How do You Plead, and Why? How Attorney Experience and Defendant Background Affect Plea Bargaining

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"There is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce."[1]

I. INTRODUCTION

For better or worse, plea bargaining has become an integral part of the United States criminal justice system. Various studies have been conducted to determine how defendants respond to plea offers and how actual innocence colors their decision. This essay describes the results of a first-of-its-kind study designed to analyze how a legal counsel's level of experience affects willingness to accept a plea offer. Furthermore, the variables of participant race, gender, and political affiliation—which are largely ignored in plea bargain research—are analyzed to provide a more robust understanding of defendants' decision making. Potential explanations for demographic disparities in plea bargain responses, such as level of trust in the legal system, are also evaluated.

II. BACKGROUND

The practice of bargaining for a reduced punishment in return for admitting guilt dates back to the "confessions" beginning in the thirteenth century.[2] But through the eighteenth century, jury trials were largely "judge-dominated, lawyer-free procedure[s] conducted so rapidly that plea bargaining was unnecessary."[3] The nineteenth century saw an increased complexity of the rules of evidence and a more adversarial process.[4] This resulted in an increased caseload for courts and an accompanying incentive to allow plea bargains.[5] Shortly after the Civil War, U.S. courts would frequently strike down plea bargain offers, allowing the defendant to withdraw his plea, based on precedent prohibiting incentives in return for guilty

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1 George Fisher, *Plea Bargaining's Triumph*, 109 YALE L. J. 857, 859 (2000).

2 Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 13 (1979).

3 John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 261 (1979).

4 *Id.*

5 *Id.*

pleas.[6] Our modern plea system rose to prominence starting in the early twentieth century, largely because of an increased criminalization and courts' inability to keep up with the associated increased caseloads.[7]

From 1908 to 1916, federal convictions from guilty pleas rose from 50% to 72%.[8] By 1925, nearly 90% of criminal convictions were the result of guilty pleas.[9] In 1970 the Supreme Court reluctantly enshrined the constitutionality of plea bargaining into law in the case of *Brady v. United States*.[10] *Brady* set the modern, more lenient standard that plea agreements need only be "voluntary."[11] Under this standard, as long as a plea is not the result of "actual or threatened physical harm or [made] by mental coercion overbearing the will of the defendant,"[12] it is considered voluntary. Because of the new use of DNA testing in the 1990s, awareness of innocent defendants who accepted guilty pleas received growing attention.[13] This was the impetus for inquiry into why defendants would confess to crimes they know they did not commit.[14] Nevertheless, plea bargaining continued on its upward trajectory to today, where 97% of felony convictions are the result of a plea.[15]

III. THE CURRENT DEBATE

A. *Anti-Plea Bargain*

Critics of the current plea bargain system point out that defendants who refuse to accept a plea may receive biased treatment at trial from a judge who would have preferred the plea option, thus clearing room on his or her docket.[16] Opponents also criticize the sometimes extreme disparity between the plea offer and the likely sentence if convicted at trial. For some categories of crime, the average sentence at

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[6] Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 8 (2013).

[7] *Id.* at 9–10.

[8] *Id.* at 10.

[9] *Id.*

[10] Brady v. United States, 397 U.S. 742, 742 (1970) (upholding a plea where the defendant claimed his acceptance of a fifty-year plea offer was the result of induced fear of the threat of the death penalty if he went to trial).

[11] *Id.* at 750.

[12] *Id.*

[13] Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUM. BEHAV. 611, 611 (2016).

[14] *Id.*

[15] Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.

[16] Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 944 (2010).

trial is seven times longer than the plea offer.[17] This "trial penalty"[18] may, in effect, be so disparate as to effectively coerce the defendant into pleading guilty[19] and therefore potentially violate the requirement that pleas be made knowingly, intelligently, and voluntarily.[20] This disparity also results in similarly situated defendants receiving vastly unequal punishments, harming the legitimacy of our criminal justice system by increasing arbitrariness. To make matters worse, courts have other tools in place to coerce defendants into accepting a plea offer. These include charge-stacking, pretrial detention, unaffordable bail, and threats to investigate friends and family of the defendant.[21]

B. *Pro-Plea Bargain*

Proponents of the plea bargain system claim that, despite its inherent problems, the feasible alternatives are even less desirable.[22] The American Bar Association argued in favor of plea bargaining by pointing out that "the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence."[23] Additionally, if trial sentences are so severe that they "coerce" defendants into taking a plea, then the prudent solution would be to reduce trial sentences, not abolish the defendant's only other option. The alleged "trial penalty" depends on one's starting point. By starting with considering the generous plea and then considering the outcome of a conviction at trial, it may look like a punishment for going to trial. But it is equally valid to first consider the harsh outcome of a trial conviction and then consider the lenient plea offer. Depending on either perspective, one could refer to a "plea reward" just as strongly as a "trial penalty." Similarly, while anti-plea-

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[17] Shruti Bhatt et al., *System Favoring Plea Deals Penalizes Defendants Who Go to Trial*, CAP. NEWS SERV. (Jan. 3, 2019), https://marylandreporter.com/2019/01/03/system-favoring-plea-deals-penalizes-defendants-who-go-to-trial/.

[18] NAT'L ASS'N CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.

[19] *Id.*

[20] AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY 2–4 (3d ed. 1999).

[21] Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal*, NBC NEWS (Aug. 8, 2019), https://www.nbcnews.com/think/amp/ncna1034201 (defining "charge-stacking" as "charging more and more serious crimes than the conduct really merits").

[22] Timothy Sandefur, *In Defense of Plea Bargaining: The Practice Is Flawed, But Not Unconstitutional*, 26 REG. 28 (2003).

[23] AM. BAR ASS'N, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY 2 (Tentative Draft 1967).

bargaining advocates only point to the severe punishment of a conviction at trial, one must also consider the outcome of an acquittal.

It is certainly true that two similarly situated defendants may face vastly different outcomes under the current plea system. Critics of the plea-bargaining system are quick to point out the arbitrariness of one defendant accepting a plea with a light sentence and the other going to trial and receiving a much harsher sentence. However, the fairness of plea bargaining must be assessed at the moment the decision was made. And at that point, it was unknown if the trial would result in an acquittal or conviction. This illustrates another benefit of the plea bargain system. It allows defendants the option to trade risk for certainty based on their personal preferences of risk aversion. Finally, abolishing plea bargaining would do little to remove disparate punishments from the criminal justice system.[24] Similarly situated defendants would still frequently receive disparate punishments based on their strategic choices during the investigation stage and at trial.[25] Despite these diametrically opposed positions, there is hope for agreement on this issue. Recently, criminal justice reform is one of the few topics conservatives and liberals seem willing to work together on.[26]

III. METHODOLOGY

Research has already been conducted into how innocence plays a role in defendants' willingness to accept pleas.[27] This survey was designed to measure the extent to which defense attorney experience and predicted likelihood of success at trial also contribute to plea bargaining decisions. The survey started by asking background questions, such as gender, race, and political affiliation. Then, two plea bargaining questions were asked. Four different versions of the survey were administered, each with slight variations in the two plea bargaining questions. The variations were in the areas of innocence (innocent or guilty), the defense attorney's estimated likelihood of conviction at trial (30% or 85%), and the defense attorney's level of experience (four months or fifteen years). In all versions of the plea bargaining questions, the punishments stayed constant (12 months for accepting the plea and 24 months in the event of a conviction at trial). Therefore, the eight versions

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[24] *See* Sandefur, *supra* note 22, at 31.

[25] *Id.* (The specific example provided is that one defendant may choose to exercise his right to not testify at trial while another may not. This choice could result in the former receiving a vastly more severe punishment than the latter. But that disparity that resulted from the exercise of a right does not mean that vastly disparate outcomes. But that does not mean that the choice to testify at trial should not be afforded to defendants.).

[26] Shaila Dewan & Carl Hulse, *Republicans and Democrats Cannot Agree on Absolutely Anything. Except This*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/us/prison-reform-bill-republicans-democrats.html?searchResultPosition=1.

[27] *See* Vanessa Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining's Innocence Problem*, 21 CURRENT RES. SOC. PSYCHOL. 14 (2013).

of the plea bargain questions were as follows (see Appendix A for complete survey language):

1. Guilty, 30% chance of conviction 15 years' experience
2. Innocent, 85% chance of conviction, 4 months' experience
3. Guilty, 30% chance of conviction, 4 months' experience
4. Innocent, 85% chance of conviction, 15 years' experience
5. Guilty, 85% chance of conviction, 15 years' experience
6. Innocent, 30% chance of conviction, 4 months' experience
7. Guilty, 85% chance of conviction, 4 months' experience
8. Innocent, 30% chance of conviction, 15 years' experience

This 4 × 2 methodology allows for each of the three variables to be independently controlled for. To better measure slight variations in responses, four options were provided for each plea bargain question. Participants could either "definitely go to trial," "probably go to trial," "probably take the plea offer," or "definitely take the plea offer." Each response was coded one through four, to measure the effect of the three variables, with one being "definitely go to trial" and four being "definitely take the plea offer." This allows for a more nuanced analysis of preferences when compared to the binary "accept" or "reject" options used in most plea bargain research.

As discussed, the survey prompts had the defense attorney inform the defendant of an estimated likelihood of conviction if the plea is rejected and a trial ensues. This method was chosen because it more closely resembles the real-life position of defendants confronted with plea offers. Other studies conducted regarding plea offers simply assert the odds of success in the prompt as if the information is somehow from the voice of God and to be assumed absolutely accurate.[28] The survey was conducted in the summer of 2019 and completed by 158 participants.[29]

IV. RESULTS[30]

A. *Overall*

The overall results were as expected, in that being innocent, having a lower estimated conviction rate, and having a more experienced attorney all contributed to an increased willingness to reject the plea offer and go to trial. However, these three

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[28] *See* Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL LEGAL. STUD. 97, 108 (2010), https://scholarship.law.nd.edu/law_faculty_scholarship/835/?utm_source=scholarship.law.nd.edu%2Flaw_faculty_scholarship%2F835&utm_medium=PDF&utm_campaign=PDFCoverPages ("[T]here is a 50% chance you will be convicted . . . .").

[29] The survey was approved by the Institutional Review Board at Angelo State University. It was hosted by Qualtrics, an online experience management company. Potential participants were sent an email with a consent form and an anonymous link to the survey.

[30] See Appendix B for detailed survey results.

factors were not equal in their ability to influence survey participants' decisions. The average difference attributable to innocence was 0.91. The predicted probability of conviction difference was 0.75. And the attorney experience variable resulted in only a 0.27 difference.[31]

B. *Participant Gender*

Males were more likely to reject the plea offer and risk going to trial than females. The average score for male survey participants was 1.98, while the average for females was 2.25. This gender difference remained constant regardless of the variables of innocence, predicted probability of conviction, and attorney experience.

C. *Participant Political Affiliation*

The most significant difference between liberal and conservative participants is in the category of innocence. There, conservatives were both more likely to go to trial if innocent and more likely to accept the plea offer if guilty. This was one of the most disparate findings of the survey; conservatives were over two-and-a-half times more likely to alter their decisions based on their innocence or guilt than liberals. Although less pronounced than the innocence variable, liberals were more likely to alter their plea decisions based on the predicted conviction rate.

D. *Participant Race*

Overall, Caucasians were slightly more likely to go to trial than African Americans and Hispanics. Additionally, analyzing the innocence variable uncovered the same effect as in the political affiliation analysis above. Namely, Caucasians were both more likely to go to trial if innocent and more likely to accept the plea offer if guilty when compared to African Americans and Hispanics.

V. DISCUSSION

A. *Innocence*

Despite being the most relevant of the three measured factors in this survey, innocence should be the least relevant from a purely rationalistic, analytical perspective. In theory, people should take into consideration the factors of predicted likelihood of success at trial, attorney experience, and severity of punishment when deciding to accept or reject a plea offer. But the costs[32] associated with incurring a

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[31] This is based on the previously mentioned one through four coding system where one is "definitely go to trial" and four is "definitely take the plea offer."

[32] Here, "costs" is used in a purely economic sense, meaning simply the loss of anything of value (whether material or immaterial).

twelve-month sentence compared to that of a twenty-four-month sentence remain constant regardless of whether the defendant is innocent or guilty.

The fact that innocence was a more significant factor than predicted likelihood of success at trial and attorney experience is a novel finding of this research. However, the notion that innocence plays a role in the plea bargain decision-making process is not surprising given previous research on the subject.[33] One potential explanation for why defendants place so much emphasis on innocence—even though from a strictly rationalistic standpoint they should not—involves perceptions of fairness. Innocent defendants may view both options (plead to a crime not committed or risk being found guilty at trial for a crime not committed) as similarly unfair. Therefore, they are more likely to risk the more unfavorable outcome at trial.[34] This practice of looking beyond the objective elements of each potential punishment (guaranteed 12 months versus the probability of 24 months) and considering the subjective factor of fairness is supported by plea bargaining research. A 2010 study informed participants of the average plea offer for similarly situated defendants. Even though the plea offer remained constant, participants who were informed their plea offer was better than the average accepted it 67% of the time, while those who were told their plea offer was worse than average accepted it only 42% of the time.[35]

Others may refuse to accept a false plea regardless of how attractive an option it may be on the principled ground that admitting to a crime one did not commit is a lie.[36] Conversely, these people may also be more likely to accept a guilty plea when factually guilty because going to trial and pleading not guilty may be viewed as a lie.[37] These two factors (unwillingness to falsely admit to crime and unwillingness to falsely plead not guilty) thus further widen the gap between the guilty and innocent and willingness to accept a plea.

Perhaps the strongest explanation for the seemingly irrational behavior of innocent people not accepting plea offers is what is commonly referred to as the "innocence effect."[38] This posits that innocent people may be more confident that the truth will come out at trial, despite the stated prediction of success provided by the defense attorney.[39] One of the original plea bargain studies, conducted in 1978,

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[33] *See* Tor et al., *supra* note 28.

[34] Redlich & Shteynberg, *supra* note 13, at 613. For a real-life example of how a defendant can be driven to seemingly irrational behavior based on a sense of unfairness, see the case of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) as discussed in Tor et al., *supra* note 28, at 98–99.

[35] Tor et al., *supra* note 28, at 108–09.

[36] Redlich & Shteynberg, *supra* note 13, at 613–14.

[37] This is not to say that pleading not guilty to a crime one did commit is in fact a lie, just that some may view it as such. The counterargument would be that because the burden of proof is on the prosecution, entering a plea of not guilty is not making a claim of innocence. Rather, it is simply stating that the prosecution cannot reach its burden of proving all the elements of the crime to the required burden of proof.

[38] Redlich & Shteynberg, *supra* note 13, at 621.

[39] *See Id.*

performed manipulation checks that found that the innocent participants were more optimistic about their chances at trial, regardless of the facts.[40]

The significant role that innocence plays brings up a dilemma for defense attorneys attempting to advise their clients on whether or not to accept a plea offer. If the defendant has a low probability of success at trial and is offered a generous plea offer but is showing hesitancy to accept because he maintains his innocence, how should the defense attorney respond? Should he encourage the defendant to disregard the issue of innocence and look at the decision from the perspective of a strictly rationalistic cost-benefit analysis? Should the defense attorney encourage the defendant to follow his conscience regardless of the odds? Or should the defense attorney attempt to help the defendant consider the issue from both of these perspectives?

A common criticism of the plea bargain system is that it "places the risk of going to trial, and in some cases even being charged with a crime, so high, that innocence and guilt no longer become the real considerations."[41] This research's novel finding of how significant innocence is seems to diminish this anti-plea bargain criticism. However, critics of the plea bargain system would likely respond that the disparity in punishment between conviction at trial and accepting the plea was not incredibly extreme in this study (24 months if convicted, 12 months if plea is accepted). The more extreme the disparity between conviction and plea offer, the more likely innocent defendants would be willing to plead guilty.

The willingness of people to admit to something they did not do in order to avoid the risk of an extreme punishment is well documented. In one non-judicial role-playing study, it was found that more than half of the innocent participants were willing to falsely claim they were guilty in return for some benefit.[42] This experiment involved college students taking a test.[43] Half of the students were coerced into cheating by a fellow student, while the other half were not.[44] Then, the participant (whether in the cheating group or not) was accused of cheating and offered a plea deal to avoid official disciplinary action.[45] Of the innocent students, 56.4% accepted the plea.[46]

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[40] W. Larry Gregory et al., *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCHOL. 1521, 1524 (1978).

[41] Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 77–78 (2009). Some critics of plea bargaining think the problem of innocent people accepting attractive plea offers in order to avoid the risk of an extreme sentence at trial is alone enough to abolish the practice altogether. Tor et al., *supra* note 28, at 113.

[42] Dervan & Edkins, *supra* note 6, at 34.

[43] *Id.* at 28–29.

[44] *Id.* at 29–30.

[45] *Id.* at 30–33.

[46] *Id.* at 34.

B. *Participant Gender*

One difference that remained constant regardless of innocence, predicted conviction rate at trial, or attorney experience was that males were more likely to reject a plea offer and risk going to trial than females. This is to say, males are less "risk averse"[47] than females on the issue of plea bargaining. This finding is consistent with research into risk-weighing behaviors of males and females.[48]

C. *Participant Political Affiliation*

Conservatives put significantly more emphasis than liberals on innocence when deciding whether to accept a plea offer. Conversely, liberals put more emphasis on predicted trial outcomes than conservatives. While there are numerous potential explanations for these results, the most accurate likely involves contrasting perspectives of the legal system. Namely, conservatives place more trust in the legal system to reach the correct outcome (i.e., convict the guilty and acquit the innocent).[49] This would explain both the innocence disparity and the predicted trial outcome disparity. Since conservatives have more trust in the legal system to convict the guilty and acquit the innocent, it is no surprise that they are more likely to accept a plea when guilty and go to trial when innocent. Furthermore, this conservative trust in the legal system is likely what leads to them placing less emphasis on predicted trial outcomes—because they believe the truth will come out at trial regardless of stated predictions.

This political affiliation disparity illustrates the importance of this study. Previous plea bargaining studies have largely only presented the end, net result of all survey participant decisions.[50] The research then draws conclusions based on that average net effect.[51] But this methodology of treating all participants as a homogeneous group hides the vast differences in subgroups contained within. The belief that all defendants who receive similar plea offers will respond similarly is a

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[47] *Definition of 'Risk Averse*,*'* THE ECONOMIC TIMES, https://economictimes.indiatimes.com/definition/risk-averse (last visited Apr. 5, 2020) (Risk aversion is the behavior of attempting to lower risk when exposed to uncertainty).

[48] *See* Gary Charness & Uri Gneezy, *Strong Evidence for Gender Differences in Risk Taking*, 83 J. ECON. BEHAV. & ORG. 50, 57 (2012). This was a meta-analysis that robustly concluded that women are more risk averse than men.

[49] *See, e.g.*, Justin McCarty*, Americans Divided on Priorities for Criminal Justice System*, GALLUP (Oct. 14, 2016), https://news.gallup.com/poll/196394/americans-divided-priorities-criminal-justice-system.aspx (finding that 77% of Republicans and 32% of Democrats agree with the statement that strengthening law and order is a bigger priority than reducing bias against minorities.); *The Responsibilities of Citizenship*, PEW RES. CTR. (Apr. 26, 2018), https://www.people-press.org/2018/04/26/9-the-responsibilities-of-citizenship/ (finding that 79% of Republicans and only 61% of Democrats agree with the statement that "good citizens" should "always follow the law").

[50] *See, e.g.*, *supra* notes 6, 28 where the results of the plea bargaining study never analyzed demographic variables.

[51] *Id.*

harmful stereotype to promote. Defendants have unique considerations that attorneys need to consider. For example, specifics such as caregiving responsibilities and the potential loss of a professional license due to a felony conviction would weigh heavily on some defendants' decision to accept a plea. Consequently, defense attorneys should keep in mind their clients' unique circumstances when presenting plea offers. In a more extreme example of the individualized nature of plea considerations, for some defendants who are lawfully in the United States but not full citizens, the acceptance of a plea bargain can result in their deportation.[52]

D. *Participant Race*

Caucasians, when compared to African Americans and Hispanics, were more likely to go to trial when innocent and less likely when guilty. This finding likely has the same explanation as that provided in the liberal/conservative discussion. Namely, the difference is due to contrasting views of the trust placed in the legal system to convict the guilty and acquit the innocent. Previous studies have confirmed disparate views on the legal system when comparing Caucasians to African Americans and Hispanics.[53] Future research in this area could analyze whether this is more a function of race alone or socioeconomic status that comes to fruition through race.

E. *Attorney Experience*

Attorney experience was the least important of the three variables in determining whether a defendant would accept a plea offer. Both innocence and predicted likelihood of success at trial were over two-and-a-half times more likely to affect the decision than attorney experience. This is consistent with previous studies that found non-lawyers do not place a high level of significance on experience when selecting a defense attorney.[54] This is a misconception regarding the practice of law because attorney experience plays an important role in trial outcomes. One study found that experienced public defenders reduce the average incarceration length of their clients by 17% compared to inexperienced ones.[55]

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[52] *See, e.g.*, People v. Super. Ct. (Zamudio), 999 P.2d 686, 689 (Cal. 2000).

[53] *See* Mark Hugo Lopez & Gretchen Livingston, *Confidence in the Criminal Justice System*, PEW RES. CTR. (Apr. 7, 2009), https://www.pewresearch.org/hispanic/2009/04/07/ii-confidence-in-the-criminal-justice-system/; *Public Trust and Confidence Resource Guide*, NAT'L CTR. FOR ST. CTS. (last updated Feb. 21, 2020), https://www.ncsc.org/Topics/Court-Community/Public-Trust-and-Confidence/Resource-Guide.aspx.

[54] Michael Conklin, *How Coloradans View Attorneys*, 47 COLO. LAW. 14, 16 (2018). (If you have access to more studies with the same conclusion may be good to include here).

[55] David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1170 (2007).

F. *Future Research*

The results of this study invite future research into related plea-bargaining issues. Specifically, the finding that attorney experience played a relatively minor role sparks questions regarding other potential misconceptions defendants may have about what contributes to success at trial. Depending on the misconception and the relative importance attributed to it by the defendant, these could significantly affect the ability to make an informed decision regarding plea offers. Also, the manner in which the defense attorney communicates the plea offer to the defendant could have a significant effect on acceptance rates. For example, an attorney who provides an anecdotal warning about a past defendant who, "just like you, was sure he would win in court" may drastically increase the plea acceptance rate. Even seemingly irrelevant attributes of the defense attorney could affect how defendants respond to the information they provide. Factors such as race, gender, age, and appearance have been shown to affect how messages are received.[56]

VI. CONCLUSION

The novel findings of this research provide a more robust picture of the plea bargain decision process. Legal experience of the defense attorney who conveys the plea bargain information was found to be of little significance, while innocence was highly important. This provides a dilemma for defense attorneys advising their clients on plea considerations. The trust that different groups place on the legal system likely explains the disparities present in plea responses from conservatives versus liberals and Caucasians versus African Americans and Hispanics. Both sides of the plea bargaining debate will no doubt find aspects of this study beneficial and will significantly benefit from a greater overall understanding of the defendant thought process. Finally, by reporting on previously unresearched aspects of plea bargaining, this essay guides future researchers by illuminating areas to research in future studies.

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[56] Michael Conklin, *The Effects of Race and Gender on Attorney Selection*, 20 RUTGERS RACE & L. REV. 1 (2018) (discussing how gender and race influence consumer decisions when hiring an attorney). Because 79% of criminal law attorneys are male, this "results in the default image of a defense attorney as a man, which can facilitate a negative gender bias against females . . . ." *Id.* at 7, 11 n.15. Research outside the field of law supports the notion that perceived levels of competence are affected by age, height, weight, baldness, and the wearing of glasses. *Id.* at 10–11, nn.24–28.

APPENDIX A
Survey Prompt Language

Prompt 1: Imagine that you are arrested for a crime that you committed. Your attorney says, "I have been doing this for 15 years and after examining the evidence in your case, I conclude that if we go to trial there is a 30% chance you will be convicted and a 70% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 2: Imagine that you are arrested for a crime that you did NOT commit. Your attorney says, "While I have only been doing this for 4 months, after examining the evidence in your case, I conclude that if we go to trial there is an 85% chance you will be convicted and a 15% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 3: Imagine that you are arrested for a crime that you committed. Your attorney says, "While I have only been doing this for 4 months, after examining the evidence in your case, I conclude that if we go to trial there is a 30% chance you will be convicted and a 70% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 4: Imagine that you are arrested for a crime that you did NOT commit. Your attorney says, "I have been doing this for 15 years and after examining the evidence in your case, I conclude that if we go to trial there is an 85% chance you will be convicted and a 15% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 5: Imagine that you are arrested for a crime that you committed. Your attorney says, "I have been doing this for 15 years and after examining the evidence in your case, I conclude that if we go to trial there is an 85% chance you will be convicted and a 15% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 6: Imagine that you are arrested for a crime that you did NOT commit. Your attorney says, "While I have only been doing this for 4 months, after examining the evidence in your case, I conclude that if we go to trial there is a 30% chance you will be convicted and a 70% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will

only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 7: Imagine that you are arrested for a crime that you committed. Your attorney says, "While I have only been doing this for 4 months, after examining the evidence in your case, I conclude that if we go to trial there is an 85% chance you will be convicted and a 15% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

Prompt 8: Imagine that you are arrested for a crime that you did NOT commit. Your attorney says, "I have been doing this for 15 years and after examining the evidence in your case, I conclude that if we go to trial there is a 30% chance you will be convicted and a 70% chance you will be found not guilty. If you are found guilty you will receive 24 months in prison. But if you plead guilty now, you will only receive 12 months." Based solely on this information, what would you most likely do?

APPENDIX B
Survey Results

1. Guilty, 30% chance of conviction 15 years' experience	2.038
2. Innocent, 85% chance of conviction, 4 months' experience	2.231
3. Guilty, 30% chance of conviction, 4 months' experience	2.243
4. Innocent, 85% chance of conviction, 15 years' experience	1.756
5. Guilty, 85% chance of conviction, 15 years' experience	2.806
6. Innocent, 30% chance of conviction, 4 months' experience	1.355
7. Guilty, 85% chance of conviction, 4 months' experience	3.222
8. Innocent, 30% chance of conviction, 15 years' experience	1.355
High experience (average of 1, 4, 5, 8)	1.989
Low experience (average of 2, 3, 6, 7)	2.263
Innocent (average of 2, 4, 6, 8)	1.674
Guilty (average of 1, 3, 5, 7)	2.577
30% conviction rate (average of 1, 3, 6, 8)	1.747
85% conviction rate (average of 2, 4, 5, 7)	2.504
Male overall	1.981
Female overall	2.246
Conservative overall	2.086
Liberal overall	2.114
White overall	2.04
Black overall	2.215
Hispanic overall	2.25