OPEN PROSECUTION

Brandon L. Garrett,[*] William Crozier,[**] Elizabeth J. Gifford, [***] Catherine Grodensky, [****] Adele Quigley-McBride, [*****] and Jennifer Teitcher[*****]

Duke University School of Law
210 Science Drive
Durham, NC 27708
(919) 613-7090
bgarrett@law.duke.edu

October 21, 2021

* L. Neil Williams, Jr. Professor of Law, Duke University School of Law and Director, Wilson Center for Science and Justice. Many thanks to Stuart Benjamin, Joseph Blocher, Walter Dellinger, Kate Evans, Ben Grunwald, Ryke Longest, Darrell Miller, Allison Redlich, Barak Richman, Neil Siegel, Ronald Wright, and participants at a Duke Law School faculty workshop for comments on earlier drafts. We are deeply grateful to District Attorney Satana Deberry, District Attorney Andrea Harrington, and Utah County Attorney David Leavitt for their and their office's collaboration in this work. We are extremely grateful to the research assistance provided by Kathy Fernandez, Eunice Kim, Emma Li, Matthew Ralph, and Ellie Studdard. We are grateful to the Wilson Center for Science and Justice for supporting this research.
** Research Director, Wilson Center for Science and Justice.
*** Sanford School of Public Policy, Duke University.
**** PhD Candidate, Sanford School of Public Policy, Duke University.
***** Post-doctoral Fellow, Wilson Center for Science and Justice.

ABSTRACT

The U.S. Supreme Court has recognized, where the vast majority of criminal cases are resolved without a trial, that: "criminal justice today is for the most part a system of pleas, not a system of trials." While a plea, its terms, and the resulting sentence entered in court are all public, how the outcome was negotiated remains almost entirely nonpublic. Prosecutors may resolve cases for reasons that are benign, thoughtful, and well-calibrated; or discriminatory, self-interested, and arbitrary, with very little oversight or sunlight. For years, academics and policymakers have called for meaningful plea-bargaining data to fill this crucial void. In this Article, we describe opening the "black box" of prosecutorial discretion by tasking prosecutors with documenting detailed case-level information concerning plea bargaining. This is not a hypothetical or conceptual exercise, but rather the product of theory, design, and implementation work by an interdisciplinary team. We began collecting systematic data in two prosecutor's offices, with a third to follow shortly. We describe how the data collection system was designed, piloted, and implemented, and what insights it has generated. The system developed can readily be adapted to other offices and jurisdictions. We conclude by developing implications for prosecutors' practices, defense lawyering, judicial oversight, and public policy. Open prosecution has further constitutional and ethical implications, as well as still broader implications for democratic legitimacy. An open prosecution approach is feasible, and, for the first time in the United States, it is in operation.

TABLE OF CONTENTS

INTRODUCTION

The U.S. Supreme Court has recognized, where the vast majority of criminal cases are resolved without a trial, that: "criminal justice today is for the most part a system of pleas, not a system of trials."[1] While a plea and the resulting judgment and sentence entered in court are public, how the outcome was negotiated remains almost entirely nonpublic.[2] Prosecutors may resolve cases for reasons that are discriminatory, self-interested, or arbitrary, with very little oversight or sunlight.[3] Thus, plea bargaining is seen as a "black box," within which prosecutors have free reign, absent strong evidence of discrimination or vindictiveness.[4] In a handful of areas, researchers have been able to document racial disparities in charging.[5] In many high profile cases, DNA tests have exonerated innocent people who pleaded guilty.[6] While we better appreciate that the plea negotiation process can go wrong, "little is known" about the plea process itself and how prosecutors exercise their discretion.[7]

---

[1] *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012); Missouri v. Frye, 566 U.S. 134, 144 (2012) ("To a large extent ... horse trading determines who goes to jail and for how long… It is not some adjunct to the criminal justice system; it is the criminal justice system.") (quoting Robert Scott & William Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)).

[2] *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) ("Plea bargaining is inaccessible because bargains are made in the shadows. Only the final product of each negotiation is reported on paper and in the courtroom.").

[3] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004); Katherine Lowe, *Prosecutorial Discretion*, 81 GEO. L.J. 1029, 1035 (1993).

[4] *See* Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128–29 (2008); *see also infra* Part I.B.

[5] *See, e.g.* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998). For one study documenting racial disparities in charging decisions, particularly regarding defendants without prior criminal charges in lower-level offenses, *see* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191-92 (2018).

[6] *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Convictions Go Wrong* 152-53 (2011) (describing data and examples of DNA exonerations involving guilty pleas, but also how little is known regarding their incidence, including because a plea is a barrier to post-conviction DNA testing and relief).

[7] As one recent review of the research puts it, "little is known about plea bargaining. Pleas are offered and retracted at the unfettered discretion of

Indeed, for the bulk of decision-making in criminal cases, whether or not the case goes to trial, very little is documented, communicated, or known, even within prosecutors' offices themselves. With respect to plea negotiations specifically, line prosecutors rarely document their negotiations systematically (and, often, not at all), and they are not required to do so.[8] As a result, prosecutors, defense lawyers, judges, and the public, are left to rely on anecdotal evidence to guess how prosecutors approach their work and what factors truly drive criminal outcomes.[9] This practice affects constitutional rights, public policy, legal ethics. Given the significance of the plea process, we argue that it also implicates the core Rawlsian democratic commitment to public reason-giving.[10]

In this Article, we describe how we have opened the "black box" of prosecutorial discretion, by tasking prosecutors with documenting detailed case-level information concerning plea bargaining. This is not a hypothetical or conceptual exercise, but rather the product of theory, design, and implementation work on the ground by an interdisciplinary team. For years, academics and policymakers have called for data to fill the crucial void in our understanding.[11] However, the extant pilot projects have collected only quite limited and superficial data concerning

---

prosecutors. Bargains themselves are undocumented and largely unchallenged…" Ram Subramanian, Léon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining* (September 2020), at https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf (last viewed June 6, 2020).

[8] *See Robin Olsen, Leigh Courtney, Chloe Warnberg, and Julie Samuels, Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices (Urban Institute, 2018)* (survey of 158 state prosecutor's offices finding that many offices have an interest in collecting and using data, but it is "uncommon" to have any "systematic approaches for tracking compliance with office policies."). Nor is the role of defense counsel, effective or not, during the plea process documented in any meaningful way. We turn to that concern in Part III.

[9] Regarding the importance of prosecutorial discretion generally, *see, e.g.* M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences,* 122 J. POL. ECON. 1320, 1326 (2014) (explaining "[l]egal scholars, judges and practitioners broadly agree that prosecutorial decisions play a dominant role in determining sentences"); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 5 (2007).

[10] *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

[11] *See infra* Part I.

plea decision-making, focusing instead on the initial screening and charging stages, or on existing administrative data concerning sentencing.[12] Even some of the recent ambitious efforts by prosecutors to create data dashboards fail to convey critical information needed to evaluate practices and policies, and none of those efforts document plea negotiations.[13]

In this Article, we describe the feasibility and implementation of plea tracking. We are collecting systematic data, on the ground, in three prosecutor's offices in very different jurisdictions, which enthusiastically embraced an open prosecution approach.[14] Plea tracking has been designed, piloted, and fully implemented in Durham, North Carolina and in Berkshire, Massachusetts, and it is in progress in Utah County, Utah.[15] We describe how we developed those systems with each District Attorney's Office and our initial findings and insights. The anecdotal feedback we received from office leadership and line prosecutors is positive. It takes less than ten minutes to document a typical case. The system developed can readily be adapted for other jurisdictions to reflect different prosecution decision-making policies, local rules surrounding plea negotiations, and office structures. Hence, an open prosecution approach is feasible, and, for the first time in the United States, operational.

In Part I, we begin by describing the perennial "black box" problem, which begins with judicial deference to the "special province" of the prosecutor's discretion, largely unfettered by constitutional criminal procedure or statutory rules.[16] We highlight that, while there have been efforts to produce more open data concerning traffic stops, police use of force, and officer misconduct, prison populations, criminal sentencing, and the charging and plea-bargaining process

---

[12] *See id*.

[13] *See infra* Part I.D.

[14] We are grateful to District Attorney Satana Deberry and her office, including Assistant District Attorney Daniel Spiegel and then-Assistant District Attorney Alyson Grine, for their collaboration on the plea tracker described *infra* Part II. We are similarly grateful to District Attorney Andrea Harrington and the Berkshire County District Attorney offices.

[15] For initial news coverage of this work, *see, e.g.* Virginia Bridges, *9 Out of 10 Cases End in Plea Deals. Duke Law, NC Prosecutor Want to Know How*, News & Observer, July 15, 2021; Shira Shoenberg, *Berkshire District Attorney Aims to Open 'Black Box' of Plea Negotiations*, Commonwealth, July 15, 2021.

[16] *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985).

have remained closed to public review.[17] There have been efforts to pilot improved data collection in prosecutors' offices. We focus on the two primary efforts. First, the Vera Institute of Justice's Race and Prosecution project brought data collection into several prosecutor's offices, generating important insights.[18] The Orleans Parish District Attorney's Office, during the tenure of Harry Connick, generated internal data to inform policy, aimed at restricting the scope of plea bargaining by declining more cases, but upon his retirement the project lapsed.[19] Second, the John D. and Catherine T. MacArthur Foundation has supported work to examine data in several prosecutor's offices to produce Prosecution Performance Indicators.[20] Both efforts set the stage for efforts to rethink prosecution data collection and policy, but neither effort included plea tracking.[21]

In Part II, we first describe how we have developed and piloted data collection at two prosecutors' offices. Further, we describe how as part of piloting that system, we collected qualitative data concerning plea bargaining approaches and quantitative data coded from written records of plea transcripts.[22] Second, we describe our preliminary results.[23] Even basic descriptive findings, like the fact that the overwhelming majority of plea offers were accepted, without revision of the written offer, shed new light on plea negotiations. We gain insight into what considerations supported plea offers, the role of judges, and more.[24] Third, we describe how these data can be used by prosecutors' offices. Not only are we collecting novel data, but we can also supplement the data from the tracker with other data that exists in some jurisdictions, such as sentencing data. But, in contrast to other data sources, the plea trackers permit us to collect real-time information that can be immediately used. Thus, we are opening the black box in two respects: (1) collecting data on steps in the plea process that were

[17] Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 85 G.W. L. REV. 1490 (2018).
[18] *See infra* Part I.D.
[19] Wright & Miller, *supra*, at 61-62, 115.
[20] *See infra* Part I.D.
[21] Similarly, leading efforts to study disparities in death penalty cases, *supra* note 5, and the Berdejó study, *supra* note 5, had analysis of charging and defendant characteristics, but no data regarding plea negotiations.
[22] *See infra* Part II.A.
[23] *See infra* Part II.B.
[24] *See infra* Part II.C.

previously undocumented; and, (2) incorporating existing data to inform ongoing prosecution work. We also describe data dashboards that we are creating to interactively display data to offices.

This Article reflects the beginning of a larger project to develop methods for tracking plea negotiations and use of discretion as a standard criminal law practice. In Part III, we turn to making the case that this should be a required feature of criminal practice and provide details on the process and lessons learned from implementation. We describe how our plea tracking platform, and our results can inform the practices of prosecutors. Further, we outline how the concept of a plea tracker could be a powerful tool for defense lawyers, although a full discussion of an open defense approach is beyond the scope of this project.[25] We then turn to how this work can inform judges and judicial review.[26] We describe the larger implications for public awareness and policymaking, including addressing racialized mass incarceration. Asking prosecutors to take time to document a more holistic thought process has the potential to introduce "friction" into the plea negotiation process, as a check against racial and other invidious biases.[27]

Members of the public cannot assess how elected prosecutors are performing without meaningful, detailed, and interpretable information about what occurs during the plea negotiation process. Although we do not mean to suggest that all executive actors must document reasons for their discretionary decisions, we argue that plea bargaining is a special case. The outsized importance of plea negotiations in our system of criminal justice and lack of documentation means most cases that are resolved go undocumented. Why are court proceedings recorded and scrutinized but plea bargaining, the alternative, does not require even basic data collection? We argue that a standard practice of recording information relevant to the development of pleas and negotiations is necessary and conclude that requiring

[25] We are exploring plea tracking with several public defense offices and hope to report on piloting and evaluations in the future.

[26] *See infra* Part III.D.

[27] *See* Jennifer Lynn Eberhardt, *Biased: Uncovering the Hidden Prejudice That Shapes What We See, Think, and Do* 184-186 (2019) (describing the value of adding "friction" to a process to reduce racial bias); *see also* National Academies of Sciences, Engineering, and Medicine, *The Science of Implicit Bias: Implications for Law and Policy: Proceedings of a Workshop – in Brief* (National Academies Press, 2021), at https://doi.org/10.17226/26191.

documentation offers a crucial safeguard of the fundamental values of public reason and democratic legitimacy.[28]

I. The Lack of Prosecution Transparency

A wide range of criminal legal actors have embraced data collection as a method to assure transparency to the public and as a means of internal accountability.[29] However, data relevant to prosecution outcomes and plea-bargaining outcomes are often not collected, making publicly-funded attorneys outliers among executive agencies generally, and within the criminal system specifically. Unlike a decision to arrest, which is made at one time, prosecutorial discretion regarding decisions to pursue or dismiss some of, or all of, the charges, negotiate outcomes for the charges that are pursued, and proceed to trial or not, are made over time. Prosecutorial discretion reflects the flexibility needed to adjust to evolving considerations in cases.[30]

The rise of plea bargaining as a way to resolve more cases more efficiently heightened the importance of prosecutors' largely undocumented and non-public discretionary work. Scholars have critiqued the way that more plea bargaining has created a new "black box" of prosecutorial discretion, but little has changed in practice. The harms to public trust and accountability are noteworthy, but it is also difficult for prosecutor's offices to measure their performance internally. Traditionally, prosecutors have been evaluated based on measures such as conviction rates that may provide a skewed perspective on their work.[31] For prosecutors to develop newer measures with which to evaluate their work, they may need to college new data.

Over the past two decades, a slowly growing movement has promoted internal data collection by prosecutors. Most of those efforts have focused on charging, racial and other disparities in outcomes, and have

---

[28] *See* Rawls, *supra* (describing the value of public reason given as a core feature of democratic accountability).

[29] *See* Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 85 Geo. W. L. Rev. 1490 (2018).

[30] *See* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1, 2, 5 (1971).

[31] *See* Elaine M. Nugent-Borakove and Lisa M. Budzilowicz, *Do Lower Conviction Rates Mean Prosecutors' Offices Are Performing Poorly?* (National District Attorneys Association, American Prosecutors Research Institute, 2007).

demonstrated that it is feasible for offices to collect and share prosecution data. In recent years prosecutors, particularly in larger jurisdictions and with outside grant support, have embraced more systematic efforts to collect data and share it with the public in data dashboards. This Part concludes by discussing strengths and limitations of those pilot efforts to collect internal prosecution data and what insights have been generated by those efforts.

A. Prosecutors as Enforcement Outliers

As the U.S. Supreme Court observed in *McCleskey v. Kemp*, prosecutorial discretion is "at the heart of the State's criminal justice system," but, quoting Kenneth Culp Davis, this "power to be lenient [also] is the power to discriminate."[32] That power is not subject to the type of regulation or oversight that is present in other types of government agencies, such as the Administrative Procedure Act.[33] While prosecutorial discretion is "subject to constitutional constraints,"[34] there are only very deferential limits on prosecutorial charging discretion, chiefly prohibitions on selective or vindictive prosecution.[35] Regarding selective prosecution, it is extremely difficult to meet the rigorous test set out by the Supreme Court in *United States v. Armstrong,* requiring a defendant to put forth "some evidence that similarly situated defendants of other races could have been prosecuted, but were not," to even obtain discovery on the question whether prosecutors engaged in race discrimination in charging.[36]

---

[32] McCleskey v. Kemp, 481 U.S. 279, 297, 312 (1987) (quoting Kenneth Culp Davis, *Discretionary Justice* 170 (1969)).

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

[34] United States v. Batchelder, 442 U.S. 114, 125 (1979).

[35] *See* Blackledge v. Perry, 417 U.S. 21 (1974).

[36] United States v. Armstrong, 517 U.S. 456, 469 (1996); *see, e.g.* Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 Geo. Wash. L. Rev. 659, 685-717 (1981); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 Am. Crim. L. Rev. 1071, 1106-19 (1996). No such claim has succeeded in federal courts since the *Yick Wo* decision. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886); *see also* Bibas, *supra* note xxx, at 970.

Courts have expressed deep reluctance to review decisions to decline to file charges, citing to separation of powers concerns.[37] As the Supreme Court has emphasized:

> Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.[38]

The Supreme Court has also made clear, regarding plea negotiations specifically, that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."[39]

Although in most states, the head-prosecutors for local offices are elected, the work of the line prosecutors is not particularly salient or transparent to the public.[40] Some have hoped that the reform of criminal codes that reduce the discretion of prosecutors could bring with it greater prosecutorial accountability.[41] In contrast, however, sentencing laws have expanded the options, power, and discretion of prosecutors.[42] As Kenneth Culp Davis observed, inaction, such as a decision not to bring charges, is particularly difficult to review, difficult to track, and often

---

[37] Marc L. Miller & Ronald F. Wright, *Criminal Procedures* 908 (3d ed. 2007) (noting "only in rare circumstances" do judges review charging decisions, and when they do so, such review is "very deferential"); Bennett L. Gershman, *A Moral Standard For the Prosecutor's Exercise of the Charging Discretion*, 20 Fordham Urb. L.J. 513 (1993) ("The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law."); *see, e.g.* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring be- fore a grand jury, generally rests entirely in his discretion.").

[38] *See* Wayte v. U.S., 470 U.S. 598, 607 (1985).

[39] See Weatherford v. Bursey, 429 U.S. 545 (1977).

[40] *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 923-31 (2006).

[41] *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 630-31 (2005).

[42] *See* Bibas, *supra* note xxx, at 939-40 (describing how mandatory-minimum sentencing laws expanded prosecutorial power).

goes unnoticed, yet it is a central feature of prosecutorial discretion. Indeed, for lawmakers or policymakers to really understand the nature of the problem, as Judge Stephanos Bibas has noted, they need "full access to the underlying data," and due to a lack of existing data, "it is unclear whether oversight of prosecutors can be probing."[43] One cannot assess whether prosecutors offer plea deals that align with what they expect would be the outcome at trial, written policies in their particular office or jurisdiction, asymmetric information, cognitive biases, or resource concerns.[44] Before turning to those questions, we step back to briefly describe what forces explain the dominance of plea negotiations in modern American criminal justice.

B. The Rise of Plea Bargaining

The rise of plea bargaining as an institution in the United States, with the vast majority of criminal cases resolved through plea bargains,[45] has been well documented by legal scholars and historians, and has magnified the importance of understanding how prosecutors exercise their discretion at that stage in the process.[46] Today, the "ordinary course" of a criminal case is a plea bargain, as the U.S. Supreme Court recognizes.[47] Over several decades, the role of plea bargaining was cemented by increasing caseloads, sentencing guidelines, and professional norms.[48] What do prosecutors and defendants each gain by engaging in plea bargaining? Prosecutors themselves have limited resources and can only charge so many criminal cases; resolving cases by obtaining judgments in negotiated dispositions is far more

---

[43] *See* Bibas, *supra* note xxx at 968.

[44] *See, e.g.* Josh Bowers, *Punishing the Innocent*, 156 U. Pa. L. Rev. 1117, 1132-39 (2008); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795, 796–98 (2012).

[45] *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006).

[46] *See* Milton Heumann, *Plea Bargaining: The Experiences Of Prosecutors, Judges, and Defense Attorneys* 110-17 (1978); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2549 (2004); George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* 6 (2003).

[47] Lafler v. Cooper, 566 U.S. 156, 168 (2012).

[48] *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 51 (1968); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1 (1979).

efficient than proceeding to a criminal trial.[49] Further, they may have incentives to dispose quickly and cheaply with low-profile cases, or that have weak evidence and/or that might pose a risk of loss at trial.[50]

A range of other discretionary procedures that precede plea bargaining also define the power and discretion of prosecutors. Specifically, prosecutors also have power regarding case initiation, screening, and charging. The rules will, however, vary by jurisdiction, including whether police can direct-file cases, and prosecutors have varying levels of discretion whether to dismiss or divert charges that are accepted.[51] Those earlier screening and charging decisions have been subjected to more research and data-collection efforts, since such case information is sometimes documented in administrative court data. Unfortunately, many states only document concerning charges that result in convictions, precluding an examination of discretion in dropped charges or dismissals.[52] Further, these decisions that occur in early stages of a case can affect the subsequent plea negotiations, including whether charges are joined and "piling" charges in a single case.[53]

---

[49] Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 Ga. St. U. L. Rev. 261, 303 (2021); see also Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) ("[Prosecutors] must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.").

[50] Id. See Bibas, supra, regarding critique of the "shadow of the trial" model.

[51] *See* Crespo, *supra*, at Part I.

[52] *See* Lauren O'Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 420 (2010) ("The limited empirical attention devoted to prosecutorial discretion is largely the result of data limitations. Whereas data on judicial sentencing decisions are now readily available, records on prosecutorial charging behavior remain elusive."). For charging studies, *see, e.g.* Malcolm D. Holmes et al., *Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery*, 24 J. RES. CRIME & DELINQ. 233, 242–45 (1987) (studying race disparities in charge reductions Delaware County, Pennsylvania); Cassia Spohn et al., *The Impact of Ethnicity and Gender of Defendants on the Decision to Reject or Dismiss Felony Charges*, 25 CRIMINOL. 175, 183–86 (1987); Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, 33 JUST. Q. 398, 414 (2016) (documenting race disparities in misdemeanor marijuana charging in Manhattan).

[53] *See* id., *supra*, at Part II; Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 Penn St. L. Rev. 1107, 1121 (2005).

Moreover, prosecutorial discretion does not exist in a vacuum. The defense lawyer and the defendant might respond to or challenge the prosecutor's offer.[54] Further, the prosecutor's discretion may be partly cabined by sentencing statutes and guidelines. While typically limited, even in jurisdictions that provide for judicial involvement, the judge may play a role in what plea is negotiated and imposed.[55]

Some constitutional criminal procedure regulates the plea-bargaining process, as do state statutes. Some of those constitutional rulings broadly reinforce prosecution discretion during the plea negotiation process. The U.S. Supreme Court has made clear that prosecutors may extend offers of leniency in exchange for a plea,[56] and they may also, without violating due process, conversely threaten more serious charges if a defendant does not accept a plea offer.[57] Nevertheless, that plea can only be entered and the right to a trial can be waived if it can be demonstrated the defendant knowingly and voluntarily waived of those rights.[58] Further, the Court has explained that because a plea is a contract, the prosecutor must fulfill the promises made.[59] The defense has obligations to provide effective assistance during the plea negotiation process, as well, including adequately communicating the terms of a plea offer to their client (the defendant), ensuring their client understands the direct and collateral consequences of a conviction.[60] However, the prosecution need not disclose exculpatory evidence to the defense during the plea negotiation process, so defendants might not know the full extent of the case against them before trial.[61] Further, the rules regarding coercion and plea bargaining are quite forgiving. For example, individuals are commonly detained in jail pretrial and, in lower-level cases, face enormous pressure to plead guilty.[62]

---

[54] *See also* Ron Wright, Jenny Roberts, & Betina Wilkinson, *The Shadow Bargainers,* CARDOZO L. REV. (forthcoming) (surveying public defenders regarding plea bargaining practices).
[55] *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1228 (2016).
[56] Corbitt v. New Jersey, 439 U.S. 212 (1979).
[57] Bordenkircher v. Hayes, 434 U.S. 357 (1978).
[58] Brady v. United States, 397 U.S. 742, 748 (1970).
[59] Santobello v. U.S., 404 U.S. 257, 260 (1971).
[60] Padilla v. Kentucky, 559 U.S. 356 (2010); Lafler v. Cooper, 566 U.S. 156 (2012).
[61] United States v. Ruiz, 536 U.S. 622 (2002).
[62] *See* Subramanian et al, *In the Shadows*, *supra* note 7, at 3.

Prosecutors can use several levers during plea negotiations. Some pleas include charge-bargains, wherein the agreement involves the dismissal of one or more charges or offering to charge them with a lesser offense. Sentence-bargains involve agreements to lower sentences in exchange for a guilty plea. Others may involve fact-bargains, in which the parties agree to facts that may preclude elements supporting more serious charges. Any given case may involve all or some of these types of bargaining. States do not always permit all types of plea agreements, at least formally. There are states where "open" or "blind" pleas can be offered in which a person agrees to plead guilty and waive their right to a trial without any assurances from the prosecution regarding their ultimate punishment.[63] Such state rules reflect different roles of prosecutor, defense, defendant, and judge, depending on the type of plea bargain.

State court rulings and statutes may reflect similar approaches. State and federal statutes may also set out the basic mechanics of the plea process. In the federal system, Fed. R. Crim. P. 11 sets out categories of pleas, including both charge bargains and sentencing bargains,[64] and the approval process and standards for each. Notably, in the federal system, the judge must not participate in the process.[65] Rule 11 also requires that the defendant must enter a plea voluntarily, with a supporting factual basis. Further, the judge shall address the defendant "personally in open court," under oath, regarding the trial rights waived, and determine at that time whether the plea was? voluntary and informed given the nature of the charges and the consequences of the plea. However, there is no specific guidance in the rule for how judges should make this determination.[66] The rule requires that proceedings in court in which a plea is entered "must be recorded by a court reporter or suitable recording device."[67] Separate statutes create rights of victims to be notified of plea negotiations and have an opportunity to share

[63] *See id.* at 15 (summarizing research).
[64] Fed. R. Crim. P. 11 (A)-(C).
[65] Fed. R. Crim. P. 11.
[66] Fed. R. Crim P. 11(b)(2) ("Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)") and *id*. at (3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").
[67] *Id*. at 11(g).

their views for consideration, as well as requiring victim restitution for certain offenses.[68]

To provide a relevant state law example, North Carolina law permits negotiation over charges, dismissals, and sentencing. North Carolina statutes set out types of pleas, and for a plea with a recommended sentence, the proposed sentences must be disclosed to the court, while a plea that only disposes of charges requires just that the judge ensure that the defendant's consent is informed and supported by a factual basis.[69] A court form sets out informed-consent type information in writing, concerning rights waived, consequences of the charges and the plea, and acceptance of the offer. Further, prosecutors may not seek to induce a plea by charging or threatening to charge defendants with crimes not supported by facts, not ordinarily charged in the jurisdiction, or with sentences more severe than those ordinarily imposed.[70] Without information on what is "ordinarily" charged or imposed in the jurisdiction, though, those protections are hard to enforce.

Other states set out the roles of prosecutors and judges differently. In Utah, for example, any sentencing recommendation made in a plea bargain is only a recommendation, which a judge need not follow.[71] In Massachusetts, as discussed further in the next Part, a judge must impose an agreed-upon sentence and charge concession, but if a plea does not include *both* an agreed-upon sentence and charge concession, the judge may increase the sentence beyond an agreement, but only after giving the defendant the opportunity to withdraw their approval of the plea.[72]

While less scholarship has focused on the lack of transparency in plea bargaining specifically, as opposed to prosecution discretion writ large, the concern has not gone unnoticed, particularly where courtroom proceedings in contrast are subject to First Amendment and Sixth Amendment rights of public participation.[73] Plea negotiations

---

[68] *See* Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256; Mandatory Victims Restitution Act, 18 U.S.C. § 3663 et seq.

[69] *See* N.C.G.S. 15A-1021(c); G.S. 15A-1023(a), (b), (c).

[70] *See* G.S. 15A-1021, Official Commentary.

[71] *See* Utah R. Crim. P. 11(h)(2)(i). The procedure requires the judge to disclose to the parties whether the agreement will be followed, and if not, the defendant may withdraw the plea. *Id.* at (i)(3).

[72] *See* Mass. R. Crim. P. 12(c)-(d).

[73] William J. Stuntz, *The Collapse of American Criminal Justice* 302 (2011) ("Guilty pleas, especially ones that happen early in the process, are largely

themselves are often non-public and not reduced to writing in any form, much less a database producing searchable information.[74] Instead, plea offers are often made orally, or documented, at best, in email between prosecutors and defense lawyers or a notation in a paper file in a prosecutor's office.[75] Only when an agreement is finalized on the record, in a plea colloquy, is it documented in court and, even then, it likely contains only very limited information concerning the factual and legal support for the plea. The voluntariness of the plea and some factual basis for the plea will normally be put on the record, though.[76] As Jenia Turner has argued, plea offers can be placed on the record, in court, and still protect the identity of witnesses or victims by sealing portions of the record: "lawmakers can adopt rules requiring that plea offers be placed on record with the court whenever a defendant rejects the offer and the case is set for trial."[77] Yet, that has not been the standard practice.

Thus, plea offers, along with charging decisions, are often nonpublic and not documented in court or otherwise documented within a prosecutor's office. Indeed, courts have voiced the concern that documenting more information regarding pleas would be too burdensome for prosecutors and courts: The California Supreme Court explained, "[M]emorializing plea bargain discussions in this particular manner could be burdensome in high-volume courts were it to be followed as a general practice."[78]

Lack of documentation explains why studying plea negotiations has been extremely difficult in the past. As discussed next, not only is a plea negotiation not transparent

---

invisible. So is the bargaining that lies behind them."); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process,* 17 OHIO ST. J. CRIM. L. 423 (2020); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019).

[74] *See* Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains,* 6 TEX. A&M L. REV. 653, 664 (2019).

[75] *See* Nicole Zayas Fortier, ACLU Smart Just., *Unlocking The Black Box: How The Prosecutorial Transparency Act Will Empower Communities And Help End Mass Incarceration* 9 (2019).

[76] Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 981-82 (2021).

[77] *Id*. at 979-981.

[78] *See* In re Alvernaz, 830 P.2d 747, 756 n.7 (Cal. 1992).

in any given case, but the policies and practices of an office are also typically not transparent or reduced to writing.

C. Prosecution Policies Concerning Plea Bargaining

It is unusual for a District Attorney's office to have written, detailed policies regarding plea bargaining.[79] In place of a written policy, some research has shown that prosecutors' plea decisions are informed by group norms, informal discussions among colleagues, and formal supervisory feedback.[80] In the rare circumstance that an office has a plea policy or guideline in place, the policies are often oriented to more, rather than less, punitive charging. Offices may offer "price lists," setting out schedules of plea offers for certain offenses, often focusing on high-priority crimes.[81] However, in general, there is very little formal policy on how prosecutors should negotiate pleas, and although victims have notice and participation rights, and judges may decide whether to enter a plea, typically, individual prosecutors exercise nearly absolute discretion to make "case-processing choices without the approval or cooperation of other actors."[82]

More policies have addressed initial charging decisions. For example, the U.S. Attorney's Manual currently states, with several qualifications, that prosecutors should aim to pursue the most serious provable offense.[83] These policies and programs are typically for lower-level cases, but several prosecutor's offices have adopted polices or require supervisory review when death penalties are sought.[84]

---

[79] Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 14 (1971).

[80] *See* Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making* (New York: Vera Institute of Justice, 2012).

[81] *See* Marc L. Miller & Ronald F. Wright, *supra* note xxx.

[82] *See* Ronald Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUSTICE 395-439 (2017).

[83] U.S.A.M. 9-27.300 ("Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses."). That policy does suggest that exceptions may be warranted, however, and it provides that "[t]o ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney." Id.

[84] *See* Jonathan DeMay, *A District Attorney's Decision Whether To Seek The Death Penalty: Toward An Improved Process*, 26 FORDHAM URB. L.J. 767 (1999).

Noteworthy exceptions to the lack of written policy concerning plea bargaining include the Philadelphia District Attorney's Office, which recently adopted policies aiming to decrease certain types of overly punitive charges, charge lower gradations for certain offenses, and divert more cases from convictions.[85] Additionally, Richard Frase has found real impacts on outcomes from the federal requirement, which is fairly uncommon in prosecution systems generally, that federal prosecutors must document in writing their reasons regarding charging decisions.[86]

In the law and economics literature, legal theorists have modelled prosecutors as seeking to maximize the number of convictions and the severity of sentences, while defendants consider the likelihood of conviction at trial and the expected sentence should a conviction result.[87] Under this model, plea bargaining proceeds as a rational arms-length negotiation. In practice, however, plea bargaining is typically not arms-length. prosecutors may have more information about the facts of a case; that information asymmetry may strongly benefit prosecutors. Scholars have argued that it is a myth that fair bargaining can occur in the criminal system.[88]

More invidious considerations may infect plea negotiations. Where the public is not privy to these negotiations, concerns have been raised that prosecutors may offer pleas that vary not just based on the strength of the case, but also based on the "wealth, sex, age, education, intelligence, and confidence" of the defendant,[89] as well as on

---

[85] *See* Philadelphia District Attorney's Office, New Policies Announced February 15, 2018 (2018), at https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.

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

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

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

[89] *See* Bibas, *supra* note xxx at 2468.

the race of defendant, race of victim, pre-trial detention, and ability of counsel.[90] Further concerns have been raised regarding coercion during plea bargaining.[91] Some also raise concerns that defendants face a "trial penalty" in which the threat of a longer sentence at trial is specifically used to penalize exercise of trial rights.[92]

Still additional concerns have been raised regarding the accuracy of the evidence relied on during plea negotiations.[93] Researchers have documented examples of wrongful convictions of individuals who pleaded guilty but were later exonerated through post-conviction DNA testing.[94] Surveys have documented large numbers of self-reported false guilty pleas.[95] Thus, although prosecutors must, as Ronald Wright has put it, "fly solo and fly blind," they sometimes "respond poorly to the dangerous weather and they crash."[96]

Relatedly, a managerial justice literature has explored how prosecutors may use plea negotiations in petty cases, not just to achieve efficiency or to achieve outcomes in the shadow of trial, but rather to engage in supervision over large numbers of people.[97] In contrast, in more serious cases, the elements of substantive offenses set out in criminal codes, and the accompanying sentencing guidelines ranges, may play a far greater role in structuring outcomes during the plea negotiation process.[98]

---

[90] *See* Albert Alschuler, *The Trial Judge's Role in Plea Bargaining*, Part I, 76 COLUM. L. REV. 1059 (1976).

[91] *See* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC'Y REV. 527, 553 (1979).

[92] *See, e.g.,* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargain Reform,* 50 CRIM L.Q. 67 (2005); *see also* Grunwald, *supra* note 46 (regarding the challenge in distinguishing plea discounts and trial penalties).

[93] *See, e.g.,* Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent,* 79 ALB. L. REV. 919, 940 (2015).

[94] *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (2011).

[95] *See* Allison D. Redlich, Alicia Summers, and Steven Hoover, *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 Law and Human Behavior 79 (2010).

[96] *See* Ronald Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUSTICE 395-439 (2017).

[97] *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STANFORD L. REV. 611 (2014).

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

In response to these concerns, very little has been proposed to investigate which model of prosecution decision making is correct, whether deep biases and errors can infect the plea process, and in what jurisdictions and types of cases. As one research review summarized, "Ultimately, the lack of clarity regarding the administration and impacts of plea bargaining is perhaps the most important thing that research has revealed."[99]

Policy groups have recommended changing this state of affairs as well. For example, a model Prosecution Transparency Act proposed by the American Civil Liberties Union (ACLU) and introduced in Nebraska,[100] would require that prosecutors made public internal policies and a range of data concerning case dispositions. Tellingly, though, the Act would require disclosure of "all terms of all pleas offered," and whether discovery was provided, and what final dispositions were,[101] the Act would not require detailed documentation of the reasons for those decisions to dismiss charges, select sentencing ranges, or modify plea offers over time.[102] As discussed next, in the past two decades, some research, pilot projects, and longer-term implementation efforts, largely made possible by nonprofit foundation support, have attempted to better open the black box of prosecution work more generally, but similar to the ACLU proposal, they have tended to focus on charging, screening, and sentencing data. None have ventured far into plea negotiations specifically. But as discussed next, such efforts have shed some light on plea bargaining, providing insights and the backdrop for our open prosecution work.

D. Efforts to Open the Black Box of Prosecution Data

There is very little data available regarding the plea agreements finalized by prosecutors day-to-day, as noted, but this problem is not unique to plea bargaining. As developed

---

[99] *See Subramanian et al, In the Shadows, supra note 7, at 3.*

[100] *See* Prosecutorial Transparency Act, LB-151 (2021) (providing that, for each case prosecuted, the prosecutor collect and report demographic and criminal information related to the defendant and the plea, including the terms of the plea and whether it was accepted or rejected).

[101] *See* ACLU, *Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration* (2020), at https://www.aclu.org/report/unlocking-black-box.

[102] *Id*. at 21 (detailing the model Prosecutorial Transparency Act, and discussing plea offers and dispositions at Sections 26-44).

earlier in this Part, that lack of transparency affects much of what prosecutors do and, in fact, what all lawyers in the criminal system do.[103] In 2018, an Urban Institute study surveyed over 158 state prosecutor's offices concerning their data collection practices, finding that only a few prosecutor offices collect and analyze data of any kind.[104] More typically, when prosecutors do collect data, it is largely rudimentary, such as data on the number of cases diverted to alternative sentencing, the number of cases handled in a specialty court, or the number of cases resolved through a plea bargain.[105]

Without the ability to link with salient individual case features such as defendant demographics, charges, or even who the prosecutor was, such data do not permit evaluation of important questions. These include whether individual prosecutors are consistent in the charging and sentencing outcomes they pursue, and whether those outcomes align with office policies or norms.[106] Even less information exists on alternative sentencing, such as agreements to enter into deferral or diversion to behavioral or health treatment.[107] Few offices make any data available publicly.[108] Many offices express concern about the accuracy of data, particularly where basic data regarding case processing or outcomes may not reflect the individual practices that explain differences in how cases are processed and then reach different outcomes.[109]

While researchers have developed theoretical models for plea bargaining, there is a dearth of research using real-world cases or experimental methodology.[110] A primary

---

[103] *See* Allison Redlich, Miko Wilford, and Shawn Bushway, *Understanding Guilty Pleas Through the Lens of Social Science*, 23 Psych. Pub. Pol & Law 458 (2017).

[104] *See* Olsen, Courtney, Warnberg, & Samuels, *supra* note 6.

[105] *Id*. at 8 (noting that of the surveyed offices, most collected data regarding the numbers of cases diverted, handled through alternative courts, or deferred).

[106] *Id*.

[107] *Id*.

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

[109] *Id*. at 17 (noting data accuracy concerns expressed by prosecutor's offices).

[110] *See, e.g.* Rebecca Helm & Valeria F. Reyna, *Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents*, PSYCH. PUB. POL'Y & L. (2017); Russell Covey, *Plea Bargaining and Price Theory*, 84 G.W. L. REV. (2016).

limitation of this work is that prosecutors themselves do not document the plea-bargaining process. Thus, studies have examined patterns of final sentencing recommendations by prosecutors, but not what factors informed those recommendations.[111]

In their seminal article, "The Black Box," Marc Miller and Ronald Wright examined several programs aimed at internal study and accountability within prosecutor's offices.[112] They examined the District Attorney for Orleans Parish, in New Orleans, where Harry Connick required prosecutors to record an "unusually rich computerized record of their prosecutorial choices and reasoning."[113] In a follow-up Article, they explored the use of that data to inform a screening program in the Orleans Parish office, in which reasons for case dismissals were documented and tracked to inform initial charging decisions.[114]

During that time period, others began to similarly call for more sustained prosecution data collection efforts. For example, in 2004, the American Prosecutors Research Institute (APRI), part of the National District Attorney's Association, called for a new approach towards measuring prosecution outcomes as part of a "Prosecution in the 21st Century" Report.[115] Those calls largely went unheeded by government officials, but at the same time, nonprofit foundations began to fund new efforts to encourage prosecution data collection, as discussed next.

1. The Vera Prosecution and Racial Justice Program

The Vera Prosecution and Racial Justice program, launched in 2005,[116] initially involved three cities, Charlotte,

---

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

112 *See* Miller & Wright, *supra* note 4.

113 *Id*. at 129.

114 *See* Ronald Wright & Marc Miller, *The Screening/BargainingTradeoff*, 55 Stan. L. Rev. 29 (2002).

115 *See* Steve Dillingham, M. Elaine Nugent, and Debra Whitcomb, Prose*cution in the 21st Century, Goals, Objectives and Performance Measures* (2004).

116 *See* Vera Institute of Justice, *A Prosecutor's Guide for Advancing Racial Equity* 7 (2014) ("From the start, PRJ's goal has been to help the partnering prosecutors' offices reduce unwarranted racial disparity in the criminal justice system by showing them the cumulative impact on case outcomes of their policies, procedures, and daily practices.").

North Carolina, San Diego, California, and Milwaukee, Wisconsin.[117] Initial motivations for the work were the lack of transparency regarding decision-making by line prosecutors and the lack of relevance of conviction rates as a measure of prosecution success.[118] The Vera team candidly described the challenges in such work: "Most prosecutors' offices have never worked with outside researchers or tried to conduct a research study."[119]

The Vera approach called for new indicators at each stage in the prosecution process, from case screening, to charging, to plea offers, to final disposition.[120] The project adopted only fairly limited indicators regarding plea offers. The project largely tracked the highest charges offered for each type, total number of charges, and the plea offer and acceptance dates.[121] The overall approach was to collect data across the entire process, and therefore, the data collection at any one stage was more limited. The data collected generated useful insights by focusing on the entire flow of cases, including by identifying the sources for racial disparities. For example, the Charlotte-Mecklenburg work found that Black defendants were more likely to have an arrest charge rejected but were more likely than White defendants to be offered pleas that called for active jail or prison time.[122]

Since then, additional efforts to inform policy have established similar forms of prosecution data collection. As part of a more recent Vera-supported effort, Bruce Frederick and Don Stemen investigated prosecutorial decision-making with two moderately large prosecutor's offices in separate

---

[117] *See* Wayne McKenzie, Don Stemen, Derek Coursen, and Elizabeth Farid, Prosecution and Racial Justice (March 2009), at https://www.vera.org/downloads/Publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution/legacy_downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf.

[118] *Id*. at 2. *See also* Wayne S. McKenzie, Dir., Prosecution & Racial Justice Program, Vera Inst. Jus- tice, Racial Disparities in the Criminal Justice System, Testimony Before the House Judiciary Committee on Crime, Terrorism and Homeland Security 6 (Oct. 29, 2009).

[119] *See* Vera Institute of Justice, *A Prosecutor's Guide for Advancing Racial Equity* 7 (2014).

[120] *Id*. at 3.

[121] *Id*. at 4.

[122] *Id*. at 15. *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 4 NYU J. LEG. & PUB. POL'Y 16 838 (2013).

counties.[123] One aspect of their project involved a different type of data collection: a series of experimental surveys, as well as a qualitative analysis of interviews and focus group discussions with prosecutors in the offices.[124] In the experimental surveys, prosecutors received vignettes describing hypothetical cases.[125] They had to decide whether to prosecute the cases, what charges to prosecute, what plea offers to make, and what sentences to seek.[126] In the vignettes, the researchers manipulated strength of evidence and the seriousness of the arresting charge. They found that prosecutors were remarkably consistent in their decisions to prosecute. Nearly all prosecutors from both counties decided to prosecute cases that had high strength of evidence and to reject cases with low strength of evidence.[127] However, the two groups of prosecutors varied widely in which charges to pursue.[128]

What was particularly noteworthy was that these experimental results did not fully reflect patterns in actual cases.[129] Frederick and Stemen analyzed actual case outcomes for both groups of prosecutors and found significant variation in case outcomes between the two offices, within each office, and within units in offices.[130] In general, prosecutors were more consistent when reviewing hypothetical cases than in their actual cases.[131] These data provide insights into the legal and extra-legal factors that affect prosecutorial decision-making and indicate the complexities that affect actual case outcomes. These data do not, however, explain what accounts for the observed variability in plea outcomes, nor what a prosecutor's office should do to obtain consistency in desired outcomes. The authors noted that not written policies, but group norms, court resources, and law enforcement priorities significantly affected cases.[132]

---

[123] *See* Bruce Frederick and Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making* (New York: Vera Institute of Justice, 2012).
[124] *Id*. at 3.
[125] *Id*. at 4.
[126] *Id*. at 4.
[127] *Id*. at 5.
[128] *Id*. at 5.
[129] *Id*. at 4.
[130] *Id*. at 15.
[131] *Id*. at 15.
[132] *Id*. at 15-17.

Several additional projects, as part of the Vera effort, researched prosecution decision-making for evaluative purposes. More recently, the Vera Race and Prosecution Project examined racial disparities in additional prosecutors' offices.[133] In 2012, Vera began working with the Manhattan District Attorney's Office to study two years of data regarding 200,000 cases. They ultimately found that the office, in contrast to the Orleans Parish Office, exercised very little charging discretion. The Office "prosecutes nearly all cases brought by the police, with no noticeable racial or ethnic differences at case screening."[134] However, for subsequent decisions, disparities were mixed. Black and Latino defendants were more likely to be detained pretrial, to receive a custodial sentence offer during plea bargaining, and to be incarcerated, but they were also more likely to have their cases dismissed.[135] Later, in 2021, as part of a push towards transparency and accountability, the Office released years of race information in a data portal.[136] Using similar criteria and methods, the Milwaukee District Attorney's Office participated in a similar study, finding a lack of racial bias in prosecution decisions.[137] Another report examined the Hillsborough County, Florida District Attorney's Office, studying nearly 87,000 cases from 2017 and 2018 to compare outcomes for Black, White and Latinx defendants, and did not find "glaring" differences, but identified needs regarding resource allocation, use of diversion, and sentencing.[138] These reports highlight that offices exercise discretion quite differently at various stages of the case process, and further, racial biases can be introduced at any of these stages.

---

[133] *See* Beiski Kutateladze, Whitney Tymas and Mary Crowley, *Race and Prosecution in Manhattan* (July 2014), at https://www.vera.org/downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-summary.pdf.

[134] *Id*. at 3.

[135] *Id*. at 3.

[136] Shayna Jacobs, *Manhattan district attorney to release years of racial data as part of nationwide accountability push*, Wash Post, March 18, 2001.

[137] *See Race Not Factor, Milwaukee DA Decisions Report Says*, Dec. 9, 2019, at https://www.jsonline.com/story/news/crime/2019/12/09/race-not-factor-milwaukee-da-decisions-report-says/2617984001/.

[138] *See FIU Releases Report on Race and Prosecution in Hillsborough County*, July 2019, at https://www.sao13th.com/2019/07/fiu-releases-report-on-race-and-prosecution-in-hillsborough-county/.

2. The MacArthur Prosecution Performance Indicators Project

The John D. and Catherine T. MacArthur Foundation, as part of its long-term Safety and Justice Challenge designed to promote local justice reforms, has supported work to examine data in several prosecutor's offices to produce indicators of prosecution outcomes.[139] These include a menu of 55 prosecution indicators that go beyond traditional reliance on conviction rates, to include organizational capacity, resource prioritization, victim service, timeliness, racial and ethnic disparities, minimizing unnecessary punitiveness, community outreach, prosecutorial ethics and integrity, and addressing serious crime.[140] That MacArthur-supported effort has assisted prosecutors in constructing public facing components, including felony disposition dashboards. For example, the Milwaukee District Attorney's Office created a data portal as part of that work, which highlights a range of indicators, including race and ethnicity among persons diverted to prosecution alternatives, numbers of cases with jail sentences, and the number of days it takes on average to contact the victim following a case referral.[141] Similarly, and also supported by the MacArthur Foundation, Cook County State's Attorney Kim Foxx releases annual reports and raw data on prosecutions, under the heading of "The Data-Driven CCSAO."[142] State's Attorney Fox ran for office with a commitment to data transparency, emphasizing, "Our work must be grounded in data and evidence, and the public should have access to that information."[143] For every felony case, the released datasets include case-level information on intake, initiation, sentencing, and disposition data.[144] The data portal includes the number of arrests that

---

[139] *See* Besiki L. Kutateladze, Rebecca Richardson, Melba Pearson, and Don Stemen, *Prosecutorial Performance Indicators: What Constitutes Success in Prosecution?* (2020), at https://www.safetyandjusticechallenge.org/2020/10/prosecutorial-performance-indicators-what-constitutes-success-in-prosecution/.

[140] *See id.*

[141] *See* Milwaukee District Attorney's Office, Key Indicators, at https://data.mkedao.com.

[142] Cook County State's Attorney, The Data-Driven CCSAO, at https://www.cookcountystatesattorney.org/data.

[143] *Id. See also* Kim Foxx, *A Commitment to Transparency*, at https://www.cookcountystatesattorney.org/about/data-sao-message-sa-foxx.

[144] *Id.*

resulted in filed criminal cases, and the dispositions of those cases. The reports describe how the vast majority of felony charges result in a guilty plea.[145] The San Francisco District Attorney's Office has a very similar dashboard, also supported by MacArthur, and with aggregate data concerning case processing of detainments.[146]

The Philadelphia District Attorney's Office has launched a data dashboard which is somewhat more detailed, than many of the others.[147] Key metrics being tracked included years of incarceration, supervision, and cases with death penalty sought, as well as exonerations, all since 2018. The data website includes very detailed reports regarding outcomes, including how many cases were dismissed, diverted, or resulted in guilty pleas versus trial outcomes.[148] As part of the MacArthur-supported Prosecutorial Performance Indicators project, the office has partnered with researchers to measure office performance and advance office policy changes.[149] However, the data portal does not report on plea negotiations, apart from providing aggregate numbers of pleaded cases. One cannot observe whether pleas were lenient or harsh, what charges were dropped or added, what pleas were accepted or rejected, or what explained those outcomes.

Most recently, supported by the Tableau Foundation, the nonprofit Measures for Justice and the Association of Prosecuting Attorneys has developed dashboards for 15 prosecutor's offices.[150] In one of these offices, Yolo County, California, the dashboard notes a goal to increase felony diversions by September 2022 and depicts monthly

---

[145] *See* Cook County State's Attorney, *2017 Data Report* 8-9 (2017), at https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao_2017_data_report_180220.pdf.

[146] *See* Justice Dashboard, San Francisco District Attorney, at https://www.sfdistrictattorney.org/policy/justice-dashboard/.

[147] *See* Philadelphia District Attorney's Office, Public Data Dashboard (last viewed April 2021), at https://data.philadao.com.

[148] *See* Philadelphia District Attorney's Office, Public Data Dashboard, Case Outcomes Year End 12/31/2020, at https://data.philadao.com/Case_Outcomes_Report_YE.html.

[149] *See* Philadelphia District Attorney's Office, Grant Funded Partnerships, at https://data.philadao.com/Research.html.

[150] *See* ASU Crime and Justice News, *15 District Attorneys Join Effort to Disclose Prosecution Data*, May 14, 2021, at https://crimeandjusticenews.asu.edu/15-district-attorneys-join-effort-disclose-prosecution-data.

percentages of diverted felony cases.[151] The dashboard depicts aggregate data concerning percentages of cases resolved in particular ways; thus one can see a trend towards fewer guilty pleas during 2020, but one cannot review individual case characteristics or factors contributing to any of these trends through these dashboards.[152]

Importantly, these dashboards improve the availability of existing administrative sentencing information, which merely shows sentences entered in cases that proceeded to a conviction; the dashboards do show dismissal and diversion figures as well. However, they do not show how those sentences were arrived at or readily allow one to assess whether there were disparities in such resolutions. They do not allow one to assess what priorities or policies were reflected in those negotiated dispositions. The next Part turns to our efforts to open that black box.

II. Opening the Black Box of Plea Negotiations

Collecting transparent and reliable data that documents plea negotiations can begin to open the "black box" on plea bargaining and provide prosecutors with the information that they urgently need.[153] Typically, much of what prosecutors record is, as described, retained only in paper files, if it is documented at all.[154] Regarding the plea process, even the Vera pilot projects have involved documentation only of the charges filed, or rejected, and whether any charges were dropped if the final plea was different from the initial offer. They documented reasons for charging decisions, but not reasons for offering plea offers.[155] In the absence of legislation to require prosecutors to collect such data, the most promising areas for reform are those that instead empower prosecution-led information gathering and accountability.[156] In this Part, we turn to the implementation of just such a data system in two different jurisdictions. First, in early 2019, the District Attorney's Office in Durham, North Carolina first opened their files to us to review each record of

---

[151] Measures for Justice, *Commons, Yola County* (last visited June 1, 2021), at https://www.measuresforjustice.org/commons/yoloda/goals.
[152] *Id.*
[153] *See* Ronald Wright, *Reinventing American Prosecution Systems*, *supra.*
[154] *See* McKenzie et al, *supra*, at 5 ("prosecution offices… often rely on paper files for managing their cases.").
[155] *See* Vera, *A Prosecutor's Guide for Advancing Racial Equity*, *supra*, at 31.
[156] *Id.*

a plea offered in a felony case, and then, beginning in April 2021, fully implemented a data collection system to record information concerning all plea negotiations in felony cases. Similarly, in April 2021, prosecutors in the Berkshire, Massachusetts District Attorney's Office implemented a data collection system to record information concerning all felony plea negotiations. We describe each data system, its development, and its design.

A. Tracking Plea Negotiations in Durham, North Carolina

1. Progressive Prosecution in Durham

In January 2019, District Attorney Satana Deberry took office in Durahm, North Carolina after having run for office as a progressive, and promising to make substantial changes regarding charging, plea bargaining, and sentencing decisions in the office.[157] Durham County is a moderate-sized county of about 320,000 residents, the sixth most populous in the state. The Durham District Attorney's Office files about 30,000 charges each year, with roughly 400 felonies. The DA's Office was restructured in January 2019 into six new teams: Administrative, Homicide and Violent Crimes, Special Victims Unit, Drug and Property Crimes, Juvenile, and Traffic. Supervision typically occurs within each of these teams. There are twenty-one prosecutors in the Durham office. The majority of the prosecutors within the office have been newly hired by District Attorney Deberry.

Shortly after District Attorney Deberry took office, the office established an office culture that discourages reliance on incarceration. In general, and as part of a still-emerging approach, the Office adopted an overriding philosophy that seeks to prioritize the prosecution of cases with the most serious offenses that put the community most at risk; while, at the same time, dismissing or offering reduced or alternative sentences in the low priority cases. District Attorney Deberry delineated between high and low priority cases on her candidate website, explaining that she will "concentrate resources on those who must be in prison" by focusing on prosecuting those who commit violent and serious crimes and spending fewer resources on "minor property and minor

[157] *See* Platform, Deberry4DA, at https://deberry4da.com/platform/.

drug offenses."[158] Deberry also endorsed expanding diversion of people with behavioral health needs. [159]

To date, the Office has not yet reduced much of its approach to written policies, partly due to a desire to develop and base policies on empirical evidence.[160] Instead, the Office relies on unwritten policies and conducts frequent trainings and meetings devoted to discussion of office ethos, familiarization with alternative sentences and services for low-level offenders, and review of serious cases.[161]

More generally, in North Carolina, prosecutors have discretion to make a wide variety of decisions regarding a plea offer.[162] Prosecutors in North Carolina must consider where a case falls within the state's Sentencing Guidelines, which depends on the class of offense and the defendant's prior record level.[163] Prosecutors can choose to offer the defendant a deal in which they plead guilty to a lesser offense or receive a dismissal of one or more offenses.[164] Where the defendant is entering a plea of guilty to multiple offenses, prosecutors decide whether to seek back-to-back (consecutive) sentences, overlap the sentences (concurrent or consolidated), or impose additional conditions, such as community programs or electronic monitoring.

These prosecution choices are generally not systematically tracked or studied. The North Carolina Sentencing Commission maintains administrative data regarding the sentences that are imposed in criminal cases. Administrative Office of the Courts (AOC) data reflects screening and charging decisions, and documents which filed cases are dismissed or have charged dismissed.[165] However, there are no administrative data collected regarding plea negotiations. The final written document setting out the terms

---

158 *Id.*

159 *Id.*

160 *See* Grodensky, *supra* (on file with authors).

161 Id.

162 For an overview, *see* NC Prosecutors Resources Online, 133.1, Plea Agreements, at https://ncpro.sog.unc.edu/manual/133-1.

163 *See* North Carolina Judicial Branch, Sentencing Charts (last accessed June 1, 2021), at https://www.nccourts.gov/documents/publications/punishment-grids.

164 *See infra* Part I.B.

165 *See* North Carolina Judicial Branch, *ACIS Citizens Guide* (last accessed June 1, 2021), at https://www.nccourts.gov/assets/documents/publications/ACIS_Inquiry_RG.pdf?n5DVrlE3ODObw13mPuMpNs0uEecpTaBN.

of a plea, called a "plea transcript" in North Carolina, is filed in court.[166] That document was not typically retained by prosecutors or a District Attorney's Office, however.

As a result, the Durham District Attorney's Office had no rigorous system for collecting data on plea outcomes and no written policies on sentencing priorities. Therefore, there was no way to internally evaluate whether prosecutors' actions were aligned with the goals of the elected District Attorney, whether prosecutors were consistent with each other, and whether any disparities existed based on race, gender, age, quality of representation by the defense, pre-trial detention, or other arbitrary or invidious factors. For those reasons, the Durham District Attorney's Office enthusiastically supported data collection to permit policy development, evaluation, and supervision of outcomes.

2. Studying Plea Transcripts

As an initial effort to open the process, we requested access to all such records in Durham County. As discussed, most prosecution offices do not retain such information, and consistent with that approach, this information had not been retained in Durham in the past. In Spring 2019, the Durham District Attorney's Office issued a statement to all prosecutors that adult felony plea transcripts should be retained in files, including both draft and final transcripts. The plea transcripts were recorded using the standard form provided by the NC Administrative Office of the Courts.[167] These plea transcripts provide a record, in each adult felony case, of what plea offers were made, on what offenses, the total maximum punishment, the type of plea (no contest or an *Alford* plea) and the details of the plea arrangement. [168] The remainder of the transcript is designed to ensure an informed waiver of rights and plea.[169]

---

[166] *See* State of North Carolina, Transcript of Plea, (last accessed June 1, 2021), at https://www.nccourts.gov/assets/documents/forms/cr300-en.pdf?43JOsPUn0WvDxpOXThdzFyupi0M1S6l1.

[167] *Id.*

[168] *Id.*

[169] The transcript form asks that the defendant sign and make representations that the person understands their rights to a hearing, the nature of the offer, that the Court has been informed of all terms and conditions of the plea, and that the defendant agrees to make the plea, accept its terms, and agrees that there are facts to support the plea and admissions to any aggravating factors and sentencing points. *Id.*

We asked that the Durham District Attorney's Office retain all subsequent drafts of plea offers, to document any revisions that were made, along with brief notations providing reasons for the revision (e.g., "mitigation evidence received"). As of the end of May 2021, prosecutors had retained 442 initial and 112 revised felony plea transcripts (plus an additional 5 that reference an earlier deal that we do not have), amounting to 559 transcripts for 447 different cases, all of which have been shared with our Duke University research team in digital form. This demonstrated the office's capacity to preserve and share records of their plea deals.

These records provide information on how much back and forth negotiation typically occurs—at least in formal offers. It is noteworthy that 79% (442 of 559) of felony cases involved only 1 plea before the offer was accepted. There were 96 case that had two pleas, 15 had three pleas and just one with four. That information is highly novel; plea negotiations do not normally result in multiple completed formal draft plea transcripts. These records may not document informal conversations that occur regarding plea possibilities that are not reduced to writing or that occur prior to or after drafting a plea transcript. We also documented revisions to the written plea transcript.

We start our analysis by noting that despite the importance of equity considerations in the criminal justice system, the transcript forms in North Carolina do not have a section for the defendant's demographic information, including race. By cross referencing pleas with other documents, we were able to record defendant's race for only 311 (55.6%) of the transcripts. Of these, the vast majority of defendants were people of color. In 249 of the transcripts, the defendant was Black (44.5% of all transcripts, 80% of the transcripts for which we knew race); in 49 the defendant was White (8.8% of transcripts, 15.8% of known race transcripts); and in 13 the defendant was Latinx [170] (2.3% of all transcripts; 4.2% of known race transcripts). Only 15 of the plea transcripts were for defendants who were minors at the time of commission. For many transcripts, we were able to ascertain the defendant's criminal history level (as relevant to sentencing; discussed later); we knew the defendant's felony prior record level in 459 of the pleas (348 had a record of 2 or

[170] North Carolina AOC forms record Latinx as "Hispanic" in the race category, rather than as a separate ethnicity, as done by the U.S. Census (see https://www.census.gov/quickfacts/fact/table/US/RHI725219)

higher, roughly corresponding with at least one prior felony conviction). In 81 of the pleas, the defendant had one or more prior misdemeanor convictions.

Complete charging information, including specific charge names, level of charge, and sentencing information, was available in 499 of the transcripts; the majority of these, 376, involved only felony charges, while 76 pleas involved only misdemeanor charges, and 47 involved both. Only seven of those 423+ felony pleas were *Alford* pleas, so-called after the U.S. Supreme Court case of *North Carolina v. Alford* which approved the practice, in which a plea contains a formal claim of innocence.[171]

We documented the sentences imposed, including as compared with applicable Sentencing Guidelines ranges. Further, many of the cases involve non-incarceration sentences. Many felony cases involved no-contact orders (144 cases), treatment plans (over 150) and victim restitution (just over 100). Not more than a few dozen cases had, entirely optional, prosecution notations regarding aggravating and mitigating circumstances. Further, at least within these transcript documents, very few cases, only 13, included any information about the defense making an offer. It is worth noting, however, that this information is only observable if the prosecutor chose to include it in the open-ended section of the transcript, and it is possible other cases included defense offers but they were not recorded in any way.

We also observed trends in sentencing that are otherwise missing from North Carolina sentencing data. For example, 277 of the pleas were suspended sentences or mixed (with some suspended elements and some active sentence time; although sometimes that active sentence is included as an acknowledgement of time served in jail pretrial).[172] Only a minority of the pleas, 194, required active sentences where almost all were for cases in which the defendant pled guilty to multiple felonies. Only 26 of the pleas required concurrent sentences to be served by the defendant; 111 were consecutive sentences (although the majority, 357, did not specify in the transcript and 4 had elements of both consecutive and concurrent requirements).

In our preliminary analysis of charges, we observed that, on average, defendants pled to a median of 2 charges

[171] North Carolina v. Alford, 400 U.S. 25 (1970).
[172] *See* Crozier et. al. (on file with authors).

(mean = 2.19, *SD* = 1.54), and had a median of 2 charges dismissed per plea (mean = 3.06, *SD* = 3.96).

Finally, we examined the "plea discount" by comparing the pled active sentence to the maximum sentence exposure faced by the North Carolina sentencing guidelines.[173] Across cases where the defendant was not facing Life Without Parole (LWOP), the average plea discount was 101.4 months (*SD* = 188.23; median = 53.5). In cases to which an active sentence was pled (a total of 294 cases, excluding LWOP sentences), the disparity between maximum exposure and pled sentence is even greater: an average of 125.1 months discounted (*SD* = 217.9; median = 63.75 months). For the 26 defendants facing LWOP as a maximum punishment, none pled guilty to an LWOP sentence and the pled sentence averaged 283.6 months (*SD* = 83.56, median = 282 months).

A series of insights into the plea process flowed from this initial year of data collection. We learned how rarely formal, written plea offers are revised and how uncommon *Alford* pleas are. We gained insight into the priorities of the office such as a preference for community supervision over incarceration in felony dispositions. We saw that prosecutors frequently used suspended sentences and even when a defendant pled guilty with an active sentence, the difference between the maximum exposure and their pled sentence was considerable: averaging around a decade of avoided prison time, and no one pled guilty to LWOP.

However, we lacked information concerning the reasoning of prosecutors for selecting plea options; given the lack of formal back and forth with the defense, that reasoning

[173] The pled sentence is recorded as a range for all felony charges, and some misdemeanor charges. Here, we take the average of the listed range. The sentence exposure is written out by the prosecutor in each transcript, and is the sum of the maximum possible sentence for each charge. We note that this is possibly a misleading value; in North Carolina, sentencing ranges are calculated by considering the defendant's prior criminal record level and the level of the felony or misdemeanor charge. In these transcripts, the maximum sentence range is listed for the *highest* criminal history level, regardless of the defendant's *actual* prior record. Although our data are incomplete for prior record levels, only 44 defendants had the maximum felony prior record level, and only 47 the maximum misdemeanor prior record level. Thus, for the vast majority of defendants reflected in these data, the maximum sentence they would face if they went to trial and were found guilty is substantially less than what is listed on the plea transcript and calculated here. Separately, we are calculating the true exposure per defendant and the implications of the difference.

is all the more important to understand. Additionally, even when key information could be recorded, it sometimes was not—such as defendant demographics—demonstrating that currently collected data are inadequate to comprehensively examine plea bargaining. We turn next to our follow-up work to pilot and then implement a plea tracker in Durham County.

3. Implementing Plea Tracking in Durham

In July of 2020, we presented our preliminary aggregated plea transcript data to the Durham District Attorney's Office. The Office agreed that currently available records lacked critical information needed to assess policies and practices, including defendant or victim race, pre-trial detention, presiding judge, defense counsel, and aggravating and mitigating reasons for making offers. Based on that feedback and from our initial work with the plea tracker in Berkshire, MA, we sought to collect more comprehensive information on pleas in the Durham office, limiting our tracking to felony cases.

To inform our work before launching a plea tracker, we interviewed assistant district attorneys in the Durham office to ask them about their approaches and priorities regarding plea negotiations.[174] There is a strong body of qualitative research examining certain aspects of prosecutors' work.[175] Our work was novel in that we explored the transition of an office towards a progressive prosecution approach deemphasizing reliance on incarceration. The interviews primarily included open-ended questions such as "How do you decide on the specifics of a plea?" and "What information do you need from defense attorneys to develop a plea?", along with some closed-ended questions such as "What proportion of your cases are ultimately dismissed?" Based on prosecutors' answers to these questions, we probed for additional details to obtain a complete contextual understanding of plea deals. Interviews were audio-recorded and transcribed verbatim.

---

[174] *See* Durham District Attorney's Office Interview Guide (2019) (on file with authors).

[175] For leading work, *see, e.g.* Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1142 (2012); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065 (2014); *see also* Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 41 L. & SOC. INQUIRY (2017).

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

We also learned that the transition in the office was not just one of policy and culture, but also a change in prosecution staffing, as mentioned earlier. As of October 2020, only 7 (33%) of the prosecutors were hired under the previous administration, with 14 of the 21 prosecutors in the office newly hired by District Attorney Deberry. At the time of the initial qualitative interviews, the vast majority of the line prosecutors expressed agreement with the progressive platform District Attorney Deberry outlined during her candidacy. Many expressed that their task was to translate those larger priorities of the District Attorney into the everyday practices in their subject-matter team.

While most of the items on the plea tracker reflect basic stages and decisions in the plea process, others were included based on a series of conversations with the Office. For

example, there was real interest in documenting whether mitigating evidence was shared with prosecutors, in particular from defense attorneys, and whether it was considered in the negotiation. The tracker also measures the interactions with the defense, including whether the prosecutor corresponded with the defense before making an initial offer, how much the defense attorney influenced the initial deal, and what specific changes the defense requested.

Our initial plea tracker data collection instrument for Durham was designed to record the following information with every charged felony case: basic case information; demographics of the victim and defendant; the charges the defendant was indicted on and their maximum penalty under NC sentencing guidelines (including the "distanced travelled" between the plea and the charges indicted); the charges and terms of the initial plea offer; the factors considered in selecting those terms; and process information such as communication with the victim and defense attorney. Plea revision and final plea forms collected the charges and terms of any subsequent plea offer(s) and reasons for revision of the pleas (e.g., receipt of mitigating evidence or loss of a key witness for the State). In particular, prosecutors noted both mitigating[176] and aggravating factors[177] considered when making a plea offer.

The instrument is administered online using the Qualtrics platform, which reduces data entry costs and allows for incorporation of skip logic and logic checks to minimize respondent burden, missing data, and data irregularities.[178] Thus, each prosecutor can record information about a plea, from any device connected online.

Before its launch, the tracker was programmed into the Qualtrics platform by the study team and tested by the two prosecutors who had been appointed as office liaisons and facilitators of the project. These two prosecutors completed the tracker on their own using their own cases as examples, purposefully using cases that were varied in complexity and

[176] The mitigating factors making an initial plea more lenient include: defendant age, cooperation, IQ, minor role in crime, good record, mental health, substance abuse, social background, collateral consequences, other.

[177] The aggravating factors making initial plea more severe are: criminal history, seriousness of offense, confession, major or leadership role, presence of firearms, recidivist, violent nature of the crime, other.

[178] For examples of Qualtrics survey templates, *see, e.g.* https://www.qualtrics.com/marketplace/survey-template/.

other key factors. Over a period of several months, the prosecutors provided specific written and verbal feedback to the study team, and the study team revised the Qualtrics instrument for further testing. Once the two prosecutors felt that the instrument was developed enough for formal piloting, they enlisted one prosecutor from each unit to enter 3-5 cases into the tracker and provide written and verbal feedback to the research team. This pilot was conducted in January, 2021.

During this development process, changes were made in response to preferences and practices of the prosecutors. For example, question and answer options were modified to better align with the language used by the prosecutors. Questions that prosecutors felt were ambiguous or unclear were worded more precisely so that they could be answered more quickly and confidently.

Additionally, several questions were added to provide more relevant information about the prosecutor's decision-making process. As an example, a prosecutor noted that the tracker did not ask the user to identify the most important factor influencing the lenience or severity of the sentence, which they felt provided more insight than a long checklist of mitigating and aggravating factors. In another example, questions were added to better capture the decisions prosecutors made in response to changes requested by the defense, such as the reasons the defense provided for the change, the extent to which the prosecutor agreed with the changes, and how significantly the plea was modified.

Questions that provided information redundant with that recorded in the plea transcript were cut. Instead, this information was captured using computer programs that scraped data from the plea transcripts and link this with the tracker data. Other questions were cut because they required the prosecutor to do time-consuming research. For instance, questions asking for exact dates (e.g., dates of arrest, number of days detained pretrial) were changed to allow the prosecutor to select from a short list of time ranges (e.g., less than 1 week, 3-6 months) that prosecutors would remember without digging through files.

Finally, we streamlined how prosecutors used the tracker. Initially during pilot testing, we requested prosecutors complete the tracker any time a deal was offered, and then again when it was finalized. This resulted in three possible trackers: a "initial" form that asked about all the

details of the plea; a "revised" tracker that was used when a plea offer was changed and asked the prosecutor to include the case number, and note what had changed (without recording the original status—the research team would use case numbers to match that information on the back end); and a comprehensive "final" version where the prosecutor reported on all details for the plea and the case that were only relevant once the plea had been agreed to, such as amount of correspondence with the defense attorney. After pilot testing, the "initial", "revised", and "final" versions of the plea tracker were replaced with just one version that was designed to capture the final plea and all modifications that occurred throughout the process.

In April 2021, the Durham Office began using the new plea tracker. The data are aggregated and periodically shared with the Durham Office.

B. Tracking Plea Negotiations in Berkshire, Massachusetts

In 2018, Andrea Harrington was elected district attorney in Berkshire County, Massachusetts, a jurisdiction that handles more than 7,500 criminal cases per year, in Berkshire Superior Court, three district courts, three juvenile courts, and in appellate matters.[179] When running for office, District Attorney Harrington emphasized the need for increasing the availability and use of diversion programs, mental health and veterans courts, reentry programs, restorative justice, cultural competency training to reduce bias, and new approaches towards sentencing.[180] Harrington also emphasized the need to "implement data tracking systems so that we can measure our success."[181] Since taking office, the Berkshire District Attorney's Office has adopted a range of new policies, including policies geared towards transparency, such as an open file policy regarding discovery shared with the defense, and a presumption against prosecuting or dismissing certain low-level, non-violence

[179] *See* Berkshire District Attorney's Office, *at https://www.mass.gov/orgs/berkshire-district-attorneys-office.*

[180] *See* What a Difference a DA Makes, at http://dadifference.org/wp-content/uploads/2018/08/DaDifference_Questionairre_AndreaHarrington.pdf.

[181] *Id.*

offenses.[182] Prior to their involvement in this project, as is the case in many other jurisdictions, the Berkshire office had no existing system for collecting and managing data about plea negotiations or the key factors considered during the process.

Many aspects of the plea process in Massachusetts resemble those in North Carolina, so some aspects of the plea tracker are relatively similar. There are Sentencing Guidelines, for example, that anchor the process and many of the new policies that DA Harrington has instituted are similar to those that DA Deberry has in Durham, NC. There are, however, some differences which required different measures and approaches when creating a tool to track plea bargaining in the Berkshire Office.

One key difference in the process is that, according to statute in Massachusetts, judges can have a limited role in the plea-bargaining process whereas, in North Caroline, judges are discouraged from any involvement or influence regarding plea agreements, and the associated charging and sentencing outcomes. In Massachusetts, a judge is only required to impart an agreed-upon sentence and charge concession if *both* parties agree to these elements of the plea agreement *and* the judge accepts the plea agreement itself.[183] When a plea does not include both an agreed-upon sentence and charge concession, the judge may impose a different sentence. Note, though, that judges sometimes need to give the defendant an opportunity to withdraw their approval of the plea if they plan to impose a different sentence. District Court judges may seek to impose a different sentence, but if it will be greater than what the *defendant* requested, the judge must first give the defendant an opportunity to withdraw the plea.[184] In Superior Court, the judge can impose a sentence that exceeds the *prosecutor's* request but, again, only if the judge provides the defendant with an opportunity to withdraw.[185] Finally, if the judge chooses to reject a plea containing recommendations that both parties have agreed to, the judge

[182] *See* Berkshire District Attorney's Office, *Berkshire DA's Office Adopts Brady Policy, July 28, 2020*, at https://www.mass.gov/news/berkshire-das-office-adopts-brady-policy.
[183] *See* Mass. R. Crim. P. 12(c).
[184] Mass. R. Crim. P. 12(d).
[185] Mass. Crim. Pro. R. 12 (c)(6)(b). The rule does not specifically provide for a judge to recommend a more lenient sentence. Three Supreme Judicial Council Justices opposed the rule revision for that reason. Id.

can inform the parties what sentence the Court would impose and either party can withdraw from that agreement.[186]

Those rules permit a considerable amount of judicial involvement in plea negotiation once that plea deal has been presented in court—called a "tender of plea" in Massachusetts.[187] Judges are given the power to alter the final sentencing decision, particularly if the parties do not reach an agreement. While further participation of a judge in plea negotiations is permitted, the Supreme Judicial Council has emphasized that doing so is discouraged. In fact, the statute advises in commentary that judges may not participate "as active negotiators in pleas bargaining discussions."[188]

In addition, there are two ways that a defendant in Massachusetts can avoid a guilty finding on their record even if they are charged and sentenced. First, a "Continuance without a Finding" (CWOF) permits the person charged with the crime to avoid obtaining a guilty disposition for that charge provided they comply with all sentencing terms and conditions. A second way is a type of "diversion" specified in Massachusetts Statute, called a 276/87 disposition[189]. This means that the person charged with a crime is placed under the supervision of a probation officer and their charges will be dismissed if they compete any probation time without violating any of the terms and conditions of that sentence. As a result, the plea tracker that we developed incorporated this statutory structure in the design.

A range of other information was of particular interest to the Berkshire Office and was, thus, included in their tracker. Delays in case resolution, and its impact on case processing and negotiations, is one factor in which the Berkshire Office was particularly interested, especially during the COVID-19 pandemic. We also included a place for prosecutors to note when they would have sought diversion or referral to a treatment or rehabilitation program, had it been available. In Berkshire, as in other jurisdictions, prosecutors often find they lack the resources to divert defendants to treatment alternatives. Finally, communication

---

[186] Mass. Crim. Pro. R. 12(d)(4)(B)(i).

[187] Mass. Crim. Pro. R. 12 (b).

[188] *See* Reporter's Notes to Mass. R. Crim. P. 12(b); *see also* Commonwealth v. Ravenell, 415 Mass. 191, 193 & n.1 (1993) ("[p]articipation by a trial judge in plea bargaining, although not proscribed in Massachusetts is discouraged.").

[189] Mass. Gen. Laws, ch. 276, s. 87.

with the victims of crimes (especially violent crimes) and the defense were aspects of plea bargaining for which the Berkshire Office had implemented specific goals and policies. The tracker requests information about these factors in every case, and asks prosecutors to indicate the impact of these factors on the case. Without a data collection system like the one we have provided; the Berkshire office would not be able to answer these questions. These are matters that are outside what is typically part of the public record and so evaluating the success of such policies or determining the effect of these factors would be virtually impossible in the absence of a tool like the plea tracker.

A summary of the types of data collected in Berkshire Office Tracker is set out in Appendix A. After approximately six months of planning and collaboration, the District Attorney's Office in Berkshire, Massachusetts, began collecting data on April 1, 2021, with the goal of collecting data on every case that comes through the office for a year. Prosecutors now record data about the plea agreements drafted and entered, the negotiation process, victim demographics and involvement, defendant demographics, perceived risk, reasons for the prosecutor's sentencing recommendations, judicial decisions, and the ultimate resolution. We next turn to our initial findings.

C. Initial Findings of the Open Prosecution Project

The data presented here represent the data entered into the Berkshire County plea tracker as of August 18th, 2021 (a total of four months and 17 days of data collection). Table 1 provides a breakdown of the basic information regarding number of entries and information about those entries. These data are preliminary and do not fully represent the caseload of the Berkshire District Attorney's Office, which will be better reflected over time. In this preliminary analysis, however, we have identified several areas to describe, that we think illustrate the value of these data. First, we offer descriptive information—the number of cases and charges and features of these cases and charges, as well as information about the people charged with crimes in these cases. Second, we can look at aspects of the plea-bargaining process in more depth. We examine the frequency with which the defense or judge rejects a plea, and how often judges impose sentences that are different than what the prosecutor recommended).

Next, we assess time frames for key events in the plea-bargaining process, followed by an evaluation of measures relevant to how pleas are negotiated and why prosecutors decided on their final recommendation. To date, we have collected information about 289 tenders of plea associated with separate 442 criminal charges. Fifteen different Berkshire prosecutors have used the Plea Tracker and most of these tenders of plea were resolved in District Court.

Table 1. A Summary of the Cases Entered into the Berkshire County Plea Tracker.

Category	Count
Charges	442
Tenders of plea	289
Prosecutors	15
Charges resolved in District Court *	182
Charges resolved in Superior Court *	30
Days of collection	139

Notes. * We are missing data about which court for 77 cases, though most of these will be resolved in the District Court. Average of 1.53 charges per case (SD = 1.19). These data are current as of August 18, 2021.

Table 2. Berkshire Charge Dispositions and Cases in Which at Least One Charge Resulted in this Disposition Type.

Disposition	Number and percent^ of charges		Number and percent& of cases	
Guilty	188	42.5%	178	61.6%
CWOF*	148	33.4%	102	35.3%
Dismissed	41	9.3%	20	6.9%
Filed	9	2.0%	5	1.7%
Nolle Prosequi	12	2.7%	4	1.3%
Not Responsible	4	0.9%	4	1.3%
276/87	21	4.8%	18	6.2%
Not yet reported	24	5.4%	17	5.9%

Notes. * CWOF = Continuance without a Finding. ^ calculated by dividing the count by the # of charges (442). & calculated by dividing the count by the # of cases (289). Percentages do not total to 100% because some cases have multiple charges and, therefore, multiple dispositions of different kinds. These data are current as of August 18th, 2021.

To examine the frequency of different disposition types, we have summarized how often each type of disposition occurs at the level of charges, as well as within

each case (refer to Table 2). Any one case with multiple charges against a person may result in variety of disposition types, so dispositions need to be examined at the charge and case level to fully understand the data. The most frequent disposition was a guilty finding, with at least one guilty disposition in 61.6% of cases and 42.5% of charges. The second most common disposition was "Continuance without a Finding" (CWOF) of which there was at least one in 35.3% of cases and represented 33.4% of charges. As mentioned earlier, this disposition permits the defendant to avoid a guilty conviction so long as they successfully complete any agreed-upon treatment or probation. Dismissals occurred in 6.9% of cases, representing 9.3% of charges.

The 276/87 disposition (as described earlier, a type of diversion) was also fairly common, with 6.2% of cases included this type of disposition (representing 4.8% of charges). The 276/87 disposition is a good example of why assessing both case- and charge-level information is important. Unlike other disposition types, a lower portion of charges were 276/87 dispositions compared with the percent of cases for which this disposition was reported. Unlike other disposition types, this suggests that 276/87 cases tend to have a small number of charges—almost always only one charge, in fact. This is consistent with how the office described the way they aimed to apply this option—for first time offenders who would benefit most from probation, treatment, and a chance to keep their record clear. Other disposition types (e.g., Nolle Prosequi, Not Responsible, Filed) are comparatively rare in these data.

Table 3 summarizes the types of crimes reported in the plea tracker and their frequency on a charge and case level. Crimes against people were the most frequently reported type of crime, with at least one in 37.0% of cases. Motor vehicle offenses were the next most common type of crime reported, with at least one such charge in 21.1% of cases. Crimes against property (16.6% of cases) and violent crimes (13.8% of cases) were also reasonably common. Drugs or narcotics crimes, and crimes involving firearms less common—reported in approximately 4% to 5% of cases entered into the plea tracker—and financial crimes were rare (reported in approximately 1% to 2% of cases).

Table 3. Number of Charges by Type of Crimes

Type of Crime	Number and percent ^ of cases	
Crimes against people	107	37.0%
Crimes against property	48	16.6%
Violent crimes	40	13.8%
Drugs/narcotics crimes	13	4.5%
Motor vehicle offenses	61	21.1%
Financial crimes	5	1.7%
Crimes involving a firearm	12	4.2%

Notes. ^ calculated by dividing the count by the number of cases reported (289). Percentages do not add to 100% because some crimes fall within more than one category or are missing data. Data are current as of August 18th, 2021.

There was very little racial variation among those charged with crimes in Berkshire during this time (57.1% of cases were reported to have a White defendant), but often racial information was not known or not reported (28.7% of cases) which is not unusual—most jurisdictions do not track these data well.

People charged with crimes were mostly male (60.5%) and 35.86 years (*SD* = 12.22) of age on average. Prosecutors reported at least one past felony conviction for defendants in 21.8% of cases, and lower level criminal history (misdemeanor conviction or a CWOF) in 49.8% of cases. Finally, 24.6% of defendants had no criminal record, with the defendants remaining missing this information. Most defendants were perceived by prosecutors as only a minor threat to public safety (29.8% of defendants), though 9.3% were judged to pose a high level of threat, 18.7% a moderate level of threat, and 21.5% no threat. Prosecutors though most defendants posed no threat to property (36.3% of defendants), but 3.8% posed a high level of threat to property, 12.1% a moderate level of threat, and 26.3% a minor threat.

1. The Role of Judges and Defendants

A total of 31 cases (out of 289, or 10.7%) were changed by a judge who imposed a different sentence from what the prosecutor recommended. Most of the time (51.6% of these charges) the imposed change reduced the sentence (e.g., a shorter probation period). Other changes imposed by judges included imposing fines and fees when the prosecution had not recommended imposing them, increasing the length of probation (more severe imposed sentences; 38.7% of cases), or

making a change regarding other conditions that did not clearly impact the severity of the sentence (9.7% of cases).

Table 4. Summary of Berkshire Cases in which the Defendant or the Judge Rejected or Altered the Plea.

Event	Number of cases	Percent of cases
Defendant rejected plea	31	10.7%
Defendant withdrew approval of plea	3	1.0%
Judge rejected tender of plea	29	10.0%
Judge imposed a different sentence	31	10.7%
…more severe sentence	*12*	*38.7%**
…less severe sentence	*16*	*51.6%**
…different but no more/less severe	*3*	*9.7%**

Notes. *Percentages represent the proportion of cases in which the judge imposed a sentence (N = 31). All other percentages were calculated using the total number of cases (N = 289).

When the defendant rejected or disagreed with a tender of plea, they sought a much shorter probation length than the prosecution recommended. When this happened, the judge imposed a sentence somewhat frequently (54.8% of the time, or 17 out of 31 cases). In these situations, the judge either imposed the defense's recommendation or simply imposed a more moderate sentence than what prosecutors recommended. Refer to Table 4 for a summary of how frequently judges and defendants affected the final plea agreements even after a final recommendation is presented to the court by the prosecutor.

These initial data include only a small number of cases, and so the specific patterns in these results should be interpreted with great caution. Nevertheless, these preliminary results suggest that the data from the Plea Tracker could eventually shed light on how the judges and defense counsel influence case outcomes in Massachusetts. Specifically, what is the impact of judge involvement in plea negotiations and for what types of cases do judges typically choose to step in. In addition, with more data, we will be able to assess any differences in how judges affect or change plea outcomes in District versus Superior court in Massachusetts.

2. Disposition Times

To look at the time taken to finalize a plea once a defendant was arrested, the mean and median number of

days were calculated. The average number of days to resolve a case and arrange a tender of plea in Superior Court was 721.57 days (SD = 384.88, *N* = 30) and the median is 655 days. This is much higher than the average number of days to resolve a case and arrange a tender of plea in District Court, which was 182.22 days (SD = 172.35, *N* = 182) with a median of 124 days[190]. A summary of the procedural events associated with the presentation of finalized plea agreements in District Court can be found in Table 5. The majority of plea agreements were resolved during a pre-trial conference (32.4%), but many were also resolved at arraignment (9.9%) and at the initial pretrial conference (14.8%).

Table 5. Procedural Event Associated with Plea Agreement Resolution in Berkshire, by the Court Overseeing the Case.

Procedural Event	District Court Pleas
Arraignment	18 (9.9%)
Initial Pretrial Conf.	27 (14.8%)
Pretrial Conf. (All)	9 (32.4%)
Plea Hearing	1 (0.5%)
Day of Trial	3 (1.6%)
Other	14 (7.7%)
None	22 (12.1%)

Notes. Some data is missing, and there were comparatively few Superior Court cases. These data represent the 182 District Court cases only and were current August 18th, 2021.

Although these data so far are comparatively difficult to obtain from publicly available data, collecting these data alongside other Plea Tracker data permits us to easily compare different types of cases and how long they take to resolve. For example, among the District Court cases reported so far, cases involving drug crimes or firearms take the longest to resolve (226 days and 218.5 days on average, respectively). Violent crimes are resolved the quickest (on average 122.9 days), however, which is in line with the Berkshire office's policy to obtain a quick result for victims of violent crimes. Motor vehicle offenses (*M* = 197.4 days), crimes against people (*M* = 194.00 days), property offenses (*M* = 182.4 days) fall in between these extremes. Superior court

[190] The mean is the average number of days and is the metric typically used to calculate the center point of a data set. The median is the value that is in the middle when all values of interest are ordered from smallest to largest, a type of "central value," not skewed by extreme numbers.

cases take much longer to resolve than District Court cases, regardless of the type of crime, as is expected because these are typically the more serious or more complicated cases.

3. How Pleas are Negotiated

A main goal of this project for us, as researchers, was to investigate how pleas are negotiated, what factors influence decisions made by prosecutors, and how plea outcomes change as a result of these aspects of the plea-bargaining process. Our Plea Tracker asks prosecutors to record how much they communicated with the defense and the mode of communication, and what charging and sentencing options they prioritized or felt were most important when they were negotiating a case. They are also asked to disclose the mitigating, aggravating, and other case factors they considered when creating the plea agreement or negotiating the plea. These data are totally unique to this open prosecution approach and Plea Tracker tool.

Table 6. Communication Type and Frequency with Defense Counsel as Reported by Berkshire Prosecutors.

Mode of communication	Amount of Communication			
	None	A little	Moderate	A lot
Formal	114 (39.4%)	29 (10.0%)	16 (5.5%)	1 (0.3%)
Informal	98 (33.9%)	26 (9.0%)	28 (9.7%)	2 (0.7%)
Email	42 (14.5%)	51 (17.6%)	95 (32.9%)	8 (2.8%)
In writing	128 (44.3%)	16 (5.5%)	6 (2.1%)	0 (0.0%)
Phone, Zoom, in person, etc.	68 (23.5%)	72 (24.9%)	55 (19.0%)	3 (1.0%)

Notes. This information was not reported in all cases, so the percentages do not add to 100%, but were calculated by dividing the count by 289 (total number of cases).

In general, these data suggest that communication with defense counsel is fairly limited, as can be seen in the summary found in Table 6. Formal communication with the defense was rare, though informal communication was also not frequent. The most common form of communication was email, with "a lot" of email communication reported in 2.8% of cases, "moderate" email communication in 32.9% of cases,

"a little" in 17.6% of cases, and only 14.5% of cases reporting no email communication at all. Most prosecutors reported no written communication at all (44.3% of cases), and talking with defense counsel in person, over the phone, or via a service like Zoom was also not common[191], occurring "not at all " in 23.5% of cases, "a little" in 24.9% of cases.

Table 7. Average Importance of Aspects of Plea Agreements Across Cases in Berkshire.

Plea Feature	Not important	Somewhat important	Moderately important	Important
Charging^	177 (61.2%)	3 (1.0%)	11 (3.8%)	16 (5.5%)
Sentence Length	90 (31.1%)	13 (4.5%)	47 (16.3%)	61 (21.1%)
Jail/Prison Time	136 (47.1%)	10 (3.5%)	24 (8.3%)	43 (14.9%)
Fines	164 (56.7%)	2 (0.1%)	20 (6.9%)	15 (5.2%)
Rehab/ Treatment	79 (27.3%)	10 (3.5%)	47 (9.3%)	68 (23.5%)
Probation	97 (33.6%)	10 (3.5%)	45 (15.6%)	46 (15.9%)
Other*	164 (56.7%)	5 (1.7%)	9 (3.1%)	14 (4.8%)

Notes. ^Average of three features (reduced charge severity or counts, and dropped charges). *Average of three features (restorative justice, timing of sentence, and community service). Percentages are out of the total number of cases (N = 289) and do not total to 100% as there is missing data.

The prosecutors were asked to provide their opinion regarding the importance of various aspects and topics of the plea negotiation process, by providing a rating on a scale from 1 (very unimportant) to 6 (very important). These data were averaged across topic, across all charges. Table 7 shows the importance of each of these topics relative to the others. These data show that prosecutors rated sentence length and rehabilitation or treatment options as the most important overall, followed closely by jail/prison time and probation options. With more data, we will be able to look at how these patterns differ for different kinds of cases and defendants and shed light on the factors that influence what prosecutors decide is important in any particular case.

[191] Communication via Zoom or an equivalent became the norm during the COVID-19 pandemic. The frequency of this method of communication is likely to change as prosecutors and courts return to in-person operation.

Table 8. Summary of Factors influencing Sentencing Recommendations in the Berkshire DA's Office.

Mitigating Factors		Aggravating Factors		Other Factors	
Good past record	50	Nature/ circumstances of the crime	45	Collateral Consequences	45
Other*	50	Public safety	36		
Accused expresses remorse	27	Deterrence	32	Delay	13
Cooperation	25	Criminal History	32		
Age of the defendant	25	Multiple incidents against this victim	27	Victim opinion – more severe	7
Potential for rehabilitation	24	Risk of recidivism	24	Victim opinion – less severe	12
Mental or physical health	21	Violence/Cruelty	12		
Weak case	20	Other*	11	Other *	9
Enrolled in rehab or treatment	4	Confession	9		
Defendant was provoked	7	Number of people affected	8		
Minor role in the crime	7	Firearm involved	7		
Defendant is a primary caregiver	5	Demographic background	5		
Demographic background	5	Major role/leader in crime	3		
		Committed while on probation	3		

Notes. *The "Other" option means that the prosecutor felt there was a factor that informed their recommendation, but it was not in the list. Data are current as of August 18th, 2021.

We also asked prosecutors to report mitigating and aggravating factors they considered in each case, and the other factors and collateral consequences that they felt influence their sentencing recommendations. The top five mitigating factors reported that prosecutors used to justify a more lenient plea were: good past record, remorse expressed by the accused, the accused cooperated with police and the prosecutor, the age of the accused, and the accused individual's potential for rehabilitation. The top five aggravating factors reported were: the nature and circumstance surrounding the crime, public safety concerns, deterrence, the criminal history of the accused, and evidence that they had committed this crime before against this victim. Table 8 contains a detailed summary of these data.

Finally, we also asked Berkshire prosecutors to report when they had considered the collateral consequences of any conviction or sentence imposed on a person accused of and

charged with a crime. The top three collateral consequences prosecutors reported when thinking about how they made their decisions about plea agreements were: driver's license suspension, ability to seek employment, and ability to contribute positively to the community. Refer to Table 9 for more detail regarding collateral consequences. Again, with more data we can assess patterns in these reports from prosecutors and the frequency with which these factors are considered by prosecutors for different kinds of crimes and defendants with different demographics.

Table 9. Summary of Collateral Consequences Considered by Prosecutors in the Berkshire DA's Office.

Collateral Consequence	# of Cases
Driver's license suspension	39 (13%)
Ability to seek employment	34 (12%)
Ability to contribute positively to the community	39 (13%)
Ability to return to daily life once legal obligation complete	27 (9%)
Reduce potential for sentence to cause family hardship	25 (9%)
Consideration of the accused's existing debt	21 (7%)
Other*	15 (5%)

Notes. * "Other" is when the prosecutor felt there was a factor that informed their recommendation, but it was not in the list. Numbers represent the number of cases in which a prosecutor reported this collateral consequence and the percentage of cases this was reported in (out of 289). Data are current as of August 18th, 2021.

Finally, we looked at the average sentencing recommendations for cases that were entered into the Plea Tracker. Again, there are two main reasons why data of this kind is so useful and unique. First, obtaining these kinds of data from various sources of publicly available may be time consuming and, often, impossible. Second, by associating information about sentence type, length, terms and conditions, and fines with the type of crime, defendant characteristics, and mitigating or aggravating factors, we can look at statistical models of prosecutorial decision-making. There exists no other data set that can examine prosecutorial

judgments about defendants, the crime they have been accused of, and factors relevant to the sentencing decision in such a detailed and comprehensive way.

Probation is the most commonly recommended sentence type (65.4% of cases) with an average length of 8.97 months (*SD* = 4.78). Prison is recommended comparatively less often, in 31.5% of cases, with an average length of 13.32 months. These prison sentences are most often recommended for the House of Corrections and followed by a period of probation. Fines and fees are mostly mandated by statute in Massachusetts, so are typically not within the discretion of the prosecutor (though the prosecutor can recommend waiving certain fees, such as probation supervision fees). Our records show that only 28.0% of cases incorporated fines or fees into the sentencing recommendation, with an average amount of US$570.10 (*Mdn* = $300; SD = $944.89).

A substantial proportion of cases included rehabilitative or alternative sentencing outcomes as part of the sentencing recommendation (29.4%). The types of rehabilitation recommended included the Driver Alcohol Education Program (DAEP) in 38.8% of cases, 16.5% were referred for Mental Health Evaluation, and 17.6% were referred to a detoxification program or to some type of substance abuse treatment. This suggests that the Berkshire office is successfully enacting their goal to send defendants to appropriate treatment programs that might help that individual rebuild their life and stay away from crime. It will be useful, once more data is collected, to review which type of cases and defendants tend to include treatment as part of their sentence, and how frequently strained resources in the area prevent prosecutors pursuing treatment for defendants.

D. Plea Dashboards

The implementation work has continued, with our work turning to develop a dashboard that offices can use to examine the data and learn from it. We have shared brief reports describing key findings with each office. Additionally, we are developing data dashboards so that offices can themselves explore the data on their own, in real-time. This open prosecution project not only collects novel data, but also augments it with existing data and presents it in a form that actors can use in a timely manner. A draft dashboard allows a dynamic display, so that prosecutors, can,

for example, examine how sentences vary by defendant demographics, or how often formal communication is used to negotiate various types of plea deals.

The goal is to visually present data in way that is useful and intuitive for prosecutors. Some of the data are easy to summarize and reflect basic operations of the office, such as how many pleas the offices have resolved by unit, how many prosecutors are using the tool, and summary statistics on the number of charges pled to and dropped per case. We are also working with each office to identify which data they are most interested in, and what type of questions they would like to have easy access to answer. So far, the main focus is on big picture concerns regarding case resolutions in their office including potential racial disparities in outcomes, and how often outcomes that include diversion or alternatives to prison time are used. We think that these dashboards provide an effective tool for transparency, both by allowing district attorneys to see what is going on in the office, and by giving the office the data it needs to communicate transparently with the public.

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

In this Part, we turn to the democratic legitimacy and the consequentialist arguments for an open prosecution approach. Those arguments are connected. Without public reason giving, as John Rawls would call it, by prosecutors, there is not only a lack of democratic accountability, but also neither prosecutors nor the public can engage in policy questions regarding the consequences of prosecution approaches, evaluate them, and make better policy choices.[192]

The democratic deficit in prosecution has been longstanding and raises a series of problems beyond prosecutors. An ACLU report recommending legislation to require prosecution transparency (which has not been enacted in any state) noted that there exist "few public statistics on prosecutorial decision making," which makes it "nearly impossible to uncover individual abuses, systemic discrimination, or patterns that do not align with office

[192] *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997).

policies."[193] Indeed, the costs of non-transparency in plea negotiations extend to prosecutors, the defense, judges, and the public. The public is not fully aware of what the "trial penalty" may be, or conversely, what leniency prosecutors may offer in plea negotiations. Prosecutors, in turn, need not justify their exercise of discretion.

We acknowledge that not all exercises of discretion need be accompanied by public reason-giving. There can be advantages to prosecutors and other officials exercising discretion without oversight, which may chill the exercise of that discretion.[194] However, as our work has detailed, in the past prosecutors have not documented reasons internally, much less shared them publicly. There are important advantages to internal collection of real-time data to inform the internal use of discretion concerning plea bargaining, and still additional advantages to disclosure of at least some of these data to the public. Second, we discuss the reasons why defense lawyers should similarly track plea negotiations and the unique insights that could result from defense lawyers doing so. Third, we discuss the ways in which judges would benefit from the information provided by plea tracking work, including to inform their own exercise of discretion and their broader docket management. Fourth, we develop the potential implications for public awareness, public policy, and efforts to reduce reliance on incarceration and to reduce racial and other disparities in criminal outcomes.

A. Prosecutorial Accountability and Quality

While researchers have documented that trial convictions increase sentence lengths, whether a "trial penalty" results from a defendant asserting trial rights, or other considerations during plea bargaining, is not possible to assess without data concerning the plea-bargaining process.[195] Most prosecutors in the U.S. are locally elected to

---

[193] *See* ACLU, *Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration* (2020).

[194] See, e.g. Ashley S. Deeks, *Secret Reason-Giving*, 129 YALE L. J. 612 (2020) (describing advantages of internal, non-public reason-giving in the national security context).

[195] *See, e.g.* Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent. Rep. 256, 257 (2019); Nancy J. King, David A. Soulé, Sara Steen & Robert R. Weidner, *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 Colum. L. Rev. 959, 973-75, 992 (2005).

serve four-year terms.[196] When voters hold prosecutors accountable in elections, they have very little information from which to base their decisions. As Judge Stephanos Bibas has noted, anecdote has often driven prosecutor elections in the past:

> "Part of the problem … is that juicy, salient anecdotes are more memorable and powerful than dry numbers. Part of the answer may be that voters lack clear, comprehensive, and meaningful statistics about arrests, charges, pleas, and sentences. If, for example, statistics revealed racial charging and sentencing disparities, the public might clamor for more equality, or at least explanations."[197]

Mere access to crime rate information or conviction statistics, do not adequately inform voters. [198]

As Ronald Wright has detailed, we need additional accountability mechanisms in the "period in between quadrennial elections," to improve public decisions and prosecutor's own decisions.[199] Ideally, mechanisms would permit community feedback regarding data that is made public. Our plea tracking efforts will include public-facing data sharing, so that aggregate patterns can be understood and examined by the public. The extent to which public deliberation occurs based on these data remains to be seen. We note that the open prosecution system that we have described does not make public individual and case-level information, so it would not satisfy a need for reason-giving in specific cases. Full case-level information concerning plea agreements could expose information concerning cooperators and informants, for example.

Nevertheless, the internal documentation and reason-giving can have an important influence. As Judge Harold Leventhal put it, "Reasoned decision promotes results in the public interest by requiring the agency to focus on the values

---

[196] Steven W. Perry, *Bureau of Just. Stat., Prosecutors in State Courts*, 2005, at 3 (2006). Ronald Wright, *Beyond Prosecutor Elections*, 67 SMU L. Rev. 593, 598 ("All but five states elect their prosecutors at the local level").

[197] Bibas, *supra*, at 987.

[198] *Id*. at 986.

[199] Wright, *Beyond Prosecutor Elections supra,* at 593 ("techniques for publicizing data about prosecutor performance and collecting community feedback might promote a form of prosecutor accountability that goes beyond the blunt force of elections.").

served by its decision, and hence releasing the clutch of unconscious preference and irrelevant prejudice."[200] Or, as Fred Schauer has put it, "when institutional designers have grounds for believing that decisions will systematically be the product of bias, self-interest, insufficient reflection, or simply excess haste, requiring decisionmakers to give reasons may counteract some of these tendencies."[201] Thus, there is a strong consequentialist case for requiring reason-giving; that case is particularly strong, as described, in the plea negotiation context.

In our role as assisting in a process of institutional design, we have built reason-giving into key decision points, including the decision to offer a plea. The plea tracking approach does not require prosecutors to write judicial-type opinions, but it does call on them to document the steps in the process, and their reasons for the decisions at those key stages in the process. The insights from such data can spark internal decision-making and policy. Aggregate data documenting disparities can result in internal communication and changes, as occurred in the Milwaukee office after data documented an unexpected racial disparity in drug charges.[202] Similarly, also as part of the Vera work, the Charlotte-Mecklenberg office discovered charges were filed in almost all drug cases, but subsequently, large numbers were being dismissed; in response, the office increased declinations in drug cases.[203]

Prosecution offices traditionally have not had quality control programs, like a crime laboratory or a hospital would routinely have, but this plea tracking can inform a new quality function.[204] The quality control function of the data system would enable identification of outcomes that can readily be viewed as an error or quality control failure under the new policies. The metrics for quality assessment will be dependent on the specifics of the new office policies, but may include adherence to written office policies or to legal requirements. For example, there may be cases that, based on the charges and aspects of the defendant profile, should have been recommended for dismissal or discussed with the

---

[200] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1971).
[201] Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633, 657-58 (1995).
[202] McKenzie et al, *supra*, at 6-7.
[203] Id. at 7.
[204] For an overview of quality control functions in such settings, *see* Brandon L. Garrett, *Autopsy of a Crime Lab: Exposing the Flaws in Forensics* Ch.9 (2021).

defense attorney regarding diversion, but were not. There may be cases in which procedures set out in policy were not followed, such as if prosecutors did not disclose exculpatory evidence, did not document adequate reasons for a plea outcome, or failed to follow a requirement that they confer with the defense regarding potential mitigation evidence. These cases could be identified and flagged in the system as process failures, and used to guide further staff development and training. Even absent clearly identifiable errors, "quality" can involve examination of aggregate metrics such as final plea agreements, dismissals, and diversion to compare and evaluate prosecutors.

Prosecutors could be rated on metrics such as internal consistency and consistency with colleagues, adherence to office policies, and level of bias in sentencing across groups of defendants based on race or other characteristics. Additionally, as part of routine supervision, supervising prosecutors could randomly select cases for an independent review and discussion with the line prosecutor. The specifics of such a quality program could to "grow out of typical management needs" in a given office.[205] Thus, the Durham District Attorney's Office, following this thinking, is extremely interested in using data to inform supervision, so that there are new metrics to evaluate performance of prosecutors.

B. Defense Data

Defendants may have far more to gain from data collection concerning plea bargaining, and they can adopt similar systems. As Judge Bibas has put it: "Defendants and defense counsel are valuable sources of information about prosecutorial behavior, ones that we have not tapped well."[206] Further, defense lawyers have obligations to convey plea information to their clients, which better-documented plea practices can support; as the Supreme Court put it in *Missouri v. Frye,* "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."[207] Defense lawyers may not have sound information about what a prosecutor represents as the "going rate" for a type of charge.

[205] *See* Wright, *supra* note xxx, at 2017.
[206] *See* Bibas, *supra* note xxx, at 995.
[207] 566 U.S. 134, 145 (2005).

They may not have sound information about how typical an offer is or whether it is an outlier. Defense lawyers cannot systematically improve the quality of their defense advocacy during plea negotiations absent systematic data concerning their work and the outcomes.[208]

In addition, there may be specific abuses that occur during the plea negotiation process that would be of special concern to public defenders. The National Association of Criminal Defense Lawyers (NACDL) has documented concerns with the "trial penalty," in which defendants that reject plea offers and proceed to trial may be penalized.[209] They have called specifically for better data collection regarding plea offers and subsequent outcomes, since with "limited data available" in New York state, the focus of the most recent study, they had to rely on interviews and existing case processing information.[210] Specifically, they recommend that: "Agencies involved in criminal cases should collect data on at least (1) the best plea offered; (2) the final plea offered; and, if applicable, (3) any final sentence."[211] They note that with trials in dramatic decline in jurisdictions like New York, it is particularly important to examine potential abuses in the plea negotiation system. [212]

There is crucial data that can only be obtained by focusing on the plea process from the defense perspective. Public defender caseloads are an important example. The NACDL quoted one lawyer, who comments, "Excessive caseloads for attorneys leads to [the] client's belief that the attorney is too busy to handle the case and too busy to adequately prepare their case for trial leading to pressure to enter a plea."[213] Caseload pressures on plea outcomes could be documented directly or measured indirectly, by examining caseloads of attorneys and outcomes by attorney.

---

[208] *See* Turner, *supra* note xxx, at 994 ("the lack of searchable plea records inhibits proactive efforts by defense attorneys to improve the assistance they provide during plea negotiations."); *see also* Wright, Roberts & Wilkinson, supra note xxx (surveying defense lawyers).

[209] *See* New York State Association of Criminal Defense Lawyers and National Association of Criminal Defense Lawyers, New York State Trial Penalty 10 (2021), at https://www.nacdl.org/getattachment/1d691419-3dda-4058-bea0-bf7c88d654ee/new_york_state_trial_penalty_report_final_03262021.pdf.

[210] *Id*. at 12.

[211] *Id*. at 10.

[212] *Id*. at 15.

[213] *Id*. at 85.

The defense has unique access to their own clients. Only the defense can fully track, to the extent that it is investigated and uncovered, mitigation evidence, whether it is shared with prosecutors, and its impact if any on plea negotiations. Only the defense can fully track preferences, including risk preferences, of defendants, and whether they are willing to negotiate or risk a trial. Only the defense can fully document defendant preferences regarding supervision and other conditions of a plea. Only the defense can fully document defendant preferences and concerns regarding collateral consequences of a plea, on subjects such as housing, employment, and immigration.

More broadly, Pam Metzger and Andrew Ferguson have called for the creation of defense-lawyering databases: "there has been no widespread effort to develop a data-driven approach to the highly adversarial practice of public defense, in part because public defense presents unique challenges for a data-driven systems approach."[214] One obstacle, they note, is that outcomes are defined by client interests, and not the budget and caseload information that is typically collected in public defender offices.[215] Another obstacle is cultural:

> Although most defenders handle the same types of cases, in the same courts, with the same law, using the same methods, defenders do not see a larger defender system at work. By oath and ethics, defenders devote themselves to one client above all other considerations. As a result, defenders tend to view systemic data as unnecessary and errors as anomalous occurrences that occur in individual cases; they do not see errors as institutional failures that affect multiple clients in broad and often undiscovered ways. [216]

However, a system could be set up to examine outcomes, very much like the system we have designed for prosecutors. Kay L. Levine, Ronald F. Wright, Nancy J. King and Marc Miller have argued that defense organizations should create such databases to "crowdsource" plea bargain information, and as a result, "the pricing for pleas would become more

[214] *See* Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. Cal. L. Rev. 1057 (2015).
[215] *Id*. at 1063.
[216] *Id*. at 1078.

transparent, particularly for newcomers to the profession."[217] Many of the same questions, regarding the terms of the plea offers exchanged and ultimately accepted, would be asked and answered about any given case. Other outcomes could be documented, such as successful efforts to suppress evidence or obtain a diversion or a reduced sentence.[218] Open defense lawyering should accompany open prosecution.

C. Judicial Review

Judges cannot exercise effective oversight over plea bargains if they are not privy to the relevant information concerning the process in a particular case and across cases. They may not be aware of what charges were dropped or reduced or added and they may not be in any position to document key information concerning plea offers exchanged between the parties. In some jurisdictions, judges are involved in plea negotiations, and those negotiations are recorded.[219] As described, however, judges are largely not involved or able to access information about plea negotiations. Unlike executive actors that do exercise discretion in ways that are not intended to be public, judges service a key democratic function in making reasons and outcomes public. Thus, as Micah Schwartzman has explained, the case for judicial reason-giving includes the normative and consequentialist arguments that: "transparent decision making constrains the exercise of judicial power, makes judges more accountable to the law, provides better guidance to lower courts and litigants, promotes trust and reduces public cynicism, and strengthens the institutional legitimacy of the courts."[220]

Further, the U.S. Supreme Court and other courts have expressed real separation of powers concerns with inquiring into the exercise of prosecutorial discretion generally. As

---

[217] Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 Tex. A&M L. Rev. 653, 664 (2019).

[218] However, efforts would have to be made to safeguard any confidential client information, as well as work product, such as assessments of strength of the evidence, which is also present in the prosecution databases. *Id*. at 669-70.

[219] *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 Tex. L. Rev. 325, 341 (2016).

[220] Schwartzman, *supra*, at 989.

noted, the Supreme Court has emphasized "systemic costs of particular concern," including the potential to delay proceedings, "chill law enforcement," and "undermine prosecutorial effectiveness by revealing the Government's enforcement policy."[221] Under an open prosecution regime, prosecutors should themselves reveal their enforcement policies. Further, they already, without delaying case processing, collect data in real-time to themselves evaluate whether they are following their own policies. As a result, judges may be in a better position to evaluate exercise of prosecutorial discretion. Judges may have far less reason to step in, however, if prosecutors themselves can identify outlier exercises of discretion and remedy them before any judicial review would be needed. Thus, an open prosecution framework can both empower judicial review if there are abuses, but most significantly, it can detect and prevent any abuses or departures from policy, before they affect defendant rights. In so doing, as described, they create a self-regulating system for prosecutorial accountability.

Such a system can shed light, if failures are not remedied, on a range of constitutional rights that are affected, but whose violation may be disguised by the "black box" that is the standard current state of data collection and documentation. Thus, as Jenia Turner has noted: "As the Supreme Court has recognized, however, it is difficult to ensure that defendants are receiving effective assistance if plea bargaining occurs off the record."[222] The NACDL has highlighted concerns with impacts of plea bargaining on trial rights in its "trial penalty" reports.

Further, judges may currently focus on the wrong kind of data that may incentivize them to focus their review on the wrong types of information. Judges often do have data concerning caseloads and timing. As a result, they may try to push cases towards plea outcomes in order to clear dockets, without any information about what dynamics that may result in and what outcomes for defendants. The NACDL points out that "while prompt resolution of criminal cases is an important constitutional right, … pressure on judges to resolve cases quickly (and thereby avoid trials) may incentivize judges to discourage criminal defendants from exercising their right to litigate cases up to and including a

[221] *See* Wayte v. U.S., 470 U.S. 598, 607 (1985).
[222] *See* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973, 994 (2021).

trial."[223] An open prosecution approach may provide judges with a broader perspective in which to evaluate their own dockets and case management.

D. Open Prosecution and Redressing Mass Incarceration

One early justification for enhanced data collection by prosecutors was largely focused on improving prosecution legitimacy, to "enhance public confidence in the fairness of the prosecutorial function." [224] Neither accountability nor policy change were central goals, although both flowed from those efforts. However, the ambition of more recent prosecution transparency efforts has been to use data collection to accompany far deeper changes in the fundamental approach to prosecution. Progressive prosecutors have consciously adopted, to some degree, an anti-carceral agenda. They have sought to document and evaluate those policies using data. Plea tracking has the potential to help offices and outsiders assess whether these progressive prosecution goals are being met. As one research review summarized, "Fixing the major failings of America's justice system—including mass incarceration and systemic racism—is made exponentially more difficult when the most common and most fundamental of court operations is largely invisible."[225]

The plea tracking effort builds more time and more holistic consideration of factors into the plea negotiation process. That process has the potential to introduce when Jennifer Eberhardt calls "friction" into the plea negotiation process, which has the potential to operate as a check against racial and other invidious biases.[226] Future work could examine whether the plea tracking process itself has such effects. More fundamentally, plea tracking can document patterns in case outcomes that might not otherwise be apparent, in order to potentially detect invidious bias.

We note that there is another important part of the plea negotiation process that is still not examined: impacted individuals' own experiences in plea bargaining.[227] Unlike attorneys, persons charged as defendants not repeat actors,

---

[223] *See* NACDL, *supra* note xxx, at 56.
[224] *See* McKenzie et al, *supra*, at 8.
[225] *See Subramanian et al, In the Shadows, supra note 7, at 3.*
[226] *See* Eberhardt, *supra,* at 184-186.
[227] *See id. at 3.*

lack legal training, and their stakes are highly personal. They may face pressures, including due to pretrial detention, to plead guilty whether they are innocent or guilty, as noted. We believe that impacted individuals are indispensable to any model of plea negotiations that aims to speak to justice and outcomes in our legal system. Few studies have interviewed or surveyed impacted individuals about their experiences in plea negotiation; there is evidence that many individuals do not meet with their defense lawyers for long and may not understand what they are pleading guilty to or the consequences of doing so.[228] One of us plans to explore the experiences of impacted individuals in the plea tracking jurisdictions to shed light on this defendant perspective.

E. Public Reason, Ethics, and Prosecutors

A core feature of democratic accountability is that government officials provide publicly-stated reasons for their actions.[229] Administrative agencies and courts most commonly provided public reasons for the decisions,[230] while, as noted, prosecutors, as enforcement officials, have tended not to do so with respect to key decisions, including those reached largely out-of-court in plea negotiations. While judges should "show that their decisions are justified according to the law,"[231] in contrast, we acknowledge that a wide range of negotiated dispositions need not be fully justified by the law, and nor are they subject to searching judicial review, or regulatory oversight.[232] In the context of plea negotiations, the American Bar Association has set out certain ethical obligations during the process.[233] Those rules do not address transparency or documentation of key steps during the negotiation process. This open prosecution

[228] *See, e.g.* Tina M. Zottoli, Tarika Daftary-Kapur, Georgia M. Winters, and Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 Psychol. Pub. Pol'y & L. 250 (2016).
[229] *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. Chi. L. Rev. 765 (1997).
[230] *See* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 Fordham L. Rev. 17, 22 (2001).
[231] Micah Schwartzman, *Judicial Sincerity*, 94 Va. L. Rev. 987, 1004 (2008).
[232] Owen M. Fiss, *Against Settlement*, 93 Yale LJ. 1073 (1984).
[233] See, e.g., American Bar Association Standing Committee on Ethics and Professional Responsibility, Rule 3.8: Special Responsibilities of a Prosecutor.

approach suggests revising that approach, given the benefits from a consequentialist perspective, but also the democratic accountability goals of public reason-giving in criminal cases, so many of which are now resolved through plea bargains.

CONCLUSION

The U.S. Supreme Court in *McCleskey v. Kemp* emphasized, in a landmark decision rejecting as constitutionally relevant the results of a substantial empirical study of prosecutorial discretion in death sentencing practices, that prosecutorial discretion is "at the heart of the State's criminal justice system."[234] The Court's constitutional criminal procedure rulings, and state and local rules, have not incentivized efforts to open the lid on what occurs during plea negotiations, treating the entire domain as within the unique purview of prosecutors. Yet prosecutors have begun to see the value of collecting such data as a means to inform themselves and improve their work.

The black box of plea negotiation has been opened. In our plea tracking projects, with very different jurisdictions and in interdisciplinary team of researchers, we have begun the work of collecting systematic plea data. We describe how this data collection system was designed, piloted, and implemented. We describe the initial data we have collected and what insights into the process that have so far been generated. We have already learned a great deal about how the plea process proceeds, what types of communications occur between prosecutors and the defense, how productive that communication is, what factors motivate prosecutors in arriving at plea offers, and what role judges play in reviewing plea outcomes. We believe that criminal defense lawyers can similarly benefit from collecting these data.

Plea tracking is not complex. The system we have developed can readily be adapted across jurisdictions: we seek provide a national model for criminal lawyers to document plea negotiations in all cases. An open prosecution approach is feasible, and, for the first time in the United States, it is in operation.

[234] McCleskey v. Kemp, 481 U.S. 279, 297, 312 (1987) (quoting Kenneth Culp Davis, *Discretionary Justice* 170 (1969)).

Appendix A. Berkshire Plea Tracker

1. Summary of Support Staff Data Entry

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

Defendant Information

- *Basic information*:
    - o Full name, age (current & at time of offense), race, & gender.
    - o Whether English is the defendant's second language?
        - § If yes, does the defendant need a translator?
    - o Names of any co-defendants.

- *Criminal History*:

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

Victim Information

- Option to indicate if this was a victimless crime or a crime against a business.

- If there were victims, enter the following for each victim:

o Age, whether they are a member of a vulnerable population (minor, elderly, physically or mentally disabled, or other), race, & gender.

Charge Information

- For each charge, enter the following:

o *Details of charge*: What charge/offense, date of offense & indictment, chapter/Section, docket number, and counts.
o *Sentence type*: life, state prison, house of corrections, county/split, probation, filed, policy amendment, or other.
§ Enter mandatory minimum/maximum or other details where applicable.
o *Financial Sanctions*: Fine, restitution, victim/witness fee, rehabilitation or treatment fee, probation supervision, or bar advocate fee.
§ Indicate amounts and whether fees were waived or imposed.
o Any additional notes about this charge.

Which emails should the report be distributed to?

Summary of ADA Responses

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

Defendant Information:

- Full name of defendant

- Your opinion regarding the defendant's threat to people/public safety and property:

o Options: "*no threat at all*", "*a minor threat*", "*a moderate threat*", "*a high level of threat*", or "*this has yet to be determined*".

Victim Information:

- Option to indicate if this was a victimless crime or a crime against a business.

- If there were victims, enter the following for each victim:

o *Impact on the victim*: rate from 1 to 7 & higher means more negative impact.
o Whether there has been communication with the victim and, if so, how much.
o Other involvement - right to be heard, impact statement, came to court, or testified

Fate of Previous Tender of Plea [*if entering a modified or final tender of plea*]

- Did the defense or judge reject the previous tender of plea?

- Did the judge attempt to impose a sentence? If yes, did the defense withdraw approval?

Tender of Plea Information

- Arrest date, date plea was offered to defense, & date plea was presented to court.
- Any charges being dropped and why
- The procedural event associated with this tender of plea.
- Details of the following aspects of sentences, where applicable:
o Pretrial detention, suspended sentencing, "time served" incorporated into sentence, community service, rehabilitation/treatment, "no contact" orders, & how multiple sentences will be served.

- For each charge:

o Reasons for any changes to the charge during negotiations or since the last tender of plea, status of the charge
o If probation, specify any terms and conditions and the length of probation. o If prison, specify total length of time recommended.
o If charge was amended, why?
o What did the defense and judge recommend for sentencing and fines/fees?

Questions About Decision-Making

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

Which email should the report be sent to?