Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism

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I. Introduction

The trial penalty—the often severe and unjustifiable difference between a pre-trial offer and a post-trial sentence—affects some people much more than others. Given profound systemic biases in the criminal justice system, people of color feel the impact of the trial penalty much more frequently and intensely than others, just as they feel the impact of heavy-handed policing, prosecution, and sentencing. This should be no surprise: bargaining in a context of systemic racism subjects people of color to disproportionate and unjustifiable penalties, thereby undermining the integrity of the system and ruining lives.

This article will lay out the evidence for the disparate impact of the trial penalty on people of color, and explore the rise of the trial penalty, its scope, and several potential solutions to this problem. Recognizing injustice and its roots is the first step in preventing future wrongs and remedying past injustices.

II. Racial Disparity in the Application of the Trial Penalty

There are troubling racial disparities in the trial penalty, resulting in longer sentences for Black and Brown people for similar convictions. A study from Professors Jeffery Ulmer and Mindy Bradley found that the trial penalty for Black individuals convicted of serious violent offenses increased proportionally based on the percentage of a county's population comprised of Black people.[1] Ulmer and Bradley reference a 2005 paper by Steven Barkan and Steven Cohn in hypothesizing that racial prejudice may be driving a desire to "send a message" to the larger community that certain types of crime (associated with race) will be handled swiftly and severely.[2]

A. Pre-Existing Prejudice

A more recent study by Jeffrey Ulmer, Noah Painter-Davis, and Leigh Tinik used sentencing data from Pennsylvania and U.S. District Courts to further investigate race as a factor in the application of the trial penalty. In *Disproportional Imprisonment of Black and Hispanic Males: Sentencing Discretion, Processing Outcomes, and Policy Structures,* they note the pre-existing disparity among Black and Hispanic males: Blacks are already three times as likely as Whites to be imprisoned, and Hispanics are more than four times as likely. Sentence length disparity is similarly pronounced, with 50 percent longer sentences for Blacks and 17 percent longer sentences for Hispanics.[3] Ulmer, Painter-Davis, and Tinik then statistically control for a multitude of factors that may explain the increased incarceration rate and sentence length, including the offense type, conviction history, guidelines, mandatory minimums, and departures. Markedly, a full 90 percent of Black male prison length disparity can be controlled—or explained—by overall imprisonment odds, guidelines and minimums, offense type, multiple charges, and criminal history.

B. The Role of Prosecutors

The study above notes how the criminalization of, and the systemic attention devoted to, individuals of color can explain at least part of the sentencing disparities seen at the back end of a case. Notable for not playing a large part in sentence length, downward departures based upon prosecutorial discretion account for only a 5 percent and 1 percent decrease in Black and Hispanic imprisonment odds, respectively.[4]

The importance of factors largely decided or dictated well before the sentencing phase once again suggests the outsized role that the discretion of prosecutors plays in the adjudication of criminal cases. Both charge reduction and sentencing negotiations, in particular, rest in the hands of prosecutors and have a profound impact on the racial disparity seen in outcomes.

C. Systemic Trends

Hovering over these racial disparities is the heavy external pressure to plea from the volume of cases entering the legal system. Beginning in the early 1980s, several statutory changes to how the War on Drugs was waged had a profound impact on the incarceration rates in the United States. The Anti-Drug Abuse Act of 1986 took much of the discretion out of the hands of judges and imposed mandatory minimum sentences.[5] Additionally, the Sentencing Reform Act of 1984 eliminated federal parole.[6]

Together, these pieces of legislation contributed to a dramatic rise in both the incarcerated population and the average length of prison sentences. Between 1980 and 2013, the number of those incarcerated in federal prison for drug offenses grew from 4,749 to 100,026.[7] By the later end of that timeframe, fully half of all federal prisoners were behind bars for drug offenses. The War was being waged, however, primarily against certain racial groups. In

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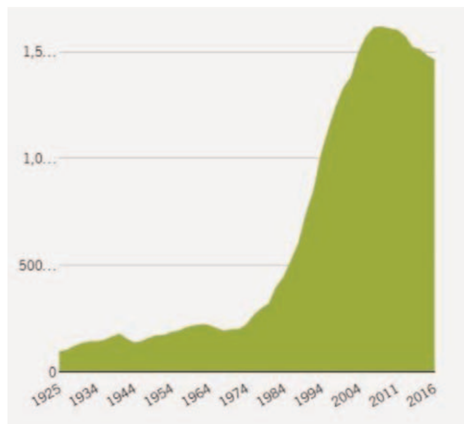
Figure 1
U.S. state and federal prison population, 1925–2016



2012, over 38 percent of those sentenced to federal drug offenses were Black, and over 37 percent were Latino.[8] With respect to sentences, between 1984 and 1991, prison time grew from less than 30 months to nearly 80.[9] Figure 1 shows how state and federal incarceration rates have largely followed the same trend.[10]

The damage from the War on Drugs has not been borne equally by all Americans. Despite equal culpability in the sale and use of illegal drugs, Blacks and Whites are not equally as likely to be incarcerated for drug-related offenses. In 1980, 23 percent of those arrested for drug offenses were Black; that number grew to 41 percent in 1991.[11] Blacks are more than three times as likely as Whites—despite equal or lower usage—to be arrested for drug selling.[12]

The National Research Council of the National Academies found that more than half the growth in state prison populations was due to changes in prosecution and sentencing: it became far more likely to be imprisoned following an arrest.[13] "Three strikes and you're out" and "truth-in-sentencing" laws at both the federal level and across the majority of states also contributed to the marked rise in incarceration.[14] And while a "tough on crime" narrative was the outward face of the legislation, many have suggested that an undercurrent of racism supported the agenda. In *The New Jim Crow*, Michelle Alexander connected "tough on crime" bills with a veiled effort to re-exert control over Blacks and assure White voters of their place in society.[15] In Washington, the first state with a "three strikes" law, within a decade of its passage, Blacks accounted for 37 percent of the state's life-sentenced inmates from "three strikes," but only 3 percent of the total population.[16]

III. Historic Trial Rates

It is instructive to pause to explore the underpinnings of the plea bargain and how it came to occupy such an outsized role in the court system. Plea bargaining is not a new phenomenon, and despite the recent attention to the shrinking rate of cases reaching trial, its prominence is also nothing new. Studies have long noted the rapid rise of pleas, and the correlating retreat of trials, throughout the 19th and early 20th centuries. In "The Vanishing Jury," Raymond Moley tracked cases in New York City, finding that only 15 percent of felony convictions in Manhattan and Brooklyn in 1839 were the result of guilty pleas. The rate increased regularly over the timeframe analyzed by Moley, to 80 percent by 1919, and to 90 percent by 1926.[17]

Several accounts in the early 20th century describe rampant corruption significantly contributing to the rise of plea bargaining. Police officers were able to increase their pay by transporting individuals to long-term detention facilities. Police thus played an active role in encouraging pleas.[18] All in all, contemporary and retrospective investigations surrounding the turn of the century paint a picture of criminal courts as rife with corruption and rarely reviewed by appellate bodies.[19]

IV. Pressure to Plea

The incentives and pressures to resolve a case without going to trial exert themselves in two distinct ways. The looming possibility of the trial penalty is perhaps the most readily apparent. But the initial—and more systemic—pressure is that placed on the legal system. In a sense, both external and internal forces are brought to bear on the court system apparatus. Collectively they contribute to the subsequent threat of the trial penalty.

A. The Costs of a Case

Closely tied to the caseload pressure are the attendant costs associated with administering a case. Although not directly addressing drug charges, a RAND study from 2016 provided some estimates for the costs to prosecute, defend, and adjudicate several offenses. At the high end were homicides ($22,000 to $44,000) and rape/sexual assault ($2,000 to $5,000).[20] At the low end, burglary ($600 to $1,300), aggravated assault ($800 to $2,100), and larceny/theft ($300 to $600) may provide more of a fiscal analogue for the cost of bringing most drug charges to trial. Multiplied across the exponential growth in the latter end of the 20th century, the financial incentives for the government to plea bargain begin to take shape.

B. Pressure at the Individual Level

Although not excusing the threat of the trial penalty as a tactic to coerce plea agreements, the dramatic rise in the number of individuals entering the legal system does provide a sobering context for the frequency with which cases are pleaded.

The external pressure placed on the legal system by the dramatic increase in caseloads manifests at the individual level with strong incentives to plea. Sentencing guidelines coupled with charging discretion in the hands of prosecutors combine to create a bargaining paradigm markedly weighted against individuals. Below are several of the

statutory tools prosecutors have at their disposal to leverage an individual into a plea:

1. **Conspiracy Laws.** In the federal context, conspiracy laws carry the same mandatory sentence as the underlying drug crime. Because an agreement between one or more people opens each conspirator to the maximum penalties (for example, sentences based upon the collective quantity of drugs possessed by the group), these laws tend to over-penalize the least or lesser culpable defendants.[21] Rather than serving as a tool against so-called "kingpins" or leaders, 23 percent of those convicted of federal drug crimes are low-level couriers, 21 percent are wholesalers, and 17 percent are street-level dealers. The imbalanced application of policing inevitably means that these rates come down harshest on Black and Brown people. When the entire motivation for the War on Drugs was subjugation and racial animus, the imbalanced application of conspiracy laws becomes clear. John Ehrlichman, President Nixon's domestic policy chief, described the entire effort:

> You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black[s], but by getting the public to associate the hippies with marijuana and blacks with heroin[, and] then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.[22]

2. **Mandatory Minimums.** The minimums effectively moved sentencing authority from judges to prosecutors. This power, along with vesting charging decisions with prosecutors, creates an apparatus where prosecutors can decide what punishment an individual faces. The plea rates convey just how significant this framework became. Between 1980 and 2010, the percentage of federal drug cases settled by plea grew from 68.9 percent to 96.9 percent,[23] corresponding with a War on Drugs that has had a disproportionate effect on people of color.[24]

3. **Sentencing Guidelines.** Sentencing Guidelines combine several factors, often disproportionate to the charged offense, and frequently result in extreme punishments. Aggravating factors such as criminal history and gun possession can multiply a sentence by several factors. Previous convictions—at any point in the past—resulting in imprisonment as brief as one year can activate the enhancement.[25] Even more informative for the trial penalty, however, is the discretion with which prosecutors can seek multipliers. Here, once again, racial disparities also emerge. Studies immediately before and soon after the application of sentencing guidelines saw Blacks outpace Whites in both rate of imprisonment and length of sentence.[26]

4. **Safety Valves.** Safety valves allow leniency in very limited circumstances. Courts can also employ an exception for first-time, low-level, non-violent offenders. The average sentence with a safety valve is 34.2 months, and 94.2 months without it. Once again, however, these safety valves are often at the discretion of the state. And once again, it is not always applied equally. A report by the United States Sentencing Commission found that, in fiscal year 2016, 12.4 percent of Blacks facing a mandatory minimum drug sentence received safety valve relief, while the number for Whites was 16.5 percent.[27]

5. **Substantial Assistance.** Prosecutors can offer the potential for a substantial reduction in prison sentence in exchange for a defendant's "substantial assistance" in the investigation and prosecution of others. Prosecutors do so by recommending to the sentencing court that an individual receive a reduced sentence if the prosecutor's office, in its sole discretion, concludes that the defendant has provided substantial assistance to the government.

6. **Fact and Charge Bargaining.** Prosecutors have at their discretion the ability to present or not present facts or arguments that can impact the offense level an individual faces in the guidelines. Similarly, the prosecutors can dismiss charges or threaten to pursue additional charges if a plea is not accepted. Prosecutors often threaten additional charges that trigger mandatory minimum sentences either by filing an aggravator (for example, § 851 enhancements for prior drug convictions, which can double a minimum sentence) or filing a new charge, either of which triggers a mandatory minimum. All of these options both effectively and often significantly increase the sentence an individual risks if he/she pursues the case to trial and loses.

V. The Judicial Underpinnings of the Plea Bargain and the Sanctioning of the Trial Penalty

The coercive landscape of plea arrangements exists in the presence and with the blessing of the judiciary. Several cases have firmly entrenched the plea bargain in modern American jurisprudence. Such an outcome was not always clear, however. The conflict between the sizable role played by the plea bargain in the functioning of the legal system and the inescapable concerns about due process presented by the trial penalty played out over several cases. For a time, both individual and due process rights seemed to weigh heavier in the Supreme Court's consideration. Unfortunately, keeping the gears of the legal system churning eventually carried the day.

A. *North Carolina v. Pearce*, 1969

The idea of prosecutorial vindictiveness was introduced in two instances where a court imposed stricter sentences after an initial successful appeal.[28] In writing for the Court, Justice Stewart noted that the Fourteenth Amendment's Due Process Clause "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Additionally, the Court held that, "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that

a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."[29]

B. *Blackledge v. Perry*, 1974

Several years after *Pearce*, in a case originally granted certiorari to address double jeopardy, *Blackledge v. Perry* somewhat inadvertently revisited *Pearce*. The plaintiff, Jimmy Seth Perry, a prisoner in North Carolina, was originally convicted of misdemeanor assault.[30] When Perry exercised his state right to seek a de novo appeal, the prosecutor changed the charge to felony assault with intent to kill and inflict serious bodily injury. Perry ended up pleading to felony assault and thus a longer sentence.

Rather than addressing the double jeopardy claim, however, the Court instead took the vindictiveness rule in *Pearce* and extended it beyond judges to also include prosecutors. Again writing for the Court, Justice Stewart reasoned that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case."[31]

C. *Bordenkircher v. Hayes*, 1978

It took only four years for the tide to turn and for the Court to address the complications it had created for plea bargaining. In *Bordenkircher*, the Court put any doubt about the practice to rest.[32] Paul Hayes was facing a felony charge for forging a check for less than $100 and a corresponding sentence between two and ten years. He was offered—and declined—a five-year plea deal and instead went to trial. In a move repeated countless times in plea negotiations, the prosecutor then opted to invoke a habitual offender statute based on two prior felony convictions and won a mandatory life sentence.

Initially, the Sixth Circuit saw in the higher indictment a striking similarity to the vindictiveness in *Blackledge*. At the heart of *Bordenkircher* was a conflict between the Court's own rule against prosecutorial vindictiveness and its recent *Brady* decision that effectively sanctioned the use of sentencing discounts and threats of the death penalty to negotiate plea deals:

> For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty. . . . [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State. . . . A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained.[33]

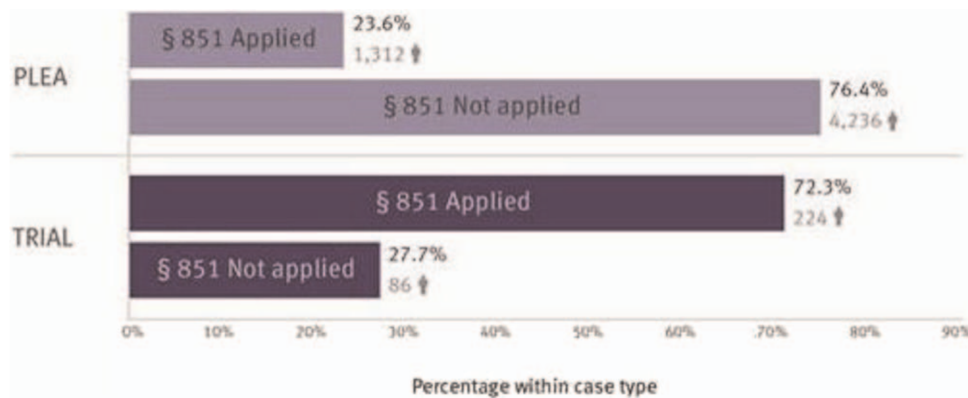
The fact that *Brady* already yielded to the importance of plea bargaining in the administration of the legal system suggested the ultimate decision in *Bordenkircher*. In a close 5–4 vote, the Court found no distinction between a prosecutor reducing a charge for accepting a plea and increasing a charge for rejecting it:

> It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. . . . In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation". . . . To hold that the prosecutor's desire to induce a guilty plea is an "unjustifiable standard," . . . would contradict the very premises that underlie the concept of plea bargaining itself.[34]

VI. Linking Plea Bargaining with the Trial Penalty

Defenders of plea bargaining, and the corresponding ramifications for refusing a deal, frequently claim that pleas serve a vital role in the machinery of the legal system. Pleas allow—so the argument goes—the government to conserve resources and guilty individuals to negotiate the best possible sentence without having to go through with a trial. Without plea bargaining, a system with a rigid sentencing matrix would afford no benefit for the accused accepting responsibility and showing remorse, two factors that currently allow individuals to lessen their sentences and serve a philosophical purpose in the legal system. With respect to the trial penalty, and somewhat perversely, prosecutors may feel pressure to follow through on the threats they made in plea negotiations. Not holding firm, the reasoning goes, negatively impacts a prosecutor's ability to effectively bargain in future cases.[35] Studies into just how strictly a prosecutor must impose a penalty to encourage future cooperation have cast doubt on this intuition, however, with some suggesting that limiting the imposition of trial penalties to visible, high-profile cases may have the same effect as regularly seeking higher sentences.[36] What's more, prosecutors do not hold firm equally across demographics. In New York City, for example, Black and Brown people in the legal system were more likely to be held in pretrial

Figure 2
Percentage of federal drug defendants eligible for a § 851 sentencing enhancement by whether enhancement was applied and by plea/trial[42]



detention, less likely to receive a plea offer with a reduced charge, and more likely to receive an offer that includes time spent incarcerated.[37]

The data behind how plea bargaining is employed in practice portrays plea bargaining as an institution far more often used as a stick rather than a carrot. The gaping disparity between sentences for similar offenses highlights prosecutorial discretion and challenges notions of equal justice. In 2012, for instance, the average sentence for federal drug trafficking offense ranged from a low of 25 months in Arizona to a high of 160 months in the Central District of Illinois: a difference of more than 11 years.[38] By the same token, the rate at which the aforementioned enhancements are applied are even more disparate. Section 851 enhancements—those for previous convictions—were applied to 87 percent of eligible individuals in the Northern District of Florida and only 1.5 percent in the Southern District of California and the Northern District of Texas.[39] Remarkable only as a demonstration of arbitrary application, seven districts did not apply the enhancement at all.[40]

Despite the seemingly capricious application of sentencing parameters, factoring in whether an individual accepted a plea or went to trial demonstrates a clear trend. A 2013 study of Sentencing Commission data found that, of 5,858 applicable drug cases sampled (see Figure 2), "those who went to trial were 8.4 times more likely to receive the § 851 enhancement than those who pled."[41]

Figures of nearly every metric convey just how coercive the trial penalty has become:

- The average federal sentence for drug offenses for individuals who accept a plea is 5 years, 4 months. For those who go to trial, the average is 16 years.[43]
- Individuals in possession of a gun at the time of their offense were 2.5 times more likely to receive an enhancement if they went to trial.[44]
- Prosecutors frequently require individuals to plead guilty in order to negotiate a "substantial assistance" exception to mandatory minimums. Nevertheless, according to the Sentencing Commission, 6 out of 10 individuals who provided such assistance did not receive a safety valve exception.[45]
- A Human Rights Watch study found that a low 4.9 percent of individuals who took their case to trial were able to avoid sentences carrying a mandatory minimum. Conversely, 60.4 percent of those that pleaded guilty avoided mandatory minimum sentences.[46]
- A similar trend holds for weapon enhancements: 26 percent of guilty pleas receive §924(c) enhancements when eligible. That number grows to nearly 47 percent for those who go to trial. And similar to prior conviction enhancements, the average sentence is considerably longer for those with §924(c) enhancements who go to trial: more than 8 years longer than enhancements applied after plea agreements.[47]

VII. One Size Does Not Fit All

One argument in favor of imposing a trial penalty is that one of the alternatives—a stricter form of sentencing—does not take into account nuance among individuals charged. Remorse or responsibility, for instance, would not be factored in. The gulf in sentencing between not only courts but also demographics, however, conveys much more of a challenge to equal treatment under the law than nuanced justice. Not only do wide variations exist across different courts, as mentioned above, but research shows that variations exist across offenses as well.

Charges for serious, violent offenses and/or those brought against individuals with extensive criminal histories would suggest aggressive enhancements and lengthier sentences for those that opted for trial. Ulmer and Bradley, however, found that to be true, but with nuance: the trial penalty was less severe for those individuals with greater criminal history.[48] Additionally, leniency through plea offers may be less available in these categories of offense, shrinking the gap between plea offer and ultimate sentence.

And with respect to racial disparity, the over-policing of Black and Brown communities lends to lengthier criminal histories and thus less room to bargain within the broken system.[49]

VIII. Recommendations

Real reform must right-size the legal system by intercepting poverty, mental health, addiction, racism, and other societal problems before they are dropped on the doorstep of the courts. Instead of devoting more resources to an overworked legal apparatus or searching for efficiencies, policymakers would be better served by taking a long, hard look at what is driving so many people into contact with the law in the first place, and limit judicial involvement to real cases and real controversies.

Beyond the more obvious measures of discretion and mandatory minimums, a balance needs to be imposed on the plea process and the legal system itself. An information asymmetry often exists between the prosecution and the defense. Bargaining with less-than-complete information on prosecutorial evidence and/or witnesses puts the defense at a strategic disadvantage.

Although non-quantifiable, these imbalances can have the effect of encouraging plea deals rather than "risking" trial. Reforms that ensure the defense has early and complete access to everything in the possession of the prosecution, and the ability to test and investigate facts early and independently are constructive steps in facilitating a more transparent plea negotiation.

IX. Conclusion

Deep-rooted undercurrents of racism lurk at every turn in the legal system, severely tilting the process against people of color. Nowhere is the danger of unequal parties and disparities more prominent than in plea bargaining. And nowhere are notions of fairness more damaged than in the existence of the trial penalty.

The stark contrast between sentences imposed on those who seek to bring their case to trial and those who plea all but proves the existence of the trial penalty—and a severe one at that. Disparities with how the trial penalty is applied across both courts and races adds an additional layer of inequality and injustice. And the reliance on the courts to address a host of societal problems further encourages the trial penalty.

Both data and commentary firmly place the majority of the onus for the trial penalty on mandatory minimums and sentencing guidelines. In a certain sense, however, the most-discussed answers are merely window dressing for the larger, gaping cracks in the legal system. Over-policing, over-criminalization, and an active ignorance to those suffering from mental health issues help to drive the gears of a system that destroys the lives of so many.

The figures behind plea bargaining and the imposition of the trial penalty profoundly question the idea of a give-and-take negotiation. Far more accurate than a "bargain" is an "ultimatum" that uses severe penalties as leverage. Swift and direct action must be taken to preserve the trial and ensure it is a real, viable element of the legal system, not a piece of history resigned to first-year law books.

Notes

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1 Ulmer & Bradley, *infra* note 48.

2 Steven Barkan & Steven Cohn, *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, 52 Soc. Probs. 300 (2005).

3 Jeffrey Ulmer, Noah Painter-Davis, & Leigh Tinik, *Disproportional Imprisonment of Black and Hispanic Males: Sentencing Discretion, Processing Outcomes, and Policy Structures*, 33 Just. Q. 642 (2016), https://doi.org/10.1080/07418825.2014.958186.

4 *Id.*

5 Jamie Fellner, an Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty, Human Rights Watch, (Dec. 5, 2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#.

6 After 1994, parole was eliminated in many states in order to qualify for truth-in-sentencing grants to build or expand correctional facilities through the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program in the 1994 Crime Act (Pub.L. No. 103–322, 108 Stat. 1796 (1994)). To qualify for these grants, states must require persons convicted of a Part 1 violent crime to serve not less than 85% of the prison sentence. This incentive structure drove many states to abolish parole, effectively handing prosecutors strict mandatory sentences that contributed to the trial penalty.

7 Fellner, *supra* note 5.

8 Sam Taxy, Julie Samuels, & William Adams, Urban Institute, Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data, Bureau of Justice Statistics Special Report, NCJ248648 (Oct. 2015).

9 *Id.*

10 *Id.*

11 Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, Brookings (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/.

12 *Id.*

13 The Growth of Incarceration in the United States: Exploring Causes and Consequences (Jeremy Travis, Bruce Western, & Steve Redburn eds., National Research Council, 2014), *available at* https://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.

14 *Id.*

15 Michelle Alexander, the New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

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17 Raymond Moley, *The Vanishing Jury*, 2 S. Cal. L. Rev. 97 (1928).

18 Francis Wharton, Evidence in Criminal Issues 1326 n.22 (10th ed. 1912).

19 Albert Alschuler, *Plea Bargaining and Its History*, 79 Colum. L. Rev. 1 (1979).

20 Press Release, RAND Corporation, First Estimates of Judicial Costs of Specific Crimes, from Homicide to Theft (Sept. 12, 2016); *citing* Pricilla Hunt, James Anderson, & Jessica Saunders, *The Price of Justice: New National and State-Level*

Estimates of the Judicial and Legal Costs of Crime to Taxpayers, Am. J. Crim. Just. (online Aug. 20, 2016).

[21] Fellner, *supra* note 5.

[22] Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016, 3:14 PM ET).

[23] Fellner, *supra* note 5.

[24] *Criminal Justice Facts*, the Sentencing Project, https://www.sentencingproject.org/criminal-justice-facts/.

[25] Taxy et al., *supra* note 8.

[26] Douglas C. McDonald & Kenneth E. Carlson, Sentencing in the Federal Courts: Does Race Matter? the Transition to Sentencing Guidelines, 1986–90, Bureau of Justice Statistics NCJ-145328 (Dec. 1993), *available at* https://www.bjs.gov/content/pub/pdf/sfc-drmtsg8690.pdf.

[27] U.S. Sentencing Commission, Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System 26 (Oct. 2017), *available at* https://www.ussc.gov/research/research-reports/mandatory-minimum-penalties-drug-offenses-federal-system.

[28] North Carolina v. Pearce, 395 U.S. 711 (1969).

[29] *Id*.

[30] Blackledge v. Perry, 417 U.S. 21 (1974).

[31] *Id*.

[32] Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

[33] Brady v. United States, 397 U.S. 742 (1970).

[34] *Bordenkircher*, *supra* note 32.

[35] Fellner, *supra* note 5.

[36] David Brereton & Jonathan Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 Law & Soc. Rev. 45 (1981).

[37] Besiki Luka Kutateladze & Nancy R. Andiloro, Prosecution and Racial Justice in New York County—Technical Report, Vera Institute of Justice (July 2014), https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf.

[38] Fellner, *supra* note 5.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*. at 102.

[44] *Id*. at 6.

[45] *Id*. at 73.

[46] *Id*. at 105.

[47] *Id*. at 61.

[48] Jeffery Ulmer & Mindy Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 Criminology 631 (2006).

[49] *New Neighbors and the Over-Policing of Communities of Color: An Analysis of NYPD-Referred 311 Complaints in New York City*, Community Service Society (Jan. 6, 2019), http://www.cssny.org/news/entry/New-Neighbors.