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BARGAINING WITHOUT BIAS

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TABLE OF CONTENTS

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INTRODUCTION

Bias, disparate treatment, and racism are embedded into the U.S. criminal legal system. African Americans, Latinx, and other people of color are more likely to be stopped by police,[1] arrested,[2] and serve time in custody after being charged.[3] Overall, the United States incarcerates more people and has a higher rate of incarceration than any other country in the world.[4] On any given day over 2.3 million people are incarcerated in the United States,[5] and over 7 million are under some kind of carceral control including jail, prison, probation, or parole.[6] Racial and ethnic minorities are disproportionately represented in all of these numbers.[7] A key player within the criminal legal system that could dramatically reduce or eliminate these disparities are prosecutors. Prosecutors enjoy extraordinary power and they exercise that power with few constraints. For most defendants the single most important prosecutorial decision, after charging, is the plea offer. Over 90% of all criminal convictions are due to plea bargains.[8] Yet, there are virtually no

1. *See, e.g.*, FRANK R. BAUMGARTNER ET AL., SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE (2018) (examining 14 years of data of traffic stops in North Carolina and concluding that African American drivers were 63% more likely to be stopped while driving and 115% more likely to be searched than white drivers).

2. Anagha Srikanth, *Black People Five Times More Likely to Be Arrested Than Whites, According to New Analysis*, HILL (June 11, 2020), https://thehill.com/changing-america/respect/equality/502277-black-people-5-times-more-likely-to-be-arrested-than-whites.

3. WILLIAM J. SABOL ET AL., COUNCIL ON CRIM. JUST., TRENDS IN CORRECTIONAL CONTROL BY RACE AND SEX 4–5 (2019), available at https://cdn.ymaws.com/counciloncj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends_in_Correctional_Control_-_FINAL.pdf (stating that African American and Latinx incarceration rate disparities have declined, but at both the state and federal level disparities remain).

4. *See, e.g.*, Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), https://www.prisonpolicy.org/global/2018.html (stating that the United States incarcerates 698 per 100,000 people).

5. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

6. *Id.*

7. *See, e.g.*, Lech Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html.

8. *See, e.g.*, Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). For other data, see Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 545 (2004).

limitations on prosecutors during the plea bargaining stage and relatively little attention given to how standard plea bargaining practices can exacerbate bias.[9] What happens at the plea bargaining stage, whether a case is dismissed, charged as a misdemeanor, charged as a felony, or charged as a felony with additional enhancements, will change the direction of defendant's life in far-reaching ways. A criminal conviction could prevent, or make it harder to get, a job.[10] A criminal conviction can result in deportation.[11] A criminal conviction can make it harder, or impossible, to get certain professional licenses.[12] A criminal conviction may make it harder to rent an apartment or live within certain areas.[13] A criminal conviction can make the punishment in any future criminal conviction worse due to enhancements or habitual offender laws.[14] The prosecutor is the key decision maker and, unfortunately, standard prosecutorial practices can exacerbate the biases that are already embedded into the criminal legal system.[15] There are multiple challenges that make it difficult for prosecutors to reduce or eliminate their biases.[16]

The first core problem is that plea bargaining is largely unsupervised and prosecutors have extraordinary power and virtually unlimited discretion in the process. Prosecutors regularly engage in hard bargaining tactics and there is no meaningful check on prosecutorial bias in deciding what offers to make on what cases. The second core problem is that plea bargaining can exacerbate racial disparities and bias. The third core problem is that once a case comes into the criminal legal system, and the case is charged, a prosecutor's first offer acts as an anchor in the negotiation, regardless of whether the offer reflects bias. Unlike in other negotiation contexts, the defendant in a criminal case has no meaningful option to counter or walk away from the prosecutor's offer.

In this article, to work towards decreasing bias in plea bargaining, I propose a structural fix and an individual fix to these core problems. The structural fix is that prosecutors' offices should adopt policies for blind

9. For exceptions, see *infra* Section II.

10. Christine Neylon O'Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 994–95 (2007).

11. Joshua Gallo, *Counsel Must Advise Their Clients When Criminal Conviction Would Result in Deportation:* Padilla v. Kentucky, 2 DUQ. CRIM. L.J. 93, 93 (2001).

12. *See, e.g.*, OHIO REV. CODE ANN. § 9.78 (West 2020).

13. *Renting with a Criminal Conviction or Arrest Record*, TENANT RES. CTR., https://www.tenantresourcecenter.org/renting_with_a_criminal_conviction (last visited Aug. 10, 2021).

14. *See, e.g.*, N.J. STAT. ANN. § 2C:44-3 (West 2008).

15. *See* Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24 (2008).

16. *Id.*

assessment of cases when the first plea offer is made. All indicia of race or ethnicity (including names and neighborhoods) should be removed when prosecutors review a case and make the initial plea offer. This would help prosecutors focus on the facts and their evidence when making a plea offer and prevent bias in decision making. However, it is not realistic to expect that prosecutors, even in offices that adopt blind charging and plea bargaining policies, would remain blind to who the individual defendant is in all cases. Therefore, the individual fix is to train prosecutors on empathy. Prosecutors' offices should expand and improve training and programs on empathy to change how prosecutors view defendants. People tend to have empathy for, and in the criminal context give the benefit of the doubt to, those who are "more like them"—including being the same race and socio-economic group.[17] Empathy for others is a skill that can be taught, like trial skills, negotiation, or writing.[18] Prosecutors' offices need to include empathy skills as an integral part of their overall training. Improved empathy skills would help prosecutors to stop looking at defendants as simply "criminals"[19]—a label that is often racially-based. Instead, more prosecutors could learn to see defendants, in the words of Bryan Stevenson, as "more than the worst thing" they have ever done.[20]

I. PLEA BARGAINING IS LARGELY UNSUPERVISED

Prosecutors enjoy extraordinary power in the criminal legal system in the United States.[21] There are few meaningful checks on their discretion.[22] Prosecutors decide what charges to file or to bring to a grand jury.[23] Criminal codes in every state and federally allow prosecutors to

17. *See, e.g.*, JOHAN M.G. VAN DER DENNEN, *Of Badges, Bonds and Boundaries: Ingroup/Outgroup Differentiation and Ethnocentrism Revisited*, *in* THE SOCIOBIOLOGY OF ETHNOCENTRISM 17 (Vernon Reynold et al. eds., 1987). In some circumstances, this can mean more empathy for the victim who may be from their same race or ethnic group than for the defendant. This can be particularly problematic in the context of capital cases. *See* Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1, 6–8 (2013).

18. *See* discussion *infra* Section IV.B.

19. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 15 (2014).

20. *Id.* at 17–18.

21. For a longer discussion of prosecutorial power, see Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 582–87 (2014) (hereinafter *The Impact of* Lafler *and* Frye); *see also* Davis, *supra* note 15, at 27–30 (discussing prosecutorial discretion and how prosecutors can misuse this power).

22. *See, e.g.*, Alkon, *The Impact of* Lafler *and* Frye*, supra* note 21, at 583–87.

23. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 409 (2001); CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE

choose between a wide variety of crimes for substantially similar acts.[24] They can decide to file a case as a misdemeanor or a felony.[25] Prosecutors decide what enhancements to add,[26] including adding a gun or prior conviction charge.[27] Judges have limited power to dismiss charges.[28]

Well over ninety percent of all criminal convictions are due to plea bargaining.[29] Prosecutors enjoy extraordinary and virtually unchecked discretion in the plea-bargaining process.[30] They can decide to drop charges and enhancements in exchange for a plea deal.[31] Prosecutors decide what the sentence will be, including how much jail or prison time.[32] The defendant is, of course, free to reject the plea deal. But, due to the trial penalty, defendants often face serious risks of much heavier penalties if they reject the plea offer.[33] The judge could also reject the

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RESOLUTION IN THE CRIMINAL CONTEXT 31–45 (2009); *see also* G. NICHOLAS HERMAN, PLEA BARGAINING 28 (3d ed. 2012).

24. *See* HERMAN, *supra* note 23, at 28.

25. *Id.*; *see also id.* at 203–04 (recommending that legislatures reduce the number of crimes that can be charged as both misdemeanors and felonies to reduce prosecutorial power).

26. *See* Cynthia Alkon, *An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining,* 15 UNIV. MD. L.J. RACE, RELIGION, GENDER & CLASS, 191, 194–95 (2015) (hereinafter *An Overlooked Key to Reversing Mass Incarceration*).

27. *Id.* at 207.

28. *See* Alkon, *The Impact of Lafler and Frye, supra* note 22, at 615.

29. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012).

30. *See, e.g.*, Davis, *supra* note 23, at 409; Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 403–06 (2017) (suggesting that it is time to restrict some prosecutorial hard bargaining practices) (hereinafter *Hard Bargaining in Plea Bargaining*).

31. *See* HERMAN, *supra* note 23, at 104–06.

32. *See* Davis, *supra* note 23, at 409.

33. 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, 992 (2005) (reporting trial penalties ranging from thirteen percent to four hundred sixty-one percent, depending on the state and the offense); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 224–30 (2007) (discussing that the actual trial penalty could be substantially higher due to the fact that most statistics compare the sentence for similar charges and do not consider the fact that plea bargains often include pleading guilty to a lesser offense than the one originally charged); *see also* Berthoff v. United States, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001) ("Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible."); JAMIE FELLNER ET AL., HUM. RTS. WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013) (showing examples on how the trial penalty can be used to coerce defendants to accept plea deals); *see also The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it*, NAT'L ASS'N CRIM. DEF. LAWS. (July 10, 2018), www.nacdl.org/trialpenaltyreport.

plea deal.[34] But, there is no right to a plea deal, which means that it is entirely up to the prosecutor whether they will offer a deal or not.[35]

A. The Process of Plea Bargaining

There is no set process for plea bargaining. In general, when a plea offer is made, it is made early in the case, often at or before arraignment.[36] In some jurisdictions, the offer may be included with electronic discovery and made not only before the first court appearance, but also before the first conversation between the defense lawyer and the prosecutor and even before the first conversation between a defense lawyer and their client.[37] Once an offer is made, the defendant may decide to accept it or the defense lawyer may make a counter offer. In some cases, usually in more serious cases, the first offer is not made until after the arraignment, as the prosecutor wants a chance to review the evidence, which may include talking to witnesses.[38] After this deeper assessment of the case, a prosecutor may decide to make an offer or decide that the case should proceed without any offer.[39] Not making a plea offer is more common in more serious cases, particularly murder cases.[40]

A criminal case that does not settle at arraignment may be handled by a number of prosecutors as it works its way towards trial. Some prosecutors' offices are small, so the cases will not be handed over to other lawyers within the office.[41] Some kinds of cases, such as sexual assault and murder cases, are commonly vertically prosecuted, which means

34. HERMAN, *supra* note 23, at 111.

35. *See* Missouri v. Frye, 566 U.S. 134, 142 (2012) (citing Weatherford v. Bursey, 429 U.S. 545, 561 (1977)).

36. Steven Zeidman, *Eradicating Assembly-Line Justice*, 46 HOFSTRA L. REV. 293, 293 (2017).

37. *See id.* at 293–94.

38. *See* Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After* Brady v. Maryland, 38 N.Y.U. REV. L. & SOC. CHANGE 407, 412–13 (2014).

39. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1338–39 (2018).

40. BRIAN A. REAVES, U.S. DEP'T JUST., STATE COURT PROCESSING STATISTICS, 1990-2002: VIOLENT FELONS IN LARGE URBAN COUNTIES (2006), https://bjs.ojp.gov/content/pub/pdf/vfluc.pdf.; DISTRICT AND STATUTORY COUNTY COURTS FELONY CASE ACTIVITY DETAIL: SEPTEMBER 1, 2018 TO AUGUST 31, 2019, TEX. CTS. 2–3, https://www.txcourts.gov/media/1445369/felony_activity_detail-2019.pdf. In Texas in 2018-2019, 96.27% of felony drug possession convictions were due to a guilty plea, compared to 63.39% of murder cases and 30.08% of capital murder cases. *Id.* (stating that a higher percentage of murder convictions are from trials than for other felonies).

41. *See* Steven M. Gershowitz & Laura R. Killinger, *The State (Never) Rests*, 105 NW. L. REV. 261, 266 (2001).

they will be handled by the same prosecutor from arraignment through sentencing.[42]

If the prosecution makes an offer and the defense does not like it, but they want to plead guilty, they can decide to plead "open" to the judge in hopes of a better deal.[43] This could involve the defense lawyer asking the judge for an indicated sentence, if the defendant pleads open. Some jurisdictions, including the Federal system, prohibit any conversation between the judge and lawyers about plea deals.[44] Putting aside this less common option, the defendant is usually left with two choices: accept what the prosecutor is offering or go to trial.

B. Limits on Prosecutorial Power in Plea Bargaining

There are virtually no limits on prosecutorial power in plea bargaining. As discussed above, prosecutors can decide to make an offer or not.[45] Subject to judicial approval, they can decide what that offer is,[46] including whether the charge is a felony or a misdemeanor. They can threaten to add additional charges if the defendant rejects the plea offer.[47] They can threaten to add enhancements if the defendant rejects the plea deal.[48]

The U.S. Supreme Court has ruled that prosecutors must honor their plea agreement after the defendant has accepted it.[49] But, otherwise, the

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42. For an example from San Joaquin County, California, see *Vertical Prosecution*, SAN JOAQUIN CNTY. DIST. ATT'Y OFF., https://www.sjgov.org/da/units/vertical-prosecution#:~:text=This%20vertical%20prosecution%20system%20means,the%20prosecution%20of%20the%20crime (last visited June 27, 2021) ("Deputy District Attorneys in this Division prosecute cases vertically. This means that they are assigned cases immediately after the initial referral and are responsible for those cases to final disposition by trial or plea. This vertical prosecution system means that one prosecutor will usually stay with the case from start to finish, better serving the victims, witnesses and law enforcement officials involved in the prosecution of the crime. The types of cases handled in this manner include *Homicide, Gangs, Domestic Violence, Child Abuse & Sexual Assault, Child Abduction, Human Trafficking,* and *Sexually Violent Predators*.").

43. *See generally* Alan Ellis & Mark H. Allenbaugh, *Plea Bargained vs. Open Pleas: What the Data Reveal*, 31 NO. 7 WESTLAW J. WHITE-COLLAR CRIME 1 (2017).

44. HERMAN, *supra* note 23, at 111; FED. R. CRIM. P. 11(c)(1).

45. *See* Missouri v. Frye, 566 U.S. 134, 142 (2012) (citing Weatherford v. Bursey, 429 U.S. 545, 561 (1977)).

46. *See* HERMAN, *supra* note 23, at 28.

47. *See* Brady v. United States, 397 U.S. 742, 750–51 (1970); Alkon, *supra* note 30, at 409–11.

48. *See Brady*, 397 U.S. at 750–51; Alkon, *Hard Bargaining in Plea Bargaining, supra* note 30, at 408–09.

49. Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

Court has not limited how plea bargaining is conducted.[50] Prosecutors are free to engage in hard bargaining tactics such as putting extreme time pressures on offers—and taking offers off the table if defendants do not accept within a limited time.[51] Prosecutors can make take-it-or-leave it offers and not engage in any meaningful negotiation.[52]

The main constraint on prosecutorial power in plea bargaining is within the prosecutor's office.[53] Prosecutors tend to work in hierarchical offices and are often limited by office policies.[54] The District Attorney could decide, for example, to dismiss all marijuana cases, or demand mandatory time in jail for repeat Driving Under the Influence offenses.[55] Prosecutors working in such an office would have to make sure that their plea offers comply with the stated policies.

II. RACIAL DISPARITIES ARE EXACERBATED IN PLEA BARGAINING

Prosecutors enjoy extraordinary power and, like most people, they have explicit and implicit biases.[56] Implicit bias is defined as

50. *See* Alkon, *Hard Bargaining in Plea Bargaining, supra* note 30, at 401 (arguing that the Supreme Court should "limit prosecutorial hard bargaining tactics in plea negotiations").

51. Alkon, *Hard Bargaining in Plea Bargaining, supra* note 30, at 406–08.

52. *Id*. at 411–13.

53. Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 2 (2013).

54. *Id*. ("In other instances, internal rules derive from explicit philosophies or policies created by the chief prosecutor and enforced through internal, supervisory structures.").

55. *See id*. at 7 ("[O]ffice policies . . . may require a specific charge or sentence in a plea offer regardless of the strength of the evidence.").

56. *See* BESIKI KUTATELADZE ET AL., VERA INST. JUST., DO RACE AND ETHNICITY MATTER IN PROSECUTION?: A REVIEW OF EMPIRICAL STUDIES 17 (2012) ("[P]rosecutorial decision making is associated with racial and ethnic disparities in case outcomes."); *see also* Christopher Robertson et al., *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIRICAL LEGAL STUD. 807, 810–11, 815 (2019) ("While there are a few outliers, most of the empirical studies on race and prosecutorial decision making have concluded that racial bias exists . . . ."). The experiment conducted by Professor Robertson and his coauthors, however, suggested that the issue of bias extended beyond the prosecutors themselves. *Id*. at 847. It found that the "huge racial and socioeconomic disparities in criminal justice outcomes . . . [are not] primarily due to implicit biases by prosecutors," suggesting that "more fundamental and structural solutions" are needed to "address systemic and institutionalized racism and classism." *Id*. Of course, other professionals in the criminal legal system also suffer from bias. *See, e.g.*, Jeff Adachi, *Public Defenders Can Be Biased, Too, and it Hurts Their Non-White Clients*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/. For a discussion of judicial bias see Avital Mentovich et. al., *Are Litigation Outcome Disparities Inevitable? Courts, Technology and the Future of Impartiality*, 71 ALA. L. REV. 893, 903-12 (2020).

"unconscious, automatic responses that shape our conscious behavior."[57] Implicit bias can be part of the reason that prosecutors choose to charge some defendants and not others. Implicit bias can influence the plea offers that prosecutors make.[58] Bias is one reason that prosecutors may have a hard time viewing defendants (and witnesses) who come from very different backgrounds with empathy.[59]

The challenge with implicit bias in the criminal legal system is not identifying where it might exist, but identifying how to break it down and lessen its impact. Improved empathy skills may be one way to break down implicit bias.[60] When people are made aware of the fact that everyone has implicit biases, that simple awareness can help to lessen implicit biases.[61] Empathy can also help people to move beyond seeing those who are, for example, poor or racial minorities or mentally ill as an "other" and instead to look at what they have in common and see their shared humanity,[62] which may help to stop unconscious, biased behavior.

How much does implicit bias impact plea bargaining?[63] As with most questions about plea bargaining, there is not a lot of data.[64] There have been relatively few studies examining the impact of race on plea bargaining rates, from the 1980s and continuing into 2020.[65] What we do

57. Elayne E. Greenberg, *Bridging our Justice Gap with Empathic Processes that Change Hearts, Expand Minds About Implicit Discrimination*, 32 OHIO STATE J. ON DISP. RESOL. 441, 448 (2017).

58. *See, e.g.*, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 816 (2012) (explaining how "in-group favoritism" may affect a white prosecutor's ability to empathize with a Black victim, thus affecting plea bargaining for the defendant).

59. *See id.*

60. *See generally* Greenberg, *supra* note 57 (arguing that "increas[ing] empathic opportunities" will help debias the legal system).

61. *See id.* at 452 ("Unconscious, reflexive thinking such as implicit bias (also known as System I thinking) can be mitigated by making people consciously aware of their reflexive thinking.").

62. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1243 (1993).

63. *See, e.g.,* Smith & Levinson, *supra* note 58, at 816–18. For a larger discussion of the impact of bias on plea bargaining see Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. OF CRIM L. & CRIMINOLOGY 1 (2021) (focusing on the impact of bias on African American male defendants) (hereinafter *Unshackling Plea Bargaining*).

64. *See generally* Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019) (discussing the lack of data in all aspects of plea bargaining and how this prevents meaningful reform).

65. *See* KUTATELADZE ET AL., *supra* note 56, at 5 (showing that just one of 34 empirical studies of prosecutors and race examined the guilty plea stage). Two recent articles specifically focus on plea bargaining. *See* Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 CRIM. JUST. POL'Y REV. 500, 504–05 (2020); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1213–18 (2018).

know is that people of color serve more time in prison, and are more likely to be sentenced to time in custody.[66] Some studies have concluded that African American and sometimes Latinx defendants are less likely to plead guilty and more likely to go to trial leading to convictions and, ultimately, experience worse sentences and greater sentence disparities.[67] One study found that white defendants got better deals than African American defendants on first offenses and less serious crimes and were more likely to get cases dismissed, charges reduced, and no jail time in those cases.[68]

Bias might also impact how prior convictions are weighted and viewed in plea bargaining. Prior convictions are a key fact in future plea bargains and sentencing.[69] A defendant with prior convictions can expect to get a worse deal in the future, in addition to the other collateral consequences of convictions.[70] And, defendants who reject plea offers and who are convicted at trial are more likely to receive higher sentences due to the trial penalty.[71] Interestingly, recent studies have found that the biggest differences in plea rates happen with less serious crimes.[72] One concern is that prosecutors may be using race "as a [p]roxy for [c]riminality" in these less serious cases.[73] In the absence of other information, the concern is that prosecutors may be subconsciously using race as a proxy for "a defendant's recidivism potential and dangerousness."[74]

Another factor that leads to disparate outcomes in criminal cases is whether a defendant is in custody during the pre-trial period. Those who remain in custody are more likely to plead guilty and not have weak cases dismissed.[75] A study in Harris County, Texas concluded that 17% of those detained pretrial who plead guilty in misdemeanor cases would not otherwise have been convicted due to weaknesses in their cases.[76] However, staying in custody puts pressure on defendants to plead guilty,

66. Berdejó, *supra* note 65, at 1240–41 n.276.

67. *See, e.g.*, Testa & Johnson, *supra* note 65, at 519–20.

68. Berdejó, *supra* note 65, at 1237–38.

69. *See id*.

70. *See* HERMAN, *supra* note 23, at 115–20 (discussing the impact of prior convictions under the federal sentencing guidelines); *see also National Inventory of Collateral Consequences of Conviction*, NAT'L REENTRY RSCH. CTR., https://niccc.national reentryresourcecenter.org/ (last visited June 27, 2021).

71. *See* Testa & Johnson, *supra* note 65, at 520; *see also supra* note 33 and accompanying text.

72. Testa & Johnson, *supra* note 65, at 521; Berdejó, *supra* note 65, at 1213–18.

73. Berdejó, *supra* note 65, at 1237–38.

74. *Id*. at 1238.

75. *See* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 785–86 (2017)

76. *Id*.

especially if they will get a time-served offer and will be released from custody.[77] Overall, the Harris County study found that defendants detained pre-trial on misdemeanor cases were "25% more likely to be convicted and 43% more likely to be sentenced to jail."[78] This Harris County study demonstrated that if a county relies on cash bail, not surprisingly, poorer people are more likely to remain detained, as they cannot post bail, and those who remain in detention are more likely to be convicted.[79]

III. THE IMPORTANCE, AND POSSIBLE BIAS, OF THE FIRST OFFER

Negotiation literature discusses the power of the first offer.[80] It can act to anchor the entire negotiation.[81] This can happen even if the first offer is high (or low). Stephanos Bibas has discussed how the first offer can anchor plea bargaining and, due to overcharging, a defendant may "jump at the deal" even when it might otherwise seem unreasonably high.[82] Jenny Roberts and Ron Wright found that prosecutors make the first offer more often, so they are framing the entire negotiation.[83] Notably, they found that prosecutors are even more likely to make the first offer with misdemeanors.[84] Arguably defendants have more leverage in misdemeanor cases, as the trial penalty may not be as pronounced, although whether a defendant is awaiting trial in custody changes that—giving the prosecutor more leverage, particularly with time-served offers. But, if prosecutors are more routinely making first offers in misdemeanor cases, the power of the first offer and anchoring the negotiation may counteract any advantage defendants might otherwise have.

In the context of plea bargaining, when prosecutors make the first offer it can constrain all future plea negotiations between the prosecution and the defense. It may make a prosecutor less willing to change their initial assessment of the case. And, once they put the offer in writing, it may be difficult within their office to bargain down to a lesser charge,

77. *See id.* at 717.
78. *Id.*
79. *Id.* at 736–37.
80. *See, e.g.*, Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCH. 657, 657 (2001); Brian C. Gunia et al., *The Remarkable Robustness of the First-Offer Effect: Across Culture, Power, and Issues,* 39 PERSONALITY & SOC. PSYCH. BULL. 1547, 1547 (2013).
81. For a discussion of the anchor in the context of plea bargaining, see Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1455, 1483–87 (2016).
82. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2518 (2004).
83. Roberts & Wright, *supra* note 81, at 1486–87.
84. *Id.*

lesser sentence, or dismiss the case entirely. Second, once that initial offer is made, it can constrain the ability of other prosecutors who handle the same case to offer anything less so as to not second-guess a colleague. In addition to a natural tendency to avoid contradicting a colleague in favor of an adversary (the defense lawyer), there may also be particular internal policies that make it difficult to offer less than what was offered at the beginning of the case.

This difficulty to walk back from that first offer, particularly in less serious cases,[85] may exacerbate prosecutorial bias without any effective tools to alleviate it. What if the first offer was a product of bias? What if the prosecutor was unconsciously using race as a proxy for future criminality? It is possible to train defense lawyers to be less susceptible to the anchoring effect of a first offer,[86] but this has minimal impact if prosecutorial policies make it difficult to lower the offer once it has been made.

IV. POSSIBLE FIXES: STRUCTURAL AND INDIVIDUAL

It is important to acknowledge that these two proposals, without other reforms, are limited in terms of what they could accomplish. The criminal legal system in the United States is complex. Every state and county is different.[87] Laws vary from state to state. How prosecutors do

85. Some prosecutors' offices have had official policies that the first offer will be the best offer. *See*, *e.g.*, Alisson D. Redlich, et. al., *The Influence of Confessions on Guilty Pleas and Plea Discounts*, 24 PSYCH. PUB. POL'Y & L. 148, 155 (May 2018) (describing policy of NY County District Attorney which had in 2014 a policy of making the "best first" offer). *See also* Somil Trivedi & Jared Keenan, *Coerced Out of Justice: How Prosecutors Abuse Their Power to Secure Guilty Pleas*, ACLU NEWS AND COMMENTARY (July 8, 2021) (describing a recent law suit filed in Maricopa County, Arizona, detailing an example of prosecutors being unable to even reoffer the first plea offer if the defendant doesn't accept it. Each plea offer included the following language: "The offer is withdrawn if the witness's preliminary hearing is set or waived. The offer may be changed or revoked at any time before the court accepts the plea. Note: County Attorney Policy Dictates that if the defendant rejects this offer, any subsequent offer tendered will be substantially harsher"). For the class action complaint filed in the case, see https://fingfx.thomsonreuters.com/gfx/legaldocs/yzdpxljwqpx/FINAL%20ACLU%20v%20Maricopa%20EDC%20Complaint.pdf. More often, this is an informal practice. There are few formal policies, so it is unclear if the first offer will be the best offer or if there are office policies discouraging better offers being made by subsequent Deputy DAs handling a particular case. For example, the Los Angeles District Attorney, under reforming DA George Gascon, has listed a series of policies, but none specifically on plea bargaining practices, making it hard to know what the practices or policies are. *See Policies*, L.A. CTNY. DIST. ATT'Y, https://da.lacounty.gov/policies (last visited October 31, 2021).

86. *See* Roberts & Wright, *supra* note 81, at 1484.

87. *Frequently Asked Questions: Federal and State Legal Systems*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/faq (last visited Aug. 6, 2021).

their job varies from office to office.[88] Meaningful and widespread reform needs legislative reform to reduce the prosecutorial power that is embedded in existing criminal codes. One source of extraordinary prosecutorial power is that prosecutors can choose to charge the same act as a misdemeanor or felony, with or without enhancements.[89] Bail reform is also key to changing plea bargaining practices.[90] There should also be better regulation of prosecutorial behavior in plea bargaining to ban routine hard bargaining practices like threats to add enhancements or charges if a defendant rejects a deal or tight time limits on when a defendant must accept a deal.[91] Criminal legal reform must include structural changes to reduce or eliminate mass incarceration by reducing possible sentences on a full array of criminal charges.[92] My suggestions are not meant as a substitution for the serious changes above that are needed to reduce mass incarceration and improve fairness in the criminal legal system and in plea bargaining.[93] But if blind assessment in initial plea offers and empathy training are successfully implemented, these suggestions could lessen the problem of bias in plea bargaining without legislative reform, and without electing new prosecutors, although it might take a change in leadership to acknowledge the need for these changes in some offices.

A. Structural Fix: Blind Assessments For the First Offer

Reducing bias in the criminal legal system requires changes in how the process works. Reform will be limited if it depends on the good will, or better skills, of individual prosecutors. One idea for a structural fix to reduce implicit bias is to make prosecutors "as blind as possible for as long as possible" to the defendant's race.[94] In other fields, blind

88. *See generally* Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018) (discussing differences between prosecutors in what motivated them to become prosecutors and how they approach their jobs); Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9 (2007) (discussing how criminal code structures influence prosecutorial decision-making).

89. *See* Alkon, *An Overlooked Key to Reversing Mass Incarceration, supra* note 26, at 202–07.

90. *See* Heaton et al., *supra* note 75 at 736–37.

91. *See* Alkon, *Hard Bargaining in Plea Bargaining, supra* note 30, at 424–27.

92. *See* Alkon, *An Overlooked Key to Reversing Mass Incarceration, supra* note 26, at 205–07.

93. These proposals are also not meant to exclude other ideas to reduce bias in plea bargaining, such as Elayne Greenberg's suggestions for overall anti-bias reforms for both prosecutors and public defenders. *See* Greenberg, *Unshackling Plea Bargaining,* supra note 63, at 40-49.

94. Robert Rosenthal, *How Often Are Our Numbers Wrong?* 33 AM. PSYCH. 1005, 1007 (1978).

assessment has helped to reduce bias.[95] For example, when orchestras required musicians to audition behind a barrier so they could not be seen, and the only thing that could be heard was their music, hiring of women increased.[96] One study found reduced disparities when some litigant attributes (but not all) were blinded in civil traffic infractions using online dispute resolution.[97] In a criminal context, blind assessment requires removing anything that might indicate race or ethnicity, including names, neighborhoods, descriptions of the defendant, and police officer names when prosecutors are making decisions such as charging and plea offers.[98] In 2019, the San Francisco District Attorney's office adopted a policy of blind assessment in charging decisions.[99] Empathy training, as will be discussed in the next section, would also support blind assessments and better exercise of prosecutorial discretion when making plea offers.[100] This article suggests that prosecutors go further than blind assessment in charging, and make blind decisions during at least the initial plea offer.[101]

1. San Francisco Example:

In June of 2019, the then District Attorney of San Francisco, George Gascón,[102] announced that San Francisco would adopt "blind charging" where prosecutors would evaluate what, if any, charges to file based on

95. *See, e.g.,* Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musician*s, 90 AM. ECON. REV. 715, 716 (2000).

96. *Id*. at 716, 721.

97. Mentovich et. al., *supra* note 56, at 945-54. Litigant names and date of birth were visible and gender could be discovered, but the litigants and judges communicated on an online text/email type platform so their faces were not seen. *Id*. at 943. Interestingly, one of the findings was the impact on age disparities with younger drivers paying higher fines when the proceeding was face-to-face and not blinded by the online format. *Id*. at 948.

98. Alex Chohlas-Wood et al., *Blind Justice: Algorithmically Masking Race in Charging Decisions*, STAN. COMPUTATIONAL POL'Y LAB, (unpublished manuscript) (on file with author).

99. James Queally, *San Francisco D.A. Unveils Program Aimed at Removing Implicit Bias from Prosecutions*, L.A. TIMES (June 12, 2019, 11:00 AM), https://www.latimes.com/local/lanow/la-me-san-francisco-da-prosecutions-implicit-bias-software-20190612-story.html.

100. *See infra* Section IV.

101. Sunita Sah et al., *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1 BEHAV. SCI. & POL'Y 69, 72 (2015) (suggesting that blind assessment be used in both charging decisions and plea bargaining).

102. George Gascon was elected District Attorney in Los Angeles County in November 2020, taking office in December 2020. *See* Associated Press, *LA County DA George Gascón Faces Blowback in the First Months of Launching Ambitious Slate Toward Criminal Justice Reform*, KTLA (Mar. 24, 2021, 10:37 PM), https://ktla.com/news/local-news/l-a-county-da-george-gascon-faces-blowback-in-first-months-of-launching-ambitious-slate-toward-criminal-justice-reform/.

information where race and other demographic information was removed.[103] San Francisco did this with the assistance of researchers from Stanford University who created a "masking algorithm."[104] The algorithm identified and masked five types of information: "[1] explicit mentions of race; [2] select physical descriptors, including hair and eye color; [3] individual[] names or nicknames; [4] location information, including neighborhood names and street addresses; and [5] officer names . . . ."[105] Under this new system, prosecutors first reviewed the information based on the redacted report and made a preliminary decision regarding what charges to file.[106] Prosecutors then reviewed all of the available evidence in a case, including unredacted reports (with indicators of race), and made a final decision regarding charges.[107] If a prosecutor's final decision was different they were required to explain, in writing, why there was a difference.[108] But, San Francisco's blind assessment did not apply specifically to plea bargaining; instead, it was only applied to the charging decision.[109]

2. Importance of Blind Assessments for the First Offer

As discussed above, in plea bargaining the first offer can anchor the negotiation. Prosecutors may be reluctant to change their first offer in the absence of compelling information. And, when cases are handed off to other prosecutors, there is a natural reluctance to second-guess a colleague, and possibly office policies, making it harder for a defense lawyer to significantly reduce the offer later in the case. The first offer, or assessment, of the case is extraordinarily important for what happens later. Prosecutors should take precautions to make sure their first offer is not a product of bias. As was discussed above, this may be even more important in less serious cases when race could unconsciously be used as a proxy for future criminality. Adopting blind assessment policies could be one way to make sure plea offers are not a product of bias.

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103. Timothy William, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html; '*Blind Charging' System Aims to Avoid Racial Bias in San Francisco*, IRISH TIMES (June 14, 2019, 9:17 AM), https://www.irishtimes.com/news/ireland/irish-news/blind-charging-system-aims-to-avoid-racial-bias-in-san-francisco-1.3925597.

104. Chohlas-Wood et al., *supra* note 98, at 2, 3–5.

105. *Id.* at 2. Prosecutors are often familiar with individual police officers and the neighborhoods they work in so removing their names helps to mask that information. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

3. What Should Be Part of the Blind Assessment?

As the San Francisco example illustrates, it is possible to remove all information that could be indicia of race or ethnicity. However, to make this structural change more meaningful, I suggest two additions. The first is that prosecutors shift their presumptions in cases to move away from a presumption that all cases that can be proven should be fully prosecuted. Recent research on misdemeanor cases indicates that not prosecuting nonviolent misdemeanors may decrease those defendants' involvement in the criminal legal system in the future.[110] The decision about whether to prosecute should be scrutinized, as it can be subject to bias. Once a case is charged, there should be another check in the system to decide whether to proceed. Currently, prosecutors often have to justify why they have dismissed a case, instead of justifying why they have decided to proceed forward.[111] Prosecutors' offices can decide, as a matter of policy, to not prosecute certain kinds of cases—for example, low-level marijuana cases.[112] Why not switch the process and base it on race-neutral information? After a case is charged, there should be another check in the process where if a different prosecutor is tasked with deciding the first plea offer they should scrutinize the decision to proceed with the case before moving forward.

Second, prosecutors should also have to explain and justify why they are requesting jail or prison time in a given case. Most prosecutors grew up with mass incarceration and their only professional experience was during this decades-long era.[113] Jail and prison time are now routine

110. Amanda Agan et al., *Misdemeanor Prosecution*, NAT'L BUREAU ECON. RES. 5-6 (Mar. 22, 2021).

111. *See, e.g.*, N.J. Ct. R. 3:25-1(a). ("A complaint may be administratively dismissed by the prosecutor without presentation to the grand jury, in which event said prosecutor shall report the dismissal and the basis therefor to the Assignment Judge and shall notify the defendant.").

112. *See, e.g.*, Alicia Victoria Lozano, *Philadelphia District Attorney's Office No Longer Pursuing Charges Against People Arrested with Small Amounts of Marijuana*, NBC PHILA. (Aug. 6, 2018, 11:46 PM), https://www.nbcphiladelphia.com/news/local/philadelphia-district-attorneys-office-larry-krasner-memo-no-longer-charging-for-small-amounts-of-marijuana/57446/; Kyle Jaeger, *Michigan Prosecutor Won't Pursue Most Marijuana Or Psychedelics Cases, 'Regardless of the Amount'*, MARIJUANA MOMENT (Jan. 12, 2021), https://www.marijuanamoment.net/michigan-prosecutor-wont-pursue-most-marijuana-or-psychedelics-cases-regardless-of-the-amount/; Caresse Jackman, *Nashville DA Won't Prosecute Individuals for Possession of Small Amounts of Marijuana*, NEWS 4 NASHVILLE (July 1, 2020), https://www.wsmv.com/news/davidson_county/nashville-da-wont-prosecute-individuals-for-possession-of-small-amounts-of-marijuana/article_f5ea474a-bbbd-11ea-ad1c-af102f59962f.html.

113. *See, e.g.*, James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration ("The prison population began to grow in the 1970s, when politicians from both parties used fear and thinly veiled racial rhetoric to push increasingly punitive

sentences even for minor offenses.[114] Societal messages tend to reinforce that committing a crime should mean going to jail or prison—"if you can't do the time, don't do the crime."[115] One way to start is to change the assumptions that are built into the process.[116] Instead of having to justify a lack of jail or prison sentences, prosecutors should have to justify seeking jail or prison time.[117] What is accomplished by a jail or prison sentence? Will it protect society? Is there some other goal? At this point we understand that sending people to prison is not rehabilitative.[118] Prison should not be routine, but an exception.

4. Challenges

There are (at least) three challenges to adopting a policy of blind assessments in first plea offers—how to treat prior convictions, juvenile records, and prior contacts with police. Due to disparate treatment, and more policing in communities of color, prior convictions may be a product of bias and not a fair indicator of criminality.[119] However, prosecutors rely on prior convictions when assessing cases for plea offers (and for

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policies. Nixon started this trend, declaring a 'war on drugs' and justifying it with speeches about being 'tough on crime.' But the prison population truly exploded during President Ronald Reagan's administration. When Reagan took office in 1980, the total prison population was 329,000, and when he left office eight years later, the prison population had essentially doubled, to 627,000.").

114. *See, e.g.*, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html (". . . low-level offenses account for over 25% of the daily jail population nationally, and much more in some states and counties.").

115. Lyrics from the theme song of the 1970's detective television show, *Baretta*. SAMMY DAVIS, JR., *Baretta's Theme (Keep Your Eye on the Sparrow)* (1976).

116. Larry Krasner, the Philadelphia DA., tried to change the conversation by requiring his prosecutors to detail prison costs during sentencing hearings. Bobby Allyn, *Philadelphia's New DA Wants Prosecutors to Talk Cost of Incarceration While in Court*, NPR (Mar. 31, 2018, 8:22 AM), https://www.npr.org/2018/03/31/598318897/philadephias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-cou. But judges have often resisted this type of change; *see* Samantha Michaels, *Should Judges Have to Weigh the Price Tag of Sending Someone to Prison?*, MOTHER JONES (Jan. 8, 2020), https://www.motherjones.com/crime-justice/2020/01/judges-cost-incarceration-district-attorney-biberaj-krasner-boudin/.

117. Reforming prosecutors often find it hard to change the attitudes of the prosecutors working for them, who are often entrenched in a more punishment-oriented approach. *See* Tina Rosenberg, *Can Prosecutors Be Taught to Avoid Jail Sentences?*, N.Y. TIMES (Aug. 25, 2020), https://www.nytimes.com/2020/08/25/opinion/prosecutors-sentencing.html.

118. *See* Diane Taylor, *Prisoner Rehabilitation Does Not Work, Says Former Prisons Boss*, GUARDIAN (Oct. 29, 2019, 2:00 PM), https://www.theguardian.com/society/2019/oct/29/prisoner-rehabilitation-does-not-work-says-former-prisons-boss.

119. *See* Robin Symton, *How Racial Segregation and Policing Intersect in America*, TUFTS (June 17, 2020), https://now.tufts.edu/articles/how-racial-segregation-and-policing-intersect-america.

charging).[120] It might make sense to start by not including any prior convictions during the initial plea assessment phase only with non-violent misdemeanors. It is not realistic to mask all prior convictions in felony cases where the prior conviction may be part of the charge through an enhancement, or because of the nature of the charge itself. One example is felony Driving While Intoxicated, which is based on a certain number of prior convictions for the same offense to then charge as a felony.

Theoretically, juvenile records should be sealed and not considered once a juvenile becomes an adult.[121] In practice, juvenile rap sheets are often part of adult rap sheets and are fully visible to prosecutors.[122] Prior convictions from juvenile cases should be removed from any information a prosecutor views as part of the case assessment in all cases. It is well documented that there are serious racial and ethnic disparities in how juvenile cases are handled and who is brought into the criminal legal system, instead of being disciplined at school.[123] For this reason, prosecutors should not see juvenile records when making their initial plea offer assessment. This policy supports the overall philosophy of juvenile courts that juveniles should not be treated as adults and should have a chance to rehabilitate themselves.

Just as juvenile records are often part of a defendant's rap sheet, prior police contacts, without convictions, are often included.[124] When I first started practicing law I had to quickly learn to distinguish between a conviction and a contact on a rap sheet. And, on more than one occasion, I had clients with multiple police contacts that did not result in any convictions. However, prosecutors tended to treat those defendants as if they were not first-time offenders. The regular response from prosecutors was "I can't do that" when I questioned the deals and countered that my client should get a standard first-time offender deal. I regularly was told

120. *See* Stacy Barrett, *Use of Criminal Records in Charging and Sentencing*, ALLLAW, https://www.alllaw.com/criminal-law/use-of-criminal-records-in-charging-and-sentencing.html (last viewed Aug. 8, 2021).

121. *See* Lori Cohen, *Should We Be Sealing Juvenile Court Records?*, MST SERVS. (Aug. 23, 2016, 1:01 PM), https://info.mstservices.com/blog/sealing-juvenile-court-records.

122. *See id.*

123. *See* Joshua Rovner, *Racial Disparities in Youth Commitments and Arrests*, SENTENCING PROJECT (Apr. 1, 2016), https://www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/; Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html.

124. *See Criminal Records Can Follow a Youth into Adulthood*, MST SERVS. (May 22, 2019 9:00 AM) https://info.mstservices.com/blog/criminal-records-youth ("As soon as a juvenile comes into contact with law enforcement, a criminal record is opened on them, and this record will contain every single document that is created by the police department, court, district attorney and probation department in relation to the juvenile's criminal activity.").

by prosecutors that, "it's not like it is his first time in the system" as they refused to reduce the offer. Multiple police contacts are a result of police practices and focusing on certain neighborhoods and people.[125] A police contact, without a conviction, should be masked so prosecutors do not see them when evaluating cases for the first offer.

Finally, it may be difficult to adopt a policy of blind assessments with more serious felony cases. With these cases, prosecutors often 5do not make offers until later in the case processing. And, many of these cases, such as murder and sexual assault cases, are vertically prosecuted.[126] This means that the same prosecutor will often handle the case from beginning to end.[127] Under these conditions, it can be harder to blind the case. Part of the prosecutor's case assessment in bringing charges, or bringing a case to a Grand Jury, may include interviewing complaining witnesses.[128] There can be good reasons for this, such as the need to gather more information, to make an initial plea offer later in the case. In more serious cases, later offers can work to the advantage of the defendant. It may make sense as a matter of policy to do blind plea assessments only with misdemeanors and less serious felonies, cases where an offer will be made at or before arraignment. Over 80% of all cases going through the criminal legal system are misdemeanors, so "just" focusing on misdemeanors alone could have far-reaching impact.[129]

B. Individual Fix: Empathy Training for Prosecutors

In addition to the systemic fix, this article also argues for empathy training for prosecutors to reduce bias. This suggestion is made with the recognition that it is impossible for prosecutors to be blind at every stage

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125. *See, e.g.*, Dan Krauth, *Racial Disparities in Policing Have Increased in New York City, Data Shows*, ABC 7 (Sep. 11, 2020), https://abc7ny.com/racial-profiling-disparities-in-policing-black-arrests/6414274/.

126. *See generally* Andy Meek, *'Vertical Prosecution' to Enhance DA's Casework*, MEMPHIS DAILY NEWS (Sep. 2, 2010), https://www.memphisdailynews.com/news/2010/sep/2/vertical-prosecution-to-enhance-das-casework/ ("The difference between horizontal and vertical prosecution is the difference between an assembly-line production and a custom-made order.").

127. *See id.*

128. *See id.*

129. *See generally* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL, (2018) (criticizing the misdemeanor system and the large number of people charged every year, for data on the number of misdemeanor prosecutions (over 13 million in 2015)); *see id.* at Appendix, page 251; ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 229 (2018) (criticizing the large scale misdemeanor prosecution system that rarely adjudicates cases and instead has adopted a "managerial model of judicial surveillance" that operates more as a system of social control).

of the criminal process to factors that could give rise to implicit or explicit bias. Even if a prosecutor's office adopts a policy of blinding cases before making a first offer, it will be difficult, for reasons discussed above, to blind *all* cases in the first offer phase of plea bargaining. In addition, the initial charging decisions may not be made blind. Because prosecutors have so much discretion, and because they can exercise discretion at every stage of the criminal case, it is important to not only rely on blind decision-making early in a criminal case, but also to recognize the importance of tempering prosecutorial discretion with improved empathy skills. In the context of plea bargaining, better empathy skills can decrease bias when prosecutors are making the first offer when they are aware of the defendant's race, ethnicity, and gender. Better empathy skills could also improve their overall assessment of cases in later plea negotiations, and, of course, in initial charging decisions.

There are a variety of definitions of empathy. A cognitive definition views empathy as an "intellectual ability enabling an individual to view the world from another person's perspective."[130] Defining empathy as an "affective approach" means that a person is able to match their emotional reactions to the emotional reaction of another.[131] Another approach is multidimensional, bringing the cognitive and affective approaches together.[132] Dispute Resolution scholar, Carrie Menkel-Meadow, gives this well-known definition:

> In empathy . . .we come to understand the situation of the other by experiencing her emotion and understanding her experience from her perspective, usually achieved by imaging oneself to be in the position of the other (colloquially known as "standing in the shoes" of the other, to which I would add, by taking the other person's feet).[133]

As will be discussed, prosecutors can benefit from the experience of "standing in the shoes" of defendants or "taking [their] feet."[134] Human beings tend to be more empathetic to those who we see as like

130. Emily Teding Van Berkhout & John M. Malouff, *The Efficacy of Empathy Training: A Meta-Analysis of Randomized Controlled Trials*, 63 J. COUNSELING PSYCH. 1, 1 (2016).

131. *Id.* at 1–3.

132. Mark H. Davis, *Measuring Individual Differences in Empathy: Evidence for a Multidimensional Approach*, 44 J. PERSONALITY & SOC. PSYCH., 113–26 (1983) (describing an Interpersonal Reactivity Index testing four scales that together measure empathy: perspective taking, fantasy, empathetic concern, and personal distress).

133. Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. UNIV. L. REV. 385, 389 (1992).

134. *Id.*

ourselves.[135] It is easier for us to imagine being in the shoes of someone who is already like us in some way. We also tend to be better at empathizing with individuals, not entire groups.[136] This can extend to having more empathy for those in the same group that we are from while tending to have less empathy for groups of others or outsiders. Discovering things that people have in common can help to create empathy as it can build bonds and break down the feeling of the other person being an outsider.[137]

Professionals with better empathy skills listen better and are less likely to miss key pieces of information. Medical schools have started to include empathy in their curriculum because empathetic doctors are more efficient and accurate.[138] Empathy is still not a topic that most law school courses mention or teach.[139] This means that lawyers, unlike doctors, are usually left on their own to figure out how, or if, empathy will be a part of the skills they bring to lawyering.[140]

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135. P.J. Manney, *Is Technology Destroying Empathy?*, LIVE SCI. (June 30, 2015), https://www.livescience.com/51392-will-tech-bring-humanity-together-or-tear-it-apart.html.

136. *Id.*

137. *Id.*

138. Emily J. Gould, *The Empathy Debate: The Role of Empathy in Law, Mediation, and the New Professionalism*, 36 VT. B.J. 23, 23 (Fall 2010).

139. One exception is legal clinical education which often includes discussions of empathy. *See, e.g.*, Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135, 135 ("The authors suggest that empathic communication is a critical dimension of lawyering and that without empathy, much valuable affective and cognitive knowledge about the client's case may be lost."). Negotiation and dispute resolution classes also regularly include empathy skills training. *See, e.g.*, Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH. UNIV. J.L. & POL'Y 13, 29–30 (2012) (discussing the skill of empathy as a part of better negotiation training).

140. *E.g.*, Peter Reilly, *Mindfulness, Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution*, 10 NEV. L.J. 433 (2010). This is despite the recognition that these skills matter dating back to at least 1955:

> In 1955, Harvard Law School Dean Erwin Griswold called upon the bar and the legal academy to recognize the need for human relations training in law school. Specifically, Griswold said that such training could help lawyers better understand the emotional needs of both themselves and their clients; moreover, Griswold suggested that the average lawyer spends far more time interacting with *people* than reading and arguing appellate cases. Although the last three decades have witnessed a marked increase in the number and variety of law school courses offered in interviewing, counseling, mediation, and negotiation, (as well as the number and variety of case books available to assist teaching those subject areas), I would nevertheless argue that far more needs to be done in this area. Moreover, I would suggest Professor Guthrie's assessment from nearly a decade ago still rings true today: "Lawyers are analytically oriented, emotionally and interpersonally underdeveloped, and as adversarial as the legal system within which they operate.

Id. at 449.

Prosecutors charging a larger percentage of cases may be the primary reason for mass incarceration in the United States.[141] The unanswered question is why did prosecutors start filing a higher percentage of cases in the last several decades? One answer may be due to decreased empathy and a tendency to see those arrested in a singular dimension: as criminals deserving of punishment. Experience can help prosecutors to develop empathy and make a difference in how they view cases and what they think is an appropriate outcome.[142] Life experience can make prosecutors more "forgiving of mistakes" and increase the ability of prosecutors to see themselves in those who are arrested.[143] However, this ability is likely limited to those defendants that in some way "partially resemble the life of the prosecutor or his social circle."[144]

One criticism of the 2008 financial crisis was that bankers were not prosecuted. A journalist who has examined this era observed that prosecutors tended to

> . . . essentially view executives as good people who may have made a mistake, and they don't want to put those people in prison. Suffice it to say, they don't see young black males who are dealing drugs as essentially good people making one bad mistake.[145]

The ability to view executives as good people who made a mistake is due to empathy. These executives generally come from the same socio-economic class as prosecutors; they may remind individual prosecutors of family or friends.[146] Prosecutors may feel that bank executives are part of the same group. By contrast, prosecutors are less likely to feel a connection to a defendant who is a young, African American man with limited formal education who may also may suffer from addiction or mental illness. Without strong empathy skills, prosecutors are more likely to focus on what is different and to see such defendants in a singular light, as criminals, and make decisions about the case based on that narrow view.[147]

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141. *See* John E. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. UNIV. L. REV. 1239, 1242–43 (2012).

142. *E.g.*, Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1110–11 (2014).

143. *Id.* at 1110.

144. *Id.* at 1111.

145. FRESH AIR, *Is the Justice Department Shying Away from Prosecuting Corporations?*, NPR (July 11, 2017, 2:28 PM), http://www.npr.org/2017/07/11/536642560/is-the-justice-department-shying-away-from-to-prosecuting-corporations.

146. *See id.*

147. *See id.*

1. Empathy and Bargaining

Better negotiators have strong empathy skills.[148] Empathy can help a negotiator to listen better, to understand their counterpart better, and to gather more information.[149] The better a negotiator understands the other side, the more likely they are to have a successful negotiation.[150] This understanding can help negotiators to work beyond stated positions to understand the underlying interests. A prosecutor who understands the defendant better will be more likely to offer a more appropriate sentence. For example, if the prosecutor is aware that the defendant suffers from mental illness or has a substance abuse problem, and understands the impact of their situation, the prosecutor may want to offer some sort of treatment program. And, if the prosecutor understands the underlying interests of the defendant, they may be better able to offer a deal that will be accepted. For example, if the prosecutor knows that the defendant has children and wants to be able to see them grow up, they may be able to better explain why some small amount of time in custody is better than risking a larger amount of time after conviction at trial. Empathy in the context of negotiations can be seen as another form of information gathering. In the context of plea negotiations, prosecutors who gather more information and can view the possible plea deal from the shoes of the other may make more appropriate plea offers. Prosecutors (and defense lawyers) who do not have good empathy skills will be less effective negotiators as they will have a tendency to negotiate only from their own perspective and not thinking about how what they want may not fit the needs and interests of the other side.

2. Training for Empathy

Empathy is a skill that can be taught.[151] Empathy training can take many forms.[152] Empathy training programs use games, role plays, lectures, skills training, and often a combination of all of these approaches.[153] Empathy training programs can be one hour or three days, with no agreement about what is the recommended length for effective

148. Schneider, *supra* note 139, at 29–30.

149. *Id.*

150. *E.g.*, ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 10 (2000).

151. *E.g.*, Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. UNIV. J.L. & POL'Y 189 (2012) (discussing how to teach empathy in negotiation classes); Berkhout & Malouff, *supra* note 129, at 1 (analyzing studies of empathy training and concluding that empathy training programs are "effective overall").

152. *See* Berkhout & Malouff, *supra* note 130, at 2–3.

153. *Id.* at 2.

empathy training.[154] Empathy training may focus on cognitive, affective, or multi-dimensional empathy.[155] A review of empathy training studies concluded that due to training, health professionals and university students had increased empathy and better results.[156] These results suggest that prosecutors, who also have high levels of formal education, might be in a group that is more likely to be receptive to empathy training.[157]

Some scholars have criticized the limits of empathy and instead focus on compassion.[158] Psychologists researching in this area have focused on two reactions. The first is "empathic distress," which means that a person may be so upset by understanding the negative feelings of another that they want to withdraw from the situation.[159] The second is compassion, which is concern about another person's situation that includes a desire to help (and not withdraw).[160] Compassion is often discussed as a component of empathy.[161] One way to teach compassion is through meditation and commonly through a technique called "loving kindness training."[162] While there may be great value to moving to this next level in training for all professionals in the criminal legal system, for the purposes of this article, I am going to focus on empathy, with a recognition that empathy training programs aimed at prosecutors should be careful to not simply create an empathic distress response, which may also bring a desire to withdraw, but instead should focus on how better empathy skills can enable prosecutors to improve a situation, or at least not make it worse.

3. What Kind of Empathy do Prosecutors Need?

Some prosecutors' offices have started programs to improve their attorneys' empathy skills. On November 25, 2019, forty District Attorneys around the country pledged to visit prisons, jails, and juvenile

154. *Id.*
155. *Id.*
156. *Id.* at 5.
157. *See id.* at 2.
158. *E.g.*, PAUL BLOOM, AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION (2016) (arguing empathy distorts judgement and that compassion will lead to better decisions and less cruelty).
159. Tania Singer & Olga M. Klimecki, *Empathy and Compassion*, 24 CURRENT BIOLOGY R875, R875 (2014) (special issue).
160. *Id.*
161. This is a point of debate among psychologists. *E.g.*, Paul Bloom, *Empathy, Schmempathy: Response to Zaki*, 21 TRENDS IN COGNITIVE SCI. 60, 60 (2017) ("I am comfortable with Zaki's use of 'empathy' as an umbrella term; he is right that this is a common practice. However, my own usage, distinguishing empathy from compassion, is also common.").
162. Singer & Klimecki, *supra* note 159, at R876.

detention centers and to incorporate visits into mandatory training and job expectations.[163] Prosecutors who understand more about what it is like to serve time in prison or jail will have a better informed perspective in deciding what charge or sentence is appropriate for individual cases.[164] In another program, the Manhattan District Attorney brought prisoners and prosecutors together to learn from each other and to talk about the criminal legal system.[165] These and similar efforts help prosecutors to interact with, speak with, and see more sides of the defendants they charge and incarcerate. Prosecutors need more than just generic empathy training to decrease their biases. They need training to better understand what it is to be in the shoes of defendants pulled into the criminal legal system in the United States. There are several specific elements of empathy that should be covered in specific training for prosecutors.

a. Impact of Prison/Jail

Defendants often serve time in jail, both before and after their hearings, and prison in the United States. The 2019 prosecutor pledge to visit prisons and jails as part of their training programs recognizes that prosecutors should have some awareness of what jails and prisons look like and what they are sentencing people to when there is time in custody.[166] These programs should not only walk prosecutors through the jails, but should include a component of talking to inmates. The visits should include discussions about the food, sleeping conditions, health care, work, and educational or therapeutic programs (or lack thereof). The programs should also include other basic information such as how much it costs for inmates to telephone home and how in-person family visits work.[167] People in custody who stay in better contact with their

163. Justin Jouvenal, *They Send People to Prison Every Day. Now, They Are Pledging to Visit*, WASH. POST (Nov. 25, 2019, 8:00 AM), https://www.washingtonpost.com/local/legal-issues/they-send-people-to-prison-everyday-now-they-are-pledging-to-visit/2019/11/22/5e0ff274-0d64-11ea-97ac-a7ccc8dd1ebc_story.html.

164. *Id.*

165. *Inside Criminal Justice*, INST. FOR INNOVATION IN PROSECUTION, https://www.prosecution.org/inside-criminal-justice (last visited July 15, 2021).

166. *See* Jouevenal, *supra* note 163.

167. *E.g.*, Tyler Kendall, *Why Are Jail Phone Calls So Expensive?* CBS NEWS (Oct. 13, 2020, 7:07 PM), https://www.cbsnews.com/news/why-are-jail-phone-calls-so-expensive/ ("Nationwide, the average cost of one 15-minute phone call from jail is $5.74, but that amount can range as high as $24.82, according to the Prison Policy Initiative."); Beatrix Lockwood & Nicole Lewis, *The Long Journey to Visit a Family Member in Prison*, MARSHALL PROJECT (Dec. 18, 2019), https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison.

family are less likely to recidivate.[168] Prosecutors should understand when there are institutional barriers to maintaining these contacts, as part of thinking about whether it makes sense to separate a defendant from society and sentence them to time in custody. When prosecutors can put themselves in the shoes of someone who is sentenced to time in custody then they will be able to adequately think through whether it is an appropriate sentence in a particular case.

b. Mental Illness

A significant number of people pulled into the criminal legal system in the United States suffer from serious mental illness.[169] On any given day, Los Angeles County Jail or Cook County Jail are the largest mental health institutions in the United States.[170] Many mentally ill people cycle in and out of jail because of the lack of services and support in the community.[171] They stop taking medication and end up with petty

168. *E.g.*, Meghan Mitchell et al., *The Effect of Prison Visitation on Reentry Success: A Meta-Analysis*, 47 J. CRIM. JUST. 74, 74 (2016) ("Experiencing visitation resulted in a 26% decrease in recidivism.").

169. *See, e.g.*, *Criminalization of Mental Illness,* TREATMENT ADVOC. CTR., https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness (last visited July 29, 2021).

170. *E.g.*, Eric Westervelt, *America's Mental Health Crisis Hidden Behind Bars*, NPR MORNING EDITION (Feb. 25, 2020, 5:01 AM), https://www.npr.org/2020/02/25/805469776/americas-mental-health-crisis-hidden-behind-bars#:~:text=For%20Decent%20Care-,New%20inmates%20with%20a%20mental%20illness%20arrive%20daily%20in%20the,treatment%20facility%20in%20the%20country; *see also* Ailsa Chang, "*Insane": America's 3 Largest Psychiatric Facilities Are Jails*, NPR (Apr. 30, 2018, 5:01 PM), https://www.kcur.org/2018-04-30/insane-americas-3-largest-psychiatric-facilities-are-jails. In many states, the largest mental health facilities in a state are the county jails: "In 44 states, a jail or prison holds more mentally ill individuals than the largest remaining state psychiatric hospital; in every county in the United States with both a county jail and a county psychiatric facility, more seriously mentally ill individuals are incarcerated than hospitalized." BACKGROUND PAPER, OFFICE OF RSCH. & PUB. AFFS., TREATMENT ADVOC. CTR. (Sep. 1, 2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-in-jails-and-prisons.pdf. For a discussion about Texas, see Dallas Morning News Editorial, *The Largest Mental Health Facility in Texas Shouldn't be a Jail: North Texas Needs a Psychiatric Hospital*, DALLAS MORNING NEWS (Feb. 17, 2019), https://www.dallasnews.com/opinion/editorials/2019/02/17/the-largest-mental-health-facility-in-texas-shouldn-t-be-a-jail/ ("Sadly, when measured in terms of inmates who suffer from mental illness, the Dallas County Jail is the second largest mental health institution in the state, after the Harris County Jail in Houston.").

171. *E.g.,* H. Richard Lamb, et al, *Treatment Prospects for Persons with Severe Mental Illness in an Urban County Jail*, 58 PSYCH. SERVS. 782, 782 (2007) ("Conclusions: A large percentage of persons with severe mental illness received their acute psychiatric inpatient treatment in the criminal justice system rather than in the mental health system. The persons with severe mental illness in this study would present a major challenge in treatment in any setting given their psychiatric and criminal histories. The resources of the mental health system need to be greatly expanded, with priority given to treating persons

offenses (such as trespass) and are brought into the local jail for some days.[172] In addition, being poor makes it harder to access mental health services.[173] Prosecutors should understand this dynamic. But, they should also have a better understanding of the variety of mental illnesses and the impact of those illnesses on a person's life who suffers from them. What is it like to have bipolar disorder? What is it like to have schizoaffective disorder or manic depressive disorder? Often prosecutors' experiences with these illnesses may be limited to learning how to counter a defense that may raise them as a mitigating factor or as a claim that the defendant is incompetent to stand trial. This means that prosecutors may be limited to understanding how mental illness invokes questions of competency and should impact sentencing. Prosecutors need a deeper understanding of how these illnesses can make a range of things difficult, such as appearing for multiple court appearances or maintaining housing and a job, particularly for someone who does not have reliable access to medication or if medication does not work well.

c. Substance Abuse

As with mental illness, prosecutors should have training to understand what life is like for those with substance abuse problems. This should include meeting with those in recovery who have never been in the criminal legal system. One goal is to understand that not every

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who are criminalized or who are in danger of becoming criminalized."); *see also* Paul Tullis, *When Mental Illness Becomes a Jail Sentence*, ATL., (Dec. 9, 2019), https://www.theatlantic.com/politics/archive/2019/12/when-mental-illness-becomes-jail-sentence/603154/ (discussing the lack of mental health treatment in the community and the impact of those who are incompetent to stand trial, and generally: "'[t]he dream of a good community mental-health system was not solved, and we went to the war on crime, the war on drugs, and massive cuts to housing—and sentencing guidelines pushed millions of individuals experiencing mental illnesses into the criminal-justice system,' said Steven Leifman, a judge who has been closely involved with the handling of individuals with mental illness in Miami-Dade County's criminal-justice system for the past 20 years.").

172. One suggestion to stop this dynamic is to change who responds to calls of a person in a mental health crisis, sending a professional who can help link people with services, instead of the police. *See* Jackson Beck et al., *Behavioral Health Crisis Alternatives: Shifting from Police to Community Responses*, VERA INST. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives.

173. *E.g.*, WILLIAM R. KELLY, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 53 (Rowman & Littlefield eds., 2017) ("Data from the National Alliance on Mental Illness indicate that 60 percent of adults with a mental illness received no treatment services in the past year . . . [a]ccess to treatment is largely a function of socioeconomic status.").

addict is, or needs to be, pulled into the criminal legal system.[174] Often the most important factor that decides whether a person is arrested is where that person lives—whether in a heavily policed community (which tend to be communities of color) or a less heavily policed community.[175] Ideally, this training would include information on what it is like to detox in jail or prison, discussions with medical professionals who specialize in addiction treatment, and meetings with families of addicts.[176] Prosecutors should also understand that the mentally ill often self-medicate with controlled substances and how this unique (although not unusual) dynamic brings ill people into the criminal legal system instead of getting medical treatment.[177] Finally, prosecutors should learn about the challenge of treatment. They should learn that, for many people, it takes multiple efforts, is not a linear process, and that relapse is not a failure of will power.[178]

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174. Kara Dansky, *Jail Doesn't Help Addicts. Let's Stop Sending Them There*, ACLU (Oct. 17, 2014, 11:17 AM), https://www.aclu.org/blog/smart-justice/mass-incarceration/jail-doesnt-help-addicts-lets-stop-sending-them-there.

175. *See* Robin Smyton, *How Racial Segregation and Policing Intersect in America*, TUFTSNOW (June 17, 2020), https://now.tufts.edu/articles/how-racial-segregation-and-policing-intersect-america.

176. For a discussion of how the criminal legal system, through drug courts, fails to follow medical advice, see CHRISTINE MEHTA, PHYSICIANS FOR HUM. RTS., NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES 3, 18 (2017). *See also U.S. Drug Courts Fall Short of Delivering Medically-Sound, Effective Treatment*, PHYSICIANS FOR HUM. RTS. (June 7, 2017) https://phr.org/news/u-s-drug-courts-fall-short-of-delivering-medically-sound-effective-treatment/ ("Drug courts regularly set participants up for failure. Few communities have adequate treatment facilities, insurance plans often won't finance effective treatment programs, and the criminal justice objectives of drug courts often overrule the medical needs of the patient in ways that threaten the rights and health of participants.").

177. *The Need for Mental Health and Substance Abuse Services for the Incarcerated Mentally Ill*, AM. PUB. HEALTH ASS'N (Jan. 1, 2000), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/28/14/12/the-need-for-mental-health-and-substance-abuse-services-for-the-incarcerated-mentally-ill.

178. *E.g.*, *The Science Behind Addiction*, NAT'L ASS'N OF ADDICTION PROVIDERS, https://www.naatp.org/addiction-treatment-resources/understanding-addiction (last visited June 28, 2020) ("Those who embrace the view of addiction as behaviorally-focused may also mistakenly believe that individuals misusing alcohol and drugs could, at any time, 'make a decision' to quit based upon good intentions and force of will. In fact, this is one of the most widespread myths about addiction or SUD. Though a person taking drugs may initially make a willful decision to engage in the behavior, we now know substance use leads to brain changes over time. These brain changes interfere with an addicted individual's ability to deny themselves and resist the overwhelming compulsion to continue with drug use"); *How Addiction Hijacks the Brain*, 28 HARV. MENTAL HEALTH LETTER 1 (2011).

d. Poverty

Those living in poverty are much more likely to be pulled into our criminal legal system.[179] African Americans and Latinx have higher overall poverty rates.[180] Poverty is, on its own, a source of trauma.[181] Those who are poor are often arrested for poverty-related crimes such as driving without a driver's license (because they cannot afford the fees to renew a license), or simple traffic tickets that convert to warrants when they go unpaid.[182] Criminal debt is a problem that has been well documented[183] and yet prosecutors around the country continue to routinely offer plea deals that include fines and refuse to dismiss low-level cases that will result in a variety of court-related fees along with whatever fine there might be.[184] Prosecutors should be taught to understand what poverty feels like and why what seems to be a minor case and a minor punishment—"it is just a fine"—might be an insurmountable obstacle to some.[185] At this point it is well documented that simple misdemeanor cases can lead to a downward spiral that can be hard to recover from.[186]

179. *E.g.*, Melissa S. Kearney & Benjamin H. Harris, *The Unequal Burden of Crime and Incarceration on America's Poor,* BROOKINGS INST. (Apr. 28, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/Crime-blog-post_april28FINAL-v3.pdf ("America's poorest families not only face higher risks of crime, but also face a higher likelihood that a member of their family will be incarcerated.").

180. *See, e.g.*, John Creamer, *Inequalities Persist Despite Decline in Poverty for all Major Race and Hispanic Origin Groups,* US CENSUS BUREAU (Sep. 15, 2020).

181. *E.g.*, KELLY, *supra* note 173, at 56 ("Studies of urban minority individuals living in poverty show rates of PTSD and trauma-related disorders four times that of the general population.").

182. *E.g.*, Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV 486, 492 (2016) (describing the problem of incarcerating people who cannot afford to pay for fines and fees creating a "two-tiered system" where "those who can pay their criminal justice debts can escape the system, while those who unable to pay are trapped . . . .").

183. *See* Sobol, *supra* note 182, at 492.

184. *E.g.*, Whitney Benns & Blake Strode, *Debtors' Prison in 21st-Century America*, ATL. (Feb. 23, 2016), https://www.theatlantic.com/business/archive/2016/02/debtors-prison/462378/ (describing the variety of fines and fees routinely included in criminal cases).

185. *Dispelling Myths About Poverty,* EQUAL JUST. UNDER L., https://equaljusticeunderlaw.org/poverty-myths (last visited Aug. 10, 2021).

186. *E.g.*, NATAPOFF, *supra* note 129, at 19–38.

e. Trauma

Criminologists recognize the significance of trauma as a cause of criminal behavior.[187] Problem-solving courts often focus on trauma-informed care as part of their approach.[188] Defense lawyers who specialize in death penalty work often consider trauma a mitigating factor for their clients.[189]

Trauma can impact people in a variety of ways. The first pioneering study to compile data on the impact of children being exposed to adverse events was the Adverse Childhood Experiences (ACE) Study.[190] This study had ten questions asking whether the patient had:

> experienced enumerated ACEs, including verbal and physical maltreatment, sexual contact with an adult, witnessing violence against their mothers, and having parents addicted to drugs or alcohol. Each affirmative answer was worth a point, and each participant would be assigned an ACE score of zero to ten, based on her responses.[191]

The more ACEs a participant reported, the more impact it had on them as adults, including chronic depression, suicide attempts, addiction, and other health problems.[192] Since the 1990s when the ACE Study was conducted, neuroscientists have learned that trauma "fundamentally changes neurobiology, causing psychological symptoms and social maladaptations."[193]

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187. *See* Vittoria Ardino, *Offending Behaviour: The Role of Trauma and PTSD*, 3 EUR. J. PSYCHOTRAUMATOLOGY (2012); *see also* WILLIAM R. KELLY, CRIMINAL JUSTICE AT THE CROSSROADS: TRANSFORMING CRIME AND PUNISHMENT 174–75 (2015).

188. *See, e.g.*, Will Cushman, *Why Trauma-Informed Care is Creating Hope for Kids in Wisconsin*, WISCONTEXt (May 13, 2019, 6:00 AM), https://www.wiscontext.org/why-trauma-informed-care-creating-hope-kids-wisconsin; Claudia Powell et al, *Outcomes of a Trauma-Informed Arizona Family Drug Court*, 12 J. SOC. WORK PRAC. ADDICTIONS 219, 220 (2012) (discussing a study that shows that trauma-informed care may be a good model for "parents battling substance abuse"); *see generally* Nicole C. McKenna & Kristy Holtfreter, *Trauma-Informed Courts: A Review and Integration of Justice Perspectives and Gender Responsiveness*, 30 J. AGGRESSION, MALTREATMENT & TRAUMA 450 (2021).

189. In capital cases, competent assistance of counsel requires investigating mitigating factors, which may include trauma. *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005); *see also* Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1 (2018) (arguing that defense lawyers in a wider variety of cases should investigate their clients' trauma and use that information to mitigate sentences).

190. See Gohara*, supra* note 189, at 14.

191. *Id.*

192. *Id.*

193. *Id.* at 15.

Different communities experience different levels of trauma. African Americans and Latinx are more likely than others, as children, to witness a shooting, bombing, or civil unrest.[194] They are seven times more likely to lose someone close to them due to murder.[195] Prosecutors need to understand how different people are impacted at different levels by violence in their communities. As Miriam Gohara observed, "[w]itnessing assaults, robberies, shootings, and homicides scars children, hampers their social development, and puts them at risk of committing violence themselves."[196] Prosecutors should learn more about trauma rates in their own communities, how trauma can contribute to criminal behavior, and how it might create a barrier or challenge for rehabilitation. For example, Prosecutors should know if any of the zip codes in their jurisdiction are "Cradle to Prison Pipeline" communities.[197] These are communities with higher trauma rates overall (including higher poverty rates).[198]

f. Cognitive Disability

A significant number of defendants suffer from cognitive disabilities.[199] As with other areas, there is no comprehensive data, but estimates are that between four and fourteen percent of those in the criminal legal system have an intellectual disability.[200] This is compared to between two and three percent of the general population.[201] They may be barely literate (or completely illiterate). People who have cognitive disabilities may not understand instructions that are given to them (and may be more likely to be arrested for failing to follow a lawful order by a police officer).[202] People who have cognitive disabilities may also have a much harder time finding and keeping a job, depending on the extent of the disability. This can make it harder for them to both be released on their own recognizance or raise bail. Not having reliable employment can also make it harder for them to be able to afford fines and fees. Finally,

194. *Id.* at 16.
195. *Id.*
196. *Id.*
197. *See* Marian Wright Edelman, *The Cradle to Prison Pipeline: An American Health Crisis,* 4 PREV. CHRON. DIS. (July 2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1955386/#:~:text=The%20Cradle%20to%20Prison%20Pipeline%20consists%20of%20a%20complex%20array,up%20to%20become%20productive%20adults.
198. *See generally* Gohara, *supra* note 189.
199. KELLY, *supra* note 173, at 25.
200. *Id.*
201. *Id.*
202. Leigh Ann Davis, *People with Intellectual Disabilities in the Criminal Justice Systems: Victims & Suspects*, ARC https://thearc.org/wp-content/uploads/forchapters/Criminal%20Justice%20System.pdf (last visited Aug. 4, 2021).

people with cognitive disabilities may have a hard time processing information in a criminal case.[203] They may not understand what they are being told about a plea offer and they may need more time to process the information.[204] Prosecutors who have a better understanding of the impact of these difficulties might be less likely to engage in hard bargaining tactics, like short time limits on plea offers. They may also be more realistic about probation conditions, to make sure they are not too complicated. One challenge is that many defendants are never tested for cognitive disabilities, so even their lawyers may not be fully aware of what their clients' abilities may be.

g. Other Disabilities

Defendants suffer from a full range of other disabilities. As the U.S. population ages, more will be suffering from diseases such as dementia, and prosecutors (as well as police officers) should be aware of how to better manage these disabilities.[205] Prosecutors would benefit from a better understanding of disabilities at every stage of a case processing.

When I was a public defender in Los Angeles I had a deaf client charged with spousal battery as a misdemeanor. The prosecutor refused to dismiss the case because "we can't dismiss a spousal battery." This was a case that should never have been charged. My client and his wife were having an argument. Since they were deaf, they were arguing with sign language, not spoken words. At one point my client's wife turned her back to him. He grabbed her shoulder and turned her around and resumed signing. When I asked him what happened he said, "I told her to listen to me" (grabbing her by the shoulder so she could see him signing). When the wife got on the witness stand to testify, the prosecutor asked what happened and she said, "he told me to listen to him." When the prosecutor asked how he had done that, she replied "by grabbing my shoulder and turning me to see him." She denied he committed a battery. As a deaf person, if she did not see my client signing, she could not listen to him. A prosecutor with a better understanding of deaf culture would not have prosecuted this single act (a grab on the shoulder) as the crime of spousal battery. In another case, a misdemeanor failure to follow the lawful order of a police officer, my elderly client had failed to stop when directed to do

203. *See id.*
204. *See id.*
205. *See Alzheimer's Disease and Healthy Aging,* CTR. FOR DISEASE CONTROL AND PREVENTION https://www.cdc.gov/aging/publications/features/Alz-Greater-Risk.html (last visited Aug. 5, 2021). For a story of poor training and a complete lack of empathy by police, see Michael Levenson, *Three Colorado Officers Resign After Arrest of Woman with Dementia*, N.Y. TIMES (May 19, 2021), https://www.nytimes.com/2021/04/30/us/colorado-police-dementia.html.

so by a police officer (my client was walking down a street). When I asked my client why he had not stopped, he said, "I didn't hear him." My client had no prior record. We went to trial and my client, on the witness stand, said that he had not heard the police officer. The prosecutor in the case was in his first few months on the job. While cross examining my client, he turned his back to my client and asked a question. My client said, "What? I didn't hear you." Both of my clients were acquitted, but after days in court and months of coming to and from the courthouse. Both cases should never have been tried and likely would not have been by more experienced or better trained prosecutors.[206] Both of my clients were Latinx, and both of the prosecutors in these cases were young white men who had clearly had no experience with hearing impairments and the deaf community.

Given the variety of disabilities that exist, it is not practical to train prosecutors to have empathy for every disability they might encounter. However, prosecutors are more likely to disregard the disability when the disabled person is from a different racial, ethnic, or socio-economic group than they are.[207] Some general training could help to make prosecutors more aware that disabilities matter and are something to consider in both charging and plea-bargaining decisions.

CONCLUSION

Plea bargaining is the dominant process for case resolution in the United States criminal legal system.[208] Any meaningful effort to reduce racism and bias in the criminal legal system must include reform to reduce racism and bias in plea bargaining. Plea bargaining as it works now can exacerbate bias and reinforce structural racism. This article has given two suggestions that should be included in overall reform efforts to help lessen prosecutorial bias in the plea bargaining process. First, prosecutors should use blind assessment to change the structure of how they make plea offers, which will reduce the possibility for bias. [209] This

206. *See generally* Wright & Levine, *supra* note 143 (discussing how newer prosecutors tend to see their cases in more black and white ways and fail to recognize the grey areas).

207. Police have time and again illustrated this bias. *See, e.g.*, Rebecca Hersher, *For Parents of Young Black Men with Autism, Extra Fear About Police*, NPR (Aug. 23, 2014, 6:24 PM), https://www.npr.org/sections/codeswitch/2014/08/23/342688183/for-parents-of-young-black-men-with-autism-extra-fear-about-police ("[P]eople with autism spectrum disorders are seven times more likely to interact with police over their lifetimes, compared with people without a cognitive disorder."); Rachel Treisman, *13-Year-Old Boy with Autism Disorder Shot by Salt Lake City Police*, NPR (Sept. 9, 2020, 6:46 AM), https://www.npr.org/2020/09/09/910975499/autistic-13-year-old-boy-shot-by-salt-lake-city-police.

208. *See supra* Section I.

209. *See supra* Section III.A.

could have far-reaching impact, particularly in lower-level cases. Second, prosecutors should improve their empathy skills, focusing on the challenges and conditions that most commonly impact criminal defendants.[210] Meaningful reform demands that prosecutors learn to look at defendants as full human beings deserving of compassion, not simply punishment. Bias and racism can interfere with the ability to have empathy for those who are different from ourselves and lead to disparate outcomes. The only counter to this problem of bias is an intentional effort to do things differently and to see those who are pulled into the criminal legal system differently. Prosecutors, whose primary ethical duty is to do justice[211], should intentionally move away from single dimensional views of defendants as "criminals" and look at the full and complex human being behind the criminal act.

210. *See supra* Section III.B.

211. ABA, CRIMINAL JUSTICE STANDARDS: PROSECUTION FUNCTION 3-1.2(b) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/#:~:text=%28a%29%20The%20prosecutor%20is%20an%20administrator%20of%20justice%2C,bounds%20of%20the%20law%2C%20not%20merely%20to%20convict ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict….").