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## ARTICLE

### PLEADING GUILTY INDIGENT DEFENDANT PERCEPTIONS OF THE PLEA PROCESS

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#### Abstract

*Public defenders and other court actors most often engage in behind-the-scene plea negotiating to manage overwhelming workloads and to dispose of cases as quickly and efficiently as possible. In prior work, scholars have documented an increased reliance on plea bargaining and the deleterious impact of the practice on the legal process and the rights of individuals accused of a crime; however, this research has not systematically analyzed the decisions made, and the perspectives of justice of society's most disadvantaged and arguably most important actors of the court, the defendants. Relying on data collected in a Midwestern public defense system, this*

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*article focuses attention to the intersection of indigent defense and plea bargaining by shedding light on the decision-making processes and perceptions of justice among indigent defendants. Our findings indicate that regardless of innocence, defendants plead guilty because it offers the quickest pathway out of court and with little risk; however, misunderstanding and fear often mediate decisions to plead guilty. Also, while the majority of defendants perceive the plea outcome to be fair, they do not always perceive the plea process as fair.*

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## **I. Introduction**

The United States formalized the provision of public defense through the passage of the 6th Amendment in 1789 and the unanimous ruling by the

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Supreme Court in *Gideon v. Wainwright* in 1963.<sup>1</sup> Since this time, attorneys assigned to provide public defense services to individuals who are accused of a crime, but unable to afford legal counsel, have struggled with demanding caseloads and a lack of funding to support their work.<sup>2</sup> To manage overwhelming workloads, defense attorneys and prosecutors engage in behind-the-scene negotiating to dispose of cases as quickly and efficiently as possible.<sup>3</sup> Because negotiations result in pleas of guilty in over ninety percent of cases, a large body of research has considered the implications of plea

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<sup>1</sup> *Gideon v. Wainwright*, 372 US 335, 344 (1963). While the original decision of the Court applied to adult, felony proceedings, the mandate has since been extended to misdemeanor, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002), and juvenile proceedings, *In re Gault*, 387 U.S. 1, 36 (1967).

<sup>2</sup> See Eve Brensike Primus, *Defense Counsel and Public Defense*, in REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 121 (Erik Luna ed., 2017); Michael Barrett, *The Impact of Neglecting Indigent Defense on the Economics of Criminal Justice*, 61 ST. LOUIS U.L.J. 681, 682–86 (2016) (using Missouri's public defender's system to demonstrate the funding issues); ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, *Minor Crimes, Massive Waste: The Terrible Toll of American's Broken Misdemeanor Court* 26 (2009), <https://www.nacdl.org/reports/misdemeanor/> [<https://perma.cc/UZ79-VWKH>]; NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICAN'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 52–64 (2009), <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/9GB7-UWZK>].

<sup>3</sup> See generally MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1979); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003); PETER F. NARDULLI, THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE (1978); Donald A. Dripps, *Guilt, Innocence, and Due Process of Plea Bargaining*, 57 WM. & MARY L. REV 1343 (2015).

negotiations on criminal justice actors, including attorneys, prosecutors, and the judiciary.<sup>4</sup> Very little research, however, has considered the impact of plea negotiations on the individuals whose lives are most affected by the practice: the defendants.

The goal of this research is to examine how the practice of plea-bargaining influences indigent defendant decision-making, court experiences, and perspectives of justice. Research on plea bargaining dates back to the 1920s and 1930s, prior to the passage of the 6th Amendment. Scholarly works by Miller and Moley in 1927 and 1928, and the publication of the Wickersham Commission report in 1931, for example, are highly regarded for their early considerations of plea bargaining on the legal doctrine of criminal court procedures.<sup>5</sup> Notably, in the first published issue of *Southern California Law Review*, Miller opens an article entitled, “The Compromised of Criminal Cases” with the statement, “In theory there should be no compromise of criminal cases,” but “[i]n practice, [] the condonation and compromise of criminal cases is frequent and the methods of evading the clear purpose of the written law are varied.”<sup>6</sup>

Since these early publications, scholars have documented an increased reliance on plea bargaining and the deleterious impact of the practice on the legal process and the rights of individuals accused of a crime. Legal advocates argue that because pleas of guilty are

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<sup>4</sup> BRIAN A. REAVES, U.S. DEP’T OF JUSTICE., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 — STATISTICAL TABLES 22, 24 (2013); LINDSEY DEVERS, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING (2011).

<sup>5</sup> See 4 NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T (WICKERSHAM COMM’N), REPORT ON PROSECUTION 95–97 (1931); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928); Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927).

<sup>6</sup> Miller, *supra* note 5, at 1–2.

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negotiated and agreed to outside of the courtroom and in advance of sentencing, the plea process reallocates control over sentencing decisions from the judiciary to the prosecution.<sup>7</sup> Because cases are so quickly resolved through pleas of guilty, evidentiary and legal issues are often suppressed and case investigation ceases to exist.<sup>8</sup> The formulaic agreements on which plea bargains rely often overlook the identity of those who are accused of a crime, and thereby eliminate individualized mitigation and consideration of rehabilitative responses.<sup>9</sup> Moreover, those accused of a crime find themselves pressured into admitting guilt for fear of missing an opportunity to decrease punishment versus extending the work of the court which may result in harsher sentences down the road. In 1978, Langbein went so far as to compare plea bargaining to torture, stating that although our means may be politer—“we use no rack, no thumbscrew, no Spanish boot to mash his legs”—we still make it costly for an individual accused of a criminal offense to claim their constitutional rights.<sup>10</sup>

These concerns call attention to the importance of understanding the impact of plea bargaining on the experiences and perspectives of defendants and, in

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<sup>7</sup> MICHAEL TONRY, SENTENCING MATTERS 37, 67–68 (1998); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004).

<sup>8</sup> FEELEY, *supra* note 3.

<sup>9</sup> See generally Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 951 (1991) (“These guidelines also mark a changed attitude toward sentencing—one that looks to collections of cases and to social harm rather than to individual offenders and the punishments they deserve.”); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101 (1989) (“One problem underscored in this scholarship is that individual concrete human voices and abstract, general legal rules often conflict.”).

<sup>10</sup> John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978).

particular, those defendants who cannot afford to retain legal counsel. Today, indigent defendants compose the majority of the criminal justice system, with research indicating that between 60 percent and 90 percent of defendants rely on court-appointed attorneys.<sup>11</sup> In an effort to highlight the experiences of the defendants who most frequently interact with the criminal courts and the plea process, this research utilizes semi-structured interview data with defendants and administrative court data collected in a Midwestern urban public defense system between the years of 2008 to 2011. In the following pages, we outline research related to the intersection of public defense and plea bargaining, and the decision-making process of indigent defendants and perceptions of justice, in an effort to better understand how criminal court processes are perceived by the individuals who are most directly affected by their outcomes. Our findings indicate that regardless of innocence, defendants plead guilty because it offers the quickest pathway out of court and with little risk; however, misunderstanding and fear often permeate decisions to plead guilty. While the majority of defendants perceive the plea outcome to be fair, they do not always perceive the plea process as fair.

## II. Plea Bargaining in Public Defense

It is well-documented that the plea process has become a cornerstone of the criminal justice system in the decades since its introduction and indoctrination in the late 1700s and 1800s. During this era, criminal justice

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<sup>11</sup> JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 2 (2011); LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP'T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES (2009); Carol J. Defrances & Marika F.X. Litras, *Indigent Defense Services in Large Counties, 1999*, BUREAU JUST. STAT. BULL. (U.S. Dep't of Justice), Nov. 2000, at 1.

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grew into a professional institution, incorporating formal police departments and court officials who became “repeat players” in criminal cases.<sup>12</sup> Accordingly, the court workgroup became accustomed to the routine disposition of cases, and to the outcomes and sentences associated with taking a case to trial versus negotiating a plea deal. Once outcomes and sentences of pleas and trials became familiar to court actors, a “going rate” of the expected sentence developed such that the system became routine and bureaucratic and, in doing so, increased its capacity to process more cases and at a quicker rate.<sup>13</sup>

Today, well over 90 percent of criminal cases are disposed through pleas of guilty. Most court actors, including prosecutors, defense attorneys, and judiciary, argue that plea bargaining is a necessary tool in the criminal courts, and particularly for those systems that are overwhelmed by cases and depleted in resources. Arguably, attorneys who are assigned to represent indigent defendants are one of the primary groups of court actors who are reliant on and benefit from the gains afforded by the plea process.<sup>14</sup> Since the inception of

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<sup>12</sup> FEELEY, *supra* note 3; LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 149–55 (1993); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910 (1981); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980).

<sup>13</sup> Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW & SOC'Y REV. 237 (1978); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1981); ROTHMAN, *supra* note 12.

<sup>14</sup> Feeley and other scholars have argued that the plea process is “a mixed-strategy game” in which prosecution and defense “share in gains and losses.” FEELEY, *supra* note 3, at 27. For instance, “prosecutor[s] gain[] by securing convictions.” *Id.* Also, “defense gains certainty of outcome, and a reduction of

public defense following the Supreme Court's ruling in *Gideon*, the system has struggled with considerable challenges that shape the ability of public defenders to provide effective defense.<sup>15</sup> High caseloads and a lack of funding constrain the amount of time that public defenders can spend with defendants and conducting case investigation.<sup>16</sup> Even when attorneys are available to meet with defendants, stress related to overwhelming workloads may lead public defenders to encourage defendants to accept pleas of guilty in order to facilitate case resolution.<sup>17</sup> In some cases, defendants may be approached with plea deals and plead guilty to misdemeanor offenses before ever meeting attorneys. A significant implication of these practices is that many defendants are pleading guilty to a crime without full knowledge or understanding of their rights, options, or the collateral consequences of the decision.

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the sentence.” *Id.* Further, “the state is also a beneficiary because it secures an admission of guilt, punishes the guilty, and yet saves the expense of a trial.” *Id.*

<sup>15</sup>See generally *Gideon v. Wainwright*, 372 US 335 (1963) (holding that indigent defendants are entitled to representation, without indicating an infrastructure to allow for such defense); THE CONSTITUTION PROJECT, *supra* note 2, at 50–101.

<sup>16</sup> JUSTICE POLICY INST., *supra* note 11, at 6. For example, although the American Bar Association (ABA) recommends that public defenders not exceed national caseload standards, many public defenders and, in particular those working in urban areas, typically manage double that amount of cases annually. SUZANNE M. STRONG, U.S. DEP'T OF JUSTICE, STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013 at 5 (2016).

<sup>17</sup> SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES 169–70 (2016); NAT'L LEGAL AID & DEF. SERVS., A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 39–40 (2008).



### III. Deciding to Plead Guilty

With approximately 6 million indigent individuals receiving public defense services annually, and the majority pleading guilty to a crime, it is critically important to consider why individuals who are accused of a crime decide to accept pleas of guilty. There is little theoretical guidance on the decision-making processes of defendants; however, there is some support to suggest that theories of court worker decision-making may be applicable to the decisions that defendants make.

The extent research on court worker decision-making offers three theories by which to interpret court worker decisions to employ plea bargaining strategies. First, organizational *efficiency* theories argue that disparities in sentencing are the result of court actors rewarding behavior and attitudes that are valued by the institution—because court actors value the time and resource-savings afforded by quick pleas of guilty, defendants who accept plea bargains are rewarded with less severe sentences.<sup>18</sup> Albonetti, for example, states, “Defendant cooperation exemplified by a willingness to plead guilty is viewed, by the sentencing judge, as an indication of the defendant’s willingness to ‘play the game’ in a routine, system defined manner.”<sup>19</sup> Second, theories of *uncertainty avoidance* argue that defendants

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<sup>18</sup> PETER NARDULLI, JAMES EISENSTEIN & ROY B. FLEMMING, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* 203–05 (1988); Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOC. 1157, 1157–58 (1995); Rodney L. Engen & Sara Steen, *The Power to Punish: Discretion and Sentencing Reform in the War on Drugs*, 105 AM. J. SOC. 1357, 1363 (2000); Malcolm D. Holmes, Howard C. Daudistel & William A. Taggart, *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis*, 26 L. & SOC’Y REV. 139 (1992).

<sup>19</sup> Celesta A. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision-Making in Felony Cases*, 24 CRIMINOLOGY 623 (1986).

are rewarded for pleading guilty because trials are an inherently uncertain and stressful event for court actors—decisions to pursue trials require prosecutors, defenders, and judiciary to manage unreliable or disreputable witnesses, questionable testimony, and/or the use of less-direct evidence which may or may not influence a decision of guilt. Plea deals are therefore encouraged to reduce the uncertainty of decisions and outcomes. A final theory, and one that is highlighted by the sentencing guidelines, argues that the decision to plead guilty as opposed to taking a case to trial is associated with differences in perceived *blameworthiness*.<sup>20</sup> The federal guidelines state that defendants should receive guideline-based sentencing discounts or departures for “acceptance of responsibility” and “substantial assistance to law enforcement.”<sup>21</sup> Thus, defendants who plead guilty, and therefore accept responsibility, are rewarded with lighter sentences than those who may not be perceived as accepting responsibility and showing remorse for behavior.

In contrast to arguments that plea bargaining is a coercive practice, there is some scholarly discussion to suggest that a defendant’s decision to accept a plea of guilty is arrived at through a rational decision-making process that is not dissimilar to the process by which court actors decide to employ plea bargaining. More specifically, advocates of plea bargaining argue that the process affords the defendant the opportunity to participate in a rational decision-making process whereby the costs associated with extending a case are weighed against the possibility of reduced sentencing or acquittal.<sup>22</sup> Research in misdemeanor courts, in

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<sup>20</sup> U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2009).

<sup>21</sup> *Id.*

<sup>22</sup> Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136–38 (2008); Candice McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea-Bargaining Reform*, 50

particular, has shown that defendants care less about the outcome of the case and more about the *efficiency* provided by the plea process, which can offset financial costs and time investment associated with extending the length of cases.<sup>23</sup> However, it might also be the case that an efficiency theory may only apply to defendants charged with less severe offenses. In other words, defendants who are charged with a misdemeanor offense that carries less severe sentencing outcomes might be more inclined to plead guilty to “get it over with”; whereas defendants charged with a felony offense that carries more severe sentencing outcomes might be more invested in the outcome of the case and, particularly if they believe they are innocent. Another argument suggests that defendants decide to enter a plea of guilty in an effort to decrease the uncertainty of verdicts that might be made by a jury or a judge at a later point in time. In this regard, theories of *uncertainty avoidance* argue that the plea process provides both defendants and court actors with respite from the stress associated with trial work. Finally, defendant decision-making may be driven by *blameworthiness*. The decision to accept a plea of guilty, therefore, is made in an effort to accept responsibility and express remorse for the offense.

#### IV. Perceptions of Justice

Scholars often cite decision-making as an important contributing factor to overall perceptions of fairness and justice. Indeed, the most common criticism of plea bargaining is that the process limits the defendant’s ability to be involved in the procedures and decisions made in their case. This criticism, however, is

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CRIM. L.Q. 67, 69, 73 (2005); Bibas, *supra* note 7, at 2496–99, 2507; Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 950–51 (1986); Langbein, *supra* note 10, at 8.

<sup>23</sup> FEELEY, *supra* note 3, at 187–89.

juxtaposed by scholars who argue that the plea process should be positively associated with perceptions of justice because the process requires defendants to make the decision about whether or not to accept a plea bargain, which is associated with the outcome of their case.<sup>24</sup> Despite the arguments on both sides, a relatively small body of research has actually considered the implications of plea bargaining on defendant experiences and perspectives of justice and fairness. The studies that do exist are more than thirty years old and rely on data collected in very different court settings than the ones defendants encounter today.<sup>25</sup>

Classical work on how defendants perceive court experiences has focused on theories of *distributive justice*

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<sup>24</sup> JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 94 (1972).

<sup>25</sup> For example, previous influential work on plea bargaining by CASPER, *supra* note 13, *supra* note 24, by Tom Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18 LAW & SOC'Y REV. 51 (1984), and by FEELEY, *supra* note 3, in the 1970s and 1980s predate mandatory sentencing laws and "tough on crime" policies that have reshaped courtroom justice and increased the stakes for defendants. The effect of these laws can be seen most directly in today's record high jail and prison populations; however, "tough on crime" policies have also increased both the number of low-level, petty offenders charged in misdemeanor courts and increased the amount of time and cost necessary to defend criminal cases charged in felony courts, BORUCHOWITZ, *supra* note 2 at 7, 25. In addition, defendants today face more civil sanctions as a result of criminal convictions, including the loss of legal immigration status, public benefits, housing, driver's license, and employment. BORUCHOWITZ, *supra* note 2 at 7, 25; CASPER, *supra* note 13; CASPER, *supra* note 24; FEELEY, *supra* note 3; Tyler, *supra* note 25; Becky Pettit & Bruce Western, *Mass Imprisonment and Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 153 (2004); Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10 (1996).

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which extend early formulations of Adam's equity theory to argue that individuals assess satisfaction with outcomes when they are perceived as comparable to the outcomes incurred by others.<sup>26</sup> Research in a variety of contexts, including the courts, shows that distributive justice is an influential factor in determining individuals' perception of outcome fairness.<sup>27</sup> For example, Casper's research in the 1970s shows that male defendants who consider their outcome to be fair are most likely to indicate that they perceive their sentence as a "good break," or a reasonable sentence relative to the going rate for the offense.<sup>28</sup>

In 1975, Thibaut and Walker moved beyond the basic assumptions of distributive justice by hypothesizing that satisfaction with court outcomes is independently influenced by perceptions of *procedural justice*—judgments about the fairness of the resolution process.<sup>29</sup> Theories of procedural justice argue that evaluations of justice and outcome fairness are influenced by the opportunities that defendants have to be involved in the decisions made in their case (decision control) and the opportunities that defendants have to participate in the proceedings of their case by expressing

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<sup>26</sup> J. Stacy Adams, *Inequity in Social Exchange*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267, 272–76 (Leonard Berkowitz ed., 1965).

<sup>27</sup> E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 10–12 (1988); Adams, *supra* note 26, at 272–76; Dean B. McFarlin & Paul D. Sweeney, *Distributive and Procedural Justice as Predictors of Satisfaction with Personal and Organizational Outcomes*, 35 ACAD. MGMT. J. 626, 629, 634 (1992); Robert Folger & Mary Konovsky, *Effects of Procedural and Distributive Justice on Reactions to Pay Raise Decisions*, 32 ACAD. MGMT. J. 115, 115–16 (1989); Jerald Greenberg, *Organizational Justice: Yesterday, Today, and Tomorrow*, 16 J. MGMT. 399, 400, 402–04, 406 (1987).

<sup>28</sup> CASPER, *supra* note 13.

<sup>29</sup> JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

their side of the story and presenting personal information and evidence that is relevant to their case (process control). One of the most striking discoveries of the research completed by Thibaut and Walker was the finding that satisfaction and perceived fairness are affected by factors other than whether the defendant “won” or “lost” their case.<sup>30</sup> In this regard, Thibaut and Walker’s research was the first to suggest that it is possible to enhance defendant’s perceptions of fair treatment without focusing explicitly on distributive fairness.

More recently, scholars have extended theories of procedural justice to include the behaviors of the actors who implement legal processes, and to argue that perceptions of fairness are closely tied to legitimacy and the likelihood that individuals will obey the law.<sup>31</sup> In this regard, if defendants perceive court processes and the behaviors of court actors, including publicly assigned defense attorneys, prosecutors, and judges, as fair, they will be more likely to view courts as legitimate and cooperate with their efforts and decisions. However, if defendants perceive the processes and the behaviors of court actors as unfair, they will be less likely to view courts as legitimate and subsequently less likely to cooperate with their efforts and decisions. Research on policing practice indicates that when police treat citizens

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<sup>30</sup> *Id.*; John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 548–49 (1978).

<sup>31</sup> *See, e.g.*, TOM R. TYLER & YUEN HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002); Tom R. Tyler, *Process Based Regulation: Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 297, 306–07, 309–10 (2003); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 514, 523 (2003); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 263, 270 (2004).

fairly and with respect, police legitimacy is enhanced, as well as citizen cooperation and support of police officers, although limited research has focused specific attention to the association between perceptions of criminal court processes and actors, and legitimacy and law-abiding behavior.<sup>32</sup>

## V. Race and Class

Particularly important to understanding how individuals accused of a crime make decisions to accept a plea of guilty and their perceptions of justice is the impact of race and class. When this research was conducted, black defendants accounted for 37 percent of adults aged 40 or older and 55 percent of juveniles charged with a criminal offense in urban courts.<sup>33</sup> Today, black individuals account for approximately 13 percent of the U.S. population,<sup>34</sup> yet black men represent approximately 40 percent of incarcerated individuals.<sup>35</sup> In addition, at least 40 percent of individuals imprisoned cannot read, and over two-thirds are either unemployed

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<sup>32</sup> Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 467–68 (2006); Sunshine & Tyler, *supra* note 31, at 514, 520; Tyler & Wakslak, *supra* note 31, at 275–77; Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 239–40, 242 (2008); Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 645–46 (1989).

<sup>33</sup> REAVES, *supra* note 4, at 5.

<sup>34</sup> *QuickFacts: Population Estimates, July 1, 2018, (V2018)*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045218> [<https://perma.cc/R3VH-SWKQ>].

<sup>35</sup> E. ANN CARSON, BUREAU OF JUST. STATISTICS, PRISONERS IN 2016, at 7 (2018).

or underemployed when arrested.<sup>36</sup> Decades of research on racial disparity and criminal justice, in conjunction with the most recent deadly encounters between law enforcement and black citizens, highlights the need to be cognizant of the impact of relentless policing efforts and harsh sentencing practices on the daily experiences of poor, black individuals who are accused of a crime.

Crime policies in the 1980s and 1990s increased the presence of the criminal justice system in the lives of poor communities; the war on drugs, in particular, increased the frequency and type of police-citizen encounters in urban city areas. As a result, the criminal justice system has not only become a primary source of civic education for the poor but has led to distrust and disillusionment with the “system.” Previous research shows that this distrust has typically been directed towards law enforcement and is shaped by race.<sup>37</sup> Zero-tolerance policing and the use of aggressive police tactics

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<sup>36</sup> BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); MICHAEL H. TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 12–13 (2011); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM CRIMINAL JUSTICE SYSTEM (1999); MICHAEL H. TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); Kevin L. Jackson, *Differences in the Background and Criminal Justice Characteristics of Young Black, White and Hispanic Male Federal Prison Inmates*, 27 J. BLACK STUD. 494, 497 (1997); David C. Leven, *Curing America’s Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 646 (1993).

<sup>37</sup> Bobo & Thompson, *supra* note 32, at 467; Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762, 767 (2005); Ronald Weitzer & Steven A. Tuch, *Perceptions of Racial Profiling: Race, Class, and Personal Experience*, 40 CRIMINOLOGY 435, 443 (2002); Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQUENCY 494, 502 (1999); Richard Scaglion & Richard G. Condon, *Determinants of Attitudes Toward City Police*, 17 CRIMINOLOGY 485, 489 (1980).



have prompted accusations of racial profiling and contributed to tense relationships between law enforcement and residents of high-crime areas.

Yet, the extent to which class and race are associated with negative attitudes towards criminal courts remains the subject of debate. It seems probable that negative perceptions of law enforcement would extend to the entire legal system. Bobo and Johnson, for example, argue that black individuals “are far more likely to believe” that the administration of criminal justice is “riddled with systematic bias” based on negative encounters with law enforcement.<sup>38</sup> Hurwitz and Peffley argue that because legal perspectives are based predominantly on personal experiences with criminal justice actors in communities, negative interactions with law enforcement heavily contribute to an overall perception that the justice system is inherently unfair.<sup>39</sup> Moreover, Lind and Tyler assert that people who believe the justice system to be unfair tend to evaluate the entire political system as less legitimate—for much of the poor, the justice system is as close as individuals come to the government.<sup>40</sup> Thus, low levels of support for police may bridge across institutions, undermine support for the broader system, and influence decision-making and perceptions of justice related to court processes and plea bargains.

## VI. The Current Study

This study focuses attention to the intersection between public defense and plea bargaining, and the decision-making process of indigent defendants and

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<sup>38</sup> Lawrence D. Bobo & Devon Johnson, *A Taste For Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 156–157 (2004).

<sup>39</sup> Hurwitz & Peffley, *supra* note 37, at 767.

<sup>40</sup> LIND & TYLER, *supra* note 27, at 70.

perceptions of justice. The overarching goal of this research is to raise awareness of and increase knowledge on the experiences of the individuals who are accused of a crime and, in particular, those who are financially unable to retain private counsel and therefore are reliant on the legal services of a public defender. In doing so, we rely on the theories of decision-making and perceptions of justice presented in the previous pages to guide our analysis but shift the prior application of these theories away from court actors and police to indigent defendants and the courts. The key research questions that guide this study include:

1. Why do defendants plead guilty?
2. How does the decision to accept a plea influence perspectives of case outcomes?
3. Do defendants perceive the plea process as fair and why or why not?

## VII. Data and Methods

The findings of this study are guided by qualitative and administrative data collected between the years of 2008 and 2011 in the Fourth Judicial District Court, located in Hennepin County, Minneapolis, Minnesota. When this study was completed, Hennepin County was the largest county in Minnesota with a population of slightly over 1 million, or approximately 25 percent of the state population.<sup>41</sup> Hennepin County is one of ten judicial districts in Minnesota, and one of two judicial districts with a full-time public defender office. Over forty percent of the total number of adult criminal

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<sup>41</sup> *PopFinder For Minnesota, Counties, & Regions*, MINN. STATE DEMOGRAPHIC CTR., <https://mn.gov/admin/demography/data-by-topic/population-data/our-estimates/pop-finder1.jsp> [<https://perma.cc/ZX8H-M5T8>].

cases in the state were processed through the Hennepin County court. Black individuals comprised fifty percent of defendants who received the services of a public defender in Hennepin County; twenty-four percent were female (see Table 1 for a description of defendants).

Administrative data was obtained for all cases that were referred to Hennepin County between the years of 2008–2011. Qualitative data was collected in 2010 and 2011 and relies on observational data collected in over 250 misdemeanor and felony cases across six public defenders and semi-structured interviews with 40 defendants. Observations included defender-client interviews and meetings held in jail, custody, court, and defender offices, and defender-prosecutor negotiations held in judges' chambers and in and outside of the courtroom. Cases observed for this study were not randomly selected, but rather, were dependent on the public defender's calendar and the defendants that were assigned to the defender on a particular day. All defendants included in this research consented to the study during their first appearance with the public defender. Cases were tracked as they progressed through disposition, unless the case was dismissed, the defendant was rearrested, the case was transferred to a specialty court, or the defendant failed to appear.

Informal defendant interviews were conducted throughout the case, and forty defendants were formally interviewed following case disposition. Informal interviews with defendants typically occurred in court hallways while the defendants were waiting for their cases to be called and were used to collect data on what they understood to be happening in their cases, desired outcomes, perceptions of interactions with their public defender and the plea bargains that had been offered, as well as considerations for accepting or rejecting a plea offer. Formal interviews occurred in a designated, confidential space, including libraries, parks, and correctional institutions. Formal interviews lasted

anywhere from 30 minutes to 3 hours and included questions about defendants' understanding of the procedures and outcome of their cases, the fairness of their outcomes, decisions made in their cases, experiences with their public defenders, and whether they felt as if race/ethnicity impacted their court experiences. Interviews also included questions taken from prior research with defendants by Tyler and Casper to collect data on procedural justice, including perceptions of the processes and outcomes of their cases, their ability to participate in the decisions made in their case, and whether they felt as if they had a voice and were respected.<sup>42</sup>

### A. Analytic Strategy

Detailed notes were taken and recorded throughout this research. Formal interviews were audio recorded and transcribed for data analysis. To answer the research questions of this study, analysis of formal interviews on defendant *decision-making* included responses to the following questions: Why did you accept a plea of guilty instead of pursue a trial?; What factors did you consider when you were making the decision to plead guilty?; Did you originally intend or want to plead guilty?; and, Did you understand the plea-bargaining process and the outcome? All responses are coded into one of three themes, following the theoretical literature on plea bargain decision-making—Efficiency, Uncertainty Avoidance, and Blameworthiness. Analysis of *perceptions of justice* included responses to the following questions: Do you think that the outcome of your case was fair?; Do you think that the procedures were fair?; Were you satisfied with the use of plea bargaining in your case?; Did you feel as if you had the ability to participate in the decisions made in your case?; Did you feel that you had a

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<sup>42</sup> TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); CASPER, *supra* note 24, at 90–91.

voice, and that you were listened to?; Do you feel that you were respected?; Did you feel as if your lawyer wanted you to plead guilty?; Did you feel that your lawyer was on your side?; and, Did you feel that your lawyer was fair to you?

In the following pages, we first present findings on why defendants decide to plead guilty and then consider perceptions of the plea outcome and process. Because data was collected across varying levels of case severity, we consider how perceptions differ among individuals charged with felonies and less serious charges. Past research has not considered how both defendant characteristics and case severity interact with and influence differences in court experiences; however, it is possible that defendants who face more severe sanctions, including imprisonment, loss of employment, and loss of housing, may be more concerned with the outcomes of their case and inclined to more actively participate in the procedures and decisions made in their case. In contrast, defendants who are confronted with less severe sanctions may articulate less concern with the procedures and outcomes of their case and, therefore, not be as inclined to participate in their case. It is also likely that defendants who are solely charged with misdemeanors have fewer opportunities to participate in the procedures of their case. Because misdemeanor courtrooms often have many cases to consider in a relatively short amount of time, attorney-client interactions are quick and succinct.

## **VIII. Results**

The characteristics of all Hennepin County defendants, defendants who received legal services through the public defender's office, and the defendants interviewed for this study are reported in Table 1. Similar to courts across the U.S., Hennepin County defendants are disproportionately poor, young, and male.

Black defendants represent thirty percent of the total population but fifty percent of defendants who received legal services through the public defender’s office. Over sixty percent of both the total sample and the defendants who received legal services through the public defender’s office were charged with a misdemeanor offense—an offense that carries a sentence of up to a maximum of ninety days in jail and/or a \$1000 fine. The demographics of defendants interviewed for this study are representative of those who received legal service through the public defender’s office; however, defendants charged with a felony are overrepresented compared to the number of felony cases represented by public defenders (sixty percent and seventeen percent, respectively). All defendants who were interviewed for this study and who were convicted and sentenced accepted an offer to plead guilty. Six defendants interviewed had their case dismissed, but five out of the six attended several court dates and entertained plea offers until their cases were dismissed.

**Table 1. Selected Characteristics of Defendants (D’s) in Hennepin County, the Public Defender’s Office, and the Interview Sample (2009, Most Serious Charge Per Case)**

	Defendants of Hennepin County		Defendants of the Public Defender’s Office		Defendants in the Interview Sample	
<b>Total</b>	59,484		21,848		40	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
<b>Gender</b>						
Male	42,382	71	16,494	75	31	77
Female	15,060	25	5,073	24	9	23
Missing	2,042	4	281	1	--	--
<b>Race</b>						
White	18,204	31	5,180	24	13	33
Black	21,866	37	11,013	50	24	60
Hispanic	2,836	5	1,131	5	--	--
Other <sup>2</sup>	16,578	27	4,524	21	3	7

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<b>Age</b>						
< 18	171	<1	20	<1	--	--
18-25	18,600	31	7,781	36	14	36
26-35	17,576	29	6,026	27	9	22
36-45	11,680	20	4,297	20	9	22
46-55	8,406	14	3,054	14	8	20
> 56	3,051	5	670	3	--	--
<b>Charge</b>						
Felony	5,229	9	3,794	17	24	60
Gross Misdemeanor	6,257	11	2,813	13	2	5
Misdemeanor	38,748	65	15,032	69	14	35
Petty Misdemeanor	9,250	15	209	1	--	--
<b>Offense</b>						
Homicide	44	<1	31	<1	--	--
Assault	4,400	7	2,852	13	3	8
Domestic	706	1	509	2	4	10
Sex Offense	481	<1	304	1	2	5
Weapons	606	1	432	2	0	--
Drugs	1,463	2	831	4	4	10
Property	2,607	4	1,785	9	16	40
Alcohol	7,979	13	2,552	12	1	2
Conduct <sup>3</sup>	15,317	26	8,058	37	3	8
Traffic	24,797	42	4,222	19	7	17
Other <sup>4</sup>	1,084	2	272	1	--	--
<b>Legal Represent- ation</b>						
Free, Appointed Counsel	21,848	37	21,848	100	40	10 0
Private Attorney	11,720	20	--	--	--	--
None	25,916	43	--	--	--	--
<b>Disposition</b>						
Dismissed <sup>5</sup>	29,081	49	12,185	56	6	15
Convicted	15,567	26	6,238	29	14	35

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Stay of Imposition <sup>6</sup>	2,187	3	978	4	6	15
Continued <sup>7</sup>	12,621	21	2,428	11	14	35
Missing	28	<1	19	<1	--	--

<sup>1</sup> Data obtained from Hennepin County Research Division; Data contains all adult criminal cases filed; Data includes only one charge per criminal case.

<sup>2</sup> Includes Native American (3%), Asian (2%), Hawaiian (<1%), and defendants whose race is missing.

<sup>3</sup> Includes defendants charged with disorderly conduct, trespassing, loitering, solicitation, obstructing justice, etc.

<sup>4</sup> Includes defendants charged with land, housing, boating, animal violations, etc.

<sup>5</sup> Includes cases that were dismissed for mental incompetence (<1%) and cases that were acquitted (<1%).

<sup>6</sup> A stay of imposition (SOI) or stay of execution occurs when an imposition is pronounced but delayed to a further date. If the offender complies with the conditions of the court, a felony conviction will be reduced to a misdemeanor conviction. If the offender fails to comply with the conditions of the court, the court may hold a hearing and impose/execute the sentence.

<sup>7</sup> Includes cases with a disposition of stay of adjudication (SOA) or continued without prosecution (CWOP). SOAs and CWOPs occur when a defendant pleads guilty and the case is continued for dismissal. SOAs and CWOPs do not result in a conviction unless the defendant violates conditions of the court. SOAs and CWOPs include cases that are diverted through probation and/or diversion programs.

### A. Deciding to Plead Guilty—Efficiency, Avoiding Uncertainty, and Blameworthiness

Table 2 presents the proportion of defendants who pled guilty for reasons associated with *efficiency*, *avoiding uncertainty*, and *blameworthiness*. The smallest proportion of defendants (11 percent) indicated that they pled guilty because they committed the crime and felt that they needed to take responsibility for their behaviors. The largest proportion (50 percent) of defendants indicated that they pled guilty because of the efficiency offered by the plea process. The second largest group of defendants (38 percent) indicated that they pled



guilty because they did not want to risk taking their case to trial and receiving a more severe sentence.

**Table 2. Defendant Decisions to Plead Guilty\***

	Blame-worthiness		Efficiency		Uncertainty Avoidance	
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
<b>Total</b>	4	11.7	17	50.0	13	38.3
<b>Gender</b>						
Male	2	8.0	13	52.0	10	40.0
Female	2	22.0	4	44.6	3	33.4
<b>Race</b>						
White	2	15.4	6	46.1	5	38.5
Black	2	10.5	10	52.6	7	36.9
Other	--	--	1	50.0	1	50.0
<b>Charge</b>						
Misdemeanor and Gross	1	9.0	7	63.6	3	27.2
Felony	3	13.0	10	43.5	10	43.5
<b>Priors</b>						
Yes	2	8.0	13	52.0	10	40.0
No	2	22.2	4	44.5	3	33.3
<b>In Custody</b>						
Yes	--	--	2	33.3	4	66.7
No	4	14.3	15	53.6	9	32.1

\* Results do not include those defendants whose case was dismissed ( $N = 6$ )

Black and white defendants, and those with and without prior convictions, indicated that they pled guilty because of the time and money savings associated with accepting a plea deal. Two-thirds of defendants who were facing a less severe charge than a felony pled to “get it over with,” and half of those charged with a felony made the same decision. The finding that individuals charged with a felony enter pleas of guilty because of the

efficiency offered by the plea process is somewhat surprising. Research in the lower courts indicates that defendants who are charged with misdemeanors are most concerned about how quickly the case can be resolved, versus the outcome of the case.<sup>43</sup> For individuals who are charged with more severe offenses, we often assume that there will be an increased concern with the procedures and outcome of the case, versus the efficiency of the process. Our finding, however, indicates that individuals who are charged with a felony are not dissimilar from individuals who are charged with less severe offenses when making decisions about whether to enter a plea of guilty.

Over half of the individuals who indicated that they accepted a plea of guilty for reasons associated with efficiency and uncertainty avoidance were incarcerated pretrial. This finding is supported by prior research on the impact of pretrial custody which indicates that prosecutorial offers to “get out of jail” typically trumps defendants’ interest in pursuing a trial because of the time required to take a case to trial and the risks associated.<sup>44</sup> This finding is articulated through the following statements made by defendants:

*Personally, I would just go with whatever they give me so I can hurry up and get out of there. I just went on and told them yep, yep, whatever, anything as long as it’s going to get me out of here. (male, black, felony)*

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<sup>43</sup> FEELEY, *supra* note 3.

<sup>44</sup> Albert A. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 61–62 (1968); Bowers, *supra* note 22, at 1133; FEELEY, *supra* note 3; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2146 (1998).

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*Nah, I ain't taking nothing to trial. Plead, give them what they want, get out. A lot of people can't take it to trial because they got family shit at home. (male, black, felony)*

While the majority of defendants articulated support for an efficiency perspective of decision-making, how they arrived at their final decision was nuanced and contextualized by considerations of guilt and risk. Defendants indicated that they decided not to take their case to trial because it would require too much time and money. However, this decision was often juxtaposed by defendants stating that they were guilty—so why fight it?—or that they did not want to risk the outcome of a trial—so why spend the time on taking it to trial?

*It's too emotionally and physically draining for somebody to have to go through that [trial]. And then, you know, that means I have to take more time off work, more time finding someone to watch my kids, more time to do this. It's just not worth it overall. I'll take my responsibility. I'm in trouble, I'll take my year of probation, I'll do my fines and then it's done. It just seemed like an easier way to go. Less fines. No jail time . . . I know I did something wrong. (female, white, misdemeanor)*

*They was offering me six years, you know what I'm saying, so I fought it. I fought it for like four and a half months. I'm sitting down in the county [jail] just fighting it. Like no way, I'm not taking this. I didn't do nothing and I shouldn't even be here. But, like the deals are getting worse and worse and worse. They first offered me 48*

*months and then they went to 52 and then they went to 57, so they kept climbing the deals...No I didn't take it to trial because they said if I don't take it to trial they'll just give me four more months. Just do four more months because I already did four more months. So they made it seem so sweet to me, but it hurt me in the long run, you know, because I've never been in jail before. So I'm panicking, I'm in jail for four months and I'm like oh my goodness seems like I've been gone for like two years just sitting in a little cage, cell by yourself is crazy. I've never been in that position so I'm like freaking out. I wanted to take it to trial, but I just couldn't handle the jail, you know, and what if I did lose because, you know, I don't know. I would never want to use it as an excuse, but you know I just felt that I might have lost. If I would have lost, I would have been sitting in prison for six years. (male, black, felony)*

## **B. Deciding to Plead Guilty— Misunderstanding and Fear**

While theories of efficiency, uncertainty avoidance, and blameworthiness are associated with defendants' decisions to plead guilty, the most commonly articulated factors that mediated decisions to accept a plea of guilty were *misunderstanding* and *fear*. The observational and interview findings of this study suggest that defendants do not understand the charges to which they are pleading guilty, the sentence, and the consequences of entering a plea of guilty. Stemming from misunderstandings about the plea process and the legal language associated with plea bargains, defendants entered pleas of guilty to exit a situation that they do not

understand and have little control over.

*I believe like at court when they brought it up it was kind of like a deal saying that I would have been on probation for two years—felony probation. And you know, I do kind of have a little experience with court . . . but not really as an adult. So I didn't really know what was going to happen. And I . . . you know I really didn't want to go through that whole process so I took the first thing that was handed to me. And that's kind of what got me in this situation . . . well not exactly this situation but got me on probation. But you know I really don't, you know. And . . . ah . . . yeah, I just feel like the decisions that was made was a part of me being tired of dealing with things, and not understanding what was going on. . . . I just felt like I didn't want to deal with it. (male, black, felony)*

*Particularly when it's your first time in there, it's scary. Everything is moving quickly. A lot of people they talk like they get very frustrated by that and they get more scared because they have no idea what's going on, and then you're asked to make pretty quick decisions. And most people like me myself personally I would just go with whatever they give me so I can hurry up and get out of there. Sometimes I just agree just to get out of jail or to get out of the court room. Like the day we were there for the pre-trial [conference] I was already ready to take whatever they were going to give me. (male, black, misdemeanor)*

*I don't even want to risk it. I'm not too—I don't know too much about the system or the law or too much about that. I never really had to deal with it like that. So taking them to court, I think it would be a waste of time because I don't get it. I'll just move on.* (male, black, misdemeanor)

Defendants often considered not accepting a plea of guilty and taking their case to trial, but out of fear, ended up accepting a plea of guilty. This finding is particularly relevant as scholarly interest in wrongful convictions in the U.S. has garnered increasing attention over the past decade due in large part to a growing public awareness of wrongful convictions, and the increasing number of individuals whose sentences are vacated because they were convicted of a crime that they did not commit. Since 1989, more than 2,100 people have had their sentences vacated.<sup>45</sup> In 2017 alone, more than 130 individuals were identified as convicted for a crime that they did not commit.<sup>46</sup> Although estimates of the rate of wrongful convictions vary, and typically focus on capital charges and cases in which charges have been vacated, observational and interview data collected in this study suggest that defendants who are charged with misdemeanor and felony offenses and whom claim innocence do plead guilty.

*I took a plea agreement without even knowing what I was going to get. Like not*

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<sup>45</sup> NAT'L REGISTRY OF EXONERATIONS, UNIV. OF CAL. IRVINE, EXONERATIONS IN 2017, at 3(2017).

<sup>46</sup> *Id.* This number does not include approximately 96 individuals whose drug-related convictions were found to be the result of systematic framing on the part of police officers in Baltimore and Chicago. *Id.* at 1. At the time of publication, 176 sentences have been vacated and more are expected to occur in 2018.

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*even a full understanding, I just, I don't know. Like my public defender wanted me to keep the plea as not guilty. Like he told me that a couple times and like I just wanted out. I'd rather, I guess I'd rather have my plea as not guilty if I could have stayed out and gone to trial. If I knew I was going to be out then I pled not guilty because I don't think they could have proved beyond reasonable doubt that I did this because there was no evidence—there is absolutely nothing . . . . Obviously, I think I would win, but the whole “what if I don't.” What if I don't, then I'm dead. Because I've never been through the courts before. I've never been to the jail before, so I didn't know anything. I had no idea what was going on, like I'm just sitting there not knowing if I'm going to get out and not knowing if I needed to see the judge or what was going on. And so, then that's when I'm just like well I just want to take the plea. I just want to get out of here. I guess there was another plea and I didn't understand the other one. I guess like I know that's not why, like you're not supposed to take a plea to get out of jail. Like you can't do it I guess, but I would say that's pretty much what I did just because I wanted it done with—so I could move on. I guess I just kind of misunderstood. (male, white, misdemeanor)*

*I didn't want to take the plea. I said, “No. I don't want to.” But now when it gets all the way to this point and I got out and I got all my jobs back. Fuck it. Now I got out I might as well take it and get it over with.*

*When I was in jail I said, let's do something right now. But no. Nobody wanted to do nothing. But they gave me this opportunity to get out and . . . I don't want to take it to trial now. (female, black, felony)*

### C. Perceptions of the Plea Outcome as Fair

Given the findings associated with defendant decisions to accept a plea of guilty, it is compelling to consider whether defendants perceive the outcomes and procedures of their case as fair. Table 3 provides information on the association between defendant characteristics and the indicators of *procedural fairness*, *outcome fairness*, and *case participation*. Over 60 percent of defendants interviewed for this study expressed positive perceptions of the procedures and outcomes of their case while 72 percent expressed negative perceptions of their ability to participate in their case. Defendants charged with both felony and lesser charges articulated positive perceptions of the plea process (62 percent) and outcome (62 percent and 81 percent, respectively). Those individuals whose cases were dismissed overwhelmingly agreed that the court process and outcome was fair (100 percent); only one defendant whose case was dismissed felt that he did not have input in the process. Defendants who received a disposition other than dismissal were still most likely to express positive perceptions of the plea process (between 50 and 64 percent), but overwhelmingly expressed concern about their ability to participate in the procedures and outcomes of their case (between 66 and 92 percent).



**Table 3. Defendant Perceptions of Plea Bargaining**

	Process is Fair		Outcome is Fair		Participation	
	Yes	No	Yes	No	Yes	No
<b>Total</b>	27 (67.5%)	13 (32.5%)	28 (70.0%)	12 (30.0%)	11 (27.5%)	29 (72.5%)
<b>Gender</b>						
Male	23 (74.2%)	8 (25.8%)	24 (77.4%)	7 (22.6%)	11 (35.5%)	20 (64.5%)
Female	4 (44.4%)	5 (55.6%)	4 (44.4%)	5 (55.6%)	-- --	9 (100.0%)
<b>Race</b>						
White	9 (69.2%)	4 (30.8%)	8 (61.5%)	5 (38.5%)	2 (15.4%)	11 (84.6%)
African American	16 (66.7%)	8 (33.3%)	18 (75.0%)	6 (25.0%)	8 (33.3%)	16 (66.7%)
Other	2 (66.7%)	1 (33.3%)	2 (66.7%)	1 (33.3%)	1 (33.3%)	2 (66.7%)
<b>Charge</b>						
Mis- demeanor and Gross	10 (62.5%)	6 (37.5%)	13 (81.3%)	3 (18.7%)	7 (43.7%)	9 (56.3%)
Felony	17 (62.5%)	7 (37.5%)	15 (62.5%)	9 (37.5%)	4 (16.7%)	20 (83.3%)
<b>Dis- position</b>						
Dismissed	6 (100.0%)	-- --	6 (100.0%)	-- --	5 (83.3%)	1 (16.7%)
Convicted	9 (64.2%)	5 (35.7%)	10 (71.4%)	4 (28.6%)	3 (20.0%)	9 (80.0%)
Stay of Im- position	3 (50.0%)	3 (50.0%)	3 (50.0%)	3 (50.0%)	2 (33.3%)	4 (66.7%)
Continued	9 (64.2%)	5 (37.5%)	9 (64.2%)	5 (35.8%)	1 (7.1%)	13 (92.9%)

		Process is Fair		Outcome is Fair		Participation	
		Yes	No	Yes	No	Yes	No
<b>Total</b>		27 (67.5%)	13 (32.5%)	28 (70.0%)	12 (30.0%)	11 (27.5%)	29 (72.5%)
<b>Procedure is Fair</b>	<b>Y</b>	--	--	25 (89.3%)	2 (16.7%)	11 (100.0%)	16 (55.2%)
	<b>N</b>	--	--	3 (10.7%)	10 (83.3%)	0	13 (44.8%)
<b>Outcome is Fair</b>	<b>Y</b>	25 (92.5%)	3 (23.0%)	--	--	11 (100.0%)	17 (58.6%)
	<b>N</b>	2 (7.5%)	10 (77.0%)	--	--	--	12 (41.4%)
<b>Participation</b>	<b>Y</b>	11 (40.7%)	0	11 (39.3%)	0	--	--
	<b>N</b>	16 (59.3%)	13 (100.0%)	17 (60.7%)	12 (100%)	--	--

The two factors that were most strongly associated with defendant perceptions of outcome fairness was the belief that the outcome received was a “good break” or that the outcome was “deserved.” This result supports our finding that defendants weigh considerations of blameworthiness and uncertainty avoidance when deciding to accept a plea of guilty. It is also supported by theories of distributive justice and prior research on outcome satisfaction. For example, Casper found that the majority of male defendants describe their sentence as fair, and that perceptions of outcome fairness was based on the belief that the

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sentence receives was less severe than was anticipated—or at least the “going rate”—and appropriate to the crime.<sup>47</sup> Defendants interviewed for this study articulated similar perceptions:

*Yeah, I'm happy with the outcome. I was really happy. I was hoping for what I was offered, so I pretty much got what I was expecting. (female, white, felony)*

*I thought that that they were going to put me on some type of probation for a certain amount of time where I would have to keep coming back to my probation officer. A lot of other things like that, you know, for like six months or something, and I won't be able to get my driver's license until I'm 21 or something, that's what I thought was going to happen. You know, so it was much of a relief when they said—when she said she might be able to switch it over to a disorderly conduct. Since I had already been in jail for two days and the police officer maced me, I have had enough punishment I guess. So I was really relieved when that happened. I'm glad I didn't have to pay no ticket. That would have been even worse. . . . At the end of the day I'm happy with my outcome, yeah. (male, black, misdemeanor)*

Defendants—both those who were interviewed and those whose cases were observed—who openly discussed their guilt perceived the plea process as a means to obtain an outcome that they felt they deserved. In this sense, defendants who indicated satisfaction with

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<sup>47</sup> Casper, *supra* note 13.

their outcome adopted a just deserts approach to their outcome.<sup>48</sup> As one defendant put it, “you do the crime, you do the time.” Another defendant charged with three felony counts of theft stated that he was “happy” with his court experience:

*Because of the outcomes that I received . . . I face consequences for what I did and if I wouldn't have faced anything, if they had just said, “Okay you can go on with your business. Don't ever do that again,” I never would have learned from my mistakes. So I believe that justice was served in my case. I deserved my consequences. I have to take part in what I did, pay for what I did.*  
(male, white, felony)

Particularly in DWI and property cases where evidence is easily obtained through breathalyzers, blood tests, video surveillance, and fingerprinting, the question that loomed over defendants was not whether they would take their case to trial to dispute guilt, but what plea offer they would receive from the prosecutor. One defendant who was ultimately convicted of felony check fraud recounts, “Basically the deal that I got—there’s no other better way that you could have ever put it, you know what I mean? I didn’t have to go to jail and got the same probation officer. To be honest with you, I probably should have gotten a little bit worse punishment than I did considering the fact of what I did.”

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<sup>48</sup> See ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993); ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1987); ANDREW VON HIRSCH, COMM. FOR THE STUDY OF INCARCERATION, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

#### **D. Perceptions of the Plea Process as Fair**

Over 90 percent of the defendants who were interviewed for this study and who perceived their outcome as fair also perceived the court process leading to their outcome as fair. A defining measure of procedural fairness in this study was whether defendants felt that they were treated the same as other defendants, and whether they felt fairly treated by the public defender—conclusions arrived at by observing other cases and talking to other indigent defendants. In most cases, the considerable amount of waiting time required for a defendant's case to be called allows plenty of opportunities to talk and mingle with other indigent defendants in hallways, elevators, and smoking areas. These interactions offer defendants a way to “blow off steam” and “kill time,” but it also provides them with information about others' experiences, which they use to assess their own situation. As one defendant stated after stepping out of court, “They treat everyone the same, so yeah, I would consider it fair, or fair enough.”

For this same reason, however, some defendants perceive their treatment as unfair. In these cases, defendants articulated concern that their case was being handled the same as all other cases and not given individual consideration. Defendants expressed concern that they never had a conversation with their public defender before pleading guilty and did not understand the plea process that resulted in their outcome. One defendant who was charged with a felony count of property theft indicated that he was satisfied with his outcome but dissatisfied with the process:

*No, I don't feel that I was treated fairly going through the process, but, I mean, what choice did I have. . . . He [the public defender] never communicated with me. Maybe he did do something, but I don't*

*know what he did. He never told me anything. I was on my own. He said, "here is what's going to happen. This is your case, so you go over here, go over there. Now you just come back and go see the judge and you're on your way." You know, and I'm like "okay." But, I mean, yes, I am happy with the outcome. (male, black, felony)*

This statement illustrates the frustration that many defendants articulated about their public defender, and how perception of public defenders' behaviors can influence defendant perceptions of fairness. Legal scholars identify different and often competing conceptions of the role of criminal defense lawyers; however, most agree that zealous advocacy of defendants is necessary and justified.<sup>49</sup> The American Bar Association Model Code of Professional Responsibility states that it is a lawyer's responsibility to "represent a client zealously within the bounds of the law."<sup>50</sup> For indigent defendants, perceptions of enthusiastic and effective representation influence positive and negative judgments of public defenders. Those who perceived their public defender as an individual who is willing to fight for their case—i.e., put time and effort into the case—were most likely to talk positively about public defenders

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<sup>49</sup> THE CONSTITUTION PROJECT, *supra* note 2, at 158; Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1209–10 (2004); Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2104–05 (2003); Charles J. Ogletree Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 92 (1995); Charles J. Ogletree Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1242 (1993).

<sup>50</sup> MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (AM. BAR ASS'N 1998).

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and feel as if they were fairly treated. As one incarcerated black male stated, "I felt like she was great. She did everything in her power, everything that she could possibly do to give me the lesser charge possible or try to get me out of it. She did everything that she could do. So I felt she did her job really well." Another white male charged with felony theft stated:

*Oh, I liked my public defender, she's a great attorney and I really appreciated her help. I feel like she did a better job than other public defenders I've ever had. It just seemed like she had an actual knowledge of the case, like she actually paid attention to it. Most public defenders don't even know who you are until they look in your file when they see you. She seemed like she actually, you know, took the time and tried to find out the best results and get information. So, yeah, I was real appreciative. I liked her, she was a good person. (white, male, felony)*

Defendants who perceived their public defender as an individual who was not willing to fight for their case were less likely to speak positively about their experience with their legal representation and their court experience:

*Personally, to me, I want to have my own lawyer next time. Pay my own lawyer, 'cause I know if I got my own lawyer that he's gonna fight for me. The public defender is not gonna fight for you. (black, male, felony)*

*I think it's just not fair, like the public defenders are bullshit. Like you can call a*

*real lawyer and he can get you less time, but call a public defender and he can get you the most time, you know what I'm saying? Like if a public defender is supposed to be a lawyer, right? So how come they can't act like the lawyer? It's like bullshit, you know. They're supposed to try their hardest. I bet you if somebody was paying them, then they will try to go harder, know what I mean? A lot of them don't care. They don't care because they got so many cases. They get paid for so many cases, so they pretty much want to get you in and get you out of their face. (black, male, felony)*

Research shows that the most common complaint received by public defenders concerns the lack of time and attention they give to defendants.<sup>51</sup> Professional conduct rules require that public defenders keep clients informed of the status of their case and promptly respond to client requests for information.<sup>52</sup> The reality, however, is that public defenders are often unable to comply with professional duties because of circumstances that include excessive caseloads and a failure to be appointed to a case in a timely manner.<sup>53</sup> When public defenders have too

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<sup>51</sup> Christopher Campbell et al., *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of Their Public Defenders*, 33 BEHAV. SCI. & L. 751, 758–66 (2015); ROY B. FLEMMING ET AL., *THE CRAFT OF JUSTICE: POLITICS AND WORK IN CRIMINAL COURT COMMUNITIES* (1992); cf. THE CONSTITUTION PROJECT, *supra* note 2, at 95 (discussing the inability of indigent defense attorneys to comply with their professional duties due to, among other things, excessive caseloads).

<sup>52</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (AM. BAR ASS'N 1998).

<sup>53</sup> BORUCHOWITZ, *supra* note 2, at 22; THE CONSTITUTION PROJECT, *supra* note 2, at 95.



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many cases, client contact suffers and sometimes becomes virtually non-existent. Defenders become unavailable to defendants because they are constantly in court, which often forces initial public defender-defendant meetings to take place in the courtroom.

*Yeah, like the only reason that I would not have him to be my lawyer again is basically because of the miscommunication that we had. It's not something that he did with my case wrong or anything. It's just that I feel like if I call, if I call you two or three times a week and you don't return any of my calls or give me any type of response, something's wrong with that. Either you're just ignoring me or you don't really care about what's going on with my case. You just want to get it over with. And, you know, he has a lot of other clients too, but that's no reason. With Monday through Friday, there's no reason that out of those days that I can't get a response from you from calling you two or three times a week. (white, male, felony)*

*The hardest part is getting a hold of the public defender. I was trying to get a hold of the public defender, but they never call you back or talk with you or anything like that. So until your date, your next court date—that's the first time I talked with my public defender. And all they do is come out and ask for a new court date because they haven't had a chance to look over the case at all. (white, male, felony)*

*He talked with me one time and he told me the offer, that's it. (black, male, felony)*

*I wasn't treated fairly because being treated fairly is when you're honest with your client and you put everything on the table and let them know what's going on. (black, female, felony)*

Research by Tom Tyler and colleagues suggests that defendants are most likely to report positive perceptions of court actors if they understand what motivates their behavior and decision-making.<sup>54</sup> Authorities who act unexpectedly are not necessarily judged to be untrustworthy if people feel that they understand why they behave in the manner in which they do. Conversations with the defendants in this study confirm this finding. As articulated in the previous statements, defendants critique public defenders but also provide justification for their behaviors. For example, one black male who received a stayed sentence for a series of misdemeanor violations indicated that he was disappointed in his lawyer's willingness to fight for a better plea negotiation—"He was alright, but he could have tugged a little harder to get it down a little more." The defendant followed this statement with the following explanation for the defender's behavior:

*He was pressed for time 'cause he got to be here, he got to be there. You can't get mad at them because they are overloaded. You know, if you want to keep it real, they are all public defenders, pretenders, or whatever. They are all overloaded. They get*

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<sup>54</sup> TYLER, *supra* note 42; Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 129 (1998); Tyler, *supra* note 25, at 70; Tom Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, in APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS 78 (John S. Carroll ed., 1990).

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*more and more every day. You know it's a wonder that all of them ain't half crazy. It's not good. It's not good. It's not good. But, that's basically what it is, you know. It's bad because you—you ain't have no faith in the system, you know, 'cause you ain't got nobody that's gonna really fight for you. Half of them can't even negotiate on a plea bargain, let alone on a trial. I guess that's probably even how they are taught in college now-a-days, just to be a deal-maker.*  
(male, black, misdemeanor)

Another white female who received probation for a misdemeanor indicated that she was concerned during court because she expected to have more opportunities to talk with her attorney, but also indicated that “there are so many other cases and horrible things that happen, that they can't worry about [her].” Also, a black male who was incarcerated for multiple misdemeanors stated,

*Those public defenders, you can't even talk to them. It's frustrating. You know that it's six or seven other people to this one person. I mean like how many people can you actually juggle by yourself? I thought public defenders were supposed to be there to help so why isn't there more of them?*  
(male, black, misdemeanor)

Previous research indicates that defendants express sentiments of distrust for public defenders.<sup>55</sup> The findings of this research, however, indicate that defendants are not necessarily distrusting of public defenders, but of the system that public defenders work

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<sup>55</sup> CASPER, *supra* note 24; Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. LAW SOC. ACTION 4, 6 (1971).

for. Public defenders are perceived by defendants as part of a larger system that prescribes their behavior.

*I do not really feel like he was on my side. I'll be honest with you. Not really. I'm just another, you know, pawn on the chessboard. He's just doing his job. Just get 'em in, get 'em out, get 'em in, get 'em out, you know? It's just a job with the prosecutor. (male, black, misdemeanor)*

*When you're incarcerated they call them "public pretenders." But, you know, it's the truth because you know the prosecutors and the public defenders they eat lunch together, they go fishing together, you know they just hang out together, they're friends. You know, so while they're like eating ravioli, it's probably like, "Oh what do you want to do with him? Okay I'll give you him, just let me beat this case right here." You know what I'm saying? It's like chess and it's kind of messed up. (male, black, felony)*

*It's not fair because they work for the city. So, he started working with the prosecutors and seeing what they want to come up with, but he's not asking the client what's going on. It's not fair. It was all him, him and the prosecutor. The public defender is not fair; it's not justice because they do what they want to do. What them and the prosecutor want to do. (male, black, felony)*

Statements such as these suggest that defendants do not necessarily view the behavior of public defenders as representative of the defenders themselves, but rather as a reflection of the circumstances of their position in the

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criminal courts, which relies heavily on the plea process to ensure efficient case progress. Defendants did not perceive public defenders as apathetic but overextended. This account of the plea process parallels criticisms among scholars who argue that the criminal process has evolved into a system of assembly line justice which is most concerned with processing cases as quickly and efficiently as possible.<sup>56</sup> For these reasons, many defendants are not provided with contact information for their public defenders and, if they are, are not able to reach the public defender or receive a return phone call. A defendant who was charged with driving with a cancelled license for the fifth time explained this experience:

*Yeah, you know, it's just like a process, like a processing plant. They just process you, like they processing cattle. They say, "Okay this is what they gonna do for you: so, so, so, so. Now if you don't do this here, now the charge carries: so, so, so, so. Now I can get you this here. Right now, today, I can get you so, so, so, and then you go to jail." You*

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<sup>56</sup> BORUCHOWITZ, *supra* note 2; William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), <https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html> [<https://perma.cc/H3XX-FLA5>]; William Galberson, *Courts in Slow Motion, Aided by the Defense*, N.Y. TIMES, (Apr. 14, 2013), <https://www.nytimes.com/2013/04/15/nyregion/justice-denied-courts-in-slow-motion-aided-by-defense.html> [<https://perma.cc/8W8T-A5NQ>]; Ari Shapiro, *Report Calls Out Flaws In Public Defender System*, NAT'L PUB. RADIO, (Apr. 15, 2009), <https://www.npr.org/templates/story/story.php?storyId=103108229> [<https://perma.cc/3CQP-EBH6>]; Cara Tabachnick, *In the Public Defense*, THE CRIME REPORT, (Oct. 7, 2010), <http://www.thecrimereport.org/archive/in-the-public-defense> [<https://perma.cc/GRQ8-5Z64>].

*know, it's just a process. You know, they don't have time to deal with no one individual, 'cause they can't put too much time in 'cause they got so many. Like I say, it's like, "Come on down, you're the first contestant in The Price is Right!" It's like Monty Hall in Let's Make a Deal. (male, black, misdemeanor)*

As this defendant articulates, the plea process can move rapidly. On days in which the court calendar is full—such as after the weekend or a holiday—or, in courts that see a particularly high volume of cases—such as property and drug courts—cases can move so quickly that there is not time for the defendant to meet or talk to their public defender. In conversations with defendants after their first appearance, defendants were often unable to state the name of their public defender, or how they may be able to reach the defender. As one black male defendant charged with 5th degree drug possession articulates:

*The first time I went through it, I was terrified. I didn't know what was going on. I felt like I was from Asia and it's my third day here in America and I didn't have no English classes or whatever, so I'm speaking a whole different language. And they're just like talking a foreign language and I'm like, "What's going on? I need to talk to my lawyer." I'm like, "but look I don't understand, like, you know, hold up." I just felt ignorant, you know what I mean. The first time, I'm like "oh my." I learned everything I know about the court system*

*being inside the jail and not from being in court, not from my lawyer, but by sitting there listening and watching other cases. (male, black, felony).*

### **E. Perceptions of Participation and Self-Expression**

Despite the finding that most defendants perceive the outcomes and procedures of their case as fair, over 70 percent of defendants did not feel like that they had adequately participated in their cases. Table 3 indicates that over half of all defendants who reported that the process and outcome of their case was fair also indicated that they did not have enough input in their case. This finding is somewhat surprising. As cited previously, the extant literature on perceptions of fairness argue that when defendants feel as if they are a part of the procedures of their case and have adequate opportunities to voice their side of the story, positive attitudes of the fairness of the outcome and procedures of their case increase.<sup>57</sup> Empirical studies that consider the plea process, however, provide contradictory accounts of the effect of participation in plea bargaining on perceptions of fairness. For example, some scholars argue that plea bargaining provides more control and a heightened sense of efficacy because defendants are actively participating in their case by pleading guilty in return for an agreed upon sentence.<sup>58</sup> In this regard, the process of plea bargaining can provide defendants with greater certainty over their outcome, leading to more positive evaluations

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<sup>57</sup> LIND & TYLER, *supra* note 27, at 9; THIBAUT & WALKER, *supra* note 29.

<sup>58</sup> Anne M. Heinz, *Procedures Versus Consequences: Experimental Evidence of Preferences for Procedural and Distributive Justice*, in COURTS AND CRIMINAL JUSTICE: EMERGING JUSTICE (Susette M. Talarico, ed., 1985).

of their process. Casper argues that in cases when defendants receive an outcome that is not expected, they are more likely to articulate limited participation in their case and perceive the process as less fair.<sup>59</sup> The findings of our research also indicate that defendants who were caught off-guard by the decisions of the court were more likely to express negative attitudes. One defendant charged with 2nd degree assault describes her experience of receiving a more severe sentence than she anticipated:

*No, we didn't talk a lot. I left him [public defender] a few messages, spoke to him on the phone and asked him, you know different questions about where I was going. He said jail time was out of the picture. I knew for a fact that jail time wasn't going to happen. I just knew that for a fact that it was no jail time. And then on the last day it's jail time...it wasn't an honest way to come and tell me I was doing jail time, to find out on the very last day when I go to court that I'm going to get sentenced to jail, and never heard it. Before any conversation that we had, any paperwork that I signed, he never said anything. So then I come to court and expect probation, monetary probation, strict probation, or whatever and then have to get locked up. I thought that was very unfair because that was the first time I heard of it before going into court. I just wished he would have talked to me more and prepared me a little bit more. When I*

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<sup>59</sup> CASPER, *supra* note 24.



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*expected no jail time and then when I got jail time it was like, "oh well, you got jail time." It was like "case closed" for him. Like I know he had to know ahead of time before five minutes before court. So, oh well, I just got to live with it and do my time I guess. I would have felt good if I would have had a chance to speak more and explain myself. Then I would have been prepared for this, but like I said, it all hit me like five minutes before we went to court, so I wasn't really expecting that. And the judge, the judge just agreed to everything that was going on and did not take time to listen to my side. So, I guess I get the shit end of the stick.*  
(female, white, felony)

In more serious felony cases, such as this one, defendants are less likely to be certain of the outcome of their plea agreement when they sign it. Unlike misdemeanor cases, in which most cases are settled on the first or second day in court, felony cases can be extended for over a year (as in this case), and often involve pre-plea agreements. In cases in which pre-pleas are signed, the defendants admit their guilt and consent to an interview and evaluation by probation that presumably guides the decision of the judge. In most cases, public defenders promote pre-plea evaluations as an opportunity to decrease defendant sentences because they offer the judge and other court members a more thorough understanding of the defendant's history and the situation surrounding the case. However, defendants often become frustrated after reading these reports because they do not feel as if the probation officer adequately represents them—most articulated concern that the report contained negative information that was

not reported by the defendant, such as drug and alcohol use.

Differences in procedures between felony and misdemeanor cases may understandably influence the experience of defendants. Table 5 reports defendant perceptions of procedures, outcomes, and case participation by case severity. These results indicate that the most prevalent difference between individuals charged with felonies and less severe charges is the association that defendants draw between having a voice and fair procedures and outcomes. Individuals who are charged with felonies, compared to those who are charged with less severe offenses, are less likely to indicate that they adequately participated in their case (16 percent compared to 43 percent) and less likely to associate their participation with procedural and outcome fairness. Only 23 percent of felony defendants agreed that they participated in procedures that they experienced as fair (compared to 70 percent of misdemeanor/gross misdemeanor defendants); 26 percent agreed that they had participated in outcomes they perceived as fair (compared to 53 percent of misdemeanor/gross misdemeanor defendants). Prior examinations of the relationship between case severity and court experiences suggests that case severity can influence defendants' interest in their case, particularly when the outcomes are more severe.<sup>60</sup> This research provides support for such claims. Defendants in this study who were charged with lower-level offenses were more likely to express apathy towards the procedures and outcome of their case. For example, when asked whether defendants would prefer more opportunities to be involved in their case, one Hispanic male charged with a misdemeanor count of contempt of court responded that the courts can "do what they want." When we subsequently asked if he felt that he was treated with respect, he indicated that he "has never really thought about it." Statements such as these

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<sup>60</sup> Heinz, *supra* note 58.

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by defendants support observed differences in misdemeanor and felony courts. Defendants in misdemeanor courts more frequently “blow-off” court dates. They plead guilty without talking with their public defender about options other than the original plea offered by the state. Defendants charged with misdemeanors are also more likely to arrive to court alone without family or friends, whereas in felony courtrooms, family members, friends, and caseworkers provide a regular show of support, concern, and input into defendant decision-making.

**Table 5. Defendant Perceptions of Plea Bargaining, by Process, Outcome, Satisfaction, and Charge Level**

		Process is Fair		Outcome is Fair		Participation	
		Yes	No	Yes	No	Yes	No
<b>Misdemeanor and Gross</b>		10 (62.5%)	6 (37.5%)	13 (81.3%)	3 (18.7%)	7 (43.7%)	9 (56.3%)
Procedure is Fair	Y	--	--	10 (76.9%)	0	7 (100.0%)	3 (33.3%)
	N	--	--	3 (23.1%)	3 (100.0%)	0	6 (66.7%)
Outcome is Fair	Y	10 (100.0%)	3 (50.0%)	--	--	7 (100.0%)	6 (66.7%)
	N	0	3 (50.0%)	--	--	0	3 (33.3%)
Participation	Y	7 (70.0%)	0	7 (53.8%)	0	--	--
	N	3 (30.0%)	6 (100.0%)	6 (46.1%)	3 (100.0%)	--	--
<b>Felony</b>		17 (62.5%)	7 (37.5%)	15 (62.5%)	9 (37.5%)	4 (16.7%)	20 (83.3%)
Procedure is Fair	Y	--	--	15 (100.0%)	2 (22.2%)	4 (100.0%)	13 (65.0%)
	N	--	--	0	7 (77.8%)	0	7 (35.0%)
Outcome is Fair	Y	15 (88.2%)	0	--	--	4 (100.0%)	11 (55.0%)
	N	2 (11.8%)	7 (100.0%)	--	--	0	9 (45.0%)
Participation	Y	4 (23.5%)	0	4 (26.7%)	0	--	--
	N	13 (76.4%)	7 (100.0%)	11 (73.3%)	9 (100.0%)	--	--

## IX. Conclusion

Research indicates that the majority of individuals charged with a crime plead guilty. This study focuses on why defendants decide to plead guilty versus take their case to trial and their perceptions of the plea process and outcomes. Our findings suggest that defendants decide to plead guilty, regardless of innocence, because the process provides the quickest pathway out of court and with little risk. The decision to enter a plea of guilty is also influenced by confusion over court processes and outcomes, and fear of what may happen if the defendant does not accept a plea deal. While *outcomes* associated with plea bargaining are considered by defendants to be by and large fair—primarily because the outcome was expected and perceived as comparable to the outcomes that others receive—defendants do not always perceive the plea *process* as fair. Dissatisfaction with the legal representation and perceived lack of control and input in the decisions of their case are key factors that influence perceptions of procedural fairness and justice.

Scholars and legal practitioners often argue that defendants' decisions to plead guilty reflects their guilt and a concern for taking responsibility for their behaviors. The courts—particularly federal courts—have supported the position that defendants should receive leniency in exchange for accepting blame for their actions.<sup>61</sup> However, while defendant guilt may play a mediating effect in defendant decision-making, the findings of this research indicate that guilt has little direct effect on the decision to plead guilty. Rather, the efficiency that the plea process provides is a primary influence on defendant decision-making. Many scholars argue that as the number of individuals who intersect with the courts increases, plea bargaining provides a

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<sup>61</sup> See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2009).

quick, inexpensive way to handle growing dockets.<sup>62</sup> The findings of this research suggest that the plea bargaining process is not only preferred by court actors, but also by the defendants, who are also influenced by a desire to “just get it over with.”

In addition to the time and money saved by pleading guilty, defendants indicated that they preferred the certainty of plea deals. Research shows that defendants who decide to take their case to trial and are found guilty frequently receive more severe sentences than they would if they had pled guilty. Plea-trial disparity research shows that some defendants receive a sentence at trial that is up to ten times more severe than defendants with similar charges and backgrounds who decide to plead guilty.<sup>63</sup> The results of this study echo these findings, with defendants articulating concern for the risk associated with taking their case to trial. Many defendants felt as if they were receiving a “break” or a

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<sup>62</sup> See sources cited *supra* note 18.

<sup>63</sup> See Brian D. Johnson et al., *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737 (2008); Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959 (2005); McCoy, *supra* note 22; Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145 (2001); Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOC. REV. 705 (2000); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733 (2001); Celesta A. Albonetti, *An Integration of Theories to Explain Judicial Discretion*, 38 SOC. PROBS. 247 (1991); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289 (1985); Ruth D. Peterson & John Hagan, *Changing Conceptions of Race: Towards an Account of Anomalous Findings of Sentencing Research*, 49 AM. SOC. REV. 56 (1984).

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“good deal” and were not willing to take the chance that they may be acquitted or receive a more lenient sentence from a judge or jury at trial.

An important finding of this research is the influence that misunderstanding has on the decision-making process of defendants. The findings of this study illustrate that defendants arrive at the decision to plead guilty through a series of justifications that are influenced by the strain of making a quick decision and a lack of understanding about plea bargaining, court procedures, and the implications of sentencing outcomes. Although defendants’ decisions to plead guilty may be adequately described by an efficiency or uncertainty avoidance perspective, the final decision to accept a plea is influenced by a combination of factors that include guilt, time and financial concerns, and fear. These considerations are mediated by a lack of understanding of the legal procedures and language associated with the court system.

Notably, this study is the first to examine plea bargain decision-making through interviews with defendants. In doing so, the findings advance our understanding of how defendants arrive at the decision to plead guilty and contribute to knowledge about whether defendants perceive the plea process and outcome as fair. Prior research argues that individuals who perceive case proceedings as fair are more likely to view outcomes as fair and report overall satisfaction with their court experience.<sup>64</sup> Also, procedures that provide defendants with the opportunity to have a voice and participate in the decisions made in their case are more likely to feel fairly treated, respected, and valued by court actors.<sup>65</sup> In this study, however, most defendants did not report a sense of participation in their case; yet, over two-thirds of defendants perceived both the plea procedures

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<sup>64</sup> CASPER, *supra* note 24; Casper, *supra* note 13.

<sup>65</sup> Christopher Campbell et al., *supra* note 51, at 759; Casper, *supra* note 13.

and outcome of their case as fair. In fact, most defendants spoke positively about the outcomes of their case and believed that they received sanctions that were deserved and less severe than they had anticipated. Defendants perceived their court experience as fair because it mirrored other defendants' experiences; for the most part, defendants felt that they were all treated the same, for the good and the bad.

Yet, defendants in this study did not necessarily feel that they were treated well or fairly by their public defenders. Defendants who expressed both positive and negative perceptions of public defender behavior, however, attributed the behavior to the social and situational circumstances of the courts. Attribution theories argue that people make distinctions between persons and their social situations.<sup>66</sup> Social attributions occur when individual behavior is interpreted in terms of situational forces and, particularly, when an individual is a member of a group. For example, Vincent Yzerbyt and Anouk Rogier argue that “social attribution is especially likely to be at work when perceivers believe that they are confronted with a clear social entity, a coherent whole,” and that social attribution is “of paramount importance for the rationalization and justification function of stereotypes.”<sup>67</sup> Defendants in this study attributed the behaviors of public defenders to the “system”—public defender behavior is therefore a consequence of being a worker in “The Public Defender’s Office” which is funded by “The State” or “The System.” The legitimacy of public defenders as figures of authority

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<sup>66</sup> See generally Daniel T. Gilbert, *Ordinary Personology*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 89 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998).

<sup>67</sup> Vincent Yzerbyt & Anouk Rogier, *Blame It on the Group: Entitativity, Subjective Essentialism, and Social Attribution*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 103, 105 (John T. Jost & Brenda Major eds., 2001).



is contextualized by defendant beliefs about the court system. Defendants viewed public defenders as acting legitimately or, at the very least, consistently in this social context—i.e., eager to plead defendants guilty, disinclined to give them much time, and not concerned about their welfare. In this regard, although defendants do not trust the motives of public defenders—because they are dictated by the system—they trust that they will receive the legal representation of an overburdened public defender.

Importantly, defendant attitudes toward the procedures and outcome of their case are not necessarily contingent on perceptions of fairness or trust of public defenders. Defendants do not feel as if they receive fair treatment or necessarily trust public defenders to represent their best interests, but they express satisfaction with the plea process and outcomes. Process-based models of regulation state that defendants who lack confidence in their lawyer are not only likely to harbor negative feelings about the law but are also more likely to resist the lawyer's and court's advice regarding the implications of future non-law-abiding behavior.<sup>68</sup> Past research notes that defendants often lay full blame for the faults of the system on their public defender.<sup>69</sup> The findings of this research, however, argue that defendants contextualize the behaviors of their public defender. Public defenders are criticized and often blamed by defendants, but they are also seen as part of a larger system that is out of both the public defender's and the defendant's control. Thus, the legitimacy of the criminal justice system is questioned by defendants more so than

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<sup>68</sup> TYLER & HUO, *supra* note 31; Tyler, *supra* note 31, at 311; Sunshine & Tyler, *supra* note 31, at 515; Tyler & Wakslak, *supra* note 31, at 259.

<sup>69</sup> CASPER, *supra* note 24, at 85; Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 11 AM. B. FOUND. RES. J. 253, 258 (1986); Casper, *supra* note 55, at 6.

the actual behaviors of public defenders and the relationships they establish with defendants.

Defendant evaluations of the courts are also not necessarily contingent on their experiences and evaluations of law enforcement. Research consistently finds that poor individuals, especially minorities, embrace negative attitudes about police, which is based on personal experiences and the experiences of others in their community.<sup>70</sup> Many scholars argue that legal perspectives are created through interactions with law enforcement; negative perceptions of police practices spill over to other areas of the criminal justice and political systems.<sup>71</sup> Yet, this may not always be the case. In this project, defendants spoke unexpectedly and at length about police misconduct. Defendants complained first and foremost about their treatment by police and the fairness of the charges against them. This is to say that, for the most part, defendants blamed law enforcement for their status as a defendant in a criminal case and subsequently viewed the courts as “just doing their job.” This finding may be negative or positive depending on how it is interpreted. On the one hand, defendants can differentiate between criminal justice institutions, their role in their criminal process, and their treatment by criminal justice personnel, indicating that the legitimacy of the criminal justice and political systems are not necessarily always overshadowed by the actions of law enforcement. On the other hand, this finding may indicate that the poor may be so disillusioned by police practices that they can only interpret court experiences

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<sup>70</sup> Elaine B. Sharp & Paul E. Johnson, *Accounting for Variation in Distrust of Local Police*, 26 JUST. Q. 157, 159–60 (2009); Hurwitz & Peffley, *supra* note 37, at 781; Weitzer & Tuch (2002), *supra* note 37, at 442–43; Weitzer & Tuch (1999), *supra* note 37, at 502; Scaglione & Condon, *supra* note 37, at 486, 489.

<sup>71</sup> TYLER, *supra* note 42, at 95; Bobo & Thompson, *supra* note 32, at 447; Bobo & Johnson, *supra* note 38.

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as more positive than their experiences with the police.

In generalizing these findings to the total population of defendants, we note that this research relies only on adult criminal defendants located in a mid-sized Midwestern town. Defendants in smaller or larger areas may have different court experiences. Sentencing guidelines also vary by state, and, as the first state to implement determinant sentencing, Minnesota may not reflect the practices of states that still rely on indeterminate sentencing practices. Sentencing rules and guidelines may, in turn, significantly affect defendant experiences and decisions. For example, defendants in Hennepin County speak openly about situating their decisions and experiences within the boundaries of the Minnesota Sentencing Guidelines (i.e. “the grid”). Therefore, while defendants may not feel satisfied with their outcome, they feel fairly treated because they assume that guidelines guarantee that similar defendants receive similar outcomes.

At the same time, this research includes only those defendants who are represented by a public defender. Individuals represented by public defenders are the largest and most socially disadvantaged population of defendants in the criminal courts. Unlike indigent defendants, affluent defendants may be more likely to hire a private attorney and afford the costs of childcare and time away from work, which defendants in this study indicated as key considerations to accepting a plea of guilty. More affluent individuals are also less reliant on governmental assistance, which often stipulates that an individual may not receive assistance if they have a criminal conviction. Due to these differences in circumstances, it is likely that the decision-making considerations and processes of defendants in this research are different than the population of defendants who are not represented by public defenders.

Despite the limitations of this research, the implications are significant. This research shows that

defendants plead guilty because they are confused, scared, and feel coerced. Since plea bargaining was first implemented over a century ago, scholars have argued that the process creates a coercive atmosphere for defendants—defendants feel that they have to plead guilty or risk receiving a more severe sentence at trial, even if they are innocent.<sup>72</sup> The findings of this research support this argument, with defendants expressing fear of taking their case to trial. Even those defendants who originally enter a plea of not guilty with the intention to pursue a trial ultimately plead guilty out of fear that the outcome at trial might result in more significant consequences. While Minnesota does not have a strict guideline rule that reduces sentences for those who plead guilty, public defenders rely heavily on sentencing guidelines and grids to illustrate minimum and maximum sentences to defendants. Public defenders may not insist that defendants take a plea bargain; however, they do adamantly remind defendants that if they do not accept a plea, they may go to trial and receive the maximum sentence. In the most direct situations, defenders openly inform defendants that the judge has indicated that if they take the case to trial, that they will be given the maximum sentence allowed by law.

Our findings also indicate that fairness is not monolithic and can take on different meanings across individuals who are accused of a crime. For example, defendants in this study were most likely to associate the even distribution of justice—outcomes and procedures—with fairness. This finding is contrary to research by Tyler and colleagues that found that defendants did not define their experience based on their ability to participate and have input in the procedures of their

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<sup>72</sup> Bowers, *supra* note 22, at 1120; McCoy, *supra* note 22, at 69; Bibas, *supra* note 7, at 2531; Langbein, *supra* note 10, at 16 (citing *People v. Byrd*, 162 N.W.2d 777, 787 (Mich. Ct. App. 1968) (Levin, J., concurring)).

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case.<sup>73</sup> Most frequently, defendants relied on the fair application of the law in their case. This result is particularly compelling when considered in light of research showing disparity in arrests and sentencing severity between black and white individuals and, particularly, those charged with drug and property offenses.<sup>74</sup> This finding may be less surprising, however, when we consider that the poor are far more likely to be the subject of unfair and discriminatory treatment on a daily basis and in their own communities. As Merry argues, most lower-class Americans believe that society is unfair, unjust, and that everyone's rights are not equally protected.<sup>75</sup> Therefore, when poor defendants receive unsatisfactory treatment from the courts, they are not alienated—they are perhaps not even aware of being treated unfairly—because the experience is similar to experiences with other state actors and institutions.<sup>76</sup> As some of the most socially marginalized individuals in our society, poor defendants do not expect to have a voice or to receive the same treatment as individuals with more social status. They do not have the expectation that law officials will give them and their story adequate consideration, and they do not consider criminal courts as a space in which their self-value and identity is defined.

Perhaps the most important implication of this

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<sup>73</sup> LIND & TYLER, *supra* note 27, at 216; Tyler & Bies, *supra* note 54, at 89.

<sup>74</sup> DORIS MARIE PROVINE, *UNEQUAL UNDER THE LAW: RACE IN THE WAR ON DRUGS* (2007); WESTERN, *supra* note 36, at 50.

<sup>75</sup> Sally E. Merry, *Concepts of Law and Justice Among Working-Class Americans: Ideology as Culture*, 9 LEGAL STUD. F. 59, 68–69 (1985).

<sup>76</sup> JOE SOSS ET AL., *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* 181 (2011); COLE, *supra* note 36, at 8; Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 374 (1990).

research, therefore, is that criminal justice reforms are needed to ensure the rights of indigent defendants. Once indigent defendants are swept into the criminal courts, they are required to navigate a system that they do not understand. Defendants are required to make quick decisions that have significant implications on their lives, families, and communities; however, their decisions are bounded by limited information and an incomplete comprehension of the procedures and meanings of sentences. Plea bargaining allows agents of the court to move through cases quickly and rationalize that plea bargains are fair because defendants make the decision to plead guilty. This research shows that we should not presume such a simplistic and idealistic conclusion. Future research should consider how we can strengthen the position of defendants by providing defendants access to dispositional advisors, or staff that are available to counsel defendants about their decision-making processes. If courts are not capable of providing defendants adequate representation and informed decision-making, this research suggests that we need to reconceptualize the meaning of “fairness” in the court system.

Finally, this research speaks to the current state of our criminal courts and their reliance on the plea process. Over the past few decades, scholars have focused on sentencing, incarceration, and the reentry of prisoners, to the neglect of investigations into indigent defense representation and the processes of criminal courts. The lack of attention to and investment in ensuring the rights of defendants and the quality of legal representation is startling considering the continued support for “tough on crime” policies that increase the stakes for a staggering number of individuals whose lives are affected by the courts. Yet, and in despite of these changes, this research offers evidence that indicates that defendant attitudes have remained relatively stable over time. In particular, the results of this research complement early studies of defendants. In the 1970s,

Casper noted that not only did defendants speak positively about the plea process, but that most defendants preferred to “cop out” and accept a plea: “the defendant doesn’t see himself as giving up anything of great value: he is simply speaking words, and they don’t seem to mean very much.”<sup>77</sup> Although interactions with the criminal justice system and the severity of sanctions have increased, it does not appear to be the case that defendant experiences or expectations of what the courts can offer has changed much at all.

Future research and policy reforms should focus attention to increasing defendants’ understanding of their court experiences. We should also consider how defendant attitudes towards the fairness of their procedures and outcomes vary over time. As time passes, defendants may learn new information about court processes or experience the ramifications of their disposition in different ways. Consequences of criminal cases that have additional impacts over time may lead people to reconsider their fairness evaluations. As one defendant indicated, “At the time it was really about being fair. I mean, I don’t really know looking back on it if I consider it to be a fair deal. But at the time, it was just kinda like . . . what I get is what I get type of thing.”

This research offers a unique and important perspective of our courts. In doing so, it begs the question whether we should be expecting more from our courts or be satisfied to know that most defendants perceive their treatment as “fair enough.” In many regards, it is possible that most defendants cannot even conceptualize what “justice” might look like in the court system, given that the majority are represented by attorneys who are overworked, underpaid, and have little time to give adequate attention to each case. Given the infrequency of trials, most defendants have no point of comparison to the plea process. This is difficult to assess, but it is

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<sup>77</sup> CASPER, *supra* note 24, at 85.

conceivable that if we increased our expectations of fair treatment by law enforcement and other institutional actors, the standards of court experiences would not be set so low. This research asserts that most defendants are satisfied with the procedures and outcomes of their cases, but it does not imply that defendants perceive the court system to care about their well-being or the implications of court sanctions on their lives.