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Reported Experiences with Plea Bargaining: A Theoretical Analysis of the Legal Standard

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REPORTED EXPERIENCES WITH PLEA BARGAINING: A THEORETICAL ANALYSIS OF THE LEGAL STANDARD

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ABSTRACT

Although the majority of criminal cases in the United States are settled with plea bargains, very little empirical evidence exists to explain how defendants make life-altering plea bargain decisions. This Article first discusses the psychological factors involved in plea bargaining decisions. Next, this Article empirically examines the factors involved in plea decisions of real-life defendants within the legal and psychological contexts. Finally, this Article highlights the psychological issues that need to be further examined in plea-bargaining literature.

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I. INTRODUCTION

As Justice Anthony M. Kennedy observed in *Lafler v. Cooper*, "criminal justice today is, for the most part, a system of pleas, not a system of trials."[1] Despite the Constitution's promise of trial to all defendants, plea bargaining has nearly completely eclipsed the trial system: in 2018, 97.4% of federal cases were resolved through a plea bargain rather than trial.[2] In expressing its approval of plea bargaining, the Supreme Court extolled the plea-bargaining system as beneficial to prosecutors, defendants, and courts.[3] However, as the American legal system comes to rely ever more heavily on pleas over trials, prosecutors, defense attorneys, and judges alike must carefully consider the question of whether the plea-bargaining process can ever be as defendant-friendly as the Supreme Court claimed in *Brady v. United States*. Because little empirical work has examined defendants' experiences of plea bargaining from the defendants themselves, this question has long gone unanswered.

This Article examines how psychological factors influence the plea-bargaining decision process. In Part II, we discuss current plea-bargaining standards, with a particular focus on whether the standards are sufficient to ensure that the plea-bargaining system is truly fair to defendants. In Part III, we examine the psychological factors influencing plea decisions, with a particular focus on Fuzzy Trace Theory ("FTT"). We discuss the insights that FTT's theory of reasoning can offer the study of plea decisions under the current legal standards. In Part IV, we present results from a study evaluating actual defendants' reasons for pleading guilty and whether their pleas were truly knowing and voluntary. Lastly, in Part V, we discuss potential policy solutions to create a fairer plea-bargaining system.

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1 132 S. Ct. 1376, 1388 (2012).

2 U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET 4 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/1c18.pdf. Note, these statistics come from the 2018 fiscal year, not calendar year.

3 Brady v. United States, 397 U.S. 742, 753 (1970) ("[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.").

II. CURRENT LEGAL STANDARDS OF PLEA BARGAINING

Plea bargaining has been an integral part of the United States' criminal justice system for decades, and the Supreme Court officially embraced the practice in 1970 in *Brady v. United States*.[4] The *Brady* Court legitimized plea bargains largely because of its belief that guilty pleas are beneficial to prosecutors, defendants, and courts.[5] Defendants, theoretically, reap the obvious benefit of a reduced sentence as a result of accepting a plea.[6] The prosecution benefits by securing an easy conviction; prosecutors have enormous discretion in choosing which cases to plead and which charges to offer,[7] and plea bargains relieve prosecutors of their burden to prove the defendant guilty beyond a reasonable doubt. To be sure, in theory, such bargains ought to reflect the balance of evidence but avoiding a trial abrogates the need to spell out that evidence for public scrutiny. Finally, the defense, prosecution, and court alike are spared the time, hassle, and general effort of slogging through a time-consuming trial.

In accepting a guilty plea, a defendant waives several constitutional rights: the right against self-incrimination, the right to trial by a jury represented by an attorney, and the right to confront accusers.[8] However, the criminal justice system provides some protection for defendants—specifically, the record must demonstrate that defendants enter into guilty pleas knowingly (or intelligently) and voluntarily.[9] If the guilty plea is not entered knowingly and voluntarily, the plea violates due process.[10] In addition, a plea is only valid if a defendant is competent to enter into the plea deal at the time of the plea.[11]

Defendants are offered some degree of protection by Rule 11 of the Federal Rules of Criminal Procedure, which requires courts to determine whether the defendant in fact understands the constitutional rights that they forfeit by

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4 397 U.S. 742 (1970).

5 *Id.* at 753 ("[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.").

6 Blackledge v. Allison, 431 U.S. 63, 71 (1977).

7 *See* LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 2 (2011) ("The plea bargaining process has been criticized for allowing prosecutors too much discretion compared with judges, who are held to concise sentencing guidelines.").

8 McCarthy v. United States, 394 U.S. 459, 466 (1969).

9 *Id.*

10 *See id.*; *see also, e.g.*, Santobello v. New York, 404 U.S. 257, 261–62 (1971); United States v. Masthers, 539 F.2d 721, 725–26 (D.C. Cir. 1976), *abrogated by* Godinez v. Moran, 509 U.S. 389 (1993).

11 *See McCarthy*, 394 U.S. at 466.

accepting a guilty plea.[12] Judges must inform defendants of their right to plead not guilty and proceed to trial, the nature of the charges against them, and the possible minimum and maximum sentences.[13] In addition, courts must determine that there is a factual basis for the guilty plea[14]—in other words, the judge must be satisfied that the facts, conveyed either by the defendant's own admission or the prosecutor's evidence, indicate that the defendant is, in fact, guilty. Defendants may withdraw a plea prior to the court's acceptance of it, or prior to the imposition of sentence if the court rejects the plea under 11(c)(5);[15] or the defendant can show a fair and just reason for the withdrawal.[16]

Nevertheless, the plea-bargaining system has not operated in the "benefits-for-all" spirit envisioned by the *Brady* Court. Over time, the benefits and protections for defendants in the plea-bargaining system have gradually eroded, mainly through the Supreme Court's interpretation of the "knowing and voluntary" requirement.

A. "Knowingly" or "Intelligently"

Under *Brady*, plea bargains must be made "knowingly" or "intelligently."[17] A plea will be considered "knowing" or "intelligent" (the *Brady* Court used both terms to mean the same thing) if the record reflects that the defendant is "fully aware of the direct consequences" of the plea.[18] The record must indicate that the defendant knows and understands the constitutional rights that they forfeit by accepting a plea and that the defendant understands the nature of the charges against them.[19]

However, the Supreme Court has construed the "knowing" requirement very loosely, requiring defendants to have very little *actual* understanding of the plea, the crime to which they are pleading guilty, or the rights that they forfeit by accepting a plea.[20] Understanding the "consequences" of a guilty plea can mean simply that the defendant is aware of the offense charged and the maximum sentence for that offense.[21]

Frequently, however, the bar for knowledge is not even as high as awareness of possible sentences. For example, the Supreme Court has considered

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12 FED. R. CRIM. P. 11(b).

13 FED. R. CRIM. P. 11(b)(1).

14 FED. R. CRIM. P. 11(b)(3).

15 FED. R. CRIM. P. 11(c)(5).

16 FED. R. CRIM. P. 11(d).

17 Brady v. United States, 397 U.S. 742, 758 (1970).

18 *Id.* at 755.

19 *See* FED. R. CRIM. P. 11(b)(1)(G); 11(g).

20 Robert Schehr & Chelsea French, *Mental Competency Law and Plea Bargaining: A Neurophenomenological Critique*, 79 ALB. L. REV. 1091, 1098–99 (2016).

21 United States v. Guerra, 94 F.3d 989, 995 (5th Cir. 1996).

a plea knowing and intelligent as long as a defendant receives "real notice of the . . . charge[s] against him."[22] Whether the defendant actually understands the charges is another matter altogether—a plea may be knowingly made even if the defendant does not comprehend the meaning of the charges.[23] In *Brady*, the Court found that the defendant's plea was intelligent simply because the defendant had a competent lawyer, he was aware of the charge against him, and he was competent to stand trial.[24] Further, even if a defendant does not understand the specific elements of an offense, a plea may still be considered knowing as long as the record affirms that a defendant's attorney explains the elements of the charge to the defendant. In *Bradshaw v. Stumpf*,[25] because the record demonstrated that the defendant's attorney had explained the elements of the charge to the defendant, the defendant's plea to aggravated murder was considered knowing even though the defendant claimed that he did not understand the specific intent requirement.[26]

B. "Voluntarily"

The second requirement under *Brady* is that a plea agreement must be voluntary.[27] The Supreme Court set forth the standard for voluntariness in *Boykin v. Alabama*.[28] Pleas may not be influenced by threats or coercion, and the plea must be an "intentional relinquishment of constitutional rights."[29] In securing a plea, prosecutors may not employ misrepresentations, "actual or threatened physical harm," or "mental coercion overbearing the will of the defendant."[30]

Boykin established that the standard to determine whether a guilty plea is voluntarily made (i.e., that a defendant has voluntarily waived their right to a trial) is the same as the standard to determine whether a suspect has made a valid waiver of the right to counsel, which requires that the record show that the suspect was offered counsel but intelligently rejected the offer; a waiver may not be presumed from a silent record.[31] In applying this standard to plea bargains, the record must show that the defendant understood the constitutional rights that they were giving up, the nature of the charge against them, and the mandatory

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22 Bousley v. United States, 523 U.S. 614, 618 (1998).

23 Schehr & French, *supra* note 20, at 1098.

24 Brady v. United States, 397 U.S. 742, 756 (1970).

25 545 U.S. 175 (2005).

26 *Id.* at 182–83.

27 *Brady*, 397 U.S. at 748.

28 395 U.S. 238 (1969).

29 Schehr & French, *supra* note 20, at 1099 (citing *Boykin*, 395 U.S. at 243).

30 *Brady*, 397 U.S. at 750.

31 *Boykin*, 395 U.S. at 242–43.

minimum and statutory maximum sentences.[32] In other words, the defendant must choose to waive their constitutional rights.[33]

Like knowledge, voluntariness as currently implemented is a very low hurdle for prosecutors to overcome. In practice, in order to establish a showing of voluntariness on the record in accordance with Federal Rule of Criminal Procedure 11(b)(2), the defendant must simply affirm to the judge that "the plea is voluntary and did not result from force, threats, or promises (other than promises in [the] plea agreement)."[34] A guilty plea will be considered voluntary as long as the record contains no evidence that a defendant was threatened or coerced into accepting the plea.[35] The Supreme Court established a low standard for coercion in *Bordenkircher v. Hayes*[36]: as long as a defendant is free to accept or reject a prosecution's offer, a prosecutor generally may overcharge a defendant in order to then offer a plea deal that the defendant will be unable to refuse.[37]

Moreover, the Supreme Court, along with lower federal courts, has established contradictory law on the exact definition of "coercion." Despite the *Boykin* Court's mandate that plea offers must be free from threats, prosecutors are permitted to threaten a defendant with a harsh punishment at trial in return for refusing to accept what would seem to be a relatively lenient plea; the Supreme Court has acknowledged that pleas accepted under threat of a disproportionate punishment at trial still satisfy the voluntariness requirement.[38] For example, pleas have been ruled constitutional even when the prosecutor threatens the defendant with deportation to Guantanamo Bay,[39] prosecution of a family member,[40] or even seeking the death penalty.[41] In fact, in *Corbitt v. New Jersey*,[42] the Supreme Court held that offering a lenient plea under threat of a harsh trial sentence did not amount to a penalty for exercising the constitutional

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32 Schehr & French, *supra* note 20, at 1099.

33 *Id.*

34 FED. R. CRIM. P. 11(b)(2).

35 *See Brady*, 397 U.S. at 754–55.

36 434 U.S. 357 (1978).

37 *Id.* at 363.

38 *See, e.g.*, United States v. Forrest, 402 F.3d 678, 690–91 (6th Cir. 2005); Hays v. United States, 397 F.3d 564, 569–70 (7th Cir. 2005); United States v. Williams, 47 F.3d 658, 662 (4th Cir. 1995).

39 United States v. Faris, 388 F.3d 452 (4th Cir. 2004).

40 *See, e.g.*, United States v. Spilmon, 454 F.3d 657, 658–59 (7th Cir. 2006); United States v. Hodge, 412 F.3d 479, 488–89, 492 (3d Cir. 2005); United States v. DeFusco, 949 F.2d 114, 119 (4th Cir. 1991); United States v. Marquez, 909 F.2d 738, 741, 743 (2d Cir. 1990); United States. v. Buckley, 847 F.2d 991, 1000 n.6 (1st Cir. 1988); United States v. Diaz, 733 F.2d 371, 373, 375 (5th Cir. 1984); United States v. Usher, 703 F.2d 956, 958 (6th Cir. 1983).

41 Parker v. North Carolina, 397 U.S. 790, 794–95 (1970).

42 439 U.S. 212 (1978).

right to trial.[43] The Court established that due process and equal protection do not protect a defendant who simply made a "bad assessment of risks" in making a plea decision,[44] although the most basic definition of informed choice relies on an adequate assessment of risks. The *Corbitt* decision gives prosecutors free rein to threaten defendants with harsh sentences at trial in order to secure a plea deal, all without violating the voluntariness mandate.

C. "Competent"

In addition to the *Brady* knowing, voluntary, and intelligent standard, the Court has also required that plea decisions be competent. Defendants who are found legally incompetent cannot be convicted and therefore cannot plead guilty.[45] The Supreme Court has established that the requirements for competency to stand trial, articulated in *Dusky v. United States*,[46] also apply to competency to accept a plea.[47] Under *Dusky*, a defendant is competent if he has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[48] In *Godinez*, Justice Clarence Thomas set forth the differences between the competency standard and plea bargaining's knowing and voluntary requirement:

> The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the "knowing and voluntary" inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision . . . .[49]

Even when considered together, however, both the competency standard and the knowing and voluntary requirement are too easy to meet. A defendant's ability to consult with his lawyer and understand the proceedings against him is not enough to establish that the defendant is capable of making a plea decision that aligns with his values, his best interest, or even his true underlying preferences. Further, as discussed previously, the knowing and voluntary requirement does not actually measure whether the defendant understands the

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43 *Id.* at 226. Although the Court recognized that a plea is knowing and voluntary only if the defendant understood the charges and chose to enter the plea absent threats or coercion, harsh trial penalties were not considered to be coercive.

44 *Id.*

45 *See, e.g.*, Pate v. Robinson, 383 U.S. 375, 378 (1966) ("[T]he conviction of an accused person while he is legally incompetent violates due process.").

46 362 U.S. 402, 402 (1960).

47 Godinez v. Moran, 509 U.S. 389, 391 (1993).

48 *Dusky*, 362 U.S. at 402 (internal quotation marks omitted).

49 *Godinez*, 509 U.S. at 401 n.12 (internal citations omitted).

consequences of a plea decision. Rather, the requirement measures only the judge's perception of whether a defendant's plea bargain options have been sufficiently explained that the defendant *should* understand it.

III. PSYCHOLOGICAL INFLUENCES ON PLEA DECISIONS

There are many reasons why a person may accept a plea bargain. From a justice perspective, they might take a plea to receive reduced charges and lenient sentencing,[50] avoid severe punishment,[51] or for efficiency and cost reasons.[52] However, there are also social-cognitive psychological reasons. On the social side, factors such as influence from a defense attorney,[53] court,[54] or prosecutor can factor into decisions. Cognitively, factors such as uncertainty avoidance,[55] lack of understanding of consequences,[56] and processing style[57] have been found to influence plea decisions. One theory that explains cognitive factors involved in the plea-bargaining process is Fuzzy Trace Theory. FTT, a theory of memory and decision-making that explains developmental and individual differences in cognitive processing,[58] suggests that adolescents may not be competent to make plea decisions under the current legal standard even though they are capable of logical reasoning.[59]

A. Fuzzy Trace Theory ("FTT")

Fuzzy Trace Theory is a psychological theory of decision-making that explains how information is processed and how people apply values when

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[50] Allison D. Redlich, Stephanos Bibas, Vanessa A. Edkins, & Stephanie Madon, *The Psychology of Defendant Plea Decision Making*, 72 AM. PSYCH. 339, 342 (2017).

[51] Kenneth S. Bordens & John Bassett, *The Plea Bargaining Process from the Defendant's Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCH. 93, 95, 106 (1985).

[52] MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30 (Russell Sage Found. 1979).

[53] Jeanette Hussemann & Jonah Siegel, *Pleading Guilty: Indigent Defendant Perceptions of the Plea Process*, 13 TENN. J.L. & POL'Y 459, 496 (2019).

[54] Redlich et al., *supra* note 50, at 345.

[55] Hussemann & Siegel, *supra* note 53, at 486.

[56] Allison D. Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCH., PUB. POL'Y, & L. 626, 640 (2012).

[57] Rebecca K. Helm & Valerie F. Reyna, *Logical but Incompetent Plea Decisions: A New Approach to Plea Bargaining Grounded in Cognitive Theory*, 23 PSYCH., PUB. POL'Y, & L. 367, 368–370, 372 (2017).

[58] Valerie F. Reyna & Charles J. Brainerd, *Dual Processes in Decision Making and Developmental Neuroscience: A Fuzzy-Trace Model*, 31 DEV. REV. 180, 186 (2011).

[59] Helm & Reyna, *supra* note 57, at 378.

making decisions that involve risk and uncertainty.[60] According to FTT, information is encoded in two ways: verbatim-based processing and gist-based processing.[61] Verbatim processing is the processing of surface-level details, such as specific words, numbers, or probabilities.[62] Gist processing is the processing of bottom-line, big-picture meaning—substantive information irrespective of exact, trivial details.[63] Research on FTT has shown that decision-makers extract both verbatim and gist mental representations roughly in parallel, but most adults rely more on the gist.

Individuals who rely primarily on gist-based processing and those who rely relatively more on verbatim-based processing can make decisions that involve risk, but they do so in different ways. As the parallel extraction assumption of FTT makes clear, there is no such thing as a purely verbatim or purely gist thinker, but, for ease of exposition, we will contrast them: verbatim thinkers rely on a precise tradeoff of the risks and rewards provided in a decision because, by definition, verbatim representations capture such details.[64] In contrast, gist thinkers process the essence of information—its bottom-line meaning—which then is mentally represented in a form that can make contact with mental representations of core values that are important in a decision.[65] For example, mentally representing a decision as "some chance of having a life as opposed to not having a life" (i.e., avoiding a sentence of life in prison without parole) cues (or reminds) the decision-maker of the value stored in long-term memory that some life is better than none.

The difference in the way a verbatim and gist-based thinker would make decisions results in two consequences. First, verbatim-based thinkers are more likely to take risks when objective outcomes have high benefits and low risks. This tendency contrasts with that of most adults who, for instance, tend to avoid a risky gain even when it involves substantially higher rewards than a sure gain (e.g., as illustrated in the Allais paradox).[66] Many common public health and

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60 Valerie F. Reyna, *A Scientific Theory of Gist Communication and Misinformation Resistance, with Implications for Health, Education, and Policy*, 118 PROC. NAT'L ACAD. SCI. U.S. (2021), https://www.pnas.org/content/pnas/118/15/e1912441117.full.pdf.

61 Helm & Reyna, *supra* note 57, at 368.

62 Valerie F. Reyna, *A New Intuitionism: Meaning, Memory, and Development in Fuzzy-Trace Theory*, 7 JUDGMENT & DECISION MAKING 332, 333 (2012).

63 *Id.*

64 *See id.* at 350.

65 *See id.* at 351.

66 The Allais paradox is a classic decision-making paradigm where participants are asked to make choices in hypothetical situations. For example, in the book, THINKING, FAST AND SLOW (2011), Daniel Kahneman provides people with two problems. In Problem A, participants are asked if they would rather have a 61% chance of winning $520,000 or a 63% chance of winning $500,000. In Problem B, participants are asked if they would rather have a 98% chance of winning $520,000 or a 100% chance of winning $500,000. Most people are risk-seeking and choose the greater expected value (option 1) in Problem A, but are risk-averse and choose the lower expected value (option 2) in Problem B. In both problems, the difference between the two options is $20,000

legal risks are of this sort; namely, they involve risk-reward tradeoffs at the individual level that objectively favor risk-taking, but most adults avoid taking these risks. However, under these circumstances, individuals whose processing emphasizes reliance on details—(what we are loosely calling "verbatim-based thinkers") tend towards more unhealthy risk-taking than primarily gist-based thinkers.[67] Second, gist-based thinkers are more likely than verbatim-based thinkers to make decisions that align with their own underlying values.[68]

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and a 2% difference in likelihood, so if human decision-making were rational, people would choose the same option in both problems. Thus, the Allais paradox demonstrates that people tend to be irrational and seek risks in uncertainty but avoid risks in certainty.

[67] Verbatim-based processing is associated with unhealthy risk taking because reliance on precise, fine-grained details encourages risk-taking when the numerical cost is small but the benefits to be gained are large. Valerie F. Reyna et al., *Neurobiological and Memory Models of Risky Decision Making in Adolescents Versus Young Adults*, 37 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY, & COGNITION 1125, 1128 (2011). Rather than focusing on the specific tradeoff, people relying on gist-based processing engage in categorical reasoning (because categorical representations are the simplest gist of risky options, e.g., classifying a behavior as "risky" or "not risky" to distinguish substantial qualitative differences between outcomes). Helm & Reyna, *supra* note 57, at 368. For example, a low probability of infection with the human immunodeficiency virus (HIV), in consideration of high perceived benefits from sexual activity, would lead a person who processes information in a verbatim-based manner to engage in unprotected sex. *See, e.g.*, Mary B. Adam & Valerie F. Reyna, *Coherence and Correspondence Criteria for Rationality: Experts' Estimation of Risks of Sexually Transmitted Infections*, 18 J. BEHAV. DECISION MAKING 169, 173 (2005), https://www.proquest.com/docview/214697004. A person relying on gist-based thinking would simply characterize unprotected sex as risky when it includes a non-negligible possibility of an incurable disease (e.g., HIV-AIDS), and therefore choose not to take that risk, regardless of the numerically low chances of contracting an infection from a particular partner. *See* Valerie F. Reyna & Britain A. Mills, *Theoretically Motivated Interventions for Reducing Sexual Risk Taking in Adolescence: A Randomized Controlled Experiment Applying Fuzzy-Trace Theory*, 143 J. EXPERIMENTAL PSYCH. 1627, 1628 (2014). Similarly, while a person relying on gist-based processing would characterize getting into a car with a drunk driver as risky and choose to walk home, a person relying on verbatim-based processing would view the same situation differently if the odds of getting caught by authorities and the risk of an accident were low (e.g., if the driver were only slightly tipsy). A verbatim thinker will weigh the benefits of getting a ride home rather than having to walk against the low probability of getting into an accident. Because the perceived reward (getting a ride home) is greater than the perceived risk (a low chance of getting into a car crash), a person relying on verbatim-based processing will choose to take the risk and reap the reward. A gist-based thinker (despite considering the same information as the verbatim-based thinker) is more likely to ultimately decide that getting into the car with a drunk driver is risky, despite awareness of the odds of getting in a car crash or the benefits of not having to walk home. Therefore, a gist-based thinker would be more likely to avoid getting in the car altogether (i.e., risk avoidance rather than risk reduction when the latter represents trading off degrees of risk against degrees of reward). Note that FTT does not predict that verbatim-based thinkers are always risk-seeking, nor that gist-based thinkers are always risk-avoiding.

[68] Helm & Reyna, *supra* note 57, at 368. Values such as moral principles are broad and meaning-based (i.e., "gisty") rather than precise (i.e., verbatim). *See* Jun Fukukura, Melissa J. Ferguson & Kentaro Fujita, *Psychological Distance Can Improve Decision Making Under Information Overload Via Gist Memory*, 142 J. EXPERIMENTAL PSYCH. 658, 659 (2013). In contrast, verbatim-based representations are concrete and specific and fade more quickly over time than

Alignment with values is enhanced because values are mentally represented in a gist form that is more effectively cued by gist representations of options.

B. FTT and Plea Bargaining

FTT can shed light on the reasons that even people capable of engaging in logical reasoning may nonetheless be incompetent to make a plea decision as a result of the way they reason.[69] Deciding whether to accept a plea deal is a complicated decision that requires not only an analysis of the costs and benefits of taking a plea versus going to trial but also implementing values (e.g., belief in maintaining innocence; desire to avoid a felony conviction).[70]

1. Gist and Verbatim Reasoning

When deciding whether to accept a plea, there are sometimes quantitative and qualitative factors to consider. (Verbatim thinking is not necessarily quantitative, but, rather, emphasizes superficial details, some of which might be quantitative.) Quantitative factors include the length of the sentence and the probability of conviction at trial, which could objectively favor a decision to plead guilty. However, qualitative factors that are difficult to quantify, such as the difference between a felony and a misdemeanor, jail time and probation, or being factually guilty or innocent, may prove to be more important considerations in a plea decision.[71] Prior research on the influence of cognitive processing on plea decisions suggests that people who employ verbatim-based processing engage in the analysis of a plea decision differently

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long-term gist representations. *See* Valerie F. Reyna & Barbara Kiernan, *Development of Gist Versus Verbatim Memory in Sentence Recognition: Effects of Lexical Familiarity, Semantic Content, Encoding Instructions, and Retention Interval*, 30 DEV. PSYCH. 178, 189 (1994). Therefore, people relying on gist-based processing are more likely to cue their gist-based values because of the similarities of these two representations (an example of the encoding specificity in which like cues like). People who take risks might hold the same values as those who do not take risks, but they do not reliably retrieve their values because their representation of the decision options differs superficially from the generic values stored in long-term memory. A person relying on verbatim-based processing might rely on details, such as the BAC level for being legally drunk (BAC = .08), in place of the gist-based bottom line (any amount of drinking is taking a risk when driving) and associated value, such as "I should not get in a car with a person with a BAC of 0.081" or "I should not get in a car with a person who has had more than four drinks in the past hour." The verbatim representation does not apply to someone with a BAC of 0.0799 or a person who has had three drinks in the past hour. Consequently, a person relying on this verbatim representation may choose to get in a car with someone who has had only three drinks in the past hour, even if they appear visibly intoxicated because his or her verbatim representation of the decision does not match the situation exactly. Therefore, the person does not cue the categorical representation (any amount is bad when driving) that might lead them to avoid risk.

69 Helm & Reyna, *supra* note 57, at 368.

70 *Id.*

71 *Id.*

than those who rely on gist-based processing.[72] Specifically, in those experiments, people relying relatively more on verbatim-based processing relied more on the quantitative aspects of a plea decision than on qualitative, categorical distinctions.[73]

Defendants relying on verbatim-based processing are more likely to make plea decisions that appear quantitatively favorable but are not actually in their best interests. Consider the following example of a defendant who must choose between pleading guilty to a misdemeanor conviction with one year of probation and going to trial to face an 80% chance of a felony conviction with one year of probation.[74] A defendant relying on verbatim-based processing might appear to rely on what looks roughly like a calculation of the expected value of each option in terms of likelihood of conviction and choose the option with the more favorable value (because they trade off degrees of risk against degrees of reward), neglecting the qualitative, categorical distinction between a felony and a misdemeanor.[75] Here, a verbatim-based analysis will lead to a preference for trial because an 80% chance of a one-year sentence is more favorable than a 100% chance of a one-year sentence.[76] However, relying on gist-based processing would lead a defendant to rely on the qualitative distinction between a misdemeanor and a felony, not just taking into account how a felony conviction will have a greater impact on the defendant's life than a misdemeanor conviction, but, rather, that a felony conviction differs categorically from a misdemeanor.[77] A felony conviction is qualitatively different from a misdemeanor conviction, even in instances where the details of a crime and the sentences are similar. Therefore, when a plea involves receiving a misdemeanor versus felony conviction, a defendant relying on gist-based processing will ultimately categorize outcomes and probabilities based on meaningful qualitative distinctions,[78] and, thus, gist-based reasoning promotes accepting the plea and avoiding the risk of a felony conviction.[79]

Qualitative considerations involved in a plea decision are not limited to the distinction between felony and misdemeanor convictions. People who are faced with plea decisions must juggle innumerable other factors. For example, many defendants simply cannot afford to remain in jail awaiting trial and decide

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72 *Id.*

73 *Id.* at 370.

74 Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz, & Rachel Z. Novick, *Too Young to Plead? Risk, Rationality, and Plea Bargaining's Innocence Problem in Adolescents*, 24 PSYCH., PUB. POL'Y, & L. 180, 181–82 (2018).

75 *Id.*

76 *Id.*

77 *Id.*

78 For example, they might categorize both an 80% chance of conviction and a 100% chance of conviction as "high probabilities of conviction."

79 Helm et al., *supra* note 74, at 181–82.

to accept a plea so they do not lose wages or lose their jobs altogether. In addition, defendants who are single parents may choose to accept a plea offer for no other reason than that they need to get out of jail because they have no one else to take care of their children. A person relying on gist-based processing is more likely than a non-gist processor to view options in categorical terms: which option boils down to taking care of family as opposed to not taking care of family. Gist processors are more likely to then cue a core value such as "I must take care of my family" and view such a decision as the difference between "stay in jail and fail to care for my children" or "get out of jail and care for my children." Ironically, as individuals become more cognitively mature (i.e., from childhood to adulthood), they are more likely to process decisions categorically, making trading off core values against potential benefits less likely. Therefore, the cognitively normal adult is unlikely to be able to engage in the cost-benefit analysis presumed in the plea-bargaining system. In the face of such a decision, it is easy to understand why defendants would be vulnerable to coercive plea deals that are not in their best interests—the second option is much more compelling, even in the face of an unfavorable plea offer.

Most importantly, the plea-bargaining system's emphasis on trading off probabilities and outcomes essentially forces a cognitively unnatural decision. According to FTT, adults, particularly those relying on gist-based processing, do not engage in trading off relative magnitudes of risks and rewards in common real-world circumstances that tap core values, such as taking care of family or acquiring (and transmitting) an incurable disease.[80] A plea bargain, however, forces defendants to weigh the consequences of taking the plea, the risk of conviction at trial, and their own values to make a decision in an extremely high-risk situation in which defendants face the possibility of admitting to a crime of which they are innocent, family alienation, or financial ruin. Such a forced tradeoff of risk and reward is cognitively unnatural and consequently produces pleas that are the result of a compelled and impossible decision and therefore do not satisfy *Brady*'s knowing and voluntary requirement.

2. Values

As previously discussed, defendants who rely on verbatim-based processing are more likely to make decisions that do not align with their underlying values.[81] Verbatim-based decisions do not access their core values as

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80 *See, e.g.*, Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 PSYCH. SCI. PUB. INT. 1, 32 (2006). For example, even though becoming pregnant or contracting an STD is not a guaranteed consequence of having unprotected sex, the admonition that "it only takes once" is usually enough to dissuade an adult from taking such a risk. In the same vein, even though a lengthy prison sentence is not a guaranteed consequence of going to trial instead of taking the plea, adults will choose not to take the risk of going to trial and accept the plea even if doing so contradicts their values, desires, or best interests.

81 Helm & Reyna, *supra* note 57, at 369.

easily when making a decision[82]—in other words, in a deeper sense, they do not "truly" want to make the decision and indeed would choose a different option if they were relying on gist-based processing. In the plea-bargaining context, this phenomenon can mean that people relying on verbatim-based processing might make decisions that are not consistent with their fundamental values. For example, both gist-based and verbatim-based decision-makers might indicate that they would not want to plead guilty to a crime they did not commit. But, people relying on gist-based processing are more likely to refuse a plea in a hypothetical scenario in which they are not guilty than those relying on verbatim-based processing.[83] The importance that verbatim-based thinkers place on the moral principle "I would not plead guilty to a crime I did not commit" is less likely to be reflected in their hypothetical plea-bargain decisions—they are less likely to refuse a plea when innocent even if they strongly believe that they do not wish to plead guilty to a crime they did not commit.[84]

3. Knowing, Intelligent, Voluntary, and Competent

Differences in processing styles raise serious questions about whether all plea decisions actually meet the legally-mandated standard. Specifically, according to FTT, a verbatim-based processor will consider only the precise details in their reasoning, which may result in a plea decision inconsistent with the defendant's underlying values and preferences.[85] If a defendant makes a plea decision counter to their true values and preferences purely as a result of their cognitive processing style—especially considering that neither they nor their lawyer is aware that a type of cognitive processing may be supporting the decision—it is difficult to rationalize the plea as knowing or intelligent in accordance with *Brady*. Further, people relying on gist-based processing may also be vulnerable to a coercive and unfair plea offer. As discussed above, prosecutors can offer compelling plea deals—particularly pleas to time served—that reduce a defendant's bottom-line options to "get out of jail now" versus "stay in jail until trial."

IV. THE PRESENT STUDY

The present study empirically investigated the psychological factors influencing plea bargaining decisions and assessed how the legal standard applies to real-life plea decisions. Specifically, we were interested in (1) what

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82 *See* Kentaro Fujita & H. Anna Han, *Moving Beyond Deliberative Control of Impulses: The Effect of Construal Levels on Evaluative Associations in Self-Control Conflicts*, 20 PSYCH. SCI. 799, 799 (2009) ("Despite having a remarkable capacity for logical reasoning, people frequently make decisions that undermine their valued goal.").

83 Helm & Reyna, *supra* note 57, at 372.

84 *Id.*

85 *Id.* at 370.

people say influences their plea-bargaining decision and (2) whether the decisions to plead were knowing, voluntary, and competent.

The study surveyed 43 adjudicated people who had previously been offered a plea for a felony charge.[86] Participants were asked questions about the crime for which they were offered the plea, their perceptions of their choices, their knowledge about plea bargaining, the role of their attorney in their decision, and their feelings about the plea. All participants indicated that they had been offered a plea bargain that would give a lesser penalty than their worst possible trial outcome (i.e., a plea discount), and 87% ultimately accepted the plea,[87] similar to observed rates in the legal system.[88] Questions were open-ended and informative, regardless of our theoretical framework, while simultaneously allowing us to examine key theoretically motivated hypotheses.

A. Perception of Risk and Reasoning

First, we examined the factors that influenced defendants' plea-bargaining decisions.[89] Participants' responses in the present study demonstrated that they were aware of costs and benefits when deciding whether to accept a plea offer and for those that addressed the consequences of losing at trial, taking a plea bargain was likely a rational decision. In fact, one participant explicitly stated "[accepting the plea] was the rational option."

For example, one participant charged with a sex offense felony that carried a penalty of 25 years to life noted that "[t]he chances of acquittal were slim in today's society where a woman only has to say it happened . . . it was better to be a 'sex offender' at home vs. in prison." This participant is likely referring to the #MeToo movement, which the participant evidently perceives as placing defendants at a disadvantage in criminal trials dealing with cases of

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86 Participants were recruited by emailing listservs of people involved in the criminal justice system. Participants were primarily male (84%) and White (92%) with an average age of 35. Their age at the time of the plea offer ranged from 18 to 67. It is worth noting that the demographics of such participants are not representative of the legal system as a whole. Our sample is predominantly male (84%) and White (92%)—in the United States, sentenced prisoners are 93% male and 31% White. *See* E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF STAT., PRISONERS IN 2019, at 6 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf. This disparity in the demographics is a limitation of this study. Participants had been offered plea bargains an average of 2.79 separate times (range: 1 to 6), but they were asked to report on their first experience with a plea offer.

87 We asked participants, "What did you decide to do?" Within our sample, 86.8% of people said they ultimately accepted the plea offer, while 13.2% said they went to trial.

88 Although rates vary across the country, research suggests that over 90% of defendants in the justice system accept plea bargains. *See* Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611 (2016).

89 As discussed above, values are a major factor in plea bargaining decisions. However, we decided to not ask questions about their underlying values and whether decisions were consistent with their values. Even though these are important, we were concerned the questions would be too sensitive and lead to participant attrition.

sexual assault. As a result of the participant's understanding of this dynamic, the decision was not about trading off the risk of going to trial or whether the odds would fall in their favor, but, rather, that the bottom line was that the participant believed they would be considered a "sex offender" either way. Therefore, to avoid incarceration, the participant took the punishment under the plea (a reduced felony count with ten years to lifelong probation, but no prison time). This defendant incorporated the social environment but not the number of years spent in prison in the final analysis as factors in their analysis. According to FTT, this participant would likely be categorized as a gist processor since the participant drew a clear categorical inference—in either instance, they believed they would be a sex offender either way, but being at home was different from being in prison. Other defendants clearly considered potential jury prejudice or racism in their decisions.[90]

A notable theme in several participants' answers is the importance of their children in their decision. For example, one participant was told that they would "lose . . . parental rights" if they did not take a plea. The participant further stated that they were "not guilty [and] refused to give up parental rights" and "would [take the plea] again to avoid losing [their] son." Clearly, for this participant and several others,[91] parenting rights were a primary factor in their decision, indicating that the threat of losing one's children may convince people to accept a plea over exercising their right to trial. Parenting rights were discussed as non-compensatory, as a fundamental value that could not be traded off against other benefits, such as a lighter sentence. As previously discussed, this type of thinking about qualitative or categorical factors is indicative of gist-based processing. Because adults primarily rely on gist-based processing to make decisions,[92] most defendants will be influenced by these types of distinctions between non-compensatory qualitative aspects of the plea decision, which can render the plea offer coercive and unfair. The offer is not coercive in the sense of social pressure being applied; instead, the offer is coercive because normal

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90 For example, one participant stated they were "afraid of getting a jury that would be prejudiced against him." Although they do not specify the ways in which the jury might be prejudiced, this response conveys important implications for the psychology of going to trial. White defendants are less likely to have to consider prejudice and racism, so they would not take those factors into account in conducting an analysis of the costs and benefits of plea decisions. Throughout U.S. history, overt racism and discrimination have decreased; however, people still have implicit biases that that may diverge from their explicit beliefs. *See, e.g.*, Anthony G. Greenwald & Linda Hamilton Kreger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 951 (2006). One study found that mock jurors were likely to "render longer sentences for other-race defendants," and racial bias for these mock juries was "more pronounced . . . for Black participants." *See* Tara L. Mitchell, Ryann M. Haw, Jeffrey F. Pfeifer, & Christian A. Meissner, *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUM. BEHAV. 621, 627–28, 630 (2005).

91 Another participant stated that they accepted a plea "to get my kids back home" because "they were going to remove my kids."

92 Helm & Reyna, *supra* note 57, at 376.

cognition blocks consideration of the tradeoffs that must be considered, according to law.

B. Legal Standard

After we assessed how defendants perceived risk, we applied the legal framework of plea bargains to the adjudicated participants' responses. We were particularly interested in whether responses satisfied the knowing/intelligent, voluntary, and competent legal standards.

1. Knowing or Intelligent

As previously discussed, a plea is "knowing" if the defendant is "fully aware of the direct consequences" of the plea, as reflected by the record.[93] The Supreme Court established in *McCarthy v. United States*[94] that defendants may only plead guilty if they know and understand the consequences of doing so.[95] However, participants' responses to the survey demonstrate that most of the participants, in fact, did not understand even some of the most basic consequences of taking a plea. Both the quantitative responses and open-ended descriptions of their reasoning reveal a large gap between knowing what the charges being brought are and actually understanding and comprehending the implications of accepting the plea.

Quantitatively, most participants indicated that they did not understand the plea system at the time of their plea.[96] Almost all participants (92%) realized that accepting a plea meant they were waiving their right to a jury trial;[97] however, only 43% knew they were waiving the right to appeal,[98] and only 40% knew that they would face collateral consequences.[99] Some of these collateral consequences can severely limit convicted individuals' ability to reenter society.

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93 Brady v. United States, 397 U.S. 742, 755 (1970).

94 394 U.S. 459 (1969).

95 *Id.* at 466–67.

96 Participants were asked how strong their knowledge of the plea-bargaining system was at the time they were making the decision, and 67% indicated that their knowledge was less than 50%.

97 For these questions, we asked participants to reflect on their knowledge at the time they were offered the plea and were making a decision. We followed up with several questions about this knowledge. The first question we asked participants was, "Did you know that accepting a plea meant giving up your right to a jury trial?"; 91.9% responded "Yes," while 8.1% responded "No."

98 The next question we asked participants about their knowledge at the time of the plea offer was "Did you know that accepting a plea might stop you from being able to challenge or appeal your sentence in the future?"; 43.2% answered "Yes" while 56.8% answered "No."

99 The third question we asked participants about their knowledge at the time of the plea offer was "Did you know that accepting the plea would have 'collateral consequences' or influence you in other ways beyond the specific sentence, including the potential of hurting you in your ability to find a job or vote?"; 40.5% of participants said "Yes" while 59.5% of participants said "No."

For example, people with felony convictions may be barred from accessing federal housing and employment,[100] lose their rights to vote[101] and carry firearms,[102] and be required to register as sex offenders.[103] Convicted people's inability to find stable employment and housing has been shown to increase recidivism rates, so the fact that only 40% of participants knew that they might have given up those privileges is deeply troubling.[104] Some of these values would have arguably also been non-compensatory, much like taking care of family.

Qualitatively, responses also highlighted concerns that decisions are not being made knowingly. One participant stated, "[I]f I had understood the actual consequences of taking the plea at the time, I would certainly have gone to trial." Some responses suggested that participants did not even meet the current low legal bar of knowing and intelligent under *Bousley*. For example, one participant explained, "At [the time I accepted the plea] the sentence I received was not clearly understood and ended up being longer than initially thought." Sentencing is clearly a penal sanction and would therefore be a direct consequence of which defendants must be aware in order to enter a knowing and voluntary plea. The objective circumstances of this participant's plea situation are unclear; however, if the participant's recollection of the plea is accurate, the participant did not meet the "knowing" standard.

Other responses would likely not violate the current knowing standard but suggest that the standard itself is too low. One participant who accepted a plea deal explained, "I accepted [the plea] but wish I had known of the ensuing collateral consequences including lifetime registration for a sex crime which wasn't mentioned until during incarceration." Another participant noted, "I didn't know I was giving up appeal rights." These statements reflect severe knowledge gaps that should have been filled before any plea was accepted as "knowing."

Arguably, not knowing that accepting a plea would result in a lifetime on the sex offender registry or waiver of appeal rights should call into question whether a plea is truly knowing and intelligent. Case law on the definition of "direct consequence" is limited, but what little that exists indicates that direct consequences encompass only the "penal sanctions," i.e., jail time or probation,

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100 Corrine A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 545–46, 551–52, 576 (2005).

101 *Felon Voting Rights*, NAT'L CONF. STATE LEGS. (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

102 18 U.S.C.A. § 922(g)(1) (West 2021) (making it unlawful for people convicted of a felony to "possess in or affecting commerce . . . any firearm").

103 34 U.S.C.A. §§ 20911, 20913 (West 2021).

104 Seema L. Clifasefi, Heather S. Lonczak, & Susan E. Collins, *Seattle's Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations with Recidivism*, 63 CRIME & DELINQ. 429, 439 (2017).

that a defendant will face as a direct result of a guilty plea.[105] Life-changing consequences such as registering as a sex offender[106] or losing appeal rights would likely be considered "collateral consequences." Nevertheless, these life-changing consequences are likely to be reasoned about categorically by gist-based reasoners, rendering tradeoffs moot, much like avoiding HIV-AIDS is reasoned about categorically among many adults because it is incurable.[107]

Despite the participants' evident lack of understanding of the true impact of accepting a plea deal, each participant's plea decision would likely satisfy current legal standards for a knowingly entered plea. However, the gap between participants' knowledge and the actual consequences of a plea indicates that the standards for "knowing" or "intelligent" are not sufficient. Moreover, considerations that are likely to dominate decisions if known are not necessarily imparted. The Supreme Court, in *Brady, McCarthy*, and *Bradshaw*, has constructed a framework in which it is virtually impossible to enter into a plea unknowingly, and these participants have fallen victim to the low standard, resulting in many participants accepting plea bargains without fully understanding the consequences.

2. Voluntary

As established by the *Brady* Court, a plea is voluntary when it is made free of threats, coercion, or misrepresentations.[108] To confirm that the plea is voluntary, the defendant must affirm to the judge that "the plea . . . did not result from force, threats, or promises (other than promises in [the] plea agreement)."[109] However, many participants' responses indicated that, while their pleas may satisfy the current standard for voluntariness, the pleas were not actually without perceived threats or coercion. In fact, concerns about the direct and indirect costs of trial resulted in many defendants believing that accepting the plea deal was their only option—not a tradeoff as legally required.

i. Direct Costs

An effective defense can be extremely expensive, requiring attorney time, expert witnesses, and investigation. These expenses might be prohibitively high for middle- or lower- socioeconomic defendants and impossible for indigent defendants. These socioeconomic groups are comprised disproportionately of

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105 Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 679 (2008).

106 *See id.* at 678–79.

107 *See* Reyna & Mills, *supra* note 67, at 1628.

108 Brady v. United States, 397 U.S. 742, 750 (1970).

109 FED. R. CRIM. P. 11(b)(2).

members of minority racial groups, creating further injustice.[110] Middle- or lower-socioeconomic defendants are rarely provided with sufficient governmental support to mount an effective or even substantial defense. Although indigent defendants have the right to a government-provided attorney, there are limitations to what overworked and underfunded public defenders, unable to access sufficient resources, can do to defend their clients.[111] If a defendant cannot afford to mount an effective defense at trial, a plea bargain may appear to be the only option. However, this kind of argument against plea bargaining should be distinguished from the one above that rests on being informed of alternatives but being unable to consider them because of predictable habits of the gist-based mind. Nevertheless, lower socioeconomic defendants are more likely to face categorically catastrophic outcomes that are otherwise cushioned for those with means—the complete loss of housing as opposed to needing to downsize.

Lack of resources for trial was a common theme in our responses; many participants were worried about the cost of trial for themselves or their families. One participant stated that their "attorney did not have the resources to fight" and suffered from a "lack of funds." Another participant claimed that they "didn't have any more money or resources to try and fight my case." Arguably, if a defendant and their attorney believe that plea bargaining is the only viable financial option, pleading raises doubts about voluntariness.

ii. Indirect Costs

In addition to the direct costs of trial, defendants must also consider the indirect costs of trial, including opportunity costs. Going to trial often means remaining in jail, especially if a defendant cannot afford bail. If they are in jail until trial, defendants cannot work and earn money, which further compounds financial difficulties. For example, one participant states that they took the plea deal because they "had been sitting in various County jails for over 9 months and was basically ready to sign anything . . . [and would] spend several more months fighting it out to most likely lose anyways."[112] This participant could have faced opportunity costs by losing out on wages or time with family.

Moreover, staying in jail awaiting trial can further threaten parental rights, which were a driving factor for many participants' decisions to accept a plea.[113] For these participants, prosecutors were able to offer coercive plea deals

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[110] *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS'N (July 2017), https://www.apa.org/pi/ses/resources/publications/minorities.

[111] Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G REP. 91, 91, 93 (2012).

[112] This participant implicitly confirms that the previous nine months in jail is not driving them to go to trial (i.e., the time spent in jail is a sunk cost)—they would rather cut their losses and just take a plea deal.

[113] *See supra* note 91 and surrounding text.

that the participants felt trapped into taking so that they did not lose their children. This type of plea would still likely be considered "voluntary" under the current legal standard.

iii. What Is Voluntary?

The responses to our survey highlighted serious questions about whether the current legal "voluntary" standard provides sufficient protection for defendants. In many of these cases, particularly with indigent defendants, exercising the constitutional right to a speedy and public trial is cost-prohibitive (both directly and indirectly) and can negatively impact other rights, such as parental rights. One participant's response was especially poignant:

> What is the feeling one can [attach] to being forced into something horrible without their consent? Yes I took the plea, but it was without my consent. They left it the only choice. Be raped in prison, or choose a timeout . . . [my] options ran out when my cash flow was completely exhausted [and I could no longer] afford an attorney.

This participant's concerns about lack of consent likely do not meet the legal standard for "involuntary" as established by *Brady*. Subjectively, this participant felt as if their plea was involuntary and that they had no other options, but objectively the plea would probably be considered voluntary. The fear of sexual assault in prison and lack of sufficient funds presented a clear issue for the defendant and compelled them to take a plea bargain, which should at least lead to a question of whether the plea is truly voluntary.

If a defendant does not have the resources to defend himself or is going to lose her job or family if she does not accept a plea—in other words, if a defendant views a plea as her only option—the plea cannot be considered truly voluntary. The current legal "voluntary" framework, while protecting defendants from pleas coerced through physical torture or threats of bodily harm, entirely fails to preclude pleas accepted under a variety of other types of coercion. In resolving this problem, at the very least, the legal community should revisit the "voluntary" standard.[114]

3. Competent

Under *Dusky* and *Godinez*, a plea is competent if the defendant has the ability to consult with their lawyer with a reasonable degree of rational

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[114] We recognize that many of the things that are seen as coercive are actually the benefits of accepting a plea. For some defendants, having the option to accept a plea to not lose their job or their family is beneficial. However, if many are feeling as if they are being coerced into accepting a plea, the system should at least reconsider the standard. Moreover, as discussed below, it should also lead to reconsideration of a prosecutor's ability to overcharge in order to coerce a plea.

understanding.[115] Therefore, we also examined the role of the defense attorney on the defendant's decision. Results indicated that attorneys play a large role in the decision but that they are not entirely trusted by defendants.

Half of participants indicated that their attorney was a major influence on their decision[116] and provided them with all the knowledge they had about plea bargaining.[117] Although a lot of people trusted their attorneys, a concerning number of participants reported major concerns with their attorneys. Over 20% of participants did not believe that their attorney fully informed them about the consequences of the plea and 35% did not trust their attorney's assessment of the case.[118] Naturally, accusations should never be uncritically accepted as veridical. However, under conditions favoring candid responses (in this case, an anonymous survey outside of the context of legal jeopardy), these percentages seem surprisingly high and should at least raise questions for the legal system to consider.

Participants' open-ended responses also reflected that attorneys had an important role in the decision, for better or worse.[119] For example, one defendant stated, "I knew absolutely nothing and put all of my trust in my attorney, which was a bad thing." Another participant, who ultimately severely regretted accepting a plea bargain, stated, "I had paid $15,000 for a lawyer who 'knew what was best' and he was friends with the DA and judge. I was told this was a great offer and I should take it."

Several participants indicated concern that their attorneys were incompetent. For example, one participant said, "My Public Defender was incompetent, and I didn't trust him at trial . . . . [T]he [District Attorney] colluded with the [Public Defender]. [The] Public Defender was not working in my best interest." Another participant claimed, "I was told to [accept the plea] by a really incompetent attorney." And a different participant accused both their attorney

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115 Dusky v. United States, 362 U.S. 402 (1960); Godinez v. Moran, 509 U.S. 389 (1993).

116 50% said that the attorney was the main reason for their decision.

117 43% said that all knowledge about plea bargaining came from their attorney.

118 We asked participants "Did you agree with your attorney's assessment of the case?"; 64.7% responded "Yes" while 5.9% said "No I thought I was more likely to be found guilty" (i.e., they believed their attorney overestimated their likelihood of succeeding), and 29.4% indicated "No, I thought I was less likely to be found guilty" (i.e., they believed their attorney underestimated their likelihood of success).

119 This Article is not meant to criticize every attorney or suggest that many are not fulfilling their responsibilities. Most defense attorneys are arguably trying to do their job and defend their clients. However, the high number of participants indicating concern with their attorneys at the minimum suggests that the legal system needs to consider whether the current system is meeting the needs of defendants. The current plea system only requires attorneys to provide defendants with verbatim facts. However, this could be driving defendant dissatisfaction, particularly if the defendant does not remember hearing the verbatim facts during the stressful experience. Perhaps training attorneys to assist defendants in understanding the gist of the plea offer rather than the verbatim details could improve the system.

and the court of lying: "I [only knew] what the court and my attorney told me. Which was a bold faced [sic] lie."

Based on these responses, it is clear that many of the participants either felt abandoned by their attorney or questioned the attorney's integrity. Of course, some of these responses are overstatements or misunderstandings; however, they do raise the question of what the legal system should require from an attorney-client relationship in a plea-bargaining context. Under the current competency standard, the court looks to the defendant and questions whether the defendant can competently interact with their attorney. If the defendant is capable of competently interacting with their attorney, then the plea is considered competent. However, at the time of the plea decision, courts do not question whether the attorney has actually provided sufficient advice.[120] In particular, courts must consider whether the workload of typical public defenders prevents defendants from getting enough information from their attorneys to make a knowing and voluntary plea decision.

i. Attorney Responsibility

Currently, to satisfy their obligations to the defendant, a defense attorney must simply inform the defendant of the terms of the plea offer[121]—the direct consequences, but not the collateral consequences.[122] The attorney does not need to describe what they said to the defendant or show that the defendant actually understood the attorney's advice. As a result, defendants can enter into unknowing plea bargains if an attorney does not fully explain the implications and consequences of a plea.[123] Furthermore, defendants have little remedy should they claim the attorney did not sufficiently explain the plea bargain; their option

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120 It is possible that this question is being reserved for the legal profession more broadly. For example, a client can appeal the decision based on attorney incompetence, or an attorney can be disciplined for attorney incompetence. However, both of these solutions are post-hoc and not ideal for the defendant. Ultimately, they still might have entered into a plea bargain without competent guidance and could still be suffering long-term consequences. Attorney discipline might not provide the affected client with any benefit. Moreover, even with malpractice claims, the outcome of the plea bargain might not be eliminated if the court views it as harmless error.

121 Missouri v. Frye, 566 U.S. 134, 145 (2012).

122 Padilla v. Kentucky, 559 U.S. 356, 375–76 (2010) (Alito, J., concurring).

123 Kelly Mitchell, *National Summit on Collateral Consequences*, 2015 A.B.A. CRIM. JUST. SEC. CONF. REP. 4. It might be excessive to require attorneys to ensure a client understands all potential collateral consequences. The American Bar Association has identified over 45,000 possible collateral consequences. However, ensuring a client understands the rights they are waiving by accepting a plea might be more reasonable. Redlich and Bonventre have identified 42 rights that are possibly waived when pleading. Allison D. Redlich & Catherine L. Bonventre, *Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 L. & HUM. BEHAV. 162, 166, 168 (2015). At a minimum, attorneys should highlight those long-term collateral consequences that are particularly important for their clients' decisions (e.g., sex offense registration, loss of parental rights, loss of voting rights).

is limited to an ineffective assistance of counsel claim, which is seldom successful.[124]

It is difficult for a defendant to win on a claim of plea-stage ineffective assistance of counsel. A claim of ineffective assistance requires that the defendant satisfy two criteria: (1) counsel's performance was deficient, and (2) such deficient performance prejudiced the defendant.[125] In the plea-bargaining context, counsel's performance is only deficient and the plea therefore involuntary if counsel's advice is not "within the range of competence demanded of attorneys in criminal cases."[126] To show prejudice, a defendant must show that but-for counsel's deficient performance, there is a reasonable probability that both the defendant and the trial court would not have accepted the original guilty plea.[127] In addition, claims of ineffective assistance of counsel are subject to a highly deferential system of review that gives defense attorneys the benefit of the doubt.[128] As long as the defendant's attorney informs the defendant of any existing plea bargains[129] and gives anything better than glaringly erroneous advice,[130] it is difficult for a defendant to succeed on a claim of ineffective assistance of counsel at the plea-bargaining stage.[131]

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[124] One major burden defendants face is that the Court has decided that a defendant has no right to a *meaningful* attorney-client relationship. *See* Morris v. Slappy, 461 U.S. 1 (1983). Even in DNA exoneration cases (indicating that the client was actually innocent), 81% of ineffective assistance of counsel claims are rejected. *See* Emily. M. West, *Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT (Sept. 2010), https://www.innocenceproject.org/wp-content/uploads/2016/05/Innocence_Project_IAC_Report.pdf.

It is also possible that a defendant may be able to accuse their attorney of malpractice; however, the remedy does not belong to the defendant (i.e., it is a punishment for the attorney rather than a change in outcome for the defendant), and therefore will not be discussed in this context.

[125] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[126] McMann v. Richardson, 397 U.S. 759, 771 (1970); *see also* Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("[T]he voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases.") (internal quotation omitted).

[127] Lafler v. Cooper, 566 U.S. 156, 164 (2012). Perhaps this existing standard is necessary to ensure that cases are not always being challenged. However, given this high bar, it is important to ensure the original decision is made appropriately.

[128] Burt v. Titlow, 571 U.S. 12, 15 (2013); Cullen v. Pinholster, 563 U.S. 170, 190 (2011); *Strickland*, 466 U.S. at 689.

[129] Missouri v. Frye, 566 U.S. 134, 147, 151 (2012) (determining that where defendant's attorney failed to inform defendant of a plea offer from the prosecutor, counsel's performance was deficient, but remanding for prejudice determination).

[130] *Lafler*, 566 U.S. at 162, 174 (finding deficient performance at the plea-bargaining stage where defendant rejected a plea after counsel told defendant that the state could not prove intent to murder because the victim had been shot below the waist).

[131] *See, e.g.*, *Burt*, 571 U.S. at 23–24 (while concluding that defense attorney's conduct in advising defendant to withdraw acceptance of a guilty plea without taking time to learn about the case was "far from exemplary," upholding lower court ruling that attorney was not ineffective); Premo v. Moore, 562 U.S. 115, 132 (2011) (finding no ineffective assistance of counsel where

However, the issue for the courts is not simply placing a higher burden on either prosecutors or defense attorneys to demonstrate that they have successfully and thoroughly conveyed the potential consequences (and their probabilities) of a plea decision to a defendant. Instead, when communicating a plea offer, attorneys need to consider processing style and ensure that defendants are provided with the verbatim details of accepting a plea and that they understand the gist of what those details mean for the defendant: what the bottom line is, taking into account core values and categorically distinct outcomes.[132] The current competency standard is insufficient, only requiring that a defendant be able to competently communicate with their attorneys in a minimal sense that fails to take into account cognitive research on reasoning. If a defendant is able to do so but does not have an essential (gist-based) understanding with sufficient, clear, unbiased guidance, the plea bargain should be called into question.

V. PLEA BARGAINING STANDARD AND POLICY IMPLICATIONS

The legal standard for valid plea bargains (i.e., knowing, voluntary, intelligent, and competent) is woefully insufficient based on the current interpretation of these terms, as evidenced by our survey results. Despite entering pleas that would likely be considered knowing and voluntary if challenged in court, defendants do not, in fact, understand the cognitively crucial implications of the decision that they are asked to make. Defendants often fail to understand the rights that they are waiving or the consequences of accepting the plea and feel misled by their attorneys. Consequently, the plea-bargaining system needs to be reformed to give power and meaning to these legal standards in light of the realities of human information processing. Several policy changes should be considered to achieve this goal, such as training defense attorneys in reviewing plea offers, reducing prosecutors' ability to offer categorically unreasonable options that preclude trading off, reforming the bail system, and providing more resources to defendants.[133]

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attorney advised acceptance of plea bargain without first seeking to suppress defendant's confession); *Hill*, 474 U.S. at 60 (upholding denial of habeas relief where attorney supplied erroneous parole-eligibility information prior to inmate's acceptance of plea bargain because inmate failed to demonstrate that he would have accepted the plea bargain had inmate been given accurate information, and declining to determine whether counsel's performance was deficient).

132 *See* Reyna, *supra* note 60 at 4.

133 One option here might be providing defendants, particularly indigent defendants, with similar resources to those provided to the state. In other words, giving the defendant an opportunity to conduct an investigation or hire an expert witness in order to ensure they are able to put on a fair trial. It is also important to note that reducing prosecutors' ability to overcharge would also be helpful in terms of reducing coerciveness. The power of the prosecutor to threaten grossly disproportionate punishments unfairly alters the defendant's assessment of risks. However, other scholars have discussed this recommendation, and it lacks foundation in psychological theory, so will not be discussed here further. *See e.g.*, Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1313–15 (1996).

The results of the present study indicate that defense attorneys play an important role in plea decisions, as they are the defendant's lifeline to understanding the legal system and the plea bargain. However, many participants reported dissatisfaction with their attorneys' guidance. The current legal standard merely requires attorneys to provide the verbatim details of the plea offer, but decisions tend to align more closely with a person's values when they are driven by gist-based processing. Consequently, defendants might need more assistance in understanding the gist of a plea decision. As shown in medical research that similarly can involve complicated options, providing the gist is practical because it is succinct yet informative about the major aspects of a decision.[134] As experts in the legal system, attorneys are a great resource to aid defendants in understanding the meaning of the plea offer. Rather than just describing the verbatim offer, attorneys should spend more time focused on the meaning behind the offer. Specifically, attorneys should focus on explaining key categorical distinctions between the potential consequences at trial and the consequences of accepting the plea (e.g., explaining the difference between a felony record and a misdemeanor record). In addition, instead of only detailing the direct consequences of accepting the plea, attorneys should also explain the key collateral consequences that could have major long-lasting effects on the defendant. Thus, courts should ensure that attorneys have explained the nub of the plea decision—not just superficial details—and that the defendant actually understands both the life-altering direct and collateral consequences of the plea.

In addition, policymakers should consider reforming bail laws so that defendants are not faced with spending months or even years in jail pending trial only because they choose to exercise their constitutional right to a fair trial. For many defendants, particularly indigent defendants, paying cash bail is simply not an option, so their decision becomes a choice between staying in jail until trial or (in some cases) accepting a plea and getting out immediately. Limiting the use of cash bail would help to ensure that participants can make a better-reasoned plea decision, unrestricted by the threat of being held in jail until trial.

Finally, a third potential solution is to simply augment the standard for what is considered a knowing and voluntary plea based on insights from research on reasoning and decision making. The court needs to work to ensure the defendant actually understands the underlying meaning of accepting the plea, including the collateral consequences. At the moment, courts only ensure that defendants know the specifics of the charges (i.e., verbatim knowledge); but without the gist-based understanding of what the offer entails, defendants are not providing informed consent for accepting the plea. Not only should the court work with prosecutors and defense attorneys to better explain the plea offer, but also confirm that the defendant understands the meaning. For example, defendants could be required to articulate in court, in their own words, exactly

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[134] Susan J. Blalock & Valerie F. Reyna, *Using Fuzzy-Trace Theory to Understand and Improve Health Judgments, Decisions, and Behaviors: A Literature Review*, 35 HEALTH PSYCH. 781, 790 (2016).

what they understand the plea to be; if any doubt exists as to whether the defendant understands all aspects of a plea, judges should be obligated to explain the plea to the defendant again on the record. A more thorough procedure to establish whether a defendant, in fact, understands a plea deal would help to ensure that the defendant has actually made an informed decision.

VI. CONCLUSION

This Article seeks to supplement the current literature on plea bargaining by providing insight into the empirically supported thought processes that defendants engage in when making the decision to enter a plea. Plea bargaining has become an integral part of our justice system through both legislation and case law, governed by the "knowing and voluntary" standard established by the Supreme Court. As evidenced by our participants' responses, most of the plea bargains that our participants entered likely met that standard. However, many of the participants clearly faced coercive or misrepresented plea deals that they accepted without truly understanding their decision, which indicates that the current legal standard is simply too low. Further, Fuzzy-Trace Theory suggests that defendants' cognitive processing style influences the ways in which they make plea decisions and can render defendants less competent to accept a plea offer. [135] Hence, not appreciating the gist of a plea decision fails the most basic test of informed consent.

If current legal standards do not change, prosecutors, defense attorneys, and courts alike must take into account the fact that the standards allow defendants to enter into plea bargains of which they have little understanding. In order for the plea-bargaining system to be truly fair and accord defendants' due process, its actors must ensure that defendants have an *actual* understanding of their plea decisions, rather than just the surface-level understanding that *Brady* and *Boykin* require. However, as the system stands, the low standard that a plea bargain must meet to be constitutional places defendants at a disadvantage within a legal structure supposedly designed to ensure justice, not merely convenient convictions.

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[135] Valerie F. Reyna, *A Theory of Medical Decision Making and Health: Fuzzy Trace Theory*, 28 MED. DECISION MAKING 850, 852 (2008).