a crime. He may still be liable in tort, but that is civil law and thus a very different consideration.

Further, crimes are typically categorized as either being specific intent, or general intent. Knowing which is which is not necessarily straightforward as it is

⁶ See G.L. c. 265, §17 and §19.

often simply a matter of definition. Indeed, it has been commented that “In confusing circularity, a general intent offense can be said to be any crime that requires *mens rea* and that has no special or specific intent required” (Singer and Fond 2001: 50). Often, legislatures will include language such as “with intent to” to indicate that a proscribed activity is specific intent (Id). Thus, assault is a general intent crime, while assault with intent to rape is a specific intent crime. More confusingly, depending upon the terminology used by a prosecutor, many crimes can be described as being either. For instance, aggravated assault is a general intent crime that is indistinguishable from intent to kill or maim, though the latter is a specific intent crime (Id). The primary reason that it matters at all is that certain defenses work against one and not the other. Intoxication, for instance, is a defense against specific intent crimes as the defendant is considered to lack the requisite mental state. However, it is not a defense against general intent crimes.

To add another layer, a defendant’s mistake may sometimes exculpate him. In a general sense, ignorance of the law, a so-called mistake of law, does not remove liability. For instance, in *United States v. Moncini* (882 F.2d 401 (9th Cir.1989)), a defendant sent child pornography from Italy to the United States. He later entered the United States whereupon he was arrested. As a defense, he argued that the pictures were legal in Italy, and that he had thus not known they were illegal in the US. The court rejected the argument.⁷ However, a belief, even an unreasonable belief, that some illegal act is in fact not illegal, a so-called mistake of fact, has been held to relieve a defendant of liability. In *United States v. Cheek* (498 U.S. 192 (1991)), the defendant refused to pay income tax after receiving advice from his attorneys that the tax system was unconstitutional. The Court held, in that case, that even unreasonable

⁷ Other courts, and even the Supreme Court, have had the opposite view in certain circumstances, though the bulk of the opinions reject the mistake of law defense. See, e.g. *Ratzlaf v. United States*, 510 U.S. 135 (1994).

reliance on unreasonable advice could exculpate. The distinction between these cases is subtle with *Cheek* likely being limited to particular instances involving tax law and willful behavior. However, the point is that determining guilt is not always a straightforward process.⁸

The addition of evidence law adds a further level of confusion. Evidence law is arcane to a level well beyond criminal law. As a simple example, while hearsay is generally not admissible as evidence, there are many hearsay exceptions which make many hearsay statements admissible (see *The Federal Rules of Evidence 2008*, rules 801-807). Indeed, there are many statements that would be hearsay but for the fact that evidence law defines them to not be. However, even statements that fit a hearsay exception will not be admissible if the statement is offered against the accused in a criminal trial, the declarant is unavailable, the statement is testimonial, meaning that the declarant made the statement anticipating it would be used in the prosecution or investigation of a crime, and the accused had no opportunity to cross examine the statement when it was made. However, if the defendant has been considered to waive this exception through his own actions (i.e., he killed the declarant), then the statement is again admissible. Indeed, the law even allows bootstrapping such that hearsay may be admitted to prove a conspiracy, but only if the original statement is of a co-conspirator.

As another example, a prosecutor cannot introduce evidence of a defendant's bad character in order to show that the defendant likely acted in accord with that bad character by committing a crime. However, a defendant can introduce evidence of his

⁸ It might be noted that criminal statutes that are not clear enough to be understood by an average person are considered to be void for vagueness under the Due Process clauses of the 5th and 14th Amendments (see e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, (1972)). However, this does not necessarily help the situation tremendously. In order to challenge a statute as being unconstitutional, a defendant would need to have standing to do so. This generally means that he would need to be convicted of the charge and mount an appeal, something that cannot be accomplished after a plea bargain.

good character in order to show that he likely acted in accord with his good character and thus did not commit a crime.⁹ Yet, if the defendant does this, then the prosecutor can then introduce the very character evidence she was prohibited from introducing in the first place. Further, while the prosecutor cannot introduce bad character evidence to show that the defendant acted in accord with his bad character, she may circumvent the rule and introduce the very same evidence of the defendant's bad character to show motive, intent, absence of mistake, identity, or a common scheme. However, if the judge feels that this evidence is more prejudicial than it is probative, then the prosecutor may not introduce it.

The point here is not to explain evidence law. Rather, it is to say that even lawyers trained in criminal law make mistakes in applying these rules to facts and in determining what evidence is admissible. Indeed, often whether evidence is admissible is within the judge's discretion, and it is not easily determinable from the rules. Thus, it is perfectly reasonable to assume that a defendant would not know. For navigating these issues, defendants generally rely on the public defender, or sometimes a private attorney. As has been noted, however, defense attorneys have their own set of incentives which generally push away from spending large amounts of time on cases and toward plea bargains (Alschuler 1975). Thus, the more complicated the case, the greater the attorneys' incentives are to push for a plea bargain. Clearly not all defendants face such confusing issues. However, wrangling through the criminal law, and the particularly arcane rules of evidence, should leave some doubt in even the most certain or educated of people as to the probability of conviction in any particular case.

⁹ On just this topic of the accused's introduction of positive character evidence, LexisNexis publishes a \$166, 16 chapter book.

Finally, in addition to not knowing the law, perhaps more disturbingly many people do not know the basic rules of process. For instance, in a 1978 study, Parisi et al. found that only 56 percent of people understood that the burden of proof in a criminal trial is on the state, not to mention that that burden is quite high. In that study, Parisi et al. found that 44 percent of those surveyed believed that the defendant was required to prove his innocence (Parisi et al. 1978).¹⁰ That is, a defendant who is deciding whether to force the state to prove that he is in fact guilty does not necessarily know that the state actually has to do this at all. Similar results have been reported by Roberts and Stalins (1997). In terms of whether to plead guilty, this would seem to make a huge difference in how a defendant approached his case. If a defendant believes that by not presenting a defense he will be found guilty, a plea bargain must seem like a great deal as it represents both less expenditure and a lower sentence. For a defendant who believes himself to be innocent, it is an entirely different calculus to consider the costs of trial against the costs of a plea bargain as the costs of trial become necessarily higher.

Expected Value

As a final consideration of why the cost-benefit calculation is likely impossible, it is worth noting that while the published economic plea bargaining models all utilize an expected value calculation, there is no reason to think that this is the sort of calculation that a defendant would actually use.

In more concrete terms, the simple cost benefit analysis offered by existing plea bargaining models ignores the actual decision makers. That is, decision makers do not always act in ways commensurate with cost benefit evaluations. Heckathorn

¹⁰ Note that this number may be low as the survey was conducted among the entire population, not among people awaiting trial who may be overall less educated about such matters.

notes that “[C]ontrary to the deterrence doctrine, criminal organizations may compensate for lost income by increasing their level of criminal activity” (Heckthorn 1990: 366). That is, when costs are raised on criminal organizations via the imposition of criminal sanctions, the cost-benefit predicted response that the organizations will reduce output is not necessarily observed. Instead, in some cases it has been found that the organizations actually increase output to compensate for the higher costs (Id).

Additionally, social psychologists have posited several relevant theories of decision making showing that decision making does not follow simple utility calculations. Perhaps the most well known of these is so-called prospect theory. Prospect theory replaces utility with value, and it posits that people are relatively risk averse in the domain of gains but risk seeking in the domain of losses (Plous 1993). At first blush, since a plea bargain might be seen as a gain for a prosecutor and a loss for a defendant, one might expect the defendant to be risk seeking and thus opt for a trial. However, cutting against this, a defense attorney likely considers a plea bargain a gain, and is thus likely to be risk averse in the same way as a prosecutor. This is not to suggest that prospect theory predicts a particular outcome from a particular plea bargaining negotiation. Instead, it is to suggest that the factors that influence the negotiation are deeper than a simple consideration of years in prison.

Finally, there are several other social psychological theories that suggest that decision making by defendants may not be as simple as adding up costs and benefits. For instance, Tversky and Kahneman (1981) show that the framing of issues can influence how one perceives the issues. Indeed, Kassin et al. (2003) show, in a targeted experiment of this concept, that even factually innocent people can be made to admit their own guilt simply by actively presuming them to be so. In that experiment, interrogators were led to believe that mock suspects were guilty. This

expectation of guilt caused a “process of behavioral confirmation” (187) which influenced the interrogator's and the suspect's behavior, and also the judgment of third party observers. In other similar experiments, 100 percent of subjects accused of causing a computer to crash by pushing a button they were told not to, but who were in fact innocent, signed confessions admitting their guilt (Kassin and Kiechel 1996). Indeed, 65 percent of the subjects “internalized” their guilt, and 35 percent created facts to support it. What all of this suggests is that a defendant’s ability to bargain is influenced by many factors. Moreover, this ability can be considerably compromised.

The Prosecutor’s Cost-Benefit Analysis

A prosecutor has a certain amount of resources that she can use to prosecute crime. Her incentive is to convince voters that she is tough on crime and that her efforts are actually reducing crime. That is, she must convince voters that she is not wasting public resources and that she is effectively doing her job. Since it is nearly impossible to measure whether the efforts of a prosecutor are reducing crime, she must give some other measure for voters to use. The easiest measure of this is the number of successful prosecutions she obtains (Gordon and Huber 2002). Thus, a prosecutor will do what she can to obtain the largest number prosecutions, which generally means obtaining guilty pleas through plea bargains. Not only do plea bargains increase the total number of convictions she can obtain on her own, but they free up resources she would otherwise need to spend on costly trials which she can then use for more plea bargained convictions (Posner 2003, Landes 1971). In a plea bargain situation, a prosecutor saves on the cost of a lengthy investigation, on trial time, and on all of the other associated costs.

In a sense, the prosecutor’s cost-benefit analysis of when to engage in plea bargaining is more complicated than the defendant’s as it contains both costs and

benefits which increases the number of terms. However, unlike the defendant, the prosecutor may actually be capable of making many of the necessary calculations. The reason for this is that the prosecutor is generally a repeat player. This gives the prosecutor the benefit of hindsight in estimating probabilities and in making valuations.

As noted, the prosecutor should desire a plea bargain any time the benefits of bargaining minus the costs outweigh the benefits of a conviction times the probability of a conviction, plus the benefits of a trial, minus the costs of a trial, or

$$B_{PB} - B_{PC} > P_{PC} \cdot C_{PB} + T_{PC} - T_{PB}$$

. As a first step, from a practical viewpoint, the cost of a bargain should generally always be less than or equal to the costs of a trial. A plea bargain will involve some resource expenditure, but this will be a subset of the resources expended on a trial (Landis 1971).¹¹ That is, any resources expended by a prosecutor on preparing the best bargain would need to be expended preparing for trial anyway. As such, the two terms B_{PC} and T_{PC} can be dropped from the equation. More to the point, these two terms will always favor a plea bargain.

Additionally, the marginal benefit to the prosecutor of trials, T_{PB} , decreases with each subsequent trial. That is, the first trial is valuable as it demonstrates a willingness to go to trial which may help deter future defendants from pursuing this route. For instance, Baird et al. show that actors can gain a reputation in repeated negotiations for being irrational which can keep future opponents from pursuing rational strategies (Baird et al. 1994). Through these “irrational” tactics, generally refusing to settle in civil cases in Baird et al.’s example, a negotiator can receive higher future payoffs as opponents are unable to predict winning strategies and

¹¹ There may be instances where a prosecutor believes a trial to be unwinnable, would not be willing to go to trial, but is still willing to plea bargain. However, this does not suggest that T_{PC} is larger than B_{PC} . Rather, it suggests that P_{PC} is approaching 0.

become unwilling to face the uncertainty. Additionally, prosecutors need some trial experience to remain viable prosecutors. However, prosecutors only need to try a small number of cases to gain this experience. Practically speaking there will be a sufficient number of defendants unwilling to plea bargain, or irrational in their prediction of success at trial, to fulfill this need. As such, this term should drop away from a prosecutor's calculus.

Thus, for prosecutors, the determination of whether to enter into plea bargains largely comes down to weighing just the benefits of the bargain against the probability of success at trial, or

$$B_{PB} > P_{TC} \cdot C_{PB}$$

. However, unlike in the case for defendants, these terms are not as difficult to calculate. For a prosecutor, there are few social factors to consider in the evaluation. No two cases are exactly the same, and juries can be unpredictable, but as a repeat player, the prosecutor should be able to calculate reasonable approximations for both terms.

In the case of the benefit to be gained from a conviction at trial, in the vast majority of cases, a prosecutor, unlike a defendant, knows the law. Thus, the prosecutor knows what the expected sentence at trial is, and generally how much evidence is necessary for a conviction (McDonald 1985). Moreover, and more importantly, the prosecutor has a large history to draw upon which allows for a reasonable prediction of what a judge, jury, and defendant are likely to do. Similarly, for the prosecutor, there are numerous reasons to think that she in fact can be relatively certain about a defendant's convictability, let alone "guilt". She knows what a conviction costs, and she can tell any given defendant that she will drag him through a long trial unless he pleads guilty (Alschuler 1975). Prosecutors know how juries react in most situations. Indeed, if a jury can decide unanimously, a prosecutor can

often figure this out, too, perhaps with a bit of uncontrolled for bias. Finally, at the second order, these high levels of successful prosecutions cycle into even more successful prosecutions. They free up resources that the prosecutor would otherwise have spent on investigation and trial preparation to be used in additional prosecutions (Posner 2003).

Finally, in the prosecutor's calculation, there is a resource imbalance that she can consider. If the prosecutor's budget is very large, and if the difference in cost between a plea bargain and trial is small with regard to her overall budget, so long as the prosecutor thinks that most defendants will take a bargain, then the prosecutor may be indifferent between the options and can thus exert pressure on a defendant to accept a plea bargain. That is to say, in a strict economic model, a prosecutor chooses her least expensive option, which is generally plea bargaining. As such, one would expect a prosecutor to agree to concessions as a way to save resources. However, if the difference in resource expenditure between the cost of a trial and the cost of a bargain is small relative to the overall budget, the prosecutor has very little incentive to make these concessions, particularly in light of the knowledge that most cases will end in a bargain anyway. Thus, the background budget of a prosecutor is thus important, and pushes in the direction of not needing to make concessions.

Racial Attitudes About Criminal Justice

This chapter has argued that the traditional theories of how a defendant decides to plea bargain are unrealistic. It has presented evidence that a utility calculation for a defendant is impossible, and that instead institutions constrain a defendant's decision making. In particular, this project argues that a defendant makes decisions based upon his subjective view of the criminal justice system. This section will offer the final piece to this argument. It will argue that African Americans tend to be more

distrustful of the criminal justice system than whites, and that they have an overall more pessimistic outlook on interaction with that system. As such, one would expect Blacks to make decisions, once they are involved with the criminal justice system, in accord with those beliefs.

There is a sizable cannon of research demonstrating that whites and Blacks tend to have differing views on various aspects of society. Indeed, Sigelman and Welch note that, "It is hardly an overstatement to say that blacks and whites inhabit two different perceptual worlds. Whites do not acknowledge the persisting prejudice and discrimination that are so obvious to blacks" (1991: 65). Included in this research are many examples showing that this difference of views extends to views on the criminal justice system. While the majority of these studies regard opinions of the police rather than of the criminal justice system as a whole, there are also a number of studies which focus on Blacks' views on other aspects of the criminal justice system. As a whole, these studies suggest that Blacks are indeed more pessimistic about all aspects of the criminal justice system.

In a 2005 study, Hurwitz and Peffley suggest that whites believe that the criminal justice system is fair, and that Blacks view it as unfair. As part of Hurwitz and Peffley's study, respondents were asked to respond to two statements: "The justice system in this country treats people fairly," and "The courts in your area can be trusted to give everyone a fair trial" (769). Seventy four percent of Blacks disagreed with the first statement compared to 44 percent of whites. For the second, 61 percent of Blacks disagreed, against only 29 percent of whites.

Other surveys have reached similar results. In a survey of police treatment of Blacks, Schuman et al. (1997) found that in 1995 over 90 percent of Blacks believed that the police treated Blacks unfairly, as compared to just over 50 percent of whites

who believed this. Additionally, in a 1999 study by Weitzer and Tuch, over 70 percent of African Americans indicated that they believe that Blacks receive harsher treatment in the criminal justice system than do whites (1999). Thirty seven percent of whites also held this view. Further, while 58 percent of whites felt the criminal justice system treated whites and Blacks the same, only 28 percent of Blacks shared this view. These results were echoed in a similar research from Myers (1996) that found that 35 percent of whites believe that Blacks fare worse than whites in the criminal justice system. In a less formal survey, Wilbanks (1987) reports that a television news survey in Florida found that 97 percent of Blacks believe that the criminal justice system is racist as compared to 42 percent of whites. Wilbanks further reports that a 1968 survey of police officers found that 57 of Black police officers believed the criminal justice system to be racist, while only 5 percent of white officers shared this belief (Id). Additionally, Blacks are also more likely to perceive differential treatment against the poor (79 percent) in courts than are whites (Myers 1996).¹²

Anecdotal evidence suggests similar views. In 1975, writing for a conference on crime and the Black community, Alexander wrote the following:

Courts in this country suck thousands upon thousands of Black people into its [sic] brutal and inhumane clutches every year; to be prosecuted, predominantly by white prosecutors; and to be jailed, predominantly by white judges ... The structure of the courts in this country ... is generally assured to never let us forget that Black people will almost never receive equal justice under law (165).

On the one hand, the political climate has changed since this was written, suggesting it may not be echoed as loudly today. On the other hand, the racial disparity in prisons has increased, suggesting that such views may not be uncommon.

¹² In another survey, reported by Roberts and Stalans (1997) the differences between whites and Blacks are less pronounced. However, the data is from a 1994 Gallup survey, the outcome represents an outlier, and Roberts and Stalans do not report on the methodology of the survey.

Hurwitz and Peffley (2005) argue that this difference in views influences how Blacks and whites interpret the same police-civilian interactions. They further argue that this difference of views exacerbates existing racial tensions and explains why Blacks and whites are so polarized on issues of criminal justice. In essence, Hurwitz and Peffley argue for a positive feedback loop where attitudes influence interpretations, which in turn influence attitudes. Additionally, Hurwitz and Peffley argue that process rather than outcome matters more in interpretations of the criminal justice system. They suggest that it is whether the interaction with the system is fair that matters to observers rather than the outcome. However, it is difficult to see how process and outcome can be disaggregated. That is, process must be judged, at least to a degree, by the outcome. A “fair” process that results in a clearly unfair outcome would seem, at some level, to simply not be fair at all. Indeed, that a seemingly race neutral process can result in non-neutral outcomes is a central theme of this project. Finally, it is worth reiterating that perception of unfairness is only one element that would presumably cause a Black defendant to estimate his chances in the criminal justice system to be lower than for a white defendant. The perception that Blacks fared worse, though fairly, would cause the same evaluation. Indeed, data showing this is abundant (see chapter 5). At any rate, Hurwitz and Peffley do comment that while they were not surprised at how unfair African American’s think the criminal justice system is, they were surprised at how fundamentally fair whites do view it to be.

Chapter 8 – Direct Evidence

This project argues that the structure in the plea bargaining process, though race neutral on its face, leads to exaggerated prison populations, as well as to racial disparity within those prison populations. In a sense, this is a very difficult thing to show to be true. This is in part because there is no control group as plea bargaining exists practically everywhere in the United States.¹ Thus, it is difficult to show what the absence of plea bargaining might look like. Further, not only can the actual guilt of many of the people arrested or in prison never be known with certainty, neither can the status of people not arrested. That is, figuring out in an abstract way that certain people should be in prison while others should not is an inherently impossible task. Indeed, it is arguing with 1000 years of Anglo-Saxon criminal justice history.

However, it is still possible to test the model. While the most direct way to do so would be to simply eliminate plea bargaining in a district and see the outcome, this is obviously impossible for an experimenter. However, during the 1970s plea bargaining was still considered controversial, and a small number of districts did in fact eliminate plea bargaining for a time. The reasons for plea bargaining being eliminated varied. In a few cases, plea bargaining was eliminated because it was considered improper in terms of justice. Additionally, though still rooted in notions of justice, in some places it was eliminated due to power grabs by various political factions. While there is not a tremendous amount of data available from these quasi experiments, what data there is can be analyzed for trends.

The results of these quasi experiments are mixed, and in many cases difficult to analyze. Part of the reason for this is because data is limited as many of the experiments were small. In addition, the bans were only partial. The level at which

¹ The author is unaware of anywhere in the United States that plea bargaining does not exist.

plea bargaining was banned varied across different bans, but in no case was the ban total. Further, much of the original data has been lost over the years. In some cases, no data was collected,² while in others the collected data has been lost. What does exist for many of the bans are reports prepared to ascertain the effect of banning plea bargaining, or scholarly articles analyzing various aspects of the bans. However, the analyses done in the 1970s and 1980s do not necessarily cover the variables necessary to ascertain answers to the questions at issue in this project. In general, the plea bargaining debates that existed in the 1970s centered upon whether court systems could keep up in the face of a plea bargaining ban, and this is the question the bulk of the reports address. While this is important, as a criminal justice system with either little slowdown or no change in prosecutorial priorities due to the elimination of plea bargaining would contradict one of the major premises of this project, the results reported in are too narrow to fully illuminate the questions in this project. Finally, the authors of the original works, who were able to be contacted, no longer had the raw data. As such, only a meta-analysis of the existing reported findings is currently possible.

However, even with those limitations, the published results indicate that with a plea bargaining ban dispositions in borderline cases were generally reduced. That is, prosecutors did not pursue cases where they were not certain of obtaining a conviction at trial. Additionally, prosecutors also did not pursue as many cases for seemingly minor crimes where the cost of trial might be large compared to the payoff. In at least one case, while dockets were managed successfully, there was a shift away from the prosecution of low level offenses toward higher level offenses. In another, the courts simply became increasingly busy and were unable to keep up with the workload.

² For instance, New Orleans banned some forms of plea bargaining, but few if any formal studies were published (McDonald 1985).

Finally, it should be noted that none of the reported data contains information on the defendants' demographics. However, owing to the correlation between current prosecution and race, this is not necessarily a problem analytically. Current statistics show that prosecutions in low level cases are disproportionately geared toward minorities, while prosecutions in high level cases are more evenly spread. Figure 7-1 shows data for prison admission in the United States for 2003, which is the most recent data available (ICPSR 20741 2003). The classes of crime on the X-axis are of decreasing severity. Class 1 is crime the most serious violent crime, primarily homicide, Class 2 is less serious violent crime, Class 3 is the most serious property crime, Class 4 is less serious property crime, Class 5 represents drug related crime, and Class 6 represents moral crimes. These classes are roughly equivalent to the classes used by Rubenstein and White (1979) in their analysis of the data from Alaska, *infra*.³ The size of the circles represents the total number of dispositions for that category. The data included is only for Black and white admittees, and the Y-axis is the percent of these admittees who were Black.

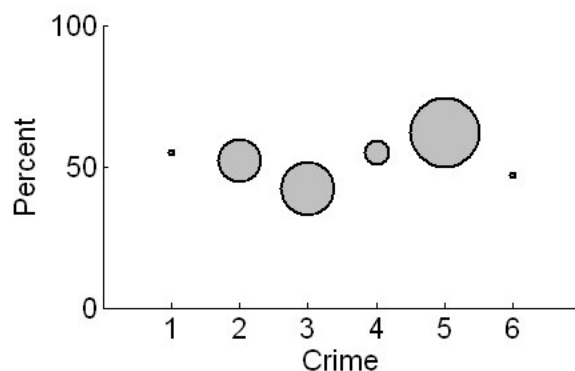


Figure 8-1, Black versus White Prison Admission for 2003

As can be seen, past a point, as the class of crime is less severe, the disproportion in race becomes larger. Further, Blumstein (1988) has argued that as the

³ The categories are “roughly equivalent” because Rubenstein and White do not specify which crimes constitute each category.

severity of crime becomes lower, the amount of discretion that prosecutors have in whether or not the prosecute becomes higher.

If the elimination of plea bargains in a district led to a decline in low level prosecutions, but not in high level ones, one could surmise that given current demographic and prosecutorial distributions, the elimination of plea bargaining in a current district would have the effect of reducing prosecutions for minorities. Put another way, current prosecution and prison demographics show that convictions for low level crimes fall more disproportionately on minorities than do prosecution for high level crimes. Thus, if data from districts that eliminated plea bargaining shows that this elimination not only led to a reduction in criminal dispositions, but also that the reduction was primarily in dispositions for low level crimes, then logically the elimination of plea bargains also led to a more equal distribution of prosecutions along racial lines.

Additionally, the project argues that since prosecutors are primarily interested in raw numbers of prosecutions, they will forgo difficult cases when inexpensive plea bargains are available. Moreover, the project argues that plea bargains for Black defendants are generally less expensive for a prosecutor than are plea bargains for whites. Since the project argues that racial disparity is a result of plea bargaining, logically, in the absence of plea bargains, when a prosecutor assesses how to allocate her resources, the racial disparity should decrease even for higher level crimes that will still be prosecuted. That is, not only will a prosecutor concentrate on crimes that are more socially costly, but she will also no longer face a situation where it is less expensive to prosecute Blacks for the same crime as whites. Finally, it should be noted that the data on prison admissions includes exceedingly few white collar type prosecutions. It is a contention of this project that the elimination of plea bargaining would increase the cost of prosecuting street crime bringing its cost closer to the level

of prosecuting white collar crime. Further, as was argued in chapter 5, the social cost, if not the prevalence, of white collar crime is in accord with the cost of street crime. Thus, the presumption is that without the cost savings obtained through plea bargains, prosecution of white collar crime should increase. Thus, for several different reasons, a move from prosecuting low level crime utilizing plea bargains to instead prosecuting higher level crime without plea bargains would lead to less racial disparity in the criminal justice system overall.

The Alaska Ban

In what was likely the largest plea bargaining ban carried out, the State of Alaska's Attorney General's office issued an order banning plea bargaining beginning in 1975 (Rubenstein and White 1978, 1979; Carns and Kruse 1991). The ban lasted in one form or another for a period of nearly 20 years. At its inception, from the prosecutor's perspective, the ban was instituted across the board and included both felony and misdemeanor charges. It covered both charge bargaining and sentence bargaining, and it was instituted statewide. The results of the ban were reported in a series of papers, primarily by Rubenstein and White (1979)⁴ with a follow up by Carns and Kruse (1991). Rubenstein and White's initial study was paid for with a massive \$300,000 grant (in 1976 dollars). The purpose of the study, according to the authors, was to determine "first, whether the policy [banning plea bargaining] had in fact been carried out; and second, its effects on Alaska's criminal justice system" (369). The scope of the study involved over 400 interviews, which by the authors' account, included nearly all judges, prosecutors, and criminal defense attorneys in the state's major cities as well as an examination of 3586 case files covering 2300 defendants.

⁴ There are a number of publications from Rubenstein and White, others appearing as book chapters, but all cover essentially the same information.

The politics and motives behind the ban are noteworthy. Alaska's Attorney General is appointed by the governor for a four year term. As such, he is not politically accountable in the way an elected official would be. Moreover, the Attorney General in 1975, Avrum Gross, was a "liberal Democrat" while the rest of the administration was Republican. While seen as a smart political move by many, Gross insisted that banning plea bargaining was a way to "clean[] up [the] least just aspect of the criminal justice system" (368). This justification for the plea bargaining ban is plausible in that the morality of plea bargaining was a widespread topic of debate in the mid 1970s (See generally Alschuler, McDonald 1985). Indeed, according to Rubenstein and White, Gross repeatedly made public reference to the "proper role of the courts" with regard to sentencing (page), and he regularly emphasized "quality of justice" (368), which presumably meant not bargained for justice. Gross did note that a particular case in which a bargain led to a lenient sentence for a "violent killer" influenced his decision to implement the plea bargaining ban. However, in other contexts, Gross indicated that the ban was not an attempt to get tough on crime.

Before examining the effects of the plea bargaining ban in Alaska, it is first necessary to determine whether it was, indeed, eliminated. This represents the first portion of Rubenstein and White's study. According to their data, sentence bargaining dropped drastically in the first year of the ban, with sentence recommendations occurring in about 4 to 12 percent of cases in the first year of the ban, and even less after that. Prior to the ban, sentence bargaining was "the dominant practice among experienced criminal attorneys" (Rubenstein and White 1979: 370). Charge bargaining declined less rapidly, though it was also virtually non-existent by the second year of the ban. Where prosecutors did drop charges, it was generally in cases with multiple counts where the additional charged counts would have had little

influence on the outcome.

However, even with the general prohibition on prosecutorial bargaining ordered by the Attorney General, the ban was not necessarily complete. Many defense attorneys continued to advise their clients to plead guilty. As has been noted, defense attorneys have many incentives, some of which push them toward advising guilty pleas for their clients (Alschuler 1975). Additionally, even without active plea bargaining on the part of the prosecutors, courts still generally give lower sentences to defendants who plead guilty, and in Alaska this was the case. Alaska's sentencing differential for sentence lengths given for guilty trial verdicts were 334 percent longer than for guilty pleas (McDonald 1985). While research on sentencing differentials is complicated, with a number of studies finding they can be accounted for by such factors as more serious cases being more likely to go to trial (Eisenstein and Jacob 1977, Rhodes 1978), most researchers consider differentials quite common (McDonald 1985).

Furthermore, as a way around the ban, a number of judges attempted to take matters into their own hands by making their own deals with defendants. In these deals, a judge would make a pretrial agreement with a defendant with regard to sentencing in exchange for a guilty plea. The state Supreme Court stepped in, and in *State v. Buckalew* (561 P.2d 289 (1977)), it prohibited this as being a conflict of interest. However, this did not stop unofficial deals from continuing. Thus, even in the absence of official plea bargains as such, defendants continued to enter a large number of guilty pleas in exchange for a sentencing concession from the courts. However, for at least a period, Alaska appears to have managed to eliminate the vast majority of active plea bargains. The policy officially remained in effect through a number of administrations until 1993 when it was finally eliminated (Alaska Fairness Study 1997). However, by the 1990s many of the barriers to plea bargaining had

begun crumbling which allowed plea bargaining to return, at least partially (Carns and Kruse 1991).

The data collected and analyzed in the Alaska experiment is generally concerned with rates of trials rather than the overall number of dispositions. For instance, the focus of the original study of the ban in Alaska was to determine whether the predictions of a clogged court system would occur, and what effect the ban would have on sentences. The results of the ban, with regard to these two questions are interesting. First, with regard to disposition times, that is, the time from arrest until conviction or acquittal, contrary to predictions there was actually a decrease that the authors attribute to “administrative and calendaring changes only tangentially related to plea bargaining” that occurred before the ban went into effect. Indeed, this was the case even though the number of trials increased. In Anchorage the authors note, the number nearly doubled, and in Fairbanks they increased by a quarter.

Second, sentences in cases with convictions increased. The chances that a convicted defendant would receive a prison sentence increased from 42 to 48 percent. To show this, Rubenstein and White separated crimes into categories from Class-1 to Class-6. Class-1 crimes represent the most severe violent crimes, i.e., homicide. Class-2 includes less severe violent crimes such as rape, robbery, and assault. Class-3 includes “property crimes by stealth” (note 13). Class-4 includes less severe property crimes such as the passing of bad checks and credit card fraud. Class-5 represents drug charges, and Class-6 represents “moral felonies” (Id). The specifics of the categories do not necessarily matter beyond the fact that the classes represent a hierarchy in perception of what constitutes severe crime. For violent crimes (Class-1 crimes), sentence length stayed relatively flat. For convictions for burglary, larceny, and similar crimes (Class-3), sentences increased by nearly 53 percent, with particular

increases for first time defendants. Additionally, for Class-4 crimes like fraud and embezzlement, sentences increased over 100 percent, and for Class-5 crimes like drug felonies, sentence increases were over 200 percent.

At first blush, this data is inconsistent with the model in this project. However, a key bit of information is left out of Rubenstein and White's analysis,⁵ which is that the total number of dispositions decreased. While the average length of sentence may have increased, this says nothing about the total man-years of prison sentences handed out.⁶ In the first year of the ban, the percent of convicted defendants receiving a sentence of over 30 days increased from 42 to 48 percent. However, the total number of defendants receiving a sentence of over 30 days decreased from 739 to 694. Further, the overall number of convictions dropped from 1743 to 1443, a decrease of over 17 percent. This suggests that it is not necessarily the case that the sentences got longer, but rather it could be that marginal cases where light sentences were bargained for were dropped.

Indeed, an examination of particular crimes proves even more illuminating. The total number of Class-1 felony convictions remained essentially constant, 12 after the ban compared to 13 before, and Rubenstein and White note that there were too few of these cases to analyze statistically. Class-2 convictions dropped slightly, and Class-3 convictions actually increased. However, Class-4 felony convictions dropped by 44 percent from 125 to 70, and Class-5 convictions similarly dropped by a third from 144 to 111. Thus, in accord with the predictions made in this project's model, after the ban on plea bargaining, not only was there a drop in the number of criminal dispositions, but the largest reductions were seen in cases of less importance. It is possible that

⁵ It is included in their report, but there is no discussion that suggests the authors consider the data significant.

⁶ Rubenstein and White do not provide sufficient data to calculate whether man-years increased or decreased.

some of the decreases in lower level crimes can be accounted for due to charges not being lowered. However, Rubenstein and White's report indicated elsewhere that sentence bargaining, and not charge bargaining, was the preferred method of plea bargaining before the ban in Alaska, which suggests that this explanation is unlikely to be correct.

As noted, the time of disposition dropped after the ban was implemented. While the authors attribute the decrease in disposition times to "administrative and calendaring changes," and this is surely partially responsible, it is also likely that simply having fewer cases is also partly responsible. Further, in addition to the administrative and calendaring changes, it is also likely important that the plea bargaining ban was instituted by the prosecutor's office. This is important because the prosecutor had an incentive to not overwhelm the courts with the new policy for fear of retaliation for institution the ban in the first place. Further, while the prosecutor no longer engaged in plea bargaining, the courts continued to offer concessions to defendants who pled guilty which surely relieved some of the possible backlog.

Finally, the trial rate actually increased at a greater rate than Rubenstein and White indicate. In Anchorage, the number of trials doubled from 29 to 57 in the first year of the ban while in Fairbanks the increase was from 72 to 90. However, Rubenstein and White's reported 97 percent and 25 percent increases do not account for the decrease in prosecutions. For instance, adjusting the number of trials for the decrease in prosecutions, the increase from 29 to 57 actually represents an increase in trial rate of 138 percent. Similarly, the increase in Fairbanks actually represents a 36 percent increase in trials. It is difficult to know what this increase indicates, however. It is possible that more defendants went to trial as they were unable to exact any concessions from the prosecutor for not doing so. However, it is also likely that some of these defendants were borderline cases who perceived the probability of not being

convicted as reasonably high, but who might have accepted a plea bargain as a hedge. In either case, the rate of trials did increase significantly after the ban.

In a follow up study conducted in 1991, Carns and Kruse (1991) investigated the long term effects of the plea bargaining ban. While the ban was still technically on the book in Alaska in 1991, there were significant changes to the nature of the ban as well as changes to the surrounding legal culture. In 1980, the rules surrounding plea bargaining were changed such that, while the prosecutor was still prohibited from changing the initial charge, that is from charge bargaining, defendants were able to plead to a lower charge that “reflected the essence of the conduct engaged in” (11) which gave prosecutors more ability to reduce charges than under the initial ban. Additionally, decision making regarding plea bargaining was moved from the Attorney General’s office to local District Attorneys. Another change was made in 1986 which allowed prosecutors to recommend sentences so long as they were “reasonably foreseeable after trial” (Carns and Kruse 1991).

According to Carns and Kruse (1991), the extent to which the ban still existed in 1991 was difficult to ascertain. Some attorneys professed ignorance that there was actually a ban at all, while others indicated that they believed it was still in place. Overall, Carns and Kruse indicate that the ban on sentence bargaining was largely still in place, while the ban on charge bargaining was not.

The data most relevant for this project is summarized in Table 1 of Carns and Kruse’s report. They report data from the original study covering 1974 through 1976, and then offer data from 1984 through 1988 as a comparison. As might be expected, with the growing emphasis nationwide on incarceration, the raw number of charges, convictions, plea bargains, and trials all increased. However, as before, the comparative rates of increase are important here. The total number of cases increased by over 60 percent from an average in the first years of the ban of 1142 per year to an

average later of 1842 with a reported high in 1984 of 2040. The rates of pleas to reduced charges, pleas to original charges, and trial convictions all stayed essentially the same. The rate of trial acquittals dropped slightly from 3 percent to 1 percent. This indicates that the rate of trials dropped slightly over time. Additionally, the rate at which charges were dismissed by the prosecutors after charges had been filed decreased from around 40 percent at the beginning of the ban to 22 percent by 1984 and 13 percent in 1987 after the second relaxation on the ban's strictness.

Additionally, cases where all of the charges were "screened out," meaning cases where the prosecutors never brought charges after an investigation and recommendation by the police, increased from around 10 percent at the beginning of the ban to around 30 percent in the 1980's. Overall, the conviction rate for cases referred to the prosecutor by the police stayed constant around 50 percent with the exception of an increase in 1987 to 56 percent. However, the conviction rate for cases the prosecutors accepted increased from around 55 percent in 1974, to 65 percent in 1984, and to 80 percent in 1987.

In general, these changing numbers are consistent with the model in this project. The plea bargaining ban in Alaska was still officially in effect for the second set of data, but it was less strictly enforced than it had previously been. Additionally, by 1987 charge bargaining had become more common and even the ban on sentence bargaining had been relaxed. Thus, one would expect a partial reversal of the changes brought about by the ban. Indeed, while many of the rates stayed the same, there were a number of changes over time. First, the rate at which prosecutors dismissed charges after they had already been brought decreased. This can likely be attributed to two things. As indicated by the increase in "screened out" cases, prosecutors likely became better at anticipating what cases were winnable. They were thus more likely to dismiss a case early rather than later in the process. Further, the rate of guilty pleas

did increase slightly. The combination of these two factors appears to have been enough to offset the rate of dismissed charges. Second, the trial rate dropped back down to its pre-ban level. This can likely be seen to coincide with the small increase in plea bargains. Interestingly, the rate of trial convictions stayed constant while the rate of trial acquittals accounted for the decrease in trials. One likely explanation for this is that the prosecutors became more practiced as trial lawyers, though the numbers are small enough that it may be mere statistical noise.

However, the most important data from Alaska may be the rate at which prosecutions increased once the strength of the ban began to wane. As shown in Figure 7-2 (which has been scaled to show relative increases in prison admissions), in the United States as a whole, from 1977 to 1987, the number of people admitted to prison for sentences of one year or longer increased from 163,203 to 339,762. This was an increase of slightly over 100 percent. However, for Alaska, the rate of increase was considerably higher. In 1977, Alaska sentenced 293 people to prison for a year or more. By 1987, that number had increased to 1061, an increase of over 260 percent, or nearly triple the national rate. Moreover, Alaska finally did away with its plea bargaining ban in 1993. From 1992 to 1993, the rate of new prison admissions in Alaska skyrocketed by 75 percent from 1491 to 2613. For comparison, in those same years the national rate increased from 480,046 to 495,756, an increase of just 3 percent (see U.S. Department of Justice 2009)). During these years, the population of Alaska increased at a rate faster than the rate for the nation as a whole. However, the population growth rate was not fast enough to account for the increased rate of prosecution. For instance, in 1977, the rate of incarceration by population in Alaska was about 65 percent of the national average. In 1993, it spiked to 140 percent, though it dropped back down somewhat in the following years. Thus, in as much as the rate of incarceration declined when Alaska instituted a ban on plea bargaining, as

the ban weakened and was ultimately eliminated, the rate of incarceration increased dramatically.

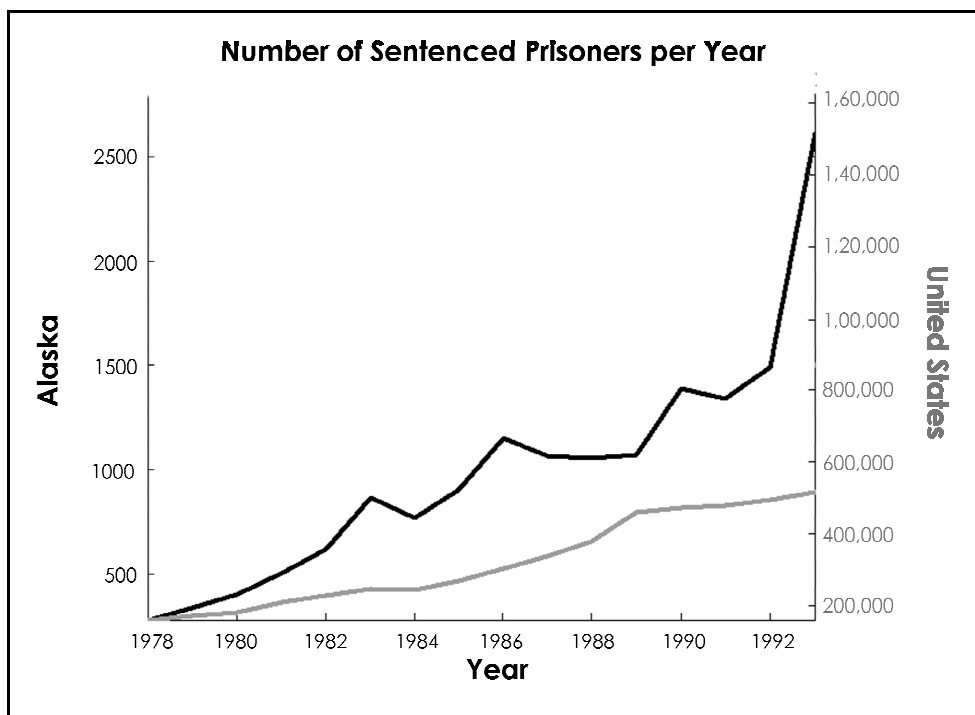


Figure 8-2, Increases in Prison Admissions for Alaska and the U.S. 1978-1993

Finally, Carns and Kruse (1991) note that under the ban, there was a disappearance of racial disparity in the implementation of Alaska’s criminal justice system. They further note that some attorneys suggested that the disappearance was a direct result of the ban. However, no statistical analysis of this outcome was completed, and thus they were unable to verify the causality. In a 1997 report commissioned by the Alaska Supreme Court in order to, “identify concerns about racial and ethnic bias in the state court system and make recommendations,” the report made the following observation:

And, while the Attorney General’s ban on plea bargaining was credited with eliminating some of the racial disparities found in earlier studies, these disparities that may have returned since the ban on plea bargaining was lifted in 1993 [*sic*]. The Alaska Legislature should fund

a new sentencing study by the Judicial Council (Alaska Fairness Study 1997:90).

Thus, also in accord with this project's model, under Alaska's plea bargaining ban, racial disparity in the administration of justice "disappeared," and then reappeared once the state lifted the ban.

Unfortunately, actual data of prison admissions in Alaska broken down by the race of the admittee is not widely available. For instance, in a report titled *Race of Prisoners Admitted to State and Federal Institutions 1926 to 1986*, and produced by the Bureau of Justice Statistics, Langan (1991) includes data, by state, of the racial composition of people admitted to prisons. However, there is no data available for Alaska included for any of those years. Moreover, the National Corrections Reporting Program collects annual data on prison admissions and releases, and includes demographic information about the prisoners. The data, which is available annually from 1983 forward, is self reported by states, and is voluntary, with about two thirds of states reporting. Unfortunately, while Alaska is one of the states that reports data, the data on prison admissions for Alaska is either not present, or it is not well coded such that it is impossible to determine which data is actually from Alaska. From 1983 to 1993, there are a total of 317 prison admission records for Alaska with most years containing zero. Even for the years that do contain some data, there is no county recorded, so it is impossible to tell if any trends occurred in a single county. More complete data is available beginning in 1994, after the ban officially ended.

The El Paso Ban

The second almost complete plea bargaining ban occurred, beginning in 1975, in the city of El Paso, Texas (Holmes et al. 1992, Weninger 1987, McDonald 1985, Daudistel 1980, Daudistel and Holmes 1979). The ban occurred due to a conflict

between the prosecutor's office and the district court judges.⁷ Based on the findings of a study that juries actually gave lower sentences than those recommended by the prosecutor for similar offenses, the district judges announced that they would no longer accept sentence recommendations from prosecutors. In retaliation, the prosecutor's office announced that it would no longer plea bargain at all, presumably threatening the judges with having to do more work. As a way around the prosecutor's plea bargaining ban, the judges enacted a "point system," giving points to defendants based on various factors such as the defendant's prior record, the severity of the crime he was accused of, etc., thus allowing a defendant and defense attorney to predict what sentence he was likely to receive. Beyond that, the judges did not offer any concession for pleading guilty. The expectation by the judges was that a defendant would be able to calculate his own sentence. The judges apparently presumed that a defendant would add up his points, realize that he only faced probation or that the sentence he was likely to receive after a guilty plea was lower than had he been able to plea bargain with the prosecutor, and thus he would not bother with a trial. However, the judges' plan largely backfired, the apparent flaw being that without concessions, defendants were responding to the new incentives, not the ones the judges' plan had replaced. That is, with no sentencing concessions for a guilty plea, a defendant would always be better off with a trial. Thus, more defendants invoked their right to a jury trial. Indeed, the judges not only added explicit concessions for guilty pleas to the point system after two years (McDonald 1985), the criminal judges in El Paso also elicited help from civil court judges, effectively increasing the number of judges from 2 to 10 (Daudistel 1980).

None of the numerous studies of the El Paso ban present much raw data

⁷ The details of the ban given here are compiled from the various studies. The various cited accounts of the ban differ slightly on the exact details of how the ban came about. The differences are not material to this project.

regarding the ban. For instance, Holmes et al.'s (1992) study is primarily an attempt to explore the relationship between caseloads and plea bargaining, and it is also an exercise in exploring more advanced statistical techniques than are used in the other studies mentioned in this section. However, while Holmes et al. presents considerable statistical detail, only trends are shown, making it difficult to ascertain what actually happened from the perspective at issue in this project. Additionally, while Weninger (1987) does report some raw numbers, the study only uses a sampling of cases and thus the raw numbers do not indicate the total number of cases for any category. Similarly, Daudistel (1980) only reports whether the judges sentencing is internally consistent, and this only for burglary and robbery charges.⁸

However, there is still some useful and interesting information given. For instance, Daudistel and Holmes (1979) report that in 1975, before the ban, the jury trial rate was 6.4 percent. It increased to 10 percent in the first year of the ban, and 16.5 percent in the year after that. Additionally, the disposition rate declined during the ban. The actual number of dispositions is not given, however the number of docketed cases is. At the beginning of the ban, there were 675 pending cases. Within the first year of the ban, this number had increased to 972, a nearly 40 percent increase.⁹ A year later the number was 1198 (Daudistel 1980). The level of new charges reportedly increased by 133 in the second year of the ban accounting for some of the increase in pending cases. However, this number had actually decreased during the first year of the ban. Finally, the authors report that prior to the ban, the courts managed to dispose of 64 percent of their cases. This dropped to 50 percent during the

⁸ In chapter 5 it was noted that there was a movement in the 1970's to remove discretion from judges and probation officers in order to make the criminal justice more equal. Daudistel's (1980) focus is on whether the point system in fact led to equality in sentencing between judges.

⁹ There is some dispute about these numbers with other studies reports that the number of cases on the felony docket increased from 219 to 767 between 1975 to 1978 (Weninger 1987, Callan 1979). However the data shows the same pattern of increase.

first year of the ban, and 42 percent in the second year.

This is somewhat different from what happened in Alaska where the docket size dropped after the ban. However, in that instance, the ban on plea bargaining was implemented by the prosecutor's office and as such the prosecutor had an incentive to keep the number of cases under control, not bringing more cases than could be tried. In El Paso, the ban was effectively instituted by the judges, and the prosecutor's office saw bringing more cases as a form of retaliation. Thus, the rise in case numbers is indicative not of increased prosecution, but of a court system that could not keep up. In other words, there was a drop in dispositions.

While the conviction rate in El Paso did not change systematically over the long term, it did drop sharply after the initial ban. Moreover, it began to rise after a few years (McDonald 1985). This is likely indicative of the dynamic between the prosecutor's office and the judges and the alternative plea bargaining system that was eventually implemented in the revised point system. Further, other studies suggested that weak cases began to be screened out after the ban leading to the initial decline, and that the cases brought by the prosecutor to the grand jury eventually became stronger (Daudistel 1980, Weninger 1987).

Other Bans

A third relevant study is from Hampton County, "a suburban county located adjacent to a major midwest [*sic*] industrial city" (Church 1976: 378).¹⁰ In his 1976 study, Church examined the effects of the policies implemented by a newly elected county prosecutor, whose campaign was based around an anti-drug theme. The prosecutor, in an effort to get tough on drug dealers, instituted a policy whereby once a

¹⁰ Hampton County is a fictitious name. However, in a conversation with the author, Hampton County was revealed to be located in western Michigan.

warrant was issued in the case of delivery of a controlled substance, the prosecutor's office was prohibited from lowering the charge. This effectively eliminated plea bargaining for drug crimes in the district as charge bargaining was the preeminent form of plea bargaining. While a different type of bargaining such as sentence bargaining could have replaced the prohibition on charge bargaining in theory, in practice the research gives no indication that this in fact happened. Instead, the mandate to eliminate charge bargaining seems to have been internalized to eliminate all bargaining. Additionally, after the first year of the policy, the prosecutor's office added armed robbery and carrying a concealed weapon to the list of charges for which plea bargaining was prohibited.

One difficulty with the data is that there is no report of what happened to other prosecutions. Further, there is also evidence that, as predicted by some commentators, much plea bargaining either went underground, became implicit, or both. For instance, judges began engaging in hypothetical deals with defendants, thus allowing a defendant to know what sort of concessions he might be granted if he did not proceed to trial.¹¹ Additionally, because the data is segregated by year, while the new prosecutor took office in the middle of a year, there is some blurring as to what data belongs to which administration thus making it somewhat difficult to analyze trends. Finally, the original study is concerned with the question of whether the elimination of plea bargaining will lead to every defendant exercising his right to a trial, and if so whether this would be sustainable in terms of maintaining the same levels of dispositions. Thus, the data is concentrated on answering this question.

However, even with those caveats, it is clear that the total dispositions in low

¹¹ As noted, the Alaska Supreme Court held that trial judges could not engage in plea bargaining directly with defendants. There is no indication that Michigan courts held similarly. However, from the description given of how these negotiations took place, the judges seemed to recognize that actual, direct negotiations would be frowned upon and thus engaged in hypothetical discussions. In practical terms, however, it likely amounts to the same thing.

level drug cases dropped considerably with plea bargaining eliminated. From 1972 to 1974, the rate of guilty pleas in drug cases dropped from 98% to 90%, and the number of trials increased from 2 to 4. Most importantly, however, the number of total warrants in these cases dropped by 36% from 237 to 151. Interestingly, even with the drop in warrants, the conviction rate after the ban dropped from 63 percent to 60 percent.¹² Convictions at trial increased from just under 4 percent to about 7 percent while acquittal at trial dropped from 2.5 percent to under one percent. However, the number that is most relevant here is that the total number of convictions dropped from 150 to 92, a nearly 40 percent reduction.

A final small case study took place in Wayne County, Michigan¹³ (Heumann and Loftin 1979). In that instance, Michigan passed a law, that went into effect January 1, 1977, whereby any defendant convicted of a felony who had a gun in his possession during the commission of the felony would receive a two year sentence added to the sentence for the underlying felony. Further, the two year additional sentence could not be suspended, and the defendant could not be paroled while serving the two year sentence. Moreover, in Wayne County, the prosecutor added to the new law by prohibiting plea bargaining with regard to the new offense. He required that if the elements of the crime existed, they would be included in the warrant, and neither the charge nor the penalty could be bargained away. By all accounts, the prosecutor's office was consistent in its application of both the law and the plea bargaining ban.

Again, the data is limited, but it still provides some support for the model. The original study is concerned with whether prison sentences actually increased under the

¹² According to the author, the conviction rate for the prosecutor before the ban was 69 percent while the conviction rate for cases handled exclusively by the prosecutor who instituted the ban was 59 percent.

¹³ Detroit is located in Wayne County.

new law, and the results are given as proportions. However, some limited raw data is supplied from which a few trends can be gleaned. The data is split into two groups, those cases occurring before the law went in to effect, and those cases occurring after. For the cases occurring before the law went into effect, the data encompasses crimes committed during or before 1976 and disposed of during 1976 or 1977. For the cases covered under the law, the data encompasses offenses committed and disposed of within the first six months of 1977. Thus, merely owing to the fact that the time period covered by the first set of data is longer, there will be more cases. However, if it can be shown that the drop off in the number of cases is steeper for those covered by the plea bargaining ban than for those not covered, it would indicate that the lack of plea bargaining was instrumental to the lower numbers.

Of trials for cases of felonious assault, armed robbery, and other assaults, where there was no gun present, for the time segment prior to the ban, there were 400 cases. For the time period after the ban, there were 119, representing a drop of 70 percent. However, for cases for the same crimes when there was a gun present, and thus where the case would come under the plea bargaining ban, in the time period prior to the ban there were 733 cases. In the period after the ban there were 174 representing a 76 percent drop off.¹⁴ Clearly, not knowing the specifics of the data collection strategies, or being able to control for the behavior of the prosecutors, it is difficult to know what the additional drop off indicates. However, for the small reach of the ban, the data is at least consistent with the prediction of the model.

While the available data from plea bargaining bans is limited, what is available is in accord with this project's model. With a ban on plea bargaining, whether due to

¹⁴ Cases from a broader spectrum (encompassing murder, sexual assault, armed robbery, and several types of assault) from the period before the ban to the period after dropped off from 2111 to 571, a reduction of approximately 73 percent.

prosecutors screening cases more stringently, or judges being unable to keep up with their dockets, the number of criminal dispositions drops. Moreover, where the disposition rate increases, it does so due to an erosion on the plea bargaining ban. Finally, the data suggests that the reduction in dispositions is more likely to be culled from low level cases rather than violent or serious property crimes.

Chapter 9 – Conclusion

The model presented in this project argues that the plea bargaining system is, in part, responsible for both the large American prison population as well as the disproportionately large number of minorities who make up that population. It is based on the premise that self-serving decisions made by self-interested actors can aggregate in ways detrimental to those same decision makers. How people make decisions is a very broad topic. In the traditional simplified rational choice model, actors make decisions by weighing costs and benefits to find the greatest payoff. Determining costs and benefits, however, is subjective for each person. Indeed, social psychologists have added a great deal of nuance to understanding how people actually make decisions. In this model, not only will a defendant's subjective beliefs about the criminal justice system influence his decisions, but his view of his particular predicament will as well. Indeed, the prosecutor's, the defense attorney's, and the judge's views will also matter.

The observation that, not only do Blacks fare worse in the criminal justice system than whites, but that this would influence how African Americans would individually approach the institution is not new. Indeed, over a century ago DuBois made the following observations: "Courts usually administer two distinct sorts of justice: one for whites, and one for Negroes ... The methods of punishment of Negro criminals is calculated to breed crime rather than stop it" (DuBois 1904). Surveys of African Americans show that, compared to whites, Blacks distrust the criminal justice system. Indeed, in many minority communities, defendants can observe that those around them have generally fared poorly once entering the criminal justice system. That is, a Black defendant will likely estimate his chances at trial to be lower than for a white defendants based upon the high conviction rates of people around him.

Perniciously, this observation is largely fueled by the high percentage of those convictions won through plea bargains. Thus, pleading out has become a norm that is enforced not only through learned behavior and shared experience, but also through more general observation of how Black's have fared in American society in general.

There is little doubt that the American prison system has spiraled out of control. In terms of both the overall population, as well as the racial makeup of that population, American prisons have moved well beyond those of any other major democracy. Easterbrook (1992) argues that absent plea bargaining, too few people will serve time which will fail to deter would be criminals from committing crime, leading to an increase in criminal activity. However, the United States already has the highest rate of incarceration in the world. Moreover, the incarceration rate has seemingly had little effect on the crime rate (Western 2006). Indeed, there is every reason to think that increased incarceration has actually backfired, created a norm of prison acceptance rather than deterring crime. Thus it is the institution of plea bargaining that has fueled the growth in both population as well as demographic disparity.

LIST OF CASES

- Bardwell v. Hiatt*, 50 F.Supp. 913 (M.D.Pa. 1943)
- Bordenkircher v. Hayes*, 434 U.S. 357 (1978)
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