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Plea Bargaining: The Influence of Counsel

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Cite as:

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Abstract (150-200 words)

For the criminal defendant, his attorney acts as his loyal and zealous advocate before the court (American Bar Association, 2015), and due process protections of the U.S. adversarial system have afforded this relationship special privilege. In this chapter, we explore the influence and role of the attorney in plea decision making. We first explore the legal context of the attorney's role in plea bargaining, reviewing several cases that address a defendant's right to effective assistance of counsel. We then review the shadow of trial theory and other theoretical perspectives as they relate to the attorney's role in the plea-bargaining process, providing a theoretical background to understand how the attorney's advice and role likely influence a defendant's decision to accept a guilty plea offer. Then, we discuss the research examining legal and extra-legal factors that influence the type of advice an attorney gives a client contemplating a guilty plea offer, considering the implications of this research for the current standards used to define effective assistance of counsel. Last, we explore future research possibilities that could contribute to the understanding of the role the attorney plays in the plea-bargaining process.

Keywords: Plea bargaining, guilty pleas, social influence, attorneys, effective assistance of counsel

Index terms: Gideon v. Wainwright, 1963; shadow of trial theory; social influence; *Lafler v. Cooper*, 2012; *Missouri v. Frye*, 2012; collateral consequences; *Strickland v. Washington*, 1984; 6th Amendment right; due process; legal factors; extra-legal factors; false guilty pleas; effective assistance of counsel; *Hill v. Lockhart*, 1985; conformity; compliance; type of counsel; trial penalties and plea discounts; case predictions; race

Plea Bargaining: The Influence of Counsel

Plea bargaining involves an agreement between the defendant and the state in which the defendant pleads guilty to a charge, typically in exchange for some form of leniency in sentencing or charges. Plea bargaining can result in an outcome that is desirable for both parties seeking to settle a dispute in an expedient and economic manner. Criticisms of the practice of plea bargaining focus on the infringement of defendant's Constitutional right to trial by a jury of his peers and lack of adversarial and procedural protections. Many of the protections for defendants afforded by the Constitution were designed with the trial process in mind and could be sacrificed in the decision to negotiate a disposition (i.e., plea bargain). For example, the defendant who accepts a guilty plea does not have the opportunity to cross-examine key witnesses or present contrary evidence to try and defend one's innocence. However, many characteristics of the U.S. criminal justice system, such as the high volume of caseloads and overburdened trial courts, promote the use of plea bargaining and increase pressure to resolve cases prior to trial.

Given these factors, it is not surprising that the majority of convictions are obtained through plea bargaining. An estimated 90-95% of all criminal convictions are a result of guilty pleas; the remaining percentage are convictions by judge or jury (Cohen & Reaves, 2006). The vast majority, 97%, of felony defendants convicted in U.S. Districts courts pleaded guilty in 2013 (U.S. Department of Justice Executive Office for United States Attorneys, 2013). In 2004, of the estimated 1,079,000 felony defendants convicted in state courts, 95% pleaded guilty, 2% were found guilty by a jury, and 3% were found guilty by a judge/bench trial (Durose & Langan, 2007). Plea bargaining is not a recent development in the U.S. criminal justice system; defendants accepting guilt in exchange for some type of leniency in sentencing has existed for

over a century, if not most of U.S. history (Friedman, 1979). In the 1920s, estimates suggest that guilty pleas accounted for 77% of convictions in Cleveland, 85% in Chicago, 81% in Los Angeles, and 90% in Minneapolis (Alschuler, 1979).

Despite the large number of convictions resolved via guilty plea, legal decision-making scholarship has only recently begun to examine plea-bargaining practices (e.g., Redlich, Bibas, Edkins, & Madon, 2017; Redlich, Bushway, & Norris, 2016). More scholarly attention has been given to other sources of legal decision making and wrongful conviction generally (e.g., juror and jury decision making, eyewitness identification, confessions). Given that plea bargaining accounts for the majority of convictions (and some known cases of wrongful conviction), research is needed to understand the processes used and context in which defendants make plea decisions. Research has begun to examine variables that might influence one's decision to accept a guilty plea, including legal factors (e.g., ability to secure pre-trial release, strength of evidence, prior criminal convictions), characteristics of defendants (e.g., youth, mental illness), and defendants' personal motivations (e.g., loss of hourly employment, potential loss of transitional nightly housing). There are numerous empirical sources of information regarding these topics (for example, for self-reported plea motivations see Malloy, Shulman, & Cauffman, 2014; Redlich, Summers, & Hoover, 2010). The purpose of this chapter is to examine the role of the attorney as a source of influence in defendant plea decision making.

For defendants, the decision of whether to waive their rights and accept a guilty plea versus take their case to trial is "the most important decision in any criminal case" (Amsterdam, 1988, p. 339). Because of legal education, the attorney's legal knowledge far exceeds the defendant's own knowledge. For example, the defendant is unlikely to fully comprehend issues surrounding evidentiary rules of the court, possible defenses, and potential punishment options,

whereas the attorney likely gained this knowledge through legal education and experience. Counsel's responsibility is to make every reasonable effort to protect the defendant from an ill-informed choice. Attorneys might persuade defendants, to the limits their conscience allows, to make the decision that is in the defendant's best interest, which typically is the guilty plea (Amsterdam, 1988). The attorney, however, must remind the client that even if he insists on going to trial, the attorney will zealously represent the defendant in court. Even though the attorney must give the client the benefit of his professional advice, the ultimate plea decision remains with the defendant. In fact, a recent United States Supreme Court (USSC) decision reaffirms that the choice of how to plead, amongst other legal decisions, remains with the defendant, not his attorney (*McCoy v. Louisiana*, 2018). Examining plea decision making and the role of attorneys in that context will contribute to the understanding of this critical component of the U.S. criminal justice system. Specifically, attorneys play a special role in the plea-bargaining process, and likely affect a defendant's understanding of his case, which then ultimately influences the defendant's decision to plead guilty or go to trial.

We will begin by exploring the attorney's role in the legal context, established by legal precedent, examining how those guidelines extend to plea-bargaining negotiation, advising, and counseling. In examining the legal context, we review several decisions addressing the defendant's 6th Amendment right to effective counsel, ranging from the 1963 decision in *Gideon v. Wainwright* to a more recent pair of cases, *Lafler v. Cooper* (2012) and *Missouri v. Frye* (2012). We will then discuss the attorney's role in the context of the dominant theoretical perspective applied to plea decision making: the shadow of trial theory. Following this, we explore how the social psychological process of social influence could help account for how defendants' plea decisions are influenced by their attorneys. We will then delve into research

examining legal and extra-legal factors that influence attorney decision making and recommendations. Then, we examine whether research on the attorney's role in plea bargaining sheds light on the standards used to define effective assistance of counsel. For example, one variable that might affect an attorney's advice is the race of the defendant. We will explore this variable and how the idea that race might affect plea outcomes through attorney advice has implications for what constitutes effective assistance of counsel. Further, we will explore whether defendants over-rely on attorney advice or pressure, making decisions that are against their own best interests and that they might not have made in the absence of such pressure. Last, we provide suggestions for future research that will contribute to the understanding of the relationship between attorneys and their clients, and how this relationship plays a role in defendants' plea decisions.

The Defense Attorney's Role

There are three phases in the plea-bargaining process: the preparation phase, negotiation phase, and client-counseling phase (Alkon, 2016). The first phase involves the defense attorney preparing to meet the client, conducting client interviews, investigating the case, establishing legal background of the case, gathering information, and preparing the client for the plea negotiation phase (Alkon, 2016). This phase is relatively straightforward, and during this time the defense attorney will orient himself to the case, client, and other legal actors involved (i.e., prosecutor and possible judges).

The second of these phases is the plea negotiation phase. During the plea negotiation phase, the defense attorney and prosecutor discuss possible plea offers and counter-offers (Alkon, 2016). When settling a criminal case, the parties involved must attempt to reach an agreement on the disposition of a case that satisfies the interests of both the prosecution and

defense, without proceeding to trial (Amsterdam, 1988). If the risks at trial for the defendant are deemed to be large, then effective assistance of counsel is securing a plea deal for the client (Amsterdam, 1988). Thus, during the negotiating phase, the defense's goal is to secure the least damaging plea deal for the client. The negotiation phase typically begins early, as there might be an incentive for the defendant to accept a plea offer quickly and for the defense attorney to gain access to discovery as soon as possible. Even if the defense attorney has an opinion about whether the case would be best suited for trial or a guilty plea, the defense attorney has an obligation to explore negotiation with the prosecutor if the client appears open to the possibility of a guilty plea (Amsterdam, 1988).

The final phase is the client-counseling phase, which occurs once the prosecutor has offered a plea and the defense attorney counsels his client about the plea offer. This phase is arguably the most important phase in which to examine the influence of the attorney. If the defense attorney has determined that accepting a plea offer is in the client's best interests and the attorney advises the client of this, the attorney should thoroughly explain his reasoning to the client (e.g., the evidence against the defendant, perception of probability of guilt at trial; Amsterdam, 1988). The attorney should advise the client of not only the benefits, but also the consequences associated with accepting the guilty plea (see discussion of collateral consequences, below).

Research suggests attorneys follow this standard. For example, one study examining plea decision making from the perspective of juvenile defense attorneys reported that attorneys engaged in three strategies to help prepare their juvenile clients in making plea bargain decisions: 1) discussing the disposition or sentence the juvenile would be facing, the charges, and evidence the state would likely use against the client at trial; 2) making sure the client understood the

rights the client would waive upon accepting a guilty plea; and 3) discussing the collateral consequences that result from accepting a guilty plea (Fountain & Woolard, 2018). Following this phase, the client will make the decision of either accepting or rejecting the guilty plea offer, taking into consideration his own personal situation, beliefs, and attorney's recommendation. If the client chooses to reject the guilty plea offer, the client could choose to fight for a better offer or take the case to trial. Effective assistance of counsel is required at each stage of the process for the defense attorney to secure the best outcome for his client (Alkon, 2016). In the next section, we will explore the concept of effective assistance of counsel, explaining the precedent and assumptions underlying those laws.

Legal Precedent: A Defendant's Right to Counsel

Right to counsel in the legal system is a fundamental issue first included in the Constitution and defined by precedent in subsequent years. In *Gideon v. Wainwright* (1963), one of the landmark decisions regarding right to counsel in the United States, the United States Supreme Court (USSC) extended the right to counsel for indigent defendants to state courts. The decision in *Gideon* overturned an earlier decision in *Betts v. Brady* (1942) that denied defendants in state courts the same right to counsel as defendants in federal courts (*Johnson v. Zerbst,* 1938) or narrowly applied only to defendants accused of capital crimes (*Powell v. Alabama,* 1932). The decision in *Gideon* was later extended to include all defendants charged with a misdemeanor offense carrying the potential for loss of liberty (i.e., imprisonment; *Argersinger v. Hamlin*, 1972) and to include juvenile defendants (*In re Gault*, 1967). Additional considerations of the constitutionality of plea bargaining focusing on fairness were addressed in *Santobello v. New York* (1971). In this decision, the USSC determined that, for a plea bargain to be valid, a prosecutor has to adhere to the plea agreement offered to a defendant at sentencing.

Gideon (1963) established the standard of effective, appointed counsel for indigent defendants as fundamental to fairness, as part of the due process clause of the 14th Amendment. Following the *Gideon* decision, the USSC further addressed the constitutionality of plea bargaining and established that a defendant must knowingly, voluntarily, and intelligently accept a guilty plea, thereby waiving his 5th Amendment rights (*Boykin v. Alabama*, 1969). The decision to accept a guilty plea is one of the most important legal decisions the defendant will make, and part of the defense attorney's role is to help ensure the defendant's decision falls into the parameters of a knowing, voluntary, intelligent, and rational decision. The USSC has established that a plea is voluntary even if a defendant accepts a guilty plea while still proclaiming innocence (*North Carolina v. Alford*, 1970), or pleads guilty to avoid the death penalty (*Brady v. United States*, 1970). More information on whether plea decisions are knowing, voluntary, and intelligent is available elsewhere (e.g., see Redlich, 2016); as the focus of this chapter is the role of counsel, we will next turn to that role as established in law.

In *Gideon* (1963), the USSC established the right to counsel but did not address what constitutes effective assistance of counsel. This question was later put to rest in *Strickland v. Washington* (1984). To help dictate what constitutes ineffective assistance of counsel, *Strickland v. Washington* (1984) offered a two-prong test: (1) Was counsel's performance deficient, falling below an objective standard of reasonableness; and (2) If there was deficiency, is there a reasonable likelihood that, if not for counsel's deficient performance, the outcome would have been different? Given the threshold established in *Strickland*, it is difficult to prove ineffective assistance of counsel. Not only does the defendant have to prove that his counsel's performance was ineffective, but also that the outcome at trial would have been different if not for his counsel (effectively having to prove one's innocence in a *Strickland* test). Thus, the 6th Amendment's

right is implied to mean “effective assistance of counsel”; however, the threshold for what constitutes effective counsel according to the *Strickland* test might not necessarily represent what one intuitively thinks of as good counsel.

That is, there have been numerous anecdotal accounts of attorneys behaving in a way that arguably does not represent good counsel, yet passes the *Strickland* test. This is likely due to the second part of the standard requiring that the outcome at trial would have to be different. For example, the USSC has ruled that an attorney meets the “effectiveness” standard if he is conscious (i.e., awake) for a “substantial” portion of trial (*Muniz v. Smith*, 2011). In this particular case, the defendant’s attorney was asleep while his client was being cross-examined by the prosecution. While the USSC acknowledged that this qualified as deficient, the defendant did not prove with reasonable probability that the outcome would have been different had his attorney not fallen asleep (*Muniz v. Smith*, 2011).

A similar example can be found in the New York State Appeals Court Decision in *People v. Badia* (1990). In this case, the Court upheld Badia’s murder conviction; however, it also acknowledged that Badia’s attorney was under the influence of heroin and cocaine during the trial. Badia’s attorney was subsequently convicted for conspiracy to distribute narcotics and was arrested just a month after Badia’s trial. The Court cited that although the attorney was under the influence, he provided meaningful representation or assistance of counsel (*People v. Badia*, 1990). For a discussion of other cases involving attorneys who have been under the influence during trial, but did not meet the threshold for ineffective assistance of counsel under the *Strickland* test, see the Marshall Project’s report (Armstrong, 2014).

Given the high standard set by the second prong of the *Strickland* test, prevailing in an ineffective assistance of counsel appeal is a difficult task. Further, it places the burden entirely

on the defendant. Data from the Innocence Project suggest that ineffective assistance of counsel can be an antecedent of wrongful conviction. Of the first 255 people who were exonerated with the help of the Innocence Project, 54 exonerees (21%) raised claims of ineffective assistance of counsel and the appellate court rejected 81% of these claims (West, 2010). However, in these cases, the outcome of trial arguably should have been different – in some cases, at least in part due to the actions of counsel or the (in)effectiveness of counsel. For example, in the wrongful conviction case of Earl Washington Jr., Washington was charged with the 1982 rape and murder of a woman in Culpeper, Virginia (innocenceproject.org). Biological testing of semen found at the crime scene conducted prior to trial excluded Washington as the perpetrator (i.e., the test detected a rare plasma protein in the sample that Washington did not possess; innocenceproject.org). His attorney failed to present this exculpatory evidence at trial.

Washington was convicted in 1984 and sentenced to death (West, 2010). He was exonerated 16 years later; at one time, coming within only nine days of his execution date (innocenceproject.org). Washington's claim of ineffective assistance of counsel was not granted by the court, which claimed that there were other pieces of inculpatory evidence presented at trial, so that counsel's failure to include the exculpatory evidence would not have changed the outcome of the verdict (*Washington, Jr. v. Murray, Director, Virginia Department of Corrections; Thompson, Warden, Mecklenburg State Correctional Facility*, 1993). While the examples provided here of possibly ineffective lawyering are rare and egregious, they shed light on the issues underlying *Strickland* and call into question whether the standard used to determine effective assistance of counsel at trial really translates to good counsel. However, the question remains of how the standard established in *Strickland* translates to plea bargaining. Next, we will

explore the concept of effective assistance of counsel as it relates to the attorney's role in the plea-bargaining process.

Legal Precedent: Attorneys and Plea Bargaining

As demonstrated in the section above, the *Strickland* test sets the bar high to prove ineffective assistance of counsel at trial and places a heavy burden on the defendant. However, we have not addressed what constitutes ineffective assistance of counsel in plea bargaining. The situational environment in which guilty pleas are negotiated and accepted is very different from the environment in which a trial takes place. That is, proving deficient attorney performance could actually be easier for those defendants who went to trial, as counsel's comments and general conduct are matters of public record (Alschuler, 1986). Most plea negotiation and counseling take place in an unmonitored environment. Thus, proving an ineffective assistance of counsel case for defendants who accepted a guilty plea could be even tougher, as many of the interactions and conversations do not take place in open court (and therefore, are not documented by public record).

However, despite these obstacles, over the last few decades, the USSC has extended precedent established in *Strickland* by applying standards governing ineffective assistance of counsel specifically to issues involved with guilty pleas, and most relevant to this chapter, the defense attorney's role in these cases. Again, extending precedent governing ineffective assistance of counsel from the public forum (the trial) to the more private forum (plea bargaining) might not take into account important differences between those two contexts. We will highlight a few of the influential decisions (and the importance of the context in which the plea negotiation takes place) below.

In the plea-bargaining context, the defendant must be able to show that he would not have pleaded guilty if he had received competent legal advice (i.e., effective assistance under the *Strickland* standard; *Hill v. Lockhart*, 1985). That is, *Hill v. Lockhart* (1985) established the rule that the defendant must prove that, if it had not been for counsel's ineffective, deficient performance, he would not have accepted the guilty plea and waived the right to trial. In *Hill v. Lockhart,* Hill argued that his guilty plea was involuntary due to ineffective assistance of counsel, who allegedly gave erroneous information regarding Hill's parole eligibility. The USSC found that Hill provided no support for the argument that he would not have accepted the guilty plea, and instead would have gone to trial, if it had not been for his counsel's influence. The fundamental question of *Hill v. Lockhart* (1985) was whether or not counsel's deficient performance caused the defendant to waive his right to trial.

Hill v. Lockhart (1985) demonstrated that the USSC has extended the mandate of effective counsel (and the *Strickland* test for determining whether counsel is ineffective) to the plea-bargaining context. In addition, the USSC also has begun to consider the issue of *what* constitutes effective assistance of counsel in the context of plea bargaining. In these cases, the defendants raised claims of ineffective assistance of counsel on the basis that the attorney neglected to advise the defendant of a consequence of accepting a guilty plea (deportation, *Padilla v. Kentucky*, 2010), gave flawed advice (*Lafler v. Cooper*, 2012), or did not advise the defendant of a plea deal offered by the prosecutor (*Missouri v. Frye*, 2012).

The first of this trio of decisions, *Padilla v. Kentucky* (2010), extended the role of the attorney in plea bargaining by ruling that counsel has a responsibility to advise his client of any possible threat to immigration status (i.e., deportation) as a result of accepting a guilty plea. Prior to this decision, counsel only needed to advise his client of direct consequences (e.g., possible

maximum sentence, likely sentence as a result of plea negotiations, fines), not collateral consequences (i.e., the additional state and federal legal and regulatory sanctions attached to criminal convictions).

However, threat to immigration status is just one possible collateral consequence. With funding from the National Institute of Justice, the American Bar Association developed the National Inventory of the Collateral Consequences of Conviction database, which provides information on the over 48,000 separate collateral consequences based on geography (https://niccc.csgjusticecenter.org/map/). These consequences include sanctions such as inability to receive welfare benefits, ineligibility for jury duty, loss of right to vote, and ineligibility to hold public office, amongst others. The question left open after *Padilla* is whether attorneys should be required, or have the responsibility, to notify their clients of other potential collateral consequences in addition to threats to immigration status. That is, given that attorneys have the responsibility to advise a client on one collateral consequence, it is unclear whether attorneys have the responsibility to advise clients on other potential consequences, or which of those consequences meet the threshold for disclosure. If attorneys have the obligation to inform clients of multiple collateral consequences, it could place a heavier burden on attorneys to investigate and inform clients of these consequences, especially if the attorney practices in multiple jurisdictions requiring informing clients of various collateral consequences.

The following two cases also address attorney advisement, specifically, the content of that advice regarding the plea offer (*Lafler v. Cooper*, 2012) or failure to inform the client of a plea offer (*Missouri v. Frye*, 2012). In the first of these cases (*Lafler v. Cooper*, 2012), Cooper's counsel advised him to reject the prosecution's initial plea, giving flawed advice regarding the state's ability to convict on the basis of the victim's injuries. Cooper was subsequently convicted

at trial and sentenced to a prison term four times the length of the initial plea offer. The USSC agreed that Cooper suffered prejudice because he sufficiently demonstrated that he would have accepted the plea if it had not been for his counsel's advice, and he was sentenced to a lengthier term after trial. The USSC acknowledged that due to counsel's constitutionally flawed advice, Cooper lost out on the opportunity to accept the initial plea offer which would have substantially shortened his sentence.

In *Missouri v. Frye* (2012), the prosecutor mailed Frye's public defender an "exploding" plea offer, meaning that Frye would need to accept the plea offer before the designated expiration date (roughly 6 weeks after the letter was mailed). Frye's attorney never notified Frye of the plea offer and he learned of the initial plea after being arrested and convicted on another charge. Frye argued that his attorney's having never conveyed the plea offer to him violated his constitutional rights and resulted in a more unfavorable sentence for him. The Court agreed. In the latter two cases, the USSC established that effective counsel must inform a client of all plea offers and must not give flawed advice regarding accepting or rejecting a plea offer.

In these cases, the USSC acknowledged that the U.S. criminal justice system is a system of pleas, not a system of trials. Thus, more attention should be paid to the decision-making processes in plea bargaining, including the unique role of the attorney in plea negotiations, counseling, and defendant decision making. However, as Justice Kennedy acknowledged in his majority opinion in *Frye*, defining the duties and responsibilities of defense attorneys in the plea bargaining-process is difficult (*Missouri v. Frye*, 2012). Bargaining and lawyering is an individual skill and attorneys engage in that skill in countless differing ways. Justice Kennedy went on to explain that it is neither prudent nor practical to define or dictate standards for proper participation of defense attorneys in the plea-bargaining process (*Missouri v. Frye*, 2012).

However, given the miscarriages of justice that have resulted, at least in part, as a result of a plea bargaining, it is prudent to explore the attorney's role in the plea-bargaining process and how legal and extra-legal factors affect attorney advice (and how a defendant acts upon that advice) from a social scientific standpoint.

While these cases have shed light on the issues of effective assistance of counsel in plea bargaining, they have also raised more questions for the Court to address, such as the limit of the attorney's obligation to inform defendants of the consequences of accepting a guilty plea. Along those lines, the Court could further define and refine what constitutes proper participation of defense attorneys in the plea-bargaining process. Given the 'behind closed doors' nature of the plea-bargaining process, the Court could address whether attorney involvement is something that should be monitored or standardized. Future cases will likely more closely examine these questions, and the role of the attorney in the plea-bargaining arena will continue to evolve as efforts are made to refine the definition of effective assistance of counsel in this context. Social scientists have also begun to explore decision making in plea bargaining, providing theoretical and empirical work to aid in understanding what affects defendants' plea decisions. We will turn to that work next to help elucidate how the attorney affects defendant plea decision making.

Theoretical Perspectives Informing How Attorneys Influence Plea Decisions

The empirical work exploring plea decision making has largely done so within the context of the most popular theory to explain plea bargaining – the shadow of trial theory (Mnookin & Kornhauser, 1979). In this section, we will explore the shadow of trial theory, explaining how the attorney's role can be understood through the tenets of the theory. In addition, we will argue that the shadow of trial theory should be expanded to account for social

influence variables that might be important in the interaction between the attorney and defendant in the plea-bargaining process.

The Shadow of Trial Theory

The shadow of trial theory is common to legal and economic research and has been applied to plea bargaining (Mnookin & Kornhauser, 1979). It is one of the most common theories referenced in relation to plea bargaining, and has spurred numerous empirical studies that explore the factors that affect the plea decision-making process.

Basic Tenets of the Theory. When applied to plea bargaining, the theory posits that the decision to accept a guilty plea is based on the defendant's perceived outcome at trial, which is determined by the strength of evidence in the case (Mnookin & Kornhauser, 1979). The defendant has two choices: the unknown trial outcome (conviction and unknown sentence or acquittal) versus the known plea outcome (known conviction and sentence). The theory introduces the idea of plea discounts or trial penalties, meaning that defendants who plead guilty are sentenced to significantly shorter sentences compared to the sentences they would receive had they been convicted at trial; research supports these notions (Ulmer & Bradley, 2006). Defendants who reject a plea offer and instead go to trial and are found guilty are likely penalized through longer sentences (Mnookin & Kornhauser, 1979).

The theory predicts variation in the amount of plea discount (defined as leniency in sentencing or other benefit gained based on accepting a guilty plea) based on the evidence (Bushway & Redlich, 2012). That is, plea discounts are expected to be large when the probability of conviction is low (i.e., the prosecutor could offer more lenient sentences in cases with weaker evidence). Conversely, plea discounts are expected to be small when the probability of conviction is high (i.e., the prosecutor could offer less lenient sentences in cases with stronger

evidence). Therefore, if a defendant perceives a large sentencing discount by accepting a guilty plea, then he is more likely to accept that plea and forgo trial compared to if he perceives a small sentencing discount by accepting a guilty plea.

While the shadow of trial theory was designed to account for defendant decisions, it can be applied to the decision making of other legal actors as well (Bushway, Redlich, & Norris, 2014). Considering that defendants' perception of these factors might be shaped through their interactions with their defense attorney, we address how these legal variables could affect defense attorney decision making. Theoretically, within the shadow of trial theoretical context, an attorney might recommend that a client accept a guilty plea because the attorney perceives the client's chance at trial to be unknown or too risky. Similarly, the attorney might perceive the magnitude of a plea discount or risk of trial penalty differently than the defendant. As such, the attorney's perception or advice might influence the defendant's perception of the plea discount and/or trial penalty. The defendant's perception likely affects his plea decision. Conversely, an attorney could advise his client to reject a guilty plea offer because the offer is comparable to the estimated sentence at trial, if found guilty; or because the defense attorney's perception of the evidence is such that he believes the defendant would likely be found not guilty at trial. The attorney could influence the defendant by confirming his concerns regarding differences in punishments between the plea bargaining and trial phases.

Expansion of the shadow of trial theory. Bibas (2004) has argued that the shadow of trial theory should be expanded to account for psychological processes and structural influences that prevent defendants and legal actors from making rational plea decisions. Similarly, Redlich and colleagues have noted that defendants' decision involves a combination of cognitive biases, heuristics, and social influence tactics, in addition to consideration of legal factors (Redlich et al.,

2017). The shadow of trial theory suggests that defendants and attorneys will strike bargains in the shadow of trial on the basis of the strength of the evidence and perceived outcome at trial (Mnookin & Kornhauser, 1979). Bibas suggests that, even though legal factors incorporated into the shadow of trial are important factors, structural influences (e.g., poor lawyering, attorneys' self-interests) and psychological biases (e.g., stereotyping, risk aversion, racial bias) could distort bargaining and punishment in certain cases (2004). In addition, the attorney might have different perceptions of base rates of accepting guilty pleas. That is, the attorney could have pre-conceived opinions regarding the frequency at which guilty plea acceptance occurs or approach the plea situation with a very different idea of how often a defendant should accept a guilty plea. This could vary by type of practice (e.g., a public defender might expect that more of his clients would accept guilty pleas versus a private defense attorney). The difference in base rates might affect the way an attorney approaches an offer compared to a client – the attorney approaches the offer with the idea that the defendant will likely plead guilty, whereas the defendant might approach the offer averse to the idea of accepting a guilty plea. These perceptions could also be influenced by differences in risk-seeking behavior; that is, defendants could be more risk-seeking, while defense attorney more risk-adverse, or vice versa.

Other factors might also affect the attorney's perception of the guilty plea offer. For example, in addition to making recommendations that are in the defendant's best interest, attorneys might also make recommendations to their clients that are not in the client's best interest for many reasons, such as they fear their client will be stereotyped by the jury, they have an overwhelming caseload, they are operating in the context of maintaining relationships with the judge and/or prosecutor, etc. Regardless of the factors that affect an attorney's perception of a guilty plea offer or advice given to a client, the attorney's recommendation likely affects the

defendant's perception of the guilty plea offer and the possible trial outcomes. Social psychological research on social influence could help elucidate the processes through which this influence occurs.

Social Influence

The relationship and interaction between client and counsel can be framed through the lens of social influence theory. Social influence involves behavioral or emotional changes that occur through one's willingness to comply with or conform to the request or behaviors of others (Cialdini & Goldstein, 2004). One of the attorney's main tasks is to provide sound and helpful advice to his client. As discussed above, it is reasonable for a defendant to follow the advice of his attorney, as the attorney certainly has more legal knowledge of the situation (and possible outcomes) compared to the client. In addressing how the defendant might perceive the attorney's advice and respond behaviorally in decision making, we will discuss principles of conformity and compliance (Cialdini & Goldstein, 2004).

Compliance can either occur explicitly (e.g., a campaign organizer directly soliciting a vote for a particular candidate) or implicitly (e.g., advertisements designed to influence attitudes and opinions, which should in turn influence votes). Regardless of whether a request for compliance is implicit or explicit, the target understands that a particular outcome is being requested (e.g., the vote; Cialdini & Goldstein, 2004). Similarly, in the case of a defendant considering a plea bargain, the attorney's advice could either serve as a request for compliance explicitly (e.g., the attorney directly advising the client to accept a guilty plea or go to trial) or implicitly (e.g., the attorney providing information about factors likely to influence a defendant's perception of the plea offer, likelihood of conviction), which then affect the defendant's ultimate plea decision. In the former case, the client might choose to comply because he trusts the

attorney's opinion or expertise. In the latter case, the client might choose to comply because he changes his attitudes or perceptions about factors that affect his perception of the plea deal. It is important to note that the attorney's tone, attitude, or other information shared could also affect the client's decision through implicit routes.

Conformity, on the other hand, differs from compliance in that conformity refers to a person changing his behavior to match the behavior of others (Cialdini & Goldstein, 2004). Again, considering the criminal defendant, a defendant might have an opinion prior to meeting with the attorney on whether he would like to accept a guilty plea or go to trial. The attorney might advise a different decision, and the client could change his decision to conform to the attorney's opinions.

Conformity and compliance occur as a result of people's need to make accurate decisions (Cialdini & Goldstein, 2004). In the case of the plea bargain, an accurate decision could have multiple definitions. First, an accurate decision could be one that maximizes outcomes for the defendant. That is, the most accurate decision is the one that results in the most favorable outcome for the defendant – either a reduced sentence or an acquittal. Conversely, an accurate decision could be one that results in a just outcome – a not guilty verdict for an innocent client and a guilty outcome for a guilty client. Given the nature of the attorney-client relationship, the former is more likely to be the goal of the attorney – the maximized outcome for the client, regardless of actual guilt. It might also be the most accurate decision to plead guilty if there is a high probability the defendant will be found guilty at trial and therefore could be subjected to a trial penalty. In this case, the guilty defendant will likely serve a reduced sentence by pleading guilty. In making these decisions, it is likely the defendant will consider the advice of his

attorney because he is the expert in this context. That is, the attorney holds the position of power in the relationship because he has the knowledge to better predict outcomes in the legal arena.

Overview of Research Showing How Attorneys Influence Plea Decision Making

Due to the attorney's relative position of power or expertise in this area, the attorney's advice likely plays an integral role in the defendant's decision-making process. Attorneys might try to convince clients to follow their recommendation of accepting a plea or going to trial (Smith, 2007). Research supports this notion; for example, defendants who pleaded guilty reported being advised by their attorney to accept a guilty plea (Viljoen, Klaver, & Roesch, 2005). In another study, defendants who self-reported that they accepted a false guilty plea noted that feeling as though their attorney was incompetent was a motivating factor in their decision (Redlich et al., 2010). Further, variations in advocate advice in an experimental simulation of a plea-bargaining scenario affected defendant decisions (described in more detail below; see Henderson & Levett, 2018). These studies collectively demonstrate that attorneys have potential to influence plea outcomes.

Further, research suggests that an attorney's recommendation might have differing effects on innocent versus guilty defendants. In one study, feeling pressured by one's attorney was a self-reported motivation for false guilty pleas (Redlich et al., 2010). Juveniles self-reported higher false guilty plea rates if they also indicated their attorney befriended, deceived, or threatened them compared to juveniles who did not indicate their attorney behaved in such a manner (Malloy et al., 2014). These attorney behaviors were not associated with true guilty pleas (Malloy et al., 2014). These high-pressure tactics might have a more detrimental effect on innocent defendants than guilty defendants, especially considering that experimental research

suggests innocent defendants are more likely to see their innocence as a protective factor and want to take their case to trial (Tor, Gazal-Ayal, & Garcia, 2010),

Other experimental work exploring the influence of an advocate/attorney suggests that attorney advice is more likely to influence innocent defendants than guilty defendants (Henderson & Levett, 2018), which is particularly problematic because it suggests that attorney advice is influential in false guilty pleas. In this study, innocent and guilty students were accused of a crime of academic dishonesty and presented with two different options for handling their case: either admitting guilt and accepting a punishment or consequence set by the professor in charge of the lab (analogous to a guilty plea) or taking their case before the student conduct committee (analogous to a trial, where the outcome was more unpredictable). The punishment set by the lab remained constant, and participants were reminded that they could be found not guilty by the student conduct committee and face no punishment, but if found guilty, could face a range of punishment options. Prior to making a decision, students spoke to a university student advocate, who, based on random assignment, advised them to accept the plea, go to trial, or gave education/unbiased advice; alternatively, they did not speak to an advocate (control group).

In this study, the percentage of false guilty pleas was lowest when a participant was advised to go to trial ($M = 4\%$), compared to the highest percentage of false guilty pleas when advised to accept the guilty plea ($M = 58\%$). Importantly, advocate recommendation influenced innocent participants' plea decisions but had no significant effect on guilty participants' plea decisions. Innocent participants also rated the influence of the advocate higher than guilty participants, suggesting that innocent defendants might be more susceptible to social influence pressures than guilty defendants. This may have occurred because innocent defendants' plea decisions might be influenced by their attorney (an external source), whereas guilty individuals

might be influenced more by internal feelings such as remorse, accountability, and responsibility (e.g., guilty defendants were more likely than innocent defendants to report accepting the guilty plea as "the right thing to do"; Redlich & Shteynberg, 2016). This would align with hypotheses regarding true and false confessions (while there are differences, both a confession and acceptance of a guilty plea are an admission of guilt; Houston, Meissner, & Evans, 2014). Although research on the topic is still limited, it suggests that the presence and recommendation of an attorney influences defendants' plea decisions; this still leaves open the question of what influences attorneys' plea recommendations to their clients in the first place.

Overview of Research Showing How Various Legal and Extra-legal Factors Affect Attorneys' Advice

The idea that attorneys will influence their clients' plea decision making is not necessarily problematic. The role of the attorney is to provide expert skill and advice to the defendant's situation and help ensure the defendant has had a rigorous and thorough defense. In addition, if that advice is affected by legal factors, such as the strength of evidence or probability of conviction at trial, certainly the advice would be sound and helpful for the defendant. However, the advice could become problematic if it makes false guilty pleas more likely or differs based on extra-legal factors that should not have an effect on outcomes in the criminal justice system. In this section, we will first examine those legal factors that influence attorney advice, and then we will turn to how extra-legal factors could also play a role in attorney advice.

Legal Factors

To understand how attorneys assess plea offers, and ultimately advise their clients, we have to first start with a discussion of legal variables. Legal variables such as the defendant's probability of conviction, and the strength and type of evidence in the case, are factors that

influence attorneys' plea decisions and recommendations, and legally, should influence outcomes. While attorneys use these factors to calculate likely trial outcomes, it is possible that attorneys might be overconfident in their abilities, which could also weigh into their plea recommendations.

Strength of evidence and probability of conviction. Using the shadow of trial theory as a guide, it is expected that the strength of evidence and probability of conviction are likely to be the most important factors influencing attorneys' case outcome predictions and subsequent recommendations. Overall, research supports this theory. In one study, defense attorneys rated the most influential factors in their decision to recommend a guilty plea as the likelihood of the defendant's conviction based on the strength of the evidence and the value of the plea based on the possible sentence if convicted at trial (Kramer, Wolbranksy, & Heilbrun, 2007). The least important factors were the impact of losing at trial on the attorney's professional reputation and if the attorney's current caseload was high (Kramer et al., 2007). In this study, defense attorneys were given information regarding a fictional client's possible sentence if convicted at trial, the client's wishes (trial vs. plea), and the likelihood of the client being convicted at trial (Kramer et al., 2007). Generally, the defendant's wish to go to trial was met with the attorney's strongest recommendation to plead guilty in most conditions (particularly when the evidence against the defendant was strong). The weakest recommendation to plead guilty was when the possible sentence if convicted at trial was short and the evidence weak; this is the only condition in which the attorney's recommendation matched the client's wish.

Other research has confirmed that the defendant's probability of conviction weighs into the attorney's recommendation to accept a guilty plea or go to trial (McAllister & Bregman, 1986). In this study, defense attorneys' willingness to plea bargain was assessed using a

hypothetical scenario manipulating the severity of the sentence if convicted at trial (2 years v. 5 years) and probability of conviction at trial (20% v. 50% v. 80%). As the defendant's probability of conviction and possible sentence if convicted increased, defense attorneys were increasingly more likely to recommend accepting the guilty plea (McAllister & Bregman, 1986). For example, when the defendant's likelihood of conviction was 20% and possible sentence 2 years, 10.3% of defense attorneys were willing to plea bargain compared to 71.8% being willing to plea bargain when the defendant's likelihood of conviction was 80% and possible sentence 5 years.

These findings suggest attorneys are considering the legal variable of evidence strength, and the possibility that weak evidence will lead to a favorable verdict at trial (considering the defendant's likelihood of conviction). Although, as a whole, the attorney's preference of accepting a guilty plea or going to trial did not match up with the defendant's preference (Kramer et al., 2007). However, another study showed that defense attorneys did not override a juvenile client's wishes, even if those wishes were in conflict with what the attorney believed to be the best course of action (Fountain & Woolard, 2018). Instead, they would engage in a variety of counseling strategies (e.g., spending extra time with the client to try and better educate them in developmentally appropriate ways, explicitly telling the client they disagreed with the client's decision but agreeing to the decision anyway).

As these studies demonstrate, there is concern that attorneys are more likely to recommend accepting a guilty plea than going to trial and are more attuned to legal variables than their clients' preferences when making recommendations (Kramer et al., 2007). This reflects one of the main functions of the attorney—to ground the defendant and offset any irrationality. So, it is not necessarily troublesome that the attorney recommended accepting a guilty plea rather than going to trial, even if the defendant had different wishes. That is, in the

above-mentioned study (Kramer et al., 2007), the strength of evidence was driving the attorneys' recommendations. Further, the attorney is still obligated to go along with a defendant's wishes, even if those wishes are contrary to the best course of action from the attorney's perspective. However, a disconnect between attorney and client preferences could lead to lack of trust between the defendant and attorney, which could hinder effective lawyering. These results offer evidence that appropriate, legal factors influence attorney advice.

Type of Evidence. In addition, other research explores how attorneys consider various pieces of evidence as factors in their plea recommendations, not simply the strength of the evidence. In one study, judges, prosecutors, and defense attorneys participated in a plea decision-making task, in which they read a case and then chose facts to view and consider in their judgments (Redlich, et al., 2016). In total, there were 31 folders available to view, consisting of defendant characteristics (e.g., prior criminal history), evidentiary factors (e.g., confession evidence), and non-evidentiary factors (e.g., defendant's race). Allowing legal actors to choose which files to open, and in which order, allows a better understanding of the factors and order of importance that legal actors consider in determining acceptable plea offers. Defense attorneys and prosecutors were equally likely to view "evidentiary factor" folders (more so than judges), and defense attorneys viewed more "non-evidentiary factor" and "defendant characteristics" folders than both prosecutors and judges (Redlich et al., 2016). Evidentiary factors such as the confession, physical evidence, eyewitness identification, and DNA evidence were viewed by over 80% of the defense attorneys in the study (N = 835 defense attorneys).

In this same study, researchers manipulated the length of the defendant's criminal history and the presence or absence of confession evidence, eyewitness evidence, and a DNA match. All legal actors were asked to choose if the best resolution to the case was accepting a guilty plea or

going to trial. The majority of the sample indicated that accepting the guilty plea was the best resolution. The presence of confession, DNA, and eyewitness evidence significantly affected plea rates; when these pieces of evidence were present all legal actors were more likely to choose the plea option. However, the defendant's prior criminal history did not significantly influence defense attorneys' plea decisions (nor did it influence judges or prosecutors; Redlich et al., 2016). Similarly, another study showed that defense and prosecuting attorneys considered their perceptions of the strength of eyewitness evidence (e.g., cross-race identifications, familiar vs. unfamiliar identifications) in their willingness to plea bargain (Pezdek & O'Brien, 2014).

Case predictions. One key element of the shadow of trial theory is that the decision to accept a guilty plea should be weighed against the defendant's probability of conviction at trial. The most reliable and likely source for this information is the defense attorney, who communicates the likely probability of conviction, based on the strength of the evidence, with his client. Thus, attorneys' abilities to predict case outcomes for their clients plays a key role in defendants' decisions. In one study, researchers examined final case outcomes compared to a priori case predictions for over 450 attorneys (it should be noted that 70% of these cases were civil cases; Goodman-Delahunty, Granhag, Hartwig, & Loftus, 2010). Overall, attorneys tended to be far more overconfident in their case predictions than underconfident (Goodman-Delahunty et al., 2010). In plea-bargaining discussions, this overconfidence is likely to affect the counseling phase between attorney and client. Attorneys who are overconfident might not effectively communicate risks and benefits with their clients, who are likely to experience disappointment if the outcome does not match with the attorney's previously communicated information. It is also possible that attorneys suffering from an overconfidence bias will exercise poorer judgment when advising clients of their options (Goodman-Delahunty et al., 2010).

Thus, the probability of conviction, based on the type and strength of the evidence, contributes to calculations of case outcomes, which defense attorneys convey to their clients, who ultimately use that information in their plea decisions. Consistent with the shadow of trial theory, attorneys consider legally appropriate facts in determining their opinions and in giving advice. However, attorneys can be overconfident in their case predictions, which could be compounded by the issue of possible gaps in evidentiary knowledge due to lack of evidence disclosure from the prosecution. There exist state-by-state variations in evidence disclosure rules, with some states promoting open-file discovery rules, and others, more restrictive guidelines (Turner & Redlich, 2016). Open-file discovery rules result in more thorough and predictable disclosure of evidence than more restrictive guidelines (Turner & Redlich, 2016).

While defense attorneys attempt to offset any irrationality on the defendant's part (by making an informed recommendation based on likely trial outcomes considering legal factors), discovery rules and overconfidence might affect the accuracy of case predictions, subsequent attorney recommendations, and ultimately defendant's plea decisions. It should be noted that overconfidence bias would suggest that attorneys recommend going to trial because they believe they will win; however, research suggests that attorneys are more likely to recommend accepting the guilty plea to their clients, not going to trial (Kramer et al., 2007). However, it could be in those cases with ambiguous evidence strength that overconfidence biases are more likely to play a role (e.g., in weak evidence conditions, attorneys were less likely to recommend accepting the guilty plea; Kramer et al., 2007). This overview provides support that legal factors play a role in attorneys' abilities to advise and make recommendations to their clients.

Extra-legal Factors

In considering what factors affect attorneys' opinions of their clients' cases (and therefore the advice that they give), thus far we have considered attorneys' reports of what affects their decisions, based on variations in evidentiary quality, strength of evidence, and/or defendant preference. It is important to note that extra-legal factors such as race and type of counsel might also influence the advice an attorney is likely to give a defendant.

Race of the defendant. Disparities on the basis of defendant race exist in plea bargaining similar to those seen in sentencing at trial. Research suggests that minority defendants receive smaller sentencing discounts than their white counterparts when convicted of the same crime (Albonetti, 1997; Zatz, 1984; for an overview of information on racial disparities in plea discounts and trial penalties, see Spohn, 2000). Similarly, research suggests that the race of the defendant plays a role in attorneys' plea recommendations as well (Edkins, 2011). In one study, with options ranging from less severe to more severe (i.e., probation to lengthier prison sentences), there was a significant difference in the plea deal defense attorneys would recommend for Caucasian clients ($M = 2.22$) compared to African American clients ($M = 2.88$). Attorneys recommended accepting a guilty plea that included lengthier jail/prison time for African American clients than they did for the Caucasian clients (Edkins, 2011). This effect was not moderated by perception of client's guilt, which would have indicated that attorneys believed the African American client to have been more culpable for the crime and thus influenced decisions to recommend accepting a guilty plea. In fact, attorneys perceived the Caucasian client as more likely to be guilty than the African American client.

It is possible that defense attorneys are aware of systematic racism and fear that their minority clients will be judged more harshly at trial, and should avoid a trial at all costs. However, in this particular study (Edkins, 2011), defense attorneys did not differentially rate the

defendants' perceived probability of conviction at trial. As Edkins noted, if attorneys had believed their minority clients would have been more likely to be convicted at trial, that effect should have been evident in their probability of conviction ratings (2011).

Type of counsel. In addition to characteristics of the defendant that might drive the advice attorneys are likely to give a client, an important variable to explore is if there are differences in plea decisions and outcomes based on type of counsel. In plea-bargaining research, this has typically been considered in light of insiders and outsiders of the courtroom workgroup (Blumberg, 1967). This environment creates an in-group (prosecutors, public defenders, judges) and out-group (privately retained counsel and defendants).

The workroom environment of the court typically suggests that public defenders and prosecuting attorneys might be working towards the common goal of securing a quick resolution through plea bargaining (Sudnow, 1969). It is possible that courtroom workgroup insiders will be more knowledgeable of the norms and situational concerns of a particular jurisdiction (judge, prosecutor, district attorney, or jury pool), and therefore be in a better position to advise their clients. However, it is also possible that attorney compensation affects the amount of time and energy attorneys are able to devote to a specific case (Alschuler, 1975), and thus private defense attorneys might be at an advantage over public defenders, who are paid a fee or salary by the state. For example, public defenders report not having sufficient time, due to excess caseloads to perform tasks such as client communication, discovery/investigation, and many aspects of case preparation (for a typical misdemeanor case; American Bar Association, 2014). Because of these distinctions, research has explored if defendants represented by an attorney within the "courtroom workgroup" favor better than those represented by an attorney outside of the workgroup, although these results are not consistent (Hartley, Miller, & Spohn, 2010; Roach,

2014).

The extra-legal factor of type of counsel is an important consideration, as a large majority of defendants in the U.S. are represented by public defenders or assigned counsel (over two-thirds of felony defendants in federal and large, state courts; Harlow, 2000). In a survey of prosecutors, when asked if they believe it makes a difference in the terms of the plea agreement whether the defendant is represented by a public defender as opposed to a private attorney hired by the defendant, roughly 66% responded that it makes a difference (Champion, 1989). Out of the 110 prosecutors who reported that it does make a difference, 42 (38% of the sample) reported that a public defender made a difference in their plea negotiations, and of those, 86% indicated that the difference would be *less* favorable to the defendant. The other 68 prosecutors (62% of the sample) reported that a private attorney would make a difference, with 96% indicated that the difference would be *more* favorable to the defendant (Champion, 1989).

Some research suggests there are no differences between types of counsel. For example, one study found no significant differences in bail decisions, plea decisions, and two sentencing decisions between public defenders and private attorneys (Hartley et al., 2010). Overall, legally relevant factors were most influential in predicting case outcomes: seriousness of the offense and prior criminal record (Hartley et al., 2010). However, findings suggest that type of counsel might have a contextual effect; that is, in certain situations, defendants benefited from having a public defender and in others, benefited from having a privately retained attorney. For example, attorney type had no significant effects on incarceration or sentence length for defendants who pleaded guilty, but those who went to trial were more likely to be sent to prison and receive longer sentences if they were represented by a private attorney at trial. The courtroom workgroup might prove more advantageous at some decision-making stages and/or in certain types of cases

than others.

Other research suggests there are differences between types of counsel. In one study, case outcomes were compared between public defenders and assigned counsel (both serve indigent populations; Roach, 2014). Assigned counsel generated less favorable outcomes for their clients than public defenders on various measures, including: likelihood of being convicted of the most serious charge, sentence length, and speed in which cases were resolved (Roach, 2014). It could be that public defenders, who operate within the courtroom workgroup and are not assigned indigent defense, benefit from being insiders as opposed to the attorneys who do not work frequently with the prosecutors in a particular jurisdiction.

In another example, in Philadelphia, indigent defendants are randomly assigned to defense attorneys in murder cases (i.e., 4 in 5 attorneys are court-appointed private attorneys, and 1 in 5 are public defenders). In comparing differences between these cases, public defenders reduced their clients' conviction rate by 19%, the likelihood their client received a life sentence by 62%, and overall prison time served by 24%, compared to the court-appointed private attorneys (Anderson & Heaton, 2012). In this particular jurisdiction, interviews with legal actors suggest various institutional and professional reasons why the public defenders might fare better than court-appointed attorneys (Anderson & Heaton, 2012). It is possible that court-appointed attorneys have more conflicts of interest, suffer from limited compensation, and practice in relative isolation (i.e., most of these types of attorneys are sole practitioners, or work in single-person law firms; Anderson & Heaton, 2012). Overall, this gives support to the notion that courtroom workgroup insiders might be able to generate better outcomes for their clients than courtroom workgroup outsiders.

Attorneys serving the indigent defense population likely struggle with unique challenges, different from private criminal defense attorneys. In the *Gideon* and *Argersinger* decisions, the USSC made the far-reaching mandate of providing counsel to all indigent defendants, but left the requirement of *how* to accomplish this task up to the states. In recent years, public defenders offices have filed lawsuits challenging the lack of funding available for indigent defense work, (Laird, 2017), which they argue can lead to violations of defendants' constitutional rights. To deal with indigent defense budget cuts, offices have had to cut investigative work and staff (Nixon, 2013). For example, in Delaware, public defenders had to take 15-day furloughs (Nixon, 2013). In New Orleans, the public defender's office at one point put cases on a waiting list and had just eight investigators for 21,000 cases (Laird, 2017). According to one chief public defender, defendants are aware when their attorney does not have the time or resources to mount a rigorous defense of their case, and instead they plead guilty, possibly even when they are not guilty (Cooper, 2017). This suggests that defendants' perceptions of their attorney, and their abilities, affect decision making.

More research is needed to explore how type of counsel affects case outcomes, and specifically, to tease apart how some of these differences influence the attorney-client relationship, and decision making. Attorneys serving the indigent defense population are often viewed as "working for the state" and are perceived as lower quality than "street lawyers", who are perceived as stronger advocates for their clients because clients pay their fees (Casper, 1970). The ideology of "you get what you pay for" and "nothing good comes for free" belittles the work and role of court-appointed attorneys as advocates for their clients. In one study, when defendants were asked if their attorney was on "their side", 100% of defendants represented by a private attorney responded "yes", compared to just 20.4% of those represented by a public

defender (Casper, 1972). Additionally, defendants represented by privately retained attorneys report higher levels of trust in their attorneys than those with court-appointed attorneys (Boccaccini & Brodsky, 2002). These attitudes likely influence the relationship between client and counsel and can hinder the attorney's ability to effectively represent his client (e.g., defendants who do not assist in their own defense because they do not trust their attorney). Thus, the source of compensation and perceived allegiance seem to affect perceptions of counsel, which can influence the effectiveness of communication and level of trust between client and counsel, and ultimately defendants' decision making. Some of these gaps in the literature are proffered as possible areas for future research (see below).

Future Directions

Research investigating the role of the attorney in plea bargaining is ripe for future empirical psychological research. Below we present a few directions we believe researchers could take that would contribute to the understanding of attorney influence in plea bargaining negotiation, counseling, and defendants' plea decisions.

First, while *Lafler v. Cooper* (2012) and *Missouri v. Frye* (2012) brought greater attention to the high proportion of convictions comprised of guilty pleas and the attorney's role in plea bargaining, explicit recommendations or reforms were not given (rather the justices indicated that such issues could be addressed by future cases or legislation). Research could help fill in some of these gaps. That is, researchers could explore effective lawyering in each of the three phases of plea bargaining: preparing, negotiating, and counseling. One such possibility is examining if the system would benefit from more explicit guidelines concerning attorneys' responsibilities to their clients, such as how attorney communication about collateral

consequences might affect plea decision making. Broadly, more information is needed regarding effective assistance of counsel in plea bargaining- what it is and what it is not.

Second, past research has yielded mixed findings regarding disparities in case outcomes between privately retained attorneys and court-appointed counsel (and differences within the latter, that is, between public defenders, contracted services, and those assigned by the judge). Research could explore these interactions further at every stage of plea bargaining. For example, in the preparation stage if certain types of attorneys are able to devote more time and effort to case preparation (e.g., those who have more autonomy over their caseloads); this difference in case preparation could lead to differences in plea recommendations. Or, researchers could examine the negotiation practices between defense attorneys (those considered courtroom insiders versus outsiders) and prosecutors in the plea negotiation stage as it affects final plea offers. Furthermore, researchers could explore regional variations or differences attributable to how jurisdictions handle indigent defense representation. It would be beneficial to examine not only the impact of attorneys on defendants' plea decisions, but the cumulative effect of interactions prior to those decisions.

Third, along these lines, research could explore the situational constraints of the job for court-appointed defense attorneys. The American Bar Association dictates that attorneys have a responsibility to be a representative of their client (1983), as an advisor (providing the client with information), an advocate (zealously representing the client), a negotiator (seeking a result advantageous to the client), and an evaluator (examining the client's case and reporting on it). But recent information regarding cutting of indigent defense budgets presents concern for how attorneys can effectively maintain their duty to their clients in light of constraints. The results of these cuts have been furloughed or laid off employees and staff members, and less funds

available for expert witnesses, investigative work, and case-related travel (Nixon, 2013). Without the necessary resources, court delays ensue that potentially violate the defendant's right to a speedy trial. Further complicating this problem is the possibility of unfairly incentivizing a guilty plea for defendants who have court delays and are unable to post bail and secure pre-trial release. Questions remain of how to alleviate these challenges affecting the work of those providing representation to indigent defendants, allowing attorneys to devote more time and energy to the continued pursuit of the best outcome for their clients.

Fourth, in considering defense attorneys' involvement in plea bargaining, one important area to delve into addresses the question of how clients perceive effective assistance of counsel and what contributes to client satisfaction with their experience with the criminal justice system. Research consistently points to client involvement as a factor in increasing client satisfaction with their attorney and the process. Clients who were allowed and asked to participate reported greater levels of trust in their attorneys compared to those not allowed or asked to participate (Boccaccini, Boothby, & Brodsky, 2004). Additionally, trust in attorney scores were highly correlated with overall satisfaction; defendants reporting higher levels of trust in their attorneys were more likely to be satisfied with their attorney and sentence (Boccaccini et al., 2004). Research suggests there are five factors important for the attorney to consider in obtaining client satisfaction and cooperation with the process: asking the client his opinion, listening to the client, examining the prosecutor's evidence, focusing on the client's case during meetings, and informing the client of potential consequences (Campbell, Moore, Maier, & Gaffney, 2015). The more these factors are present, the more likely the client is to be satisfied with the handling of his case (Campbell et al., 2015).

Both of these studies support adopting a more client-centered lawyering approach as a means of contributing to client satisfaction and cooperation. More work is needed in this area to better understand the relationship between client and counsel, particularly from the view of the defendant. Because many defendants facing criminal prosecution do not have the resources to select their attorney (82% of felony defendants in large, state courts are represented by court-appointed counsel; Harlow, 2000), it is reasonable to expect defendants to have varying degrees of confidence in the counsel they can afford or are assigned. High satisfaction and perceptions of effective assistance of counsel likely contribute to an increased perception of legitimacy in the criminal justice system. Tyler's work on legitimacy and procedural justice suggests that the fairness of the process is more influential in shaping satisfaction with and evaluations of the criminal justice system than the outcome achieved (see Tyler 1988 for an overview). For example, procedural justice was influential in shaping individuals' willingness to accept court decisions and overall views of the court system (Tyler, 2007). Research could continue to explore the connection between client satisfaction, defendants' plea decisions, and clients' overall perceptions of fairness of the plea-bargaining process and how that contributes to perceived legitimacy of the criminal justice system overall.

Further, research could explore the relationship from the attorney's viewpoint. That is, research shows that defendant race likely affects the advice attorneys might give to clients (Edkins, 2011). It is possible other defendant characteristics, characteristics of the crime, or characteristics of the plea deal offered could also affect the attorney's perceptions and advice. Further, characteristics of attorneys themselves could affect the advice they give to clients. For example, attorney attitudes or propensity for risk-seeking may affect the advice given to clients. In addition, the socio-demographic backgrounds of attorneys could affect their perceptions of

their clients' situations, and therefore, affect advice. In addition to exploring the social characteristics of the attorney, client, and plea deal proffered, the social interaction between attorney and client is also a fruitful area of future research, as evidenced by the initial work in the area (Fountain & Woolard, 2018).

Conclusion

As mentioned in the introduction of this chapter, guilty pleas constitute the majority of criminal convictions in the United States (roughly 90-95%; Cohen & Reaves, 2006). Acknowledging this reality, the USSC recently focused specific attention to the relationship between the defendant and his counsel in plea bargaining (*Lafler v. Cooper*, 2012; *Missouri v. Frye*, 2012). A defendant's right to effective assistance of counsel extends beyond trial, to plea bargaining as well. In these decisions, the Court has begun to address what constitutes effective assistance of counsel in plea bargaining. The Court established that effective counsel must appropriately advise defendants of plea offers (*Missouri v. Frye*, 2012) and risks to their immigration status (*Padilla v. Kentucky*, 2010), and give sound advice on potential outcomes (*Lafler v. Cooper*, 2012). Beyond these factors, many questions remain unanswered about what constitutes effective assistance of counsel. If extra-legal variables such as the defendant's race or attorney's working relationships factor into recommendations and outcomes, it is possible the assumptions of effective assistance of counsel are not being met. Legal decisions have established a special, privileged relationship between the defendant and his attorney, but this relationship and the factors that influence decision making in the plea-bargaining context are complex. We hope in this chapter to have provided some examples of the mechanisms by which attorneys likely influence plea decisions, and those factors that not only influence attorneys' advice and recommendation to their clients, but also the attorney-client relationship in general.

According to the shadow of trial theory, defendants will weigh the known plea outcome against the unknown trial outcome, based on their likelihood of being convicted at trial calculated by the strength of the evidence (Mnookin & Kornhauser, 1979). Similarly, attorneys consider the same factors in determining what to recommend to their clients. Bibas (2004) has argued for a more expanded model of the shadow of trial theory, one that incorporates psychological processes and structural influences that affect rational decision making. In congruence with Bibas' recommendations, we make the argument that looking at the plea decision-making process through the lens of social influence theories helps to elucidate how the attorney can offset any irrationality on the defendant's part (but also further incentivize the plea for innocent defendants; see Henderson & Levett, 2018).

The attorney is the most likely source of information regarding the strength of the evidence and probability of conviction at trial, the two key variables in the shadow of trial theory. In line with social influence theories, not only will the defendant look to his attorney for advice and a recommendation, but also his interpretation of the probability of conviction at trial is likely influenced by information from his attorney. Further, the attorney's perception of the case is likely to be influenced by both legal and extra-legal factors, indicating the theory must account for those sources of variance in plea decision making. That is, while the shadow of trial theory accounts for arguably the most influential legal variables that affect decision making and research has supported this model (Kramer et al., 2007; McAllister & Bregman, 1986), attention must be given to the other structural influences and psychological processes that likely affect decision making as well (Bibas, 2004). One likely psychological process could be explained using basic social psychological theory examining social influence.

We view the *Lafler* and *Missouri* decisions as a call to action, prompting further exploration of the many complexities of plea decision making (*Lafler v. Cooper*, 2012; *Missouri v. Frye*, 2012). Research must work backwards and explore the psychological processes, biases, and structural influences that affect decision making for each legal actor at individual decision-making points. Ultimately, uncovering those factors that affect decision making in plea bargaining will lead to a better understanding of the mechanism by which most defendants are convicted. Importantly, researchers must continue to explore how factors in plea bargaining affect decision making for both innocent and guilty defendants, with the goal of helping defendants make choices in the criminal justice system that are both informed and in their best interest.

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