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## Distinguishing Plea Discounts and Trial Penalties

Ben Grunwald

*Duke Law School*, [grunwald@law.duke.edu](mailto:grunwald@law.duke.edu)

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## DISTINGUISHING PLEA DISCOUNTS AND TRIAL PENALTIES

Ben Grunwald\*

### ABSTRACT

*We know that criminal defendants who plead guilty receive lower sentences than those convicted at trial, but there's widespread disagreement about why. One camp of scholars believes this plea-trial differential represents a deeply troubling and coercive penalty; a second believes it's merely a freedom-enhancing discount; and a third denies any meaningful distinction between the two at all. One reason for this disagreement is theoretical—it's not at all clear what these concepts mean. Another is empirical—in the absence of precise conceptual definitions, we lack relevant data because scholars don't know what to look for when searching for evidence of penalties and discounts in the real world.*

*This Article seeks to bring greater theoretical and empirical clarity to the debate. To that end, I propose a theoretical definition of plea discounts and trial penalties. Applying this framework to the existing literature, I argue that there is strong theoretical and anecdotal evidence of trial penalties but little systematic empirical evidence. Nearly all of the statistical research has only studied the plea-trial differential; because both discounts and penalties are equally consistent with the existence of such a differential, the literature cannot distinguish between them.*

*To develop a robust statistical test of the discount and penalty theories, we need to look elsewhere—where they make different*

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\* Associate Professor, Duke University School of Law; Ph.D., J.D., A.M., B.A., University of Pennsylvania. For valuable conversations and helpful comments, thanks to Matt Adler, Sara Sun Beale, Stuart Benjamin, Josh Bowers, Will Crozier, Samuel Buell, Dan Epps, Brandon Garrett, Lisa Griffin, Carissa Byrne Hessick, Daniel Hemel, William Hubbard, Aziz Huq, Eisha Jain, Arvind Krishnamurthy, Michael Livermore, Jonathan Masur, Richard Myers, Will Ortman, Michael Pollack, John Rappaport, Neil Siegel, Jenia Turner, Ronald Wright, and the participants of the 2018 CrimFest Conference at Cardozo Law School and the Duke Law School Criminal Law Works-in-Progress Workshop.

*predictions about prosecutorial behavior. Contrary to the views of the third camp of scholars—who maintain that’s impossible—I show that discounts and penalties are only indistinguishable if we assume litigation costs and acquittal probabilities are static. But they aren’t. They change all the time, and as a result, the discount and penalty theories diverge from each other, predicting different prosecutorial behavior. I argue that this theoretical insight might be used to develop an empirical test to help assess the prevalence and intensity of discounts and penalties in criminal court.*

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## INTRODUCTION

Everyone agrees that a criminal defendant who pleads guilty receives a lower sentence than if convicted at trial. But why? Does that difference represent a plea discount or a trial penalty? Much rides on this question. If the plea-trial differential represents a discount, plea bargaining merely expands the range of choices available to defendants. But if it represents a penalty, then plea bargaining—a system that helps produce the vast majority of criminal convictions in this country—is a deeply troubling and coercive practice that punishes defendants for exercising their constitutional rights.<sup>1</sup> This is plea bargaining’s greatest problem; even those scholars who have defended plea bargaining recognize the need to assume penalties away.<sup>2</sup>

Perhaps unsurprisingly, there’s widespread scholarly disagreement about plea discounts and trial penalties. The dominant view among criminal law scholars appears to be that the plea-trial differential routinely represents a penalty.<sup>3</sup> But a second group has taken the opposite position, that it represents a discount.<sup>4</sup> And a third group

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1. See Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083, 1091–93 (2016) (describing how trial penalties coerce defendants).

2. For a lengthy string cite, see sources cited *infra* note 46.

3. See, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) (“The expected post-trial sentence is . . . like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”); Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 685–86 (2013); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2668 (2013) (“[The criminal justice system] punishes many individuals convicted after trial much more harshly than those convicted after a guilty plea, in what has been characterized as a ‘trial tax.’”); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 246 (2006) (noting that threatening “unfair” trial sentences to encourage guilty pleas is a “common phenomenon in the American criminal justice system”); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204, 213 (1979) (noting that American plea bargaining has a “terrible attribute that . . . makes it coercive and unjust: the sentencing differential by which the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver”); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 47 (“[O]ne can conclude that in most cases the prosecutor unilaterally determines what concessions the defendant will receive for his guilty plea because of the state’s ability to punish those defendants who do not plead.”).

4. See, e.g., Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 619–26 (2005)

denies any meaningful distinction between the two at all, believing that discounts and penalties merely represent “two sides of the same coin.”<sup>5</sup>

One reason for the disagreement is that these concepts are often poorly defined.<sup>6</sup> While scholars refer to them all the time, they often intend different things. Sometimes scholars use “trial penalty” and

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(arguing that plea bargaining critics have failed to provide evidence that prosecutors do in fact threaten penalties); Thomas W. Church, Jr., *In Defense of “Bargain Justice,”* 13 L. & SOC’Y REV. 509, 519–20 (1979) (explicitly assuming that the plea-trial differential represents a discount); Frank H. Easterbrook, *Criminal Procedure As a Market System*, 12 J. LEGAL STUD. 289, 309 (1983) (“The defendant, who buys the plea, pays by surrendering his right to impose costs on the prosecutor by demanding trial and by surrendering his chance of acquittal at trial.”); *Lafley v. Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (“The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory.”); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 698–99 (1980); *United States v. Wiley*, 184 F. Supp. 679, 685 (N.D. Ill. 1960) (“[I]t is incorrect, in my opinion, to say . . . that a ‘more severe sentence’ is imposed on a defendant who stands trial. Rather, it seems more correct to me to say that the defendant who stands trial is sentenced without leniency according to law.”).

5. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1243 n.27 (2008) (“Plea discounts and trial penalties are simply two sides of the same coin, a logical conclusion many courts have reluctantly reached.”); see also Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 83 n.207 (2002) (“Massive plea benefits can also be seen in a logical mirror as a massive penalty for going to trial.”); John C. Coffee, Jr., *“Twisting Slowly in the Wind”: A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, 251 (“The defendant facing the plea/trial decision is facing an essentially either/or decision, and in this binary context, a credit and a penalty are too reciprocally related to pretend that crediting one who pleads guilty is not equivalent to penalizing him for going to trial.”); Comment, *The Influence of Defendant’s Plea on Judicial Determination of Sentences*, 66 YALE L.J. 204, 220 (1956) (arguing that the distinction between a penalty and a discount is “illusory . . . [and] that, whether by means of forfeiting a reward or incurring a penalty, a demand for trial will result in a more severe punishment than would be imposed following a guilty plea”); *State v. Burgess*, 943 A.2d 727, 737 (N.H. 2008) (“Therefore, ‘[w]e doubt that a principled distinction may be drawn between “enhancing” the punishment imposed upon the [defendant] and denying him the “leniency” he claims would be appropriate if he had’ expressed remorse . . . .” (quoting *Roberts v. United States*, 445 U.S. 552, 557 n.4 (1980))); *Scott v. United States*, 419 F.2d 264, 278 (D.C. Cir. 1969) (“[I]n reality there are winners and losers. The ‘normal’ sentence is the average sentence for all defendants, those who plead guilty and those who plead innocent. If we are ‘lenient’ toward the former, we are by precisely the same token ‘more severe’ toward the latter.”); *Coles v. United States*, 682 A.2d 167, 169 (D.C. 1996) (“The line between affording leniency to a defendant who has admitted guilt by pleading guilty and punishing one who has denied his guilt and proceeded to trial is elusive, to say the least.”).

6. Scholars in other fields have examined the concept of penalties and discounts extensively, but the subject has received far less extended analysis from criminal law scholars. For a few important exceptions, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 98–103 (2001); Bowers, *supra* note 1, 1101–13; Langer, *supra* note 3, at 229–47.

“plea discount” interchangeably, as though they were different phrases referring to the same idea.<sup>7</sup> Other times, they use “trial penalty” to refer to the difference between the sentence that a defendant would have received through trial or guilty plea.<sup>8</sup> Other times, they say “trial penalty” to refer to the difference between the sentence of defendants who plead guilty and the *average* sentence of both defendants convicted at trial *and* those acquitted.<sup>9</sup> Still other times, they may refer to the reduction in punishment included in plea offers to compensate defendants for giving up the chance of acquittal at trial. And still other times, they refer to a variety of prosecutorial tactics to manipulate the sentences of defendants who go to trial, including introducing extraneous evidence to “poison the court.”<sup>10</sup> Many of these legal phenomena are worthy of scholarly attention, but they are probably not all trial penalties.

Another cause of the widespread scholarly disagreement on discounts and penalties is that the empirical literature is not dispositive. One problem is that the trial penalty is a subtle and abstract concept that can be difficult to test empirically. Another is that prosecutors are reluctant to talk openly and honestly about them.

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7. See, e.g., Jeffery T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 661 (2006) (noting that the authors “expected [a defendant’s] prior record to condition greater trial penalties” but finding little supporting evidence and explaining this unexpected result three sentences later by noting that prosecutors may “offer smaller plea discounts to those with extensive prior records”); Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Airforce Courts-Martial*, 8 J. EMP. LEGAL STUD. 206, 231 (2011) (“Contrary to the rationale for a plea discount system, however, the vast majority of offenders (over 70 percent) pled guilty with either a judge or a jury without the threat of a trial penalty.”); Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT’G REP. 256, 256 (2019) (“Although plea discounts are nothing new, the scope and magnitude of contemporary trial penalties are unprecedented.”).

8. E.g., NAT’L ASS’N OF CRIM. DEF. LAWS., *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 11 (2018) [hereinafter NACDL].

9. See, e.g., David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMP. LEGAL STUD. 200, 201 (2011) (reporting that defendants “have a lower expected sentence after a trial than after plea bargain” and noting in the next sentence that it is “widely believed that defendants who reject a plea bargain and insist on a trial face a ‘trial penalty’”).

10. E.g., Norman L. Reimer, *NACDL to Expose the Trial Penalty in Bid to Resuscitate the Sixth Amendment*, CHAMPION, Sept.–Oct. 2013, at 7, <https://www.nacdl.org/Article/Sept-Oct2013-NACDLtoExposeTheTrialPenaltyin> [<https://perma.cc/7KTR-4WDP>] (writing for the National Association of Criminal Defense Lawyers).

But again, perhaps the biggest problem is conceptual: we lack relevant data because scholars don't know what to look for when searching for evidence of penalties and discounts in the real world.

This Article seeks to bring greater theoretical and empirical clarity to the discount/penalty debate. To that end, in Part I, I offer a theoretical framework to define plea discounts and trial penalties. My hope is that by specifying their criteria, it will be easier to go out into the world and generate evidence about them.

As others have observed, whether a plea offer represents a penalty or a discount depends on the normative baseline against which it's measured.<sup>11</sup> The tricky part is defining the normative baseline. To do so, I make two assumptions. The first is that the baseline is the sentence the defendant should receive.<sup>12</sup> This assumption is modest, almost tautologically true. Indeed, with only a few exceptions,<sup>13</sup> I place no restrictions on how one determines the sentence a defendant should receive.

My second assumption is that the normative baseline does not take into account the defendant's choice whether to exercise or waive the right to trial.<sup>14</sup> A full defense of this assumption is beyond the scope of this Article,<sup>15</sup> and a few readers will no doubt disagree. But, for

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11. See, e.g., Langer, *supra* note 3, at 233–36; Bowers, *supra* note 1, at 1091–93.

12. There is at least one alternative way to define the baseline that conflicts with this first assumption. See, e.g., Bowers, *supra* note 1, at 1089. When applying the Due Process Clause to plea bargaining, the Supreme Court adopted a legalistic baseline, which permits prosecutors to threaten the maximum possible sentence supported by probable cause. *Id.* But, as I argue in greater detail below—and as the vast majority of criminal law scholars appear to agree, see *infra* note 15, including those who have written full articles *defending* plea bargaining, see *supra* note 2—we should reject that alternative. See discussion *infra* Section II.B.

13. See *infra* Section I.B.

14. How might we do this? One possible model would be to imagine that the baseline is calculated through a mathematical formula with a list of inputs (for example, suffering caused, criminal history, remorse, etc.) and weights. If one input is whether the defendant exercised the right to trial, the weight for that input would be zero. Perhaps another model would be to imagine that the baseline is calculated under the assumption that the prosecutors office has infinite resources to fund trial litigation.

15. In this way, I do not grapple with the “baseline problem” or “baseline hell” discussed at length elsewhere. For a few key examples, see generally Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503 (2016); Mitchell N. Berman, *Coercion, Compulsion,*



several reasons, I suspect it captures most readers' intuitions. First, unlike baseline questions in other contexts, which are unmoored from any constitutional anchors, the Sixth Amendment of the U.S. Constitution guarantees defendants the right to a jury trial. To be sure, that does not mean the government can never burden the exercise of the right to trial.<sup>16</sup> But the existence of a constitutional right means it's harder to justify increasing the baseline because a defendant insists on going to trial. Second, a large majority of criminal law scholars appear to agree that prosecutors shouldn't seek higher punishments than a defendant should otherwise receive simply because the defendant exercises the right to trial.<sup>17</sup> Many courts have

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*and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283 (2013); Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

16. The Supreme Court has rejected the application of the doctrine of unconstitutional conditions to plea bargaining. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1045–46 (2006) (“[I]n a departure from its unconstitutional conditions jurisprudence, the Court allows prosecutors to condition sentencing or charging deals on the waiver of constitutional trial rights.”); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003) (“The Court does not recognize the waiver of criminal protections through plea bargains to entail a form of the unconstitutional conditions problem . . .”).

17. I have no systematic data to back up this claim, but it is based on personal conversations with many criminal law scholars over the last few years and on writings in scholarly literature. See, e.g., Berman, *supra* note 6, at 98–103; Langbein, *supra* note 3, at 213 (noting that plea bargaining is “coercive and unjust” because “the accused is threatened with an increased sanction for conviction after trial by comparison with that which is offered for confession and waiver”); Alschuler, *supra* note 3, at 685 (“Defenders of plea negotiation typically treat post-trial sentences as the baseline from which plea agreements are to be judged.”); Church, *supra* note 4, at 520 (“[T]rial sentences must be objectively *deserved* according to whatever sentencing philosophy is embodied in the penal code. Plea bargaining should therefore result in sentences *less than* this theoretically correct sentence. Posttrial sentences that include a surcharge for refusal to plead guilty would very probably constitute the unconstitutional burden on the right to trial that, critics charge, inheres in all plea bargaining.”); Nemerson, *supra* note 4, at 698 (“[I]t is morally impermissible to impose a greater sentence on a defendant than that justified by his individual culpability for the purpose of coercing cooperation by the defendant or others, except in the most compelling cases of social need . . .”); MODEL CODE OF PRE-ARRAIGNMENT PROC. § 350.3(3)(c) (AM. L. INST. 1975) (“The prosecutor shall not seek to induce a plea of guilty or nolo contendere by . . . threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.”); STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY § 14-1.8(b) (AM. BAR ASS’N 3d ed.1999) (“The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.”).

supported this view as well in the sentencing context.<sup>18</sup> For these reasons, I assume that the baseline does not change based on whether the defendant exercised or waived the right to trial.

Based on these two assumptions, a plea offer represents a discount if the government says it will pursue at trial a sentence equal to or below the normative baseline, which is defined as the sentence the defendant should receive without accounting for the decision to exercise or waive the right to trial. Suppose, for example, that the government informs a defendant he can accept a guilty plea to charges that translate into a seven-year sentence or else the government will pursue charges at trial that translate into a ten-year sentence. If the normative baseline is ten years (or more), then the offer represents a discount because the government will pursue a punishment equal to (or less than) the baseline if the defendant goes to trial and will pursue an even lower punishment if the defendant waives the right to trial. In other words, the offer would merely expand the defendant's range of choice by giving the option to plead guilty and receive a sentence that is lower than he should and would otherwise receive at trial. If, on the other hand, the baseline sentence is less than ten years, then the offer represents a penalty because the government threatens to pursue a sentence above the baseline if the defendant exercises the right to trial. Under these circumstances, the offer would be coercive because it would force the defendant to accept a harsher sentence than he should receive simply for exercising the constitutional right to trial.

Next, in Part II, I apply these definitions of plea discounts and trial penalties to the existing evidence in the discount/penalty debate. One strong source of evidence is institutional theory: prosecutors clearly have the institutional capacity to inflict trial penalties, and they certainly have strong incentives to do so as well. Still, to adjudicate the discount/penalty debate, we would also benefit from empirical evidence about how prosecutors use penalties in the real world.

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18. *See infra* note 58.

There are at least three sources of empirical evidence we can look to. The first are interview- and survey-based studies of the perceptions of prosecutors and defense attorneys. Their results are predictable: it depends on who you ask. Defense attorneys report that trial penalties are routine, while prosecutors uniformly deny them.<sup>19</sup>

A second source of data comes from individual cases, which offer numerous, shocking examples of prosecutorial conduct that clearly inflicts a trial penalty.<sup>20</sup> These anecdotes confirm that trial penalties happen more than they should, but it's difficult to generalize how common or large such penalties are in the tens of millions of cases filed in criminal court each year.<sup>21</sup>

Given the limits on surveys and anecdotes, we might hope to find more systematic empirical evidence in a third source, the statistical literature. The primary research design here compares sentences conditional on the stage of disposition—for example, comparing the sentences of defendants who plead guilty with those of defendants convicted at trial. Studies consistently find evidence of a plea-trial differential: defendants who plead guilty receive substantially lower sentences, on average, than defendants in similar cases convicted at trial.<sup>22</sup> Some scholars have argued that this result is evidence of the trial penalty, but both discounts and penalties are consistent with a plea-trial differential; both theories predict that defendants who plead guilty receive lower sentences than if they are convicted at trial. Thus, on its own, the plea-trial differential cannot provide evidence of the trial penalty. It can only provide evidence of the trial penalty if we invoke the heavy assumption that the plea sentence is equal to (or above) the baseline sentence. Under those conditions, any trial sentence that exceeds the plea sentence would necessarily also exceed the baseline and would, therefore, constitute a trial penalty. I

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19. See *infra* notes 68–72 and accompanying text.

20. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), is one of the most famous and shocking examples.

21. NAT'L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2016 DATA 3 (2018), [http://www.courtstatistics.org/\\_data/assets/pdf\\_file/0029/23897/sccd\\_2016.pdf](http://www.courtstatistics.org/_data/assets/pdf_file/0029/23897/sccd_2016.pdf) [<https://perma.cc/WU69-PPBE>].

22. See *infra* Section II.D.

suspect, however, that many readers would not accept the assumption that the plea sentence is equal to the baseline.

How, then, might we construct an empirical test of trial penalties that does not rely on the heavy assumption that the plea sentence is equal to (or greater than) the baseline sentence? To do so, the discount and penalty theories need to make different predictions about prosecutorial behavior. As I have noted already, a third camp of criminal law scholars and jurists maintain that's impossible, believing that discounts and penalties are merely two sides of the same coin. But that view, I suspect, is based on the assumption that the only way to study penalties and discounts is the way we always have—by comparing sentences conditional on the stage of disposition.

In Part III, I argue that we can make more progress in our search for empirical evidence of trial penalties by looking elsewhere—not by comparing the sentence of a defendant conditional on the stage of disposition, but instead by holding fixed the stage of disposition and by comparing the sentence conditional on other factors that affect the size of the penalty or discount. In other words, we should compare the sentences of two defendants who either both plead guilty or who both go to trial but who do so under conditions in which other relevant factors vary.

What factors might those be? The literature suggests that prosecutors have two key motivations to use discounts and penalties: conserving litigation costs and avoiding the risk of trial acquittal.<sup>23</sup> Litigation costs and acquittal risks change all the time, and when they do, the discount and penalty theories diverge from each other, predicting different prosecutorial behavior.

Consider litigation costs. When prosecutors offer a discount to conserve resources, I argue, they *decrease* the sentence based on the level of *resources the defendant saved the government* by pleading

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23. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 110–17 (1978) (reporting a qualitative study of prosecutors' adaptation to plea bargaining).

guilty rather than forcing the government to obtain a conviction through trial. In contrast, when prosecutors threaten a penalty to conserve resources, they *increase* the sentence based on the level of *resources the defendant forced the government to expend* to secure the conviction.

The distinction between these predictions is subtle, but it makes quite a difference—both theoretically and normatively. To see why, suppose that two defendants, D1 and D2, have cases against them that are identical in all respects except one: D1 is charged and convicted before the costs of trial litigation increase for the prosecution, while D2 is charged and convicted at some time afterwards. Under the penalty theory, if both defendants are convicted at trial, D2 should receive a longer sentence than D1 because the prosecution is forced to expend more resources to convict D2. In contrast, under the discount theory, the defendants should receive the same sentence because they both save the prosecution no resources at all by demanding a trial. Thus, when litigation costs vary, the discount and penalty theories make different predictions about prosecutorial behavior.

This is a notable theoretical result for a few reasons. First, it puts to bed the widespread view that discounts and penalties are two sides of the same coin. They can't be if they make different predictions about prosecutorial behavior.

Second, the theoretical result also offers a potential opportunity to test for discounts and penalties without relying on the heavy assumption, noted earlier, that the *plea* sentence is typically equal to (or higher than) the baseline sentence. Indeed, if prosecutors respond to rising litigation costs by decreasing plea sentences and leaving trial sentences unchanged, that provides meaningful evidence that their behavior is consistent with the plea discount theory. And, if they respond instead by leaving plea sentences unchanged and by increasing trial sentences, that's consistent with the trial penalty theory. Moreover, the inference to trial penalties is even stronger with one comparatively light assumption—that the *trial* sentence before the hike in litigation costs was typically equal to (or higher

than) the normative baseline. If that assumption holds, then an increase in trial sentences after the hike in litigation costs would necessarily exceed the baseline and, in turn, represent especially strong evidence of a trial penalty.

In Part IV, I assess whether and how we might incorporate these theoretical insights into an empirical study of discounts and penalties. I suggest that some policy changes in criminal courts—such as the adoption of open-file discovery—may provide suitable natural experiments to test my predictions. They may also help estimate both the prevalence and size of trial penalties and plea discounts enacted in response to the policy change. And, with sufficient sample sizes, they might also identify specific prosecutors offices that use penalties more aggressively than others. That said, there are several methodological challenges standing in the way of a robust empirical test. In addition to the usual problems in statistical work—like omitted variable bias, statistical power, and measurement error—we also need to worry about some other potential limitations, which I describe in greater detail below.

## I. WHAT ARE PLEA DISCOUNTS AND TRIAL PENALTIES?

In this Part, I offer a theoretical definition of plea discounts and trial penalties. But before getting there, I need to lay out some background in Section A, where I describe the dominant theory of plea bargaining. I then turn to definitions in Section B.

### A. *Background on Plea Bargaining*

Scholars have posited a number of reasons why prosecutors plea bargain, but two stand out.<sup>24</sup> The first is organizational efficiency.<sup>25</sup> Prosecutors have limited resources in a world that they perceive

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24. The classic empirical study is Milton Heumann's *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*. HEUMANN, *supra* note 23, at 110–14.

25. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 40–61 (2003).

contains nearly unlimited crime.<sup>26</sup> Trials are an expensive way to secure convictions, and guilty pleas are much cheaper. Prosecutors thus prefer guilty pleas because they free up scarce resources to obtain convictions in more cases.<sup>27</sup> The second key reason why prosecutors plea bargain is risk aversion.<sup>28</sup> A trial comes with the risk of acquittal, but a guilty plea assures conviction on at least one charge.<sup>29</sup> For both of these reasons, prosecutors have strong incentives to encourage guilty pleas through bargaining.

Although scholars have raised reservations,<sup>30</sup> the standard theory of plea bargaining, called the shadow-of-trial model, predicts when prosecutors and defendants settle and, if they do, what plea offer they agree to.<sup>31</sup> Under that model, both parties estimate the expected sentence at trial based on the probability of conviction and the likely sentence conditional on conviction. For example, if there's an 80% chance that a defendant will be convicted and, if convicted, the court is likely to impose a sentence of ten years, then the expected sentence at trial is eight years (i.e., 10 years x 0.8). Assuming that the parties are rational and neutral time discounters, that they have access to the same information, and that they have similar stakes in the litigation, the theory predicts that they will form a plea agreement that will translate into an eight-year prison sentence.

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26. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987) (“[Prosecutors] must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.”).

27. See Rachel Barkow et al., *How We Judge Prosecutors Has to Change*, LAW.COM: N.Y.L.J. (Apr. 9, 2019, 1:34 PM), <https://www.law.com/newyorklawjournal/2019/04/09/how-we-judge-prosecutors-has-to-change/> (“Today, local prosecutors measure themselves by three core metrics: how many people are indicted on criminal charges, how many cases they try and how many convictions they secure (either through guilty pleas or convictions after trial). For too long, these metrics have been used to decide promotions and raises, and to confer professional capital, dictating who gets the best cases and whose work is celebrated.”).

28. HEUMANN, *supra* note 23, at 110–14.

29. *Id.*

30. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2538 (2004) (mounting the leading critique of the shadow-of-trial model).

31. This theory of litigation has been discussed at length in both the civil and criminal litigation literatures. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966–77 (1979) (inventing the shadow-of-trial model); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 6–30 (1984); Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969, 1969–74 (1992).

Of course, a number of facts about criminal litigation skew the shadow of trial, complicating the theory's predictions. Perhaps most important for our purposes, the parties may have asymmetric litigation costs. In some cases, the social, financial, or psychological costs of litigation may be higher for defendants than the prosecution, especially if they are detained pretrial.<sup>32</sup> In other cases, however, the costs may be higher for the prosecution, particularly given that most defendants do not pay for their legal representation.<sup>33</sup> The side with relatively higher litigation costs is more likely to accept an unfavorable plea agreement relative to its estimate of the expected outcome of trial.

As prior scholarship has observed, other features of the messy reality of criminal litigation can skew the trial's shadow even further.<sup>34</sup> The parties' trial estimates are not always accurate due to information asymmetries about the evidence in the case and weak discovery rights.<sup>35</sup> The trial estimates may also be distorted by a range of cognitive biases,<sup>36</sup> such as overconfidence,<sup>37</sup> selective

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32. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132–39 (2008).

33. See CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SER. NO. NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000) (finding that defendants were represented by court-appointed counsel in 82% of felony cases in the top seventy-five largest counties). Still, defendants represented by public attorneys may experience significant agency problems due to oversized caseloads and misaligned bureaucratic incentives. See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 77–95 (1993).

34. See, e.g., Bibas, *supra* note 30, at 2545. See generally William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

35. Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 785–86 (2017) (theorizing effects of information asymmetry on plea bargaining).

36. See Russell B. Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 284–94, 300, 303, 308–14 (2006) (reviewing the empirical evidence on cognitive biases and their implications for negotiations and mediation); Bibas, *supra* note 30, at 2498–502.

37. See, e.g., David Dunning et al., *Ambiguity and Self-Evaluation: The Role of Idiosyncratic Trait Definitions in Self-Serving Assessments of Ability*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 324, 324 (Thomas Gilovich et al. eds., 2002) (surveying high school students and finding that 69% reported believing they were in the top 10% in terms of their ability to get along with others and only 2% reported having below-average leadership skills); K. Patricia Cross, *Not Can, but Will College Teaching Be Improved?*, 17 NEW DIRECTIONS FOR HIGHER EDUC. 1, 10 (1977) (surveying college professors and finding that 94% believed they were above average at teaching); Marie Helweg-Larsen & James A. Shepperd, *Do Moderators of the Optimistic Bias Affect Personal or Target*



memory,<sup>38</sup> and self-serving interpretation of evidence.<sup>39</sup> And the fact of little public oversight in low-level cases may increase prosecutors' incentives to dispose of those cases more quickly.<sup>40</sup> Still, the shadow-of-trial theory remains the dominant theoretical view of plea bargaining, and the few relevant empirical studies have largely supported it.<sup>41</sup>

### B. Defining Discounts and Penalties

Defining plea discounts and trial penalties is a tricky task because these concepts are used in so many different ways. But, as others have observed, whether a plea offer represents a penalty or a discount

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*Risk Estimates? A Review of the Literature*, 5 PERSONALITY & SOC. PSYCH. REV. 74, 74 (2001) (“Among the most robust findings in research on social perceptions and cognitions over the last two decades is the *optimistic bias*—the tendency for people to report that they are less likely than others to experience negative events and more likely than others to experience positive events.”). The overconfidence bias is particularly strong where—as in the plea bargaining context—individuals have some control over the outcome or the task is difficult. See Helweg-Larsen & Shepperd, *supra*, at 85–88; Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCH. 411, 425–28 (1992) (providing empirical evidence that overconfidence bias increases across tasks of varying mathematical difficulty).

38. George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 150 (1993) (reporting that students randomly assigned to serve as plaintiffs or defendants recalled more arguments favoring their own positions).

39. See Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 ORG. BEHAV. & HUM. DECISION PROCESS 176, 180–81 (1992) (reviewing the relevant empirical literature); Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCH. 129, 130–32 (1954) (finding that after watching a football game, respondents who supported a particular football team reported observing fewer and less severe violations than respondents who supported the opposite team); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2105–07 (1979) (finding that supporters and opponents of the death penalty interpret mixed evidence of its effectiveness as supporting their own position).

40. See Bowers, *supra* note 32, at 1122 (arguing that in low-level cases where there is “little public or official scrutiny,” prosecutors are “much more interested in reducing their own administrative costs” than in maximizing sentences).

41. One study assigned judges, prosecutors, and defense attorneys to read case files that varied randomly on a range of case characteristics, including quality of inculpatory evidence and defendant characteristics. Shawn D. Bushway et al., *An Explicit Test of Plea Bargaining in the “Shadow of the Trial,”* 52 CRIMINOLOGY 723, 735–39 (2014). The subjects were then asked to estimate the probability of conviction, the expected sentence at trial, and the least favorable plea deal that they would be willing to accept. *Id.* at 731, 734. The prosecutors’ and defense attorneys’ answers were largely consistent with the shadow-of-trial theory. *Id.* at 740–47, 750. Though, the judges’ answers differed somewhat from theoretical expectation. *Id.* at 750.

depends on the normative baseline against which the offer is measured.<sup>42</sup>

Returning to my earlier example, suppose the government informs a defendant he has two options: he can plead guilty to charges likely to result in a seven-year prison sentence, or he can go to trial where the government will pursue charges that would result in a ten-year sentence in the event of a conviction. The offer represents a discount if the normative baseline is ten years (or more) because the government will pursue a punishment at trial equal to (or less than) the baseline. The offer represents a penalty if the baseline sentence is less than ten years because going to trial will increase the defendant's sentence above that baseline.

Discounts and penalties have different normative implications for the practice of plea bargaining. In the case of discounts, the plea offer merely expands the set of choices available to the defendant: he can go to trial and receive the sentence he should receive based on the judgment of a jury and sentencing judge, or he can waive his right to trial and receive a lower sentence.<sup>43</sup> We usually don't think that an offer is coercive if it merely expands an individual's choice set. Suppose, for example, that a homeowner is offered three times the market price for their house. That offer might be difficult to turn down, but we wouldn't say it is therefore coercive. The same is true in the case of plea bargaining. A prosecutor might believe that a defendant deserves nine years of prison time but is willing to discount the sentence down to three to avoid the costs of trial. If so, the offer might be too good to turn down, but it is not coercive for that reason alone.

A trial penalty, however, takes on a more coercive shape. According to one "frequent" definition in the philosophical and legal literature, an offer is coercive if "it would be wrong to carry out the act threatened."<sup>44</sup> If it is wrong for the government to pursue a

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42. Langer, *supra* note 3, at 233–36; Bowers, *supra* note 1.

43. See Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1963–66 (1992).

44. Berman, *supra* note 6, at 15.

punishment above the baseline, then it is coercive to threaten a penalty. When threatening a penalty, the prosecutor's offer does not merely expand the range of choices available to the defendant. Presumably, if the parties were forbidden from plea bargaining and the government thus could not make a plea offer, it would drop any charges above the baseline because it would have no reason to pursue them.<sup>45</sup> If so, the use of plea bargaining to inflict trial penalties artificially constrains defendants' range of choice and thus coerces defendants into pleading guilty to a sentence they otherwise might not accept. As noted, this is plea bargaining's biggest problem. Even those scholars who have written full articles defending plea bargaining have recognized the need to assume the possibility of penalties away.<sup>46</sup>

The next question is: how do we define the normative baseline? Many factors might go into calculating the baseline in any particular case: criminal charges, evidence, mental culpability, harms to victims, criminal history, personal history, family relations, and local conditions such as crime rates and prosecutorial resources. Fortunately, for purposes of this Article, we don't need to draw any

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45. *See id.* at 103.

46. *See* Church, *supra* note 4 (noting that one of the "theoretical assumptions" of the article's "defense" of plea bargaining is that "cases that go to trial must be decided on the merits, without penalizing the defendant for not pleading guilty"); Michael Young, *In Defense of Plea-Bargaining's Possible Morality*, 40 OHIO N.U. L. REV. 251, 253, 268–69 (2013) (stating that the paper's defense only applies where prosecutors do not threaten a trial penalty); Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 770 (1998) ("[I]f the sentence imposed at a trial is the appropriate sentence for the defendant's crime, then plea bargaining allows criminals to escape with *less than* appropriate sentences." (emphasis added)); Howe, *supra* note 4 (arguing that plea bargaining critics have failed to provide evidence that prosecutors do in fact threaten penalties). In one notable article, described by Judge Easterbrook as the "best defense" of plea bargaining, Easterbrook, *supra* note 31, Robert Scott and William Stuntz argue that trial penalties are a "troubling" practice. Scott & Stuntz, *supra* note 43, at 1963. Judge Easterbrook, also a defender of plea bargaining, appeared to concur, writing that he "agree[d] on everything Scott and Stuntz themselves view as novel about their article." Easterbrook, *supra* note 31. Over a decade later, Stuntz revisited the issue with greater concern: "Plea bargains will be fair and just if, but only if, the threats that induce them are fair and just. . . . [T]here is no reason to believe that those threats are fair—indeed, there is good reason to believe the opposite." William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* 24 (Harvard Pub. L. Working Paper No. 120, 2005), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=854284](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284) [<https://perma.cc/2Y4P-C2AE>].

firm conclusions about how to calculate the baseline in individual cases. As long as we assume that a baseline does exist, an assumption necessarily implied by the very concepts of plea discounts and penalties, we can make substantial conceptual progress.

In defining the normative baseline, I make two general assumptions. The first is that the baseline is the sentence the defendant should receive. This assumption is modest, almost tautological. Indeed, with only one exception noted below, I place no restrictions on how one determines the sentence a defendant should receive. Retributivists and utilitarians alike are free to define it however they want.

Still, this first assumption is inconsistent with at least one alternative definition of plea bargaining's baseline: in *Bordenkircher v. Hayes*, the Supreme Court rejected that assumption for purposes of evaluating whether a plea offer violates the Due Process Clause of the U.S. Constitution.<sup>47</sup> In its stead, the Court adopted a *legalistic* baseline, “defined by what the prosecutor is lawfully allowed to do.”<sup>48</sup> Under this baseline, prosecutors can threaten the highest possible trial sentence—without running afoul of the Due Process Clause—as long as the charges are supported by probable cause.<sup>49</sup>

*Bordenkircher* probably offers the wrong baseline to evaluate the normative status of a plea offer. For one thing, the Due Process Clause imposes a constitutional *minimum*, designed to prohibit only the worst forms of government behavior.<sup>50</sup> The fact that a plea offer doesn't violate the Due Process Clause doesn't mean that we shouldn't be deeply morally concerned about it. More important, in the almost unanimous view of criminal law scholars, *Bordenkircher* was wrongly decided.<sup>51</sup> As others have noted, prosecutors have an

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47. 434 U.S. 357, 363–64 (1978).

48. Bowers, *supra* note 1, at 1089; *see also Bordenkircher*, 434 U.S. at 364.

49. Bowers, *supra* note 1, at 1089.

50. *See, e.g.,* Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of Constitutional Rights in Danforth v. Minnesota*, 102 NW. L. REV. COLLOQUY 365, 365 (2008) (“Few doubt that states can provide greater protection for individual rights under state constitutions than is available under the Supreme Court's interpretation of the Federal Constitution.”).

51. For a small sampling of the papers attacking *Bordenkircher*, *see Stuntz, supra* note 46 (“Plea

incentive to “threaten charges that are excessive, even by [their] own lights.”<sup>52</sup> *Bordenkircher*’s baseline permits this strategy. The result is that defendants who are threatened may accept plea offers they wouldn’t otherwise accept. And, “once the threat [is] made, it ha[s] to be carried out” because a “prosecutor who becomes known as a pushover will be taken advantage of.”<sup>53</sup> Thus, the defendant who is threatened with a severe penalty and nonetheless chooses to go to trial risks receiving a sentence far higher than he should receive.

My second assumption is that the normative baseline does not take into account whether the defendant goes to trial.<sup>54</sup> I do not offer a complete defense of this assumption here—doing so might require grappling with the notoriously difficult “baseline problem”<sup>55</sup>—but I suspect this assumption captures most readers’ intuitions for a few reasons. First, the Sixth Amendment of the U.S. Constitution

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bargains will be fair and just if, but only if, the threats that induce them are fair and just. Given the rule established by the Court in *Bordenkircher*, there is no reason to believe that those threats are fair—indeed, there is good reason to believe the opposite.”); Bowers, *supra* note 1, at 1126 (describing *Bordenkircher*’s reasoning as “positively feeble”); Berman, *supra* note 6, at 103 (calling *Bordenkircher* the “near-wholesale abdication of the judicial responsibility to protect Sixth Amendment rights from state coercion”); Timothy Lynch, *The Case Against Plea Bargaining*, 26 REGULATION 24, 27 (2003) (arguing that *Bordenkircher* “unleashed a runaway train”); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879 (2009) (describing the prosecutorial strategy in *Bordenkircher* as “coercive” and noting that the decision gave “prosecutors the ability to exact a heavy price on defendants who opt to take a case to trial to get them to plead guilty to the charge the prosecutor believes is the appropriate one”); Darryl K. Brown, Lafler, Frye and Our Still-Unregulated Plea Bargaining System, 25 FED. SENT’G REP. 131, 132 (2012) (arguing that, under *Bordenkircher*, “prosecutors are free to pose the choice to a defendant of a five-year sentence for a guilty plea or life without parole after conviction at trial, even if evidence . . . makes clear that the lesser sentence is the ordinary one and the latter one unprecedented”); Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1311 (2018) (describing the plea bargaining system sanctioned by *Bordenkircher* as “fundamentally coercive”); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 971 (2009) (describing the prosecutorial practices upheld in *Bordenkircher* as “coercive”); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 656 n.8 (1981) (asserting that “a system that permitted and condoned even an occasional *Bordenkircher* would seem to bear a significant burden of justification”); Clark Neily, *America’s Criminal Justice System Is Rotten to the Core*, CATO INST. (June 7, 2020), <https://www.cato.org/blog/americas-criminal-justice-system-rotten-core> [<https://perma.cc/VPK9-UNSQ>] (noting that the *Bordenkircher* Court “rejected a due process challenge to a prosecutor’s nakedly coercive threat to increase a defendant’s exposure . . . to life imprisonment”).

52. Barkow, *supra* note 51, at 879 (quoting Stuntz, *supra* note 46, at 26).

53. Stuntz, *supra* note 46, at 4, 24.

54. For an explanation of how we might do this, see *supra* note 14.

55. See sources cited *supra* note 15 and accompanying text.

guarantees criminal defendants the right to a jury trial. Of course, that doesn't prohibit all possible burdens on the right.<sup>56</sup> But the existence of a constitutional right means it's harder to justify increasing the baseline because a defendant elects to go to trial. Second, a large majority of criminal law scholars appear to agree that prosecutors shouldn't seek higher punishments than a defendant should otherwise receive simply for exercising the right to trial.<sup>57</sup> Many courts have supported this view as well in the sentencing context.<sup>58</sup> For these reasons, I assume that the baseline does not change depending on whether the defendant exercised or waived the right to trial.

Based on these two assumptions, a plea offer represents a trial penalty if the government threatens to pursue charges at trial above the normative baseline, which is defined as the punishment the defendant should receive without incorporating his decision to exercise or waive the right to trial. In contrast, a plea offer represents a discount if it is below the baseline, and the government says it will pursue a punishment at trial that is equal to or below the normative baseline.

## II. EXISTING EVIDENCE OF DISCOUNTS AND PENALTIES

Having defined plea discounts and trial penalties, I next apply them to assess which one is borne out by the publicly available evidence. There are at least four sources we can look to.

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56. Notably, the Supreme Court has rejected the application of the doctrine of unconstitutional conditions to plea bargaining. *See* sources cited *supra* note 16.

57. *See, e.g.*, sources cited *supra* note 17.

58. Judge Wald of the U.S. Court of Appeals for the D.C. Circuit, for example, explained:

A sentencing judge . . . could not say, "I would have given you five years if you didn't go to trial, but since you did, I will give you seven," but he could say, "Although I might otherwise have given you seven years, I am giving you only five years because you are remorseful, as shown, in part, by your willingness to plead guilty." In the first case, the judge has arrived at a benchmark sentence he believes just in all respects, but then added an extra increment because the defendant has burdened the system by going to trial. In the second case, the judge is according a measure of leniency by viewing the guilty plea as evidence of acceptance of responsibility and, as such, worthy of consideration.

*United States v. Jones*, 997 F.2d 1475, 1484 (D.C. Cir. 1993).

### A. Institutional Theory

The first source of evidence is institutional theory—that is, what we know about the background institutional structures that govern the criminal process. As several papers have described in vivid detail,<sup>59</sup> there are strong grounds to believe that prosecutors have both the institutional capacity and incentives to inflict trial penalties.<sup>60</sup> To oversimplify, the capacity stems from prosecutors’ wide discretion both in charging and plea bargaining. In charging, prosecutors wield nearly unreviewable discretion; the courts cannot review a decision not to charge, and it’s incredibly difficult for them to overturn a decision to charge as long as the indictment is supported by probable cause, a low evidentiary standard.<sup>61</sup> When deciding what charges to file, prosecutors also have a long statutory menu of overlapping crimes that enables both horizontal and vertical overcharging.<sup>62</sup> With respect to plea bargaining, prosecutors’ plea deals are rarely reviewed or overturned by the courts, and stingy discovery policies in some jurisdictions mean that defendants may be forced to negotiate in the dark.<sup>63</sup> As a result, a prosecutor has the institutional capacity to overcharge—that is, file charges that are technically legal because they are supported by probable cause but

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59. See, e.g., Stuntz, *supra* note 2, at 23–26; NACDL, *supra* note 8, at 6.

60. These institutional capacities and incentives have likely grown over the last few decades. See Note, *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 HARV. L. REV. 2074, 2087–94 (2001) (cataloging changes in the criminal justice system that might encourage greater prosecutorial vindictiveness).

61. See Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 646–48, 651 n.50 (2002) (summarizing the reviewability of prosecutors’ decisions to charge or not charge); see also *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (“Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . .”).

62. Allison O. Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1601 (2011) (“Trial taxes are aggravated by overcriminalization and overcharging because the prosecutor does not act as the safety valve the legislature counts on him to be.”); see also Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It’s Totally Legal*, NBC NEWS: THINK (Aug. 8, 2019, 7:33 PM), <https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201> [https://perma.cc/TLZ2-QJJD] (“American prosecutors are equipped with a fearsome array of tools they can use to extract confessions and discourage people from exercising their right to a jury trial. These tools include charge-stacking (charging more or more serious crimes than the conduct really merits) [and] legislatively-ordered mandatory-minimum sentences . . .”).

63. Larsen, *supra* note 62, at 1571.

for which the defendant shouldn't be punished—and then use those extra charges as bargaining chips to encourage a guilty plea.<sup>64</sup> This is quite clearly a trial penalty.

In addition to having the capacity to inflict trial penalties, prosecutors also have strong incentives to do so. As noted already, prosecutors seek guilty pleas to conserve resources, reduce workload, pursue convictions against a greater number of guilty offenders, and eliminate the chance of acquittal.<sup>65</sup> The threat of a trial penalty would help a prosecutor secure more guilty pleas.

Still, there are some modest countervailing pressures. Prosecutors concerned about their own reputations might not want others to perceive that they inflict trial penalties. Ethical commitments to professionalism and justice, as well as professional norms, might also discourage some prosecutors.<sup>66</sup> And, as Andrew Crespo argues, subconstitutional criminal rules might impose at least some meaningful checks on prosecutorial penalty strategies in at least some cases.<sup>67</sup> On balance, however, the institutional incentives lean heavily towards trial penalties rather than against them.

### B. Interviews

The second source of evidence comes from qualitative interviews and survey data of prosecutors' and defense attorneys' perceptions of the use of trial penalties and plea discounts. The results of these studies are, perhaps, predictable: it depends on who you ask. For

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64. Bowers, *supra* note 1, at 1089.

65. *See supra* Section I.A.

66. *See, e.g.*, MODEL CODE OF PRE-ARRAIGNMENT PROC. § 350.3(3)(c) (AM. L. INST. 1975) (“The prosecutor shall not seek to induce a plea of guilty or nolo contendere by . . . threatening the defendant that if he pleads not guilty, his sentence may be more severe than that which is ordinarily imposed in the jurisdiction in similar cases on defendants who plead not guilty.”); STANDARDS FOR CRIM. JUST.: PLEAS OF GUILTY § 14-1.8(b) (AM. BAR ASS'N 3d ed.1999) (“The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.”).

67. Crespo, *supra* note 51, at 1316–56 (arguing that an array of subconstitutional procedural rules, including joinder, severance, preclusion, concurrent sentencing, pretrial evidentiary review, summary dismissals, and bills of particulars, impose some regulatory constraints on a prosecutor's ability to overcharge and then bargain down).



example, a pioneering study based on interviews with prosecutors in the 1960s by Albert Alschuler reports that “[d]efense attorneys in almost every jurisdiction claim that prosecutors ‘overcharge.’”<sup>68</sup> Alschuler supports this assertion with powerful anecdotes from defense attorneys about how prosecutors overcharge and then bargain down in exchange for a guilty plea.<sup>69</sup> But Alschuler also finds that prosecutors “in almost every jurisdiction deny that their initial charges are inflated” and provide alternative explanations for prosecutorial practices perceived as overcharging.<sup>70</sup> He reports very few anecdotes from prosecutors that support the trial penalty theory.<sup>71</sup> And the prosecutors surveyed also claimed that the kinds of bargains the defense attorneys complained about almost never affect the ultimate sentence the defendant receives.<sup>72</sup>

Another classic qualitative study of plea bargaining, conducted by Milton Heumann in 1978, also provides only limited anecdotal evidence of trial penalties (as I have defined them).<sup>73</sup> In a few quotes, prosecutors admit that they “penalize” defendants who go to trial, or

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68. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–105 (1968) [hereinafter Alschuler, *Prosecutor's Role*]; see also Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1090 n.96 (1976) [hereinafter Alschuler, *Trial Judge's Role*] (noting that the *Chicago Sun-Times* quoted several defense attorneys saying that judges in Chicago tell defendants that they will impose significantly higher sentences).

69. Alschuler, *Prosecutor's Role*, *supra* note 68. Perhaps the most famous related anecdote concerns the behavior of a judge, not a prosecutor. See Alschuler, *Trial Judge's Role*, *supra* note 68, at 1089. One defense attorney reported to Alschuler that a Chicago judge once told him: “If your client goes to trial and is convicted, the minimum term will not be just the ten years required by the [mandatory minimum] statute. The minimum term will be twenty years in the penitentiary.” *Id.* The judge further explained: “He takes some of my time—I take some of his. That’s the way it works.” *Id.*

70. Alschuler, *Prosecutor's Role*, *supra* note 68, at 85.

71. One exception comes from a San Francisco prosecutor who said his office “may charge theft, burglary, and the possession of burglar’s tools, because we know that if we charged only burglary there would be a trial.” *Id.* at 90. For another powerful admission from a prosecutor, see *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, *supra* note 60, at 2081 n.60 (“Sometimes a public defender or a defense lawyer will just try and bust your ass all the time. Frankly, you end up busting theirs back. You get irritated, but you try not to take it out on the people they represent. The defendant didn’t know this asshole lawyer he hired from Adam’s housecat. Maybe the state just appointed this son of a bitch to represent him. Should you penalize him for that? No. Do we? Probably, sometimes. You try not to, but we’re human.” (quoting MARK BAKER, PROSECUTORS IN THEIR OWN WORDS 79–80 (1999))).

72. Alschuler, *Prosecutor's Role*, *supra* note 68, at 85.

73. HEUMANN, *supra* note 23.

at least those who do so frivolously.<sup>74</sup> But because the questions the prosecutors are answering don't distinguish between trial penalties and discounts, it's not clear what they mean. They may very well be referring to discounts and not penalties. For example, one prosecutor was asked, "if the case goes to trial, are you looking for a[] higher penalty than you were willing to bargain for in advance?"<sup>75</sup> An answer in the affirmative would be equally consistent with both the discount theory and the penalty theory.<sup>76</sup> It's unclear whether the question was phrased differently to other prosecutors, but it probably was not. Other related passages in the book similarly do not distinguish between discounts and penalties (again, as I have defined them).<sup>77</sup>

What exactly can we take away from interview- and survey-based studies? It's hard to say. For one thing, much of the evidence comes from defense attorneys who may sometimes misperceive prosecutorial tactics. On the other hand, prosecutors have strong incentives to stay quiet about trial penalties. Perhaps the best we can say is that the interviews and surveys suggest trial penalties do in fact happen.

### C. Cases

The third source of evidence comes from individual cases in which the prosecutor's behavior suggests a trial penalty. One of the clearest and most famous is *Bordenkircher v. Hayes*, in which a defendant was charged with writing a fraudulent check for \$88, which carried a sentence of two to ten years.<sup>78</sup> The prosecutor informed the defendant

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74. *Id.* at 124 ("I think human nature being what it is, sure, some people get penalized for motions and trials. Why not? You're dealing with human beings. . . . Sure, judges will penalize [a defense attorney for frivolous motions] and so will prosecutors.").

75. *Id.* at 125.

76. *See, e.g., id.* at 66 ("[T]here is a penalty attached to going to trial and losing; conversely, there is a reward accorded the defendant who forsakes his right to trial and pleads guilty."); *see also id.* at 140 ("If, on the other hand, the issue is perceived as frivolous, the judge feels that the reward for plea bargaining ought to be denied—or, put differently—that a penalty for these motions and trial ought to be extracted.").

77. *See, e.g., id.* at 141.

78. 434 U.S. 357, 358 (1978).

that, if he would plead guilty, the prosecutor would recommend a five-year sentence in court.<sup>79</sup> The prosecutor also said that, if the defendant went to trial, the prosecutor would supplement the indictment with a career-offender enhancement that would impose a mandatory life sentence—a charge that would be legal because the defendant had two prior convictions.<sup>80</sup> The defendant rejected the offer and, as promised, the prosecutor added the habitual-offender charge.<sup>81</sup> When convicted at trial, the defendant received a life sentence for trying to steal \$88.<sup>82</sup>

The evidence of a trial penalty is strong here.<sup>83</sup> At the very beginning, the government reasonably decided not to file the habitual-offender charge, presumably because a fraudulent \$88 check couldn't possibly merit a life sentence.<sup>84</sup> Afterward, the prosecutor did not appear to receive any new information about the case before filing the enhancement charge; indeed, the only predicate facts for the enhancement were prior convictions in the defendant's criminal history—information that was likely available at the time of charging.<sup>85</sup> Moreover, the prosecutor stated in open court his reason for adding the enhancement, asking the defendant on cross-examination:

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79. *Id.*

80. *Id.* at 358–59. One prior conviction was for robbery. *Id.* at 359 n.3. For the other, the defendant was charged with rape but ultimately convicted of “detaining a female.” *Id.* He received no prison time for either offense. *Id.* at 370 (Powell, J., dissenting).

81. *Id.* at 359.

82. *Id.*

83. The Supreme Court, for its part, disagreed. *See* *United States v. Goodwin*, 457 U.S. 368, 378–80 (1982). Four years after *Bordenkircher*, Justice Stevens explained the Court's reasoning in that case as follows:

In declining to apply a presumption of vindictiveness, the Court recognized that “additional” charges obtained by a prosecutor could not necessarily be characterized as an impermissible “penalty.” Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation—in often what is clearly a “benefit” to the defendant—changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial “vindictiveness.”

*Id.*

84. *See Bordenkircher*, 434 U.S. at 370 (Powell, J., dissenting).

85. *See id.* at 358–59 (majority opinion).

Isn't it a fact that I told you at [our initial bargaining session] if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial . . . that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?<sup>86</sup>

Clearly, the prosecutor inflicted a trial penalty.

There are many other documented cases of trial penalties, too.<sup>87</sup> In 2018, for example, the National Academy of Criminal Defense Lawyers (NACDL) published a paper examining “the structures and mechanisms in the federal system that perpetuate the trial penalty.”<sup>88</sup> Most relevant for our purposes, the report described five federal cases that, in my view, provide evidence that the prosecution sought to inflict a trial penalty.<sup>89</sup> Other published papers provide many more disturbing examples.<sup>90</sup>

Cases like *Bordenkircher* and those documented in the NACDL report and elsewhere are deeply concerning because they confirm that prosecutors do inflict trial penalties. But it's hard to infer from individual cases—even a large number—the prevalence and magnitude of trial penalties in the tens of millions of cases filed in criminal court each year.<sup>91</sup>

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86. *Id.* at 358 n.1.

87. *See, e.g.*, *Twiggs v. Superior Court*, 667 P.2d 1165, 1167 (Cal. 1983) (en banc) (noting that the prosecutor amended the information, adding five prior felony convictions, two days after the defendant refused to accept a plea offer, even though the prosecutor was aware of those convictions from the beginning); *State v. Halling*, 672 P.2d 1386, 1387 (Or. Ct. App. 1983) (The prosecutor said to the defense attorney, “I have a brilliant idea. I have just thought of a way to cause further evil to poor Mr. Halling” and then explained that she “intended to charge defendant with additional crimes unless he accepted her previous offer.”).

88. NACDL, *supra* note 8, at 7.

89. *Id.* at 31, 37, 43, 50, 53. The report also describes the cases of four other individual defendants, but, in my view, the evidence of a penalty is unclear because other case factors—often departures for substantial assistance to the government—could explain the claimed plea-trial differential. *Id.* at 29, 41, 46, 57. Reasonable minds could certainly disagree, and so I encourage interested readers to consult the report.

90. *See, e.g.*, Janeanne Murray, *Ameliorating the Federal Trial Penalty Through a Systematic Judicial “Second Look” Procedure*, 31 FED. SENT’G REP. 279, 280 (2019).

91. *See* COURT STATISTICS PROJECT, STATE CT. CASELOAD DIG. 13 (2018) (reporting statistics on the national criminal caseload over time).

#### D. Statistical Studies

The fourth source of evidence often discussed in the discount/penalty debate is the quantitative empirical literature on the plea-trial differential: the difference in sentences that defendants receive if they plead guilty or go to trial. All of the studies in this literature have explored this question by fitting a multivariate regression model on one of three dependent variables—whether the judge imposed any prison time, the length of any prison sentence, or whether the judge granted a guideline departure.<sup>92</sup> They then compare these outcome variables across cases conditional on the stage of disposition—that is, for example, comparing the sentence that would be imposed after a guilty plea with the sentence after a trial conviction, holding fixed all other observable characteristics like charges, criminal history, and demographics.<sup>93</sup>

The estimates produced by these studies vary widely. A few have found no difference between the sentences imposed in cases resolved by guilty plea and cases resolved by trial,<sup>94</sup> but most have found a difference, frequently substantial in size, and in some cases up to 75%.<sup>95</sup> According to a recent review of the empirical literature,

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92. See *infra* notes 94–96.

93. See *infra* notes 94–95.

94. William M. Rhodes, *Plea Bargaining: Its Effect on Sentencing and Convictions in the District of Columbia*, 70 J. CRIM. L. & CRIMINOLOGY 360, 367 (1979) (finding no evidence of a plea-trial differential in three of the four categories of cases examined from the District of Columbia courts); Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 965 (1986) (finding that “serious offenders who plead[ed] guilty receive[d] prison sentences similar to the expected outcome if they had gone to trial” in 2,000 robbery and burglary cases in American cities in 1978); Gary D. LaFree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 CRIMINOLOGY 289, 307 (1985) (finding that “when acquittals are included in the analysis, defendants who went to trial did not receive more severe penalties than those who pled guilty” in a sample of 3,000 robbery and burglary cases in six jurisdictions from 1976 to 1977); Abrams, *supra* note 9, at 208, 218 (finding that, in a sample of 42,000 cases filed between 1997 and 2001 in Cook County, Illinois, defendants who pled guilty received *less* severe sentences than defendants who went to trial).

95. Thomas M. Uhlman & N. Darlene Walker, “*He Takes Some of My Time; I Take Some of His*”: *An Analysis of Judicial Sentencing Patterns in Jury Cases*, 14 L. & SOC’Y REV. 323, 333 tbl.2 (1980) (finding that, in a sample of 30,000 cases in one city between 1968 and 1974, sentences were 48%–66% shorter in cases resolved by guilty plea than in cases resolved by trial); David Brereton & Jonathan D. Casper, *Does It Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 L. & SOC’Y REV. 45, 61 (1981) (finding evidence of a “substantial sentence differential” in 7,000 robbery and burglary cases from 1974 to 1978); Ulmer & Bradley, *supra* note 7, at 631, 643, 650

studies have “typically” found a 13%–40% average reduction in sentence length for defendants who plead guilty relative to those convicted at trial.<sup>96</sup>

One might argue that this finding is evidence of a trial penalty, but the plea-trial differential fits just as well with the discount theory as it does with the penalty theory. Both theories predict that defendants who plead guilty receive lower sentences than defendants convicted at trial.

The plea-trial differential can only provide evidence of trial penalties if we assume that the plea sentence is equal to (or greater than) the baseline sentence. Under those conditions, any trial sentence that exceeds the plea sentence would necessarily also exceed the baseline and would, therefore, constitute a trial penalty.

There are reasons to support the assumption that the plea sentence is equal to (or greater than) the baseline sentence. First, as in *Bordenkircher*, in some cases the plea-trial differential might be so large that no reasonable prosecutor would be willing to grant such a discount for the sake of organizational efficiency.<sup>97</sup> If so, it may be reasonable to infer that the plea sentence is equal to or closer to the baseline than the trial sentence. As noted earlier, a few studies have

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(finding that “jury trial conviction ha[d] roughly 2.7 times the incarceration odds of a guilty plea” in a sample of 8,500 cases from Pennsylvania from 1997 to 2001); Anthony Walsh, *Standing Trial Versus Copping a Plea: Is There a Penalty?*, 6 J. CONTEMP. CRIM. JUST. 226, 229 (1990) (finding that “trial defendants received 13.55 months imprisonment more than plea defendants after adjusting for other relevant variables” in a sample of 600 felony cases from a metropolitan city in Ohio from 1978 to 1983); 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, 968 (2005) (finding consistent evidence from five different states that defendants who plead guilty receive shorter sentences than defendants who receive a jury trial); Jeffery T. Ulmer et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 JUST. Q. 560, 575 (2010) (finding that “trial sentences are 16% greater than for guilty pleas” in federal courts from 2000 to 2002).

96. See Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019). As the article notes, the plea-trial differential can be calculated either as the proportional reduction in sentence for defendants who plead guilty relative to those who go to trial or as the proportional increase in sentence for defendants who go to trial relative to those who plead guilty. *Id.* at 323. The article reports the results using the former: “Estimates of [the plea-trial differential] . . . typically involve[.] . . . a 15–60 percent increase in average sentence length.” *Id.* at 313. These statistics are equivalent to a 13%–40% decrease in the average sentence length for plea sentences relative to trial sentences.

97. See discussion *supra* Section II.C.

found very large average plea-trial differentials—sometimes up to 76%.<sup>98</sup> But, again, the weight of the evidence suggests a differential that is substantially smaller, closer to 13%–40%.<sup>99</sup>

Second, some scholars have argued that the normative baseline in most cases must be the plea sentence because the vast majority of cases—around 95%—are resolved by guilty plea.<sup>100</sup> This argument has obvious persuasive force, but the government has a powerful response: it might reasonably prefer to convict and punish a larger number of defendants even if that means giving them substantially less punishment than they should receive.<sup>101</sup> The government might, for example, prefer to give convicted defendants 50% less punishment than they should receive if doing so enables the government to convict 25% more defendants. That tradeoff may be optimal under both a retributive theory of punishment that focuses on desert and a utilitarian theory that focuses on deterrence. For these reasons, it's difficult to conclude, based on the high plea rate alone, that the normative baseline in most cases is the plea sentence.

Third, one might infer from the absolute severity of American criminal punishment that trial sentences are far higher than the normative baseline. This argument is particularly compelling for low-level drug and property crimes, where incarceration is arguably

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98. See, e.g., Uhlman & Walker, *supra* note 95, at 332.

99. Johnson, *supra* note 96. Interestingly, the United Kingdom has a statute that requires judges to “take into account . . . the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty.” ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 141–48 (3d ed. 2000). Similar to the 40% estimate from the literature, the Court of Appeals has recommended that “something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed in a contested trial.” *R v. Buffery* (1993) 14 Cr. App. R(S) 511 at 515.

100. See, e.g., Bibas, *supra* note 3, at 1138 (“The expected post-trial sentence is . . . like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.”); William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1071 n.52 (2019) (“[I]n a world where more than 95% of convictions are the result of guilty pleas, it seems farfetched to suppose that post-trial sentences provide the appropriate normative baseline.”).

101. See, e.g., William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT’G REP. 309, 310 (1993) (describing how a former U.S. Attorney explained that he chose to address high caseloads through “flexible use of the prosecutor’s traditional charging discretion as well as being flexible on sentencing in disposing of some cases” because “some prosecution was better than none, even if it meant the maximum sentence under the guidelines was not achievable in all cases”).

unnecessary, but it is also compelling with respect to many violent crimes that are punished with prison sentences that are likely far too long. I am deeply sympathetic towards this view,<sup>102</sup> but many people are not. And resting a test of trial penalties on such a heavy assumption would exclude many readers—particularly those who believe that the pretrial differential represents a discount rather than a penalty.

Only one quantitative study, published in 2019, goes further than measuring the plea-trial differential, but the results are quite limited.<sup>103</sup> The study estimates the average plea-trial differential and the average trial acquittal rates for forty different kinds of crimes in the State of New York.<sup>104</sup> It then creatively tests for evidence of trial penalties by calculating the correlation between the average plea-trial differential of those forty crimes and their respective acquittal rates under the assumption that, if the plea-trial differential represents a penalty, cases with stronger evidence would have smaller differentials.<sup>105</sup> Due to the study's research design, which necessarily involves a small sample size of just forty observations, it is unable to detect any statistically significant results.<sup>106</sup> The design also relies on several relatively heavy assumptions, including that: (1) a model fit on sentences from cases resolved by guilty plea can be used to estimate the counterfactual sentence that would have been imposed if the case had gone to trial (and vice versa); (2) the acquittal rate at trial for a given crime type is indicative of the level of evidence in cases of that type that are resolved by guilty plea; and, most importantly, (3) other than the level of evidence available, no other differences between the forty different kinds of crimes are responsible for the differences in the plea-trial differential. But the

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102. See Ben Grunwald, *How to Reduce the Prison Population by X%* (Jan. 7, 2021) (unpublished manuscript) (on file with author).

103. See generally Shi Yan & Shawn D. Bushway, *Plea Discounts or Trial Penalties? Making Sense of the Trial-Plea Sentence Disparities*, 35 JUST. Q. 1226 (2019).

104. *Id.*

105. *Id.*

106. *Id.* at 1241–42.



study is nonetheless a valuable advancement over prior work that exclusively examines the plea-trial differential.

Taken together, unless we accept the heavy assumption that the plea sentence is equal to (or greater than) the baseline sentence, the available systematic empirical evidence provides little to distinguish between discounts and penalties. As noted, the strongest support for the trial penalty theory arises both from a compelling theoretical argument that prosecutors have the institutional capacity and incentives to inflict penalties and from the many documented cases in which prosecutors' behavior strongly implies a penalty. But, from this alone, it's hard to draw firm conclusions about the magnitude or prevalence of trial penalties more generally. In the next Part, I grapple with that problem directly.

### III. DISTINGUISHING PROSECUTORIAL BEHAVIOR UNDER THE DISCOUNT AND PENALTY THEORIES

To distinguish between discounts and penalties (without assuming that the plea sentence is equal to or greater than the normative baseline), the discount and penalty theories need to make different predictions about prosecutorial behavior. As I've noted, a substantial number of criminal law scholars and jurists maintain that's impossible, believing that discounts and penalties are merely two sides of the same coin.<sup>107</sup> That view, I believe, is based on the assumption that the only way to examine penalties and discounts is, as noted, how nearly all the studies to date have done so—by comparing sentences conditional on the stage of disposition. In this Part, I argue that this way of thinking about discounts and penalties is mistaken. We can make more progress in our search for empirical evidence of penalties and discounts by looking elsewhere—not by comparing the sentence of a defendant conditional on the stage of disposition—but instead by holding fixed the stage of disposition and by comparing the sentence of a defendant conditional on other factors

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107. See sources cited *supra* note 5.

that affect the size of the penalty or discount. In other words, we should compare the sentences of two similar defendants who, for example, both plead guilty (or both go to trial), but who do so under conditions in which other relevant factors vary.

What might those factors be? The academic literature suggests that prosecutors have two key motivations to use discounts and penalties: conserving litigation costs and avoiding the risk of trial acquittal.<sup>108</sup> When these two variables change, the discount and penalty theories' predictions about prosecutorial behavior diverge from each other.

#### A. *Litigation Costs*

Consider litigation costs first. Suppose a prosecutor has limited resources and that trials are expensive. Suppose further that, given the limited resources, the prosecutor can only prosecute a fraction of all crimes. Under these circumstances, guilty pleas are more attractive than trials.

The prosecution has two techniques to obtain more guilty pleas. First, it can offer a larger plea discount. The discount theory predicts the prosecution will *decrease* the defendant's sentence based on the level of *resources the defendant saved the government* by pleading guilty rather than forcing the government to obtain a conviction through trial. Second, the prosecution can threaten a larger trial penalty. The penalty theory predicts the prosecution will *increase* the sentence based on the level of *resources the defendant forced the prosecution to expend* to secure the conviction.

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108. See e.g., HEUMANN, *supra* note 23 (reporting on the results of a qualitative study of prosecutors' adaptation to plea bargaining); J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 29 CRIM. JUST. 30, 30 (2014) ("Trial tax is a euphemism for a judge imposing a more severe sentence on a defendant, in whole or in part, because the accused, who elected to reject the prosecution's plea agreement and go to trial, wasted judicial and prosecutorial resources involved in a trial."); Alschuler, *Prosecutor's Role*, *supra* note 68, at 55 ("A Manhattan prosecutor sa[id], 'Our office keeps eight court rooms extremely busy trying 5% of the cases. If even ten per cent of the cases ended in a trial, the system would break down. We can't afford to think very much about anything else.' . . . [An] Assistant District Attorney in Charge of the Litigation Division in Philadelphia, sa[id], 'The first question I ask myself in deciding what to do for a defendant who might plead guilty is, 'How much time will I have to spend in the courtroom on this case?''").

The discount and penalty theories sound similar, almost mirror images of each other, but they make different predictions when litigation costs vary. Suppose that D1 is charged with robbery. If he pleads guilty, he will receive a sentence of seven years and, if convicted at trial, he will receive ten. Now, suppose we fast-forward in time to a period in which the costs of going to trial increase for the prosecution. Suppose further that, at this time, D2 commits the same crime as D1, and the prosecution files the same charges. Thus, the two cases are identical in all relevant respects except that D2's case would be more expensive for the prosecution to take to trial.

Because of the hike in litigation costs, the discount and penalty theories make different predictions about the defendants' sentences. To see how, we need to compare the sentences of D1 and D2 conditional on the same stage of disposition. Let's assume they both plead guilty early in the criminal process, long before each side begins preparing for trial.<sup>109</sup> What does the discount theory predict will happen to D2? Recall that, under the discount theory, the prosecution decreases a defendant's sentence based on the amount of resources the defendant saves the prosecution. If D2 pleads guilty, D2 will save the prosecution even more resources than D1 would by pleading guilty because the costs of trial are higher when D2 is charged. As a result, the discount theory predicts that D2 receives an even lower sentence than the seven years that D1 received. D2 might, for example, get five years.

Now, what does the penalty theory predict will happen to D2? Recall that, under the penalty theory, the prosecution increases a defendant's sentence based on the amount of resources the defendant forces the prosecution to expend for the conviction. If D2 pleads guilty at precisely the same moment early in the criminal process as D1, then they both force the prosecution to expend the same amount of resources for their respective convictions. That's because both defendants have pled guilty at the same early moment in the

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109. For an undeveloped sketch of this idea, specifically for defendants who plead guilty, see Grunwald, *supra* note 35, at 804.

litigation—long before trial, when, I have posited, the costs of litigation in the two cases diverge. The penalty theory therefore predicts that D1 and D2 receive the same sentence of seven years. The key point is this: the penalty theory here predicts seven years for D2, whereas the discount theory predicts five.

The discount and penalty theories also make different predictions if we assume both D1 and D2 go to trial rather than plead guilty. Under the discount theory, if D1 and D2 are both convicted at trial, they will receive the same sentence of ten years regardless of the difference in prosecutorial litigation costs. That's because both have helped the prosecution avert the same amount of litigation costs: zero. But under the penalty theory, if D1 and D2 both go to trial, D2 should receive a higher sentence than D1—say, twelve years—because D2 has forced the prosecution to expend more resources to convict him (because of the higher litigation costs of trial in his case). The key takeaway is that, if both defendants are convicted at trial, the discount theory predicts that D2 will receive a sentence of ten years, whereas the penalty theory predicts that D2 will receive twelve. The two theories thus make different predictions about prosecutorial behavior when litigation costs vary.

### *B. Risk of Acquittal*

Next, consider varying the risk of acquittal at trial. Suppose a prosecutor has infinite resources and is, therefore, unconcerned about litigation costs. Instead, she is primarily concerned about losing cases. Her primary goal, therefore, is to secure a conviction on at least one charge to avoid a total loss. For that reason, guilty pleas are more attractive than trials.

As before, the prosecutor has two techniques to obtain more guilty pleas. First, to encourage defendants with lower conviction probabilities to plead guilty, the prosecutor can offer a larger plea discount. Thus, the discount theory predicts that prosecutors *decrease* the sentences of defendants who plead guilty as the risk of conviction at trial decreases. This is, essentially, the premise of the standard shadow-of-trial model—that prosecutors calibrate plea sentences

downwards based on the probability of conviction at trial. Second, to encourage defendants with lower conviction probabilities to plead guilty, the prosecutor can threaten a larger trial penalty. The penalty theory predicts that the prosecutor will *increase* the sentences of defendants who go to trial as the risk of conviction decreases.

To examine how the discount and penalty theories play out, let's return to D1 and D2. Recall that D1 would receive seven years if he pleads guilty and ten if he is convicted at trial. This time, assume both cases are identical in all respects except that the probability of conviction is, for whatever reason, lower for D2—perhaps because there was a change in the burdens of proof.

The discount and penalty theories make different predictions about how the prosecutor responds to the drop in the probability of conviction. Once again, we need to compare the defendants' sentences conditional on the same stage of disposition. Assume, then, that they both plead guilty. What does the discount theory predict? As the probability of conviction at trial falls, the prosecution decreases the sentence of a defendant who pleads guilty. Therefore, if both defendants plead guilty, the prosecutor responds to the decrease in the probability of conviction by seeking a lower sentence against D2 than D1—perhaps five years. In contrast, what does the penalty theory predict? As the probability of conviction at trial decreases, the prosecutor seeks higher sentences against defendants who go to trial. Because we have assumed that neither defendant goes to trial, the drop in the probability of conviction has no effect on D2's sentence, meaning both defendants receive the same sentence of seven years. The key takeaway is that the discount and penalty theories make different predictions about D2's sentence when the probability of conviction changes. If we assume both defendants plead guilty, the discount theory predicts that D2 gets a smaller sentence than D1, whereas the penalty theory predicts they get the same sentence.

The discount and penalty theories also make different predictions about the defendants' sentences if we assume both go to trial. Under the discount theory, if both defendants go to trial, they receive the same sentence. But under the penalty theory, the prosecutor seeks to

avoid risky trials and thus pressures defendants with lower conviction probabilities to plead guilty by increasing the trial sentence. Thus, under the penalty theory, the prosecution responds to the drop in the probability of conviction by seeking a higher sentence against D2 than D1. Once again, the takeaway is that the discount and penalty theories predict different sentences for D2. If we assume both defendants go to trial, the discount theory predicts D2 will receive the same sentence as D1, whereas the penalty theory predicts that D2 will receive a higher sentence.

### C. Implications

My claim that the penalty and discount theories make different predictions about prosecutorial behavior has at least two implications—one theoretical, the other empirical. First, the theoretical implication is that plea discounts and trial penalties are not merely two sides of the same coin. Their predictions diverge when trial costs or acquittal risks vary. Under the discount theory, for example, when trial costs go up, defendants who plead guilty early in the criminal process receive lower sentences. But, under the penalty theory, those same defendants experience no change in sentences.

Second, the empirical implication is that these diverging predictions may provide an opportunity to devise a test of plea discounts and trial penalties. Indeed, if prosecutors respond to rising litigation costs by decreasing plea sentences and leaving trial sentences unchanged, that provides meaningful evidence that their behavior is consistent with the plea discount theory. On the other hand, if they respond by leaving plea sentences unchanged and by increasing trial sentences, that's consistent with the trial penalty theory. Moreover, the inference to trial penalties is even stronger with one relatively light assumption—that, before the rise in litigation costs, the *trial* sentence was equal to (or greater than) the baseline sentence. If that assumption holds, then any increase in trial sentences due to the rise in litigation costs would necessarily exceed the baseline and would, in turn, represent strong evidence of a trial penalty. Note that this assumption is far milder than the heavy

assumption required to infer penalties from existing studies on the plea-trial differential—to infer trial penalties in that literature, we must assume that the *plea* sentence is equal to (or greater than) the baseline sentence.<sup>110</sup> In the next Part, I consider how we might translate these theoretical insights into an empirical study.

#### IV. DESIGNING AN EMPIRICAL TEST OF PLEA DISCOUNTS AND TRIAL PENALTIES

In this Part, I explore whether and how empirical scholars might use the theoretical predictions identified in the previous Part to devise a test of the plea discount and trial penalty theories. I focus primarily on the predictions associated with litigation costs because they are easier to exploit empirically.

To devise a test of discounts and penalties, we need a policy intervention that substantially changes the litigation costs of prosecution. Although there are others,<sup>111</sup> one potential candidate is open-file discovery, which several states have adopted in recent years, including North Carolina and Texas.<sup>112</sup> Open-file substantially increases discovery burdens on prosecutors.<sup>113</sup> In certain jurisdictions, it requires them to assemble all of the relevant evidence available to all relevant government agencies in every criminal case—substantially more evidence in far more cases than would be required under a traditional criminal discovery statute or the U.S. Constitution.<sup>114</sup>

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110. See discussion *supra* Section II.D.

111. Other policy changes that may affect prosecutorial trial costs, at least in certain cases, include cost-shifting statutes, *see, e.g.*, Recoupment of Costs Incurred in Prosecution of Convicted Criminal Defendant, Op. Wash. Att’y Gen. No. 14 (1976), 1976 WL 168498 (“[C]osts incurred at public expense for the payment of appointed counsel for the defendant in a criminal case as well as witness fees paid by the state for its own and defendant’s witnesses may be recovered pursuant to court order from the defendant if convicted.”), or other procedural rule changes, *see, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009) (granting defendants the constitutional right to cross examine a forensic analyst who performed a test introduced at trial by the prosecution).

112. Grunwald, *supra* note 35, at 789 & n.88.

113. See *id.* at 789–91, 795–96.

114. *Id.* at 789–91.

To test the discount and penalties theories, we would need to compare the sentences of similar defendants whose cases were resolved at the same stage in the criminal process before and after the enactment of open-file discovery. For example, we could first examine the sentences of defendants who plead guilty early (before the prosecution produces the discovery file). As noted, all else being equal, if the discount theory is correct, we would expect those sentences to go down after open-file goes into effect, and if the penalty theory is correct, we would expect no change at all.

Next, we could also compare the sentences of defendants who did receive discovery before and after open-file went into effect. We might, for example, look at the defendants convicted at trial. All else being equal, if the discount theory is correct, we would expect no change in those defendants' sentences after open-file goes into effect. But, if the penalty theory is correct, we would expect those sentences to increase.

Note that this approach might provide some information not only about the size of the additional discount or penalty in response to the change in litigation costs but also the prevalence of such responses. Information on the size of the additional discounts and penalties could be inferred by the average difference between sentences before and after open-file goes into effect. And information about prevalence might be captured by examining other characteristics of the distribution of sentences, like the spread as measured by the standard deviation. If the average trial sentence increases after open-file discovery goes into effect but the standard deviation does not, that would suggest that trial sentences went up uniformly. If, on the other hand, trial sentences increase but only for a fraction of cases, we would also expect to see an increase in the standard deviation. Assuming sufficient sample sizes, we might also be able to identify specific prosecutors offices that respond to the change in litigation costs more aggressively with discounts and penalties than other offices by subsetting the analysis by county.

Of course, there are a number of potential methodological limitations or challenges. First, like every empirical study examining



the effect of judicial reforms, ideally, the policy change would occur at a time when no other major changes are occurring in the criminal justice system. For example, in a study of just one or two counties, one might be particularly concerned about turnover in key personnel such as a judge, district attorney, or chief of the criminal division in the district attorney's office. In a statewide study, which has the advantage of averaging across these kinds of county-level idiosyncratic changes, one might still be concerned about relevant legislative enactments, changes in criminal justice funding levels, and the timing of local elections. Relatedly, changes in the composition of the caseload or the timing of disposition might also be a concern. Fortunately, the data we have on open-file provides little evidence of a compositional change,<sup>115</sup> and there are useful statistical tools to help address this kind of problem.<sup>116</sup>

Second, open-file discovery might affect sentences through an alternative causal pathway other than increased litigation costs. If so, that alternative pathway could bias an estimate of the effect of increased litigation costs. The most plausible alternative pathway is that open-file may reduce sentences by helping defendants develop a more effective litigation strategy—whether during plea bargaining or trial. Let's call this the *effective defense* pathway, to distinguish it from the *litigation cost* pathway.

This alternative pathway is a real methodological concern, but it might be smaller than it appears at first. For one thing, if open-file promotes more effective defense strategy, that would only make the trial penalty test more conservative. If, as the penalty theory predicts, sentences go up for trial convictions after open-file goes into effect—and they do so despite the potential downward bias from more

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115. *Id.* at 810–23.

116. Most importantly, we can test for changes in the volume of cases at different phases of the criminal process. If, for example, open-file leads some cases to a plea agreement that otherwise would have gone to trial, we could likely detect that change by looking for increases in the proportion of cases that are pled out. We can also test for changes in observable case characteristics—such as charges, criminal history, and defendant demographics. Furthermore, if there are compositional changes, multivariate regression could help adjust for some of them by controlling for observable case characteristics.

effective defense—that would suggest the increased litigation costs of open-file led to an even bigger trial penalty than observed in the study. The same is true for defendants who plead guilty early, and for whom the trial penalty theory predicts no change. If the study observes no change, then we probably do not need to worry about the effective defense pathway.

The problem is bigger for the discount theory, which predicts that defendants who plead guilty before the prosecution produces discovery receive lower sentences after open-file goes into effect. If sentences go down for those defendants, we won't know whether that reduction is the result of heightened litigation costs or a more effective defense. One potential solution is to lean more heavily on the plea discount theory's prediction for defendants convicted at trial—that defendants convicted at trial experience no change in sentences after open-file goes into effect. If sentences do not change, that would provide support for the discount theory without raising concerns about the alternative causal pathway of effective defense.

A third methodological challenge, which is perhaps better described as a methodological limitation, is that this test cannot detect trial penalties under certain conditions. For example, if a prosecutor has already maxed out on penalties before open-file goes into effect—meaning the prosecutor already inflicts the largest penalty possible in all cases—then the policy change cannot lead the prosecutor to increase penalties further. Similarly, when applying a test of trial penalties based on changes in litigation costs, we would not be able to pick up trial penalties based on the other motivations to plea bargain, like avoiding the chance of acquittal at trial.

A fourth methodological challenge—this one specific to the open-file context—is a measurement problem: we need to know whether individual cases were resolved before or after the prosecution has invested resources in discovery. For cases that go to trial, this is easy; the prosecution almost certainly invested significant resources in assembling and compiling a discovery package for the defense. But for cases resolved earlier in the criminal process, measuring discovery is harder.

There are a few potential solutions. One option is to use timing as a rough proxy for the prosecution's investment in discovery. Criminal court databases usually contain information on the date charges were filed and the date the defendant entered a guilty plea. At least in some jurisdictions, it may be reasonable to assume that the prosecution has not invested significant resources into discovery in cases where the defendant pled guilty soon after charges were filed. That inference may be particularly strong in certain classes of cases. In North Carolina, for example, defendants sometimes waive discovery in low-level felony drug cases that are resolved early in the criminal process before they reach felony court.<sup>117</sup> It might be possible to compare, before and after open-files goes into effect, the sentences in the subset of these low-level drug cases that are resolved early. It may similarly be possible to compare, before and after open-file goes into effect, the sentences in low-level drug cases that are resolved later in the criminal process after discovery is provided in superior court. Another option is to gather case-level data on discovery itself. Some public defender offices, for example, maintain a discovery log that captures basic information like the case number, the date of receipt, and the number of pages or boxes in the discovery file.<sup>118</sup> Such logs could be used to measure whether a defendant has received discovery before the case is resolved, which may be a strong proxy for how much labor the prosecution has invested.

As these methodological challenges reveal, implementing a rigorous test of the discount and penalty theories is no easy task. But the challenges seem worth the potential payoff—the chance to systematically test the discount and penalty theories in action using data from a large and representative sample of criminal cases.

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117. E-mail from Thomas Maher, Former Exec. Dir., N. Carolina Indigent Defense Servs., to author (Jan. 7, 2021) (on file with author).

118. Grunwald, *supra* note 35, at 827.

## CONCLUSION

Criminal law scholars have worried about the coercive effects of trial penalties on plea bargaining for over half a century.<sup>119</sup> Yet we still have little systematic empirical evidence to determine the prevalence and intensity of the problem. More work—both theoretical and empirical—needs to be done. My hope is that, armed with more precise criteria for distinguishing between discounts and penalties and with more discriminating statistical tests, it will be easier to go out into the world and generate evidence about them.

Before concluding, it is worth pausing for a brief moment to reflect on COVID-19. This Article was written and accepted for publication well before 2020—it is, therefore, written for non-pandemic times. But much of the basic logic and analysis remains intact. What has arguably changed is the normative baseline. Due to the heightened health risks of incarceration, many crimes that were suitably punished with prison before the pandemic no longer are.<sup>120</sup> In other words, for many crimes, the normative baseline for incarceration has fallen to zero. In those cases, my analysis implies that any increased prison time that defendants receive because they were convicted at trial (rather than through a guilty plea) qualifies as a trial penalty. This means that, under pandemic conditions, trial penalties are far larger, more frequent, and easier to detect, at least in those crimes for which prison time is no longer appropriate.

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119. See, e.g., Dominick R. Vetri, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 886 (1964) (noting that “a prosecutor should not include additional charges merely to bring pressure on a defendant to plead guilty”).

120. E.g., Cary Aspinwall, *These Prisons Are Doing Mass Testing for COVID-19*, THE MARSHALL PROJECT (Apr. 24, 2020, 5:32 PM), <https://www.themarshallproject.org/2020/04/24/these-prisons-are-doing-mass-testing-for-covid-19-and-finding-mass-infections> [<https://perma.cc/CM6E-9PNJ>].