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Plea Bargaining and Collateral Consequences: An Experimental Analysis

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NOTES

Plea Bargaining and Collateral Consequences: An Experimental Analysis

The overwhelming majority of convictions in the United States are obtained through guilty pleas. Many of these guilty pleas are a product of plea bargaining, where a defendant enters a guilty plea in exchange for some form of official concessions. Despite its prominence, plea bargaining is subject to limited regulation. One consequence of this limited regulation is that courts generally only require the direct consequences of a guilty plea to be communicated to a defendant. Thus, when a defendant is deciding whether to plead guilty, he is often operating with incomplete information about the costly collateral consequences that may attach to a criminal conviction. The dominant theory of plea bargaining suggests that outcomes will largely mirror trial outcomes because bargaining occurs in the shadow of trial, but this may not be accurate if failure to communicate collateral consequences influences decisions to plead guilty.

Using an experiment, this Note examines the extent to which communicating collateral consequences influences the decision to accept a plea bargain. Results from the experiment demonstrate that communicating collateral consequences decreases the rate of plea acceptance, but the effect of communication dissipates as the difference between the plea bargain sentence and the potential sentence at trial grows larger. Because communicating collateral consequences has an important effect on guilty pleas, this Note suggests that a lawyer's failure to communicate such consequences to their client should be grounds for an ineffective assistance of counsel claim.

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INTRODUCTION

The United States has the highest incarceration rate in the world. Its incarceration rate is nearly seven percent higher than the next closest country (El Salvador) and more than four times greater than rates in Western Europe.¹ At the end of 2016, an estimated 6.6 million people were under U.S. correctional system supervision.² The overwhelming majority of them came under correctional supervision not after a trial, but after pleading guilty. Ninety-four to ninety-seven percent of all convictions are obtained through guilty pleas.³

Despite their prominence, cases resolved by guilty pleas have long been subject to limited regulation. While the Supreme Court has increasingly regulated jury trials with exacting requirements, such as requiring prosecutors to produce live witnesses and prove aggravating

1. John Gramlich, *America's Incarceration Rate is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), <http://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/> [https://perma.cc/YD25-DJYM].

2. Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, BUREAU OF JUST. STAT. 1 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [https://perma.cc/GES9-E28J].

3. *Missouri v. Frye*, 566 U.S. 134, 143 (2012); see also *Padilla v. Kentucky*, 599 U.S. 356, 372 (2010) (noting that “[p]leas account for nearly 95% of all criminal convictions”).

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facts beyond a reasonable doubt, plea bargaining has remained remarkably *laissez faire*.⁴ The Court's hands-off approach to plea bargaining is rooted in both practicality and theory. The judicial system relies on guilty pleas to resolve the overwhelming majority of criminal cases, so dampening the use of plea bargaining would be costly.⁵ Further, because defendants are presumed to plead based on expected trial outcomes—the shadow of a trial theory—the Court has historically assumed that innocent defendants will not plead guilty and outcomes of any bargaining will be similar to trial outcomes because defendants' rights are protected through jury trial procedures.⁶

Symptomatic of the free market approach to plea bargaining, courts generally only require that the direct consequences of a guilty plea be communicated to a defendant.⁷ When deciding whether to plead guilty, individuals often operate with incomplete information about the severity of the offer's consequences. Defense attorneys are generally not required to communicate collateral consequences, or costly nonpenal sanctions that attach to a criminal conviction.⁸ Among these are eviction from public housing, loss of voting rights, loss of professional and occupational licenses, and denial of food stamps.⁹

4. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011) (“[T]he Supreme Court has promulgated exacting procedures to regulate jury trials . . . [b]ut even as trial procedures hypertrophied, plea bargaining remained all but unregulated . . .”).

5. See Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 931 (1970) (“A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities—judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.”).

6. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion [in the context of plea bargains], and unlikely to be driven to false self-condemnation.”); Bibas, *supra* note 4, at 1124 (“Plea bargaining supposedly takes place in the shadow of expected trial outcomes, so regulation of trials should theoretically protect plea-bargaining defendants as well.”).

7. See *Brady v. United States*, 397 U.S. 742, 758 (1970) (holding plea bargaining constitutional and requiring guilty pleas to be made with an understanding of all the direct consequences of entering a guilty plea); see also *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (distinguishing between direct and collateral consequences by examining whether the consequence was a “definite, immediate and largely automatic effect on the range of the defendant’s punishment”); *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir. 1971) (*per curiam*) (holding that the defense attorney’s failure to advise on an administrative punishment, in addition to the criminal punishment, did not constitute ineffective assistance because it was not a “definite practical consequence of the plea”).

8. See *Collateral Consequences Inventory*, COUNCIL OF STATE GOVT’S JUST. CTR., https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggtrigg_offense_category=&consequence_type=&duration_category=&page_number=1 (last visited Mar. 16, 2020) [<https://perma.cc/ZJ4Z-VZA6>] (cataloguing potential collateral consequences for convictions across jurisdictions, including loss of business licenses, removal from political office, and ineligibility for various jobs).

9. *Id.*

If the theoretical underpinnings of the Supreme Court's approach to plea bargaining are sound—innocent defendants will not plead guilty and outcomes will largely mirror trial outcomes—then the lack of communication about collateral consequences is harmless. If, however, the theoretical underpinnings are not sound, then the failure to communicate important collateral consequences may influence defendants' decisions to accept or reject plea bargain offers, including innocent defendants. Ultimately, this is an empirical question—one which has not been satisfactorily answered. Despite the existence of considerable scholarship related to factors influencing plea bargain acceptance and the merits and effects of collateral consequences, there has been little investigation of how the two interact.

Using an experiment, this Note examines the extent to which communicating collateral consequences influences the decision to accept a plea bargain that requires the defendant to plead guilty and waive the right to trial. Specifically, it tests the effect of communicating such consequences on decisions to plead guilty when the prosecutor has offered a guaranteed sentence, as opposed to when the prosecutor offers a recommended sentence or a defendant enters a guilty plea without any bargaining agreement. Though the experiment directly tests the effect of communicating collateral consequences on only a portion of guilty pleas, the findings likely have implications for other types of guilty pleas.

Part I provides background on plea bargaining, collateral consequences, and the Supreme Court's approach to plea bargaining. Part II discusses and critiques the dominant theoretical justification for plea bargaining: the shadow of a trial theory. Part III describes the experiment used in this Note and presents the results demonstrating the importance of communicating collateral consequences. Part IV argues that, in light of the experimental results, defense counsel must communicate collateral consequences to their clients.

I. HISTORICAL AND LEGAL FOUNDATIONS

A. *Plea Bargaining*

Plea bargaining, broadly defined, involves a defendant's entry of a guilty plea in exchange for some form of "official concessions."¹⁰ Typically, these concessions take the form of a reduced sentence imposed by the court, a reduced sentence recommended by the

10. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3 (1979) ("Plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction.").

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prosecutor, or a reduction in the nature of the offense charged by the prosecutor.¹¹ Legal historians generally agree that the practice of plea bargaining in the United States emerged during the early or mid-nineteenth century, became a standard feature of urban criminal courts near the end of the nineteenth century, and grew substantially during the twentieth century.¹² Scholars offer numerous explanations for the growth trajectory of plea bargaining practice in the country, including (1) crowded court dockets;¹³ (2) pretrial detention;¹⁴ (3) lawyer characteristics and incentives;¹⁵ (4) increasingly careful selection of cases by police and prosecutors;¹⁶ (5) greater access to defense counsel;¹⁷ (6) increasingly cumbersome and time consuming jury trial procedures;¹⁸ and (7) sentencing practices that made penalties at trial more certain.¹⁹

Today, “plea bargaining is a defining, if not the defining, feature of the present federal criminal justice system.”²⁰ In 2017, consistent with the last fifteen years, over ninety-seven percent of federal criminal

11. See *id.* at 3 & n.11 (explaining that other possible concessions include leniency to a defendant’s accomplices, withholding damaging information from court, the date of trial, and correctional institution placement, among others).

12. See *id.* at 19, 25–29, 34 (explaining that plea bargaining began appearing in appellate court reports after the Civil War and grew in the twentieth century, particularly around prohibition in the 1920s and in light of increasing caseloads in the 1960s); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 859 (2000) (arguing that plea bargaining was common by the 1920s); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC’Y REV. 247, 248 (1979) (articulating that plea bargaining was present in the late 1800s, became common in the 1920s and 1930s, and became prevalent in the 1950s).

13. *E.g.*, Arnold Enker, *Perspectives on Plea Bargaining*, in PRESIDENT’S COMM’N ON LAW ENF’T AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112 (1967).

14. See, *e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 124 (2005) (“Because defendants who remain in detention before trial are more anxious to resolve their cases, they plead guilty more often than defendants who are released pending trial . . .”).

15. See, *e.g.*, Malcolm M. Feeley, *Perspectives on Plea Bargaining*, 13 LAW & SOC’Y REV. 199, 200 (1979) (referencing “the low quality of public defenders, the financial incentives of private attorneys, [and] the laziness of prosecutors” as potential causes of increased plea bargaining).

16. See, *e.g.*, Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC’Y REV. 281, 284 (1979) (“[W]hen cases undergo extensive pretrial screening before they reach court, there are relatively few genuine disputes over guilt or innocence left to be resolved by juries.”).

17. See, *e.g.*, Feeley, *supra* note 15, at 201 (“Ironically, the expanded use of defense counsel may have sounded the death knell for the trial in all but a few cases.”)

18. See, *e.g.*, Alschuler, *supra* note 10, at 41 (“For all the praise lavished upon the American jury trial, this fact-finding mechanism has become so cumbersome and expensive that our society refuses to provide it.”).

19. See, *e.g.*, Wright, *supra* note 14, at 129 (“Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.”)

20. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1064 (2006).

cases were resolved through guilty pleas.²¹ The state level also has an overwhelming number of convictions obtained via guilty plea, with more than ninety-five percent of felony convictions resulting from such pleas.²² These convictions consist of a combination of “straight up” pleas²³ and plea bargains,²⁴ although the portions of each are unclear.²⁵ While there are not precise estimates of the proportion of cases resolved through plea bargaining, there is evidence that most are.²⁶ Of offenders who pleaded guilty in federal criminal cases in 2017, almost half received sentences below the applicable sentencing guideline range, and close to sixty percent of these lower sentences were requested by the government.²⁷

Although the prevalence of plea bargaining is undisputed, the practice’s merits are widely debated. Proponents of the practice stress its administrative convenience and argue that the outcomes are fair.²⁸

21. Glenn R. Schmitt & Cassandra Syckes, *Overview of Federal Criminal Cases: Fiscal Year 2017*, U.S. SENT’G COMMISSION 5 (June 2018) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf [<https://perma.cc/9E36-W9ZY>].

22. See Sean Rosenmerkel, Mathew Durose & Donald Farole, *Felony Sentences in State Courts, 2006 – Statistical Tables*, BUREAU OF JUST. STAT. 1, <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> (last updated Nov. 2010) [<https://perma.cc/9E36-W9ZY>].

23. See Mona Lynch, *Booker Circumvention? Adjudication Strategies in the Advisory Sentencing Guidelines Era*, 43 N.Y.U. REV. L. & SOC. CHANGE 59, 91 n.120 (2019) (“Pleading ‘straight up’ means that the defendant pleads guilty to the charges as they are presented in the charging document, without entering into any plea agreement with the government.”).

24. See Alschuler, *supra* note 10, at 3 (explaining that, broadly defined, plea bargains involve a defendant’s entry of a guilty plea in exchange for some form of “official concessions”).

25. See Lucian E. Dervan, *Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty*, 31 FED. SENT’G REP. 239, 239 (2019) (“Although the exact number of plea bargains is elusive, it is estimated that approximately 75 percent of such pleas of guilty are induced by threats of further punishment if a defendant proceeds to trial, by offers of leniency in return for waiving the constitutionally protected right to trial, or both.”).

26. See Schmitt & Syckes, *supra* note 21, at 5 (examining the disposition of cases in 2017).

27. See *id.* (explaining that below-guideline sentences were typically requested “because the defendant had provided substantial assistance to the government or had agreed to have his or her case handled as part of an Early Disposition Program”).

28. See, e.g., Thomas W. Church, Jr., *In Defense of “Bargain Justice”*, 13 LAW & SOC’Y REV. 509, 512–14, 523 (1979) (referencing the “positive aspects of less formal adjudication procedures”); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309–17 (1983) [hereinafter Easterbrook, *Criminal Procedure*] (extolling the virtues of plea bargains because it enables “parties [to] save the costs of trials” and because “[d]efendants presumably prefer the lower sentences to the exercise of their trial rights or they would not strike the deals”); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) [hereinafter Easterbrook, *Compromise*] (justifying plea bargaining because it “helps defendants”); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66–69 (1971) (theorizing that defendants only enter into plea bargains when it maximizes their utility); Edward A. Rittenburg, *Plea Bargaining Analytically—The Nash Solution to the Landes Model*, 7 AM. J. CRIM. L. 323, 353 (1979) (“Plea bargaining should be accepted openly as a system which can accomplish the goals of justice as completely as can a pure trial system . . .”); Robert E. Scott &

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Opponents, on the other hand, contend that plea bargaining undermines the accuracy and fairness of criminal prosecutions.²⁹ This Note focuses on one aspect of the plea bargaining system—the effect of communicating collateral consequences during plea bargain negotiations on decisions to waive trial and plead guilty—and explores its theoretical and practical consequences for defendants.³⁰

B. Collateral Consequences

Collateral consequences consist of a broad array of restrictions, limitations, and barriers that—though not embedded in the criminal code as part of the formal criminal penalty—individuals face as a result of conviction.³¹ Some are imposed informally by third parties, such as employers and potential landlords.³² This Note, however, focuses on the many collateral consequences that are formally imposed by the government and embedded throughout civil codes.³³

The practice of imposing far-reaching, state-sanctioned collateral consequences on individuals convicted of a crime is not a new phenomenon. In 1937, eighteen states had “civil death” statutes that severely restricted the civil rights of convicted persons after

William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992) (arguing that plea bargains are “paradigmatically value-enhancing bargains.”).

29. See, e.g., Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (decrying plea bargaining as producing irrational results); Bibas, *supra* note 4, at 1123 (criticizing the Supreme Court for failing to “cultivate rules tailored to make [plea] bargaining fair and substantively just”).

30. See *infra* Parts II, III.

31. See *Daniels v. United States*, 532 U.S. 374, 379 (2001) (explaining that states “impose a wide range of disabilities on those who have been convicted of crimes, even after their release”); *Estep v. United States*, 327 U.S. 114, 122 (1946) (recognizing that “[a] felon customarily suffers the loss of substantial rights”); Natalie Goulette & James Frank, *Examining Criminal Justice Practitioners’ Views on Collateral Consequences Policy*, 43 AM. J. CRIM. JUST. 724, 725–26 (2018) (“These additional restrictions can limit offenders’ civil, parental, and spousal rights.”).

32. See, e.g., Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013) (explaining that absent formal sanctions, “a conviction also has a very negative impact on individuals’ job and housing prospects”); Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, NAT’L EMP. L. PROJECT (2011) https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [<https://perma.cc/EFD2-QHVS>] (detailing the prevalence of hiring limitations for individuals with criminal records). For a model of how informal sanctions function in conjunction with the criminal justice system, see Andrew F. Daughety & Jennifer F. Reinganum, *Informal Sanctions on Prosecutors and Defendants and the Disposition of Criminal Cases*, 32 J.L. ECON. & ORG. 359 (2015).

33. See generally *Collateral Consequences Inventory*, *supra* note 8 (consisting of an expansive, searchable database categorizes collateral consequences by jurisdiction, the area of life affected, the type of offense, and whether the law applies automatically or at the discretion of a government agent). Examples of collateral consequences include ineligibility for federal benefits, revocation of the right to vote, and loss of professional licensure. See *id.*

incarceration, and additional states restricted some civil rights of convicted persons without a formal statute.³⁴ During the mid-twentieth century, such laws became increasingly unpopular and less common; in fact, in 1983, the American Bar Association predicted that collateral sanctions were heading towards “extinction.”³⁵ But that prediction proved false. Even as severe civil death statutes became scarce, collateral consequences were embedded in noncriminal statutes.³⁶

Today, people convicted of felonies and most misdemeanors face an expansive list of collateral consequences embedded “not in the penal code but in state and federal gun-ownership and voting laws, juror-qualification standards, professional-licensure requirements, [and] entitlement-eligibility rules.”³⁷ The American Bar Association Collateral Consequences Inventory contains close to forty-five thousand consequences across U.S. jurisdictions.³⁸ The more than one thousand federally imposed collateral consequences include limits and outright bans on access to federal housing,³⁹ Social Security benefits,⁴⁰ student loans,⁴¹ and federal employment.⁴² State-level collateral consequences are even more expansive—they include revocation of the right to vote,⁴³ revocation or denial of professional and occupational licensures (for

34. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790, 1796 (2012) (articulating the concept of civil death as more or less a complete extinction of civil rights).

35. *Id.* at 1798.

36. *Id.* at 1799. Although it is not entirely clear why civil death statutes were unpopular and repealed while piecemeal collateral consequences provisions were simultaneously incorporated into civil codes, the wholesale nature of civil death statutes may have made them particularly prone to opposition while individual provisions appeared more proportionate to an offense.

37. Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 145 (2008).

38. See *Collateral Consequences Inventory*, *supra* note 8.

39. See 24 C.F.R. § 966.4 (2019) (allowing for the termination of a PHA lease “for criminal activity”). See generally Corrine A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545 (2005) (describing America’s exclusion of individuals with criminal history from subsidized housing).

40. See 21 U.S.C. § 862a (2012) (providing for the denial of benefits based on specific drug-related convictions).

41. See 34 C.F.R. § 668.40 (2019) (providing for ineligibility for federally backed student loans for drug convictions).

42. See 5 U.S.C. § 3113 (2012) (providing for restrictions on federal employment for certain bribery and drug-related convictions).

43. Alabama, Arizona, Delaware, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming all deny convicted felons the right to vote indefinitely. *Felon Voting Rights*, NAT’L CONF. ST. LEGISLATURES (Oct. 14, 2019), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/4ADT-9YRL>].

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example, a medical or barber's license),⁴⁴ ineligibility for food stamps,⁴⁵ restrictions on adoption,⁴⁶ and ineligibility for public office,⁴⁷ among innumerable others.⁴⁸ Thus, the formal sanctions of a conviction are only part of its cost. Often "collateral consequences . . . are the harshest sanctions because they limit opportunity, can be timeless, and inhibit full reentry."⁴⁹

Because courts generally regard collateral consequences as nonpunitive, they "have imposed few limits on creation and implementation of collateral consequences."⁵⁰ The Supreme Court has condoned collateral consequences related to occupational ineligibility,⁵¹ deportation,⁵² sex offender registrations,⁵³ civil commitment,⁵⁴ voter

44. *E.g.*, MINN. STAT. § 626A.20 (2018) (providing for the suspension or revocation of licenses "to practice a profession or to carry on a business" for certain communications-related convictions); W. VA. CODE § 21-1B-7 (2018) (providing for the suspension or revocation of professional and occupational licenses for convictions of fraud and labor laws).

45. *E.g.*, IDAHO ADMIN. CODE r. 16.03.04.287 (2018) (restricting food stamp eligibility for drug-related felonies); TENN. CODE ANN. § 71-5-308 (2018) (restricting food stamp eligibility for drug-related convictions).

46. *E.g.*, HAW. REV. STAT. § 346-19.7 (2019) (providing for denial of adoption application based on criminal conviction); N.J. STAT. ANN. § 30:4C-26.8 (West 2019) (restricting eligibility for adoption based on criminal convictions).

47. *E.g.*, FLA. STAT. § 112.317 (2018) (preventing individuals convicted of crimes involving fraud, dishonesty, misrepresentation, or money-laundering from holding public office); 17 R.I. GEN. LAWS § 17-23-6 (2018) (preventing individuals convicted of election-related offenses from holding public office).

48. *See Collateral Consequences Inventory, supra* note 8 (providing a comprehensive listing of collateral consequences by jurisdiction).

49. Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031, 1032 (2020).

50. Chin, *supra* note 34, at 1806; *see* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (establishing a balancing test to determine if a law is criminal punishment or civil regulation); Hawker v. New York, 170 U.S. 189, 195–98 (1898) (holding that a provision prohibiting those convicted of a felony from holding a medical license was not *ex post facto* criminal punishment, but merely made use of conviction of a felony as evidence for disqualification).

51. *See Hawker*, 170 U.S. at 197–200 ("[S]uch legislation is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming . . . appropriate evidence of such qualifications.").

52. *See Galvan v. Press*, 347 U.S. 522, 530–31 (1954) (holding that the Ex Post Facto Clause does not apply to deportation because it is not punitive even if it "deprive[s] a man 'of all that makes life worth living'" (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922))).

53. *See Smith v. Doe*, 538 U.S. 84, 104–06 (2003) (holding that the Ex Post Facto Clause does not apply to sex offender registration because the statute requiring registration was regulatory, civil, and nonpunitive).

54. *See Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (holding that the Ex Post Facto Clause did not apply to involuntary confinement after conviction for indecent liberties with a child because the statute was not punitive).

disenfranchisement,⁵⁵ and firearm possession.⁵⁶ Subjecting collateral consequences to rational basis review, lower courts have upheld collateral consequences on cost-saving,⁵⁷ public safety,⁵⁸ and public confidence⁵⁹ grounds. Collateral consequences thus represent a widespread, court-sanctioned, and costly result of conviction, but when defendants are considering entering a guilty plea, such consequences need not be communicated to them.

*C. The Supreme Court, Plea Bargaining,
and Collateral Consequences*

Despite the Supreme Court's promulgation of exacting procedures for jury trials, the Court's approach towards plea bargaining has remained quite deferential.⁶⁰ In the seminal case on plea bargaining, the 1970 *Brady v. United States* decision, the Supreme Court held that plea bargaining was constitutional.⁶¹ It recognized that the government "encourages pleas of guilty at every important step in the criminal process" and refused to hold that a guilty plea is compelled and invalid when motivated by a defendant's desire to accept the certainty of a lesser penalty rather than risk a heavier sentence at trial.⁶² The Court highlighted the mutual benefits of plea bargaining for defendants and for the government: defendants with little chance of acquittal are relieved of the "burdens of trial" and "the correctional

55. See *Richardson v. Ramirez*, 418 U.S. 24, 54–55 (1974) (finding that loss of voting rights related to felony conviction was not a violation of the Equal Protection Clause).

56. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (noting that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons").

57. See *Houston v. Williams*, 547 F.3d 1357, 1363–64 (11th Cir. 2008) (holding that "the conservation of funds constitutes a rational basis on which to deny assistance to convicted felons and sex offenders").

58. See *Rinehart v. La. Dep't of Corr.*, No. 93-5624, 1994 WL 395054, at *1 (5th Cir. July 7, 1994) (per curiam) (holding that employment prohibitions are rationally related to security and safety).

59. See *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014) (holding that an Illinois statute restricting felons from elected office is rationally related to the legitimate state interest in ensuring public confidence in elected officials).

60. See *Bibas*, *supra* note 4, at 1119 ("[T]he Supreme Court has promulgated exacting procedures to regulate jury trials. . . . But even as trial procedures hypertrophied, plea bargaining remained all but unregulated, a free market that sometimes resembled a Turkish bazaar.").

61. See 397 U.S. 742, 751–52 (1970):

[Plea bargaining] is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law.

62. *Id.* at 750–51.

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process can begin immediately,” while the government can allocate limited resources to cases in which there “is a substantial issue of the defendant’s guilt.”⁶³

Because guilty pleas constitute a waiver of the constitutional right to trial, due process requires judges to ensure that pleas are intelligent and voluntary.⁶⁴ The bar for what constitutes a voluntary and intelligent guilty plea is low, however. In *Brady*, the Court concluded that judges’ due process obligations are met when they ensure that defendants understand the “direct consequences” of entering a guilty plea and do not face threats, misrepresentations, or bribes.⁶⁵ Thus, at plea colloquies, judges must “explain only the direct consequences of a plea, such as the minimum and maximum sentences and any fine, forfeiture, or probation.”⁶⁶ Further, the Court subsequently held that prosecutorial threats to bring more severe charges if a defendant rejects a plea offer do not vitiate the voluntariness of a guilty plea because there is no “element of punishment or retaliation” in the “give-and-take negotiation common in plea bargaining between the prosecution and defense.”⁶⁷ And, as recently as 2002, in *United States v. Ruiz*, the Court determined there is no constitutional due process right to impeachment and affirmative defense information during plea bargaining.⁶⁸

Additionally, in contrast with trial practice, the Court has routinely upheld the waivability of rights in the plea bargaining

63. *Id.* at 752.

64. *See id.* at 748 (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”); *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969) (finding that a trial judge may not accept a guilty plea “without an affirmative showing that it was intelligent and voluntary”).

65. 397 U.S. at 755 (adopting the Fifth Circuit standard):

A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).

(quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev’d on other grounds*, 356 U.S. 26 (1958)).

66. *Bibas, supra* note 4, at 1130; *see also Brady*, 397 U.S. at 755 (adopting the standard that a defendant need only be made aware of the plea’s “direct consequences” (quoting *Shelton*, 246 F.2d at 572 n.2)). The Rule 11 plea process builds on constitutional requirements for guilty pleas established in *Brady* and *Boykin*, requiring that during plea colloquies the judge need mention only the rights being waived, the nature of the charges, the maximum and minimum penalties, and some factual basis for the plea. *See* FED. R. CRIM. P. 11 (establishing the federal model for plea bargaining, which is followed by many states).

67. *Bordenkircher v. Hayes*, 434 U.S. 357, 362–63 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting in part)).

68. *See* 536 U.S. 622, 629–30 (2002).

context. In *United States v. Mezzanatto*, the Court emphasized the strong presumption that all rights are waivable in plea bargaining.⁶⁹ More recently, in *Apprendi v. New Jersey* and *Blakely v. Washington*, the Court held that facts admitted by defendants who plead guilty are exempt from the Sixth Amendment guarantees that the jury find all facts that aggravate maximum sentences and sentences under sentencing guidelines.⁷⁰ In fact, “[m]ost guilty pleas forfeit most rights that defendants could otherwise appeal,” and “[d]efendants often waive” additional rights, including “the right to appeal itself.”⁷¹ Defendants must merely be informed of the rights they are waiving.⁷²

In theory, the Sixth Amendment right to effective counsel helps ensure that defendants make knowing, intelligent guilty pleas.⁷³ The same year *Brady* was decided (1970), in *McMann v. Richardson*, the Court held that defendants have a right to competent legal advice regarding guilty pleas.⁷⁴ Although the Court explained that effective assistance of counsel is based on whether the actions and conduct of an attorney came “within the range of competence demanded of attorneys in criminal cases,” it did not provide guidance on what this standard means in a guilty plea context.⁷⁵ Lacking guidance, lower courts developed and relied on a test incorporating the “direct consequences” language in *Brady*. Courts distinguished between direct and collateral consequences and held that when counsel advise defendants on the direct and automatic consequences of a guilty plea, they satisfy the effective counsel requirement.⁷⁶

69. See 513 U.S. 196, 200–03 (1995) (holding that defendants may waive rules that exclude from evidence statements made during plea negotiations).

70. See *Blakely v. Washington*, 542 U.S. 296, 310 (2004) (extending *Apprendi* to facts that aggravate sentences under sentencing guidelines and emphasizing that defendants can waive *Apprendi* rights in plea bargaining); *Apprendi v. New Jersey*, 530 U.S. 466, 488–90 (2000) (exempting facts admitted by defendants from its holding that the Sixth Amendment guarantees jury findings of all facts that aggravate maximum sentences).

71. *Bibas*, *supra* note 4, at 1123; see also *United States v. Broce*, 488 U.S. 563, 575–76 (1989) (holding that a guilty plea barred a later double jeopardy claim that relied on additional evidence); *People v. Seaberg*, 541 N.E.2d 1022, 1024–26 (N.Y. 1989) (allowing waiver of the right to appeal).

72. See *Bibas*, *supra* note 4, at 1124 (“[D]efendants need know only that they are giving up their trial rights.”).

73. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

74. See 397 U.S. 759, 770 (1970) (holding that “a defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant’s confession”).

75. *Id.* at 771.

76. See, e.g., *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (distinguishing between direct and collateral consequences by examining whether the consequence was a “definite, immediate and largely automatic effect on the range of the defendant’s punishment”); *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir. 1971) (per curiam) (holding that the defense attorney’s failure to advise on an administrative punishment, in addition to the

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In 1985, the Court extended the two-pronged test for ineffective counsel, first developed as a trial right in *Strickland v. Washington*, to guilty pleas.⁷⁷ *Strickland* provides a two-pronged test for ineffective assistance claims: (1) whether “counsel’s representation fell below an objective standard of reasonableness” and (2) whether counsel’s “deficient performance prejudiced the defense.”⁷⁸ Under the first prong, reasonableness is considered in relation to “prevailing professional norms” such as the American Bar Association standards.⁷⁹ Under the second prong, there is prejudice when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁸⁰

In the case extending *Strickland* to guilty pleas, *Hill v. Lockhart*, the Court clarified that there is prejudice in the plea context when there is “a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”⁸¹ Because the *Hill* defendant failed to satisfy the prejudice prong, the Court did not address the question of reasonableness in the plea context.⁸² And overwhelmingly, lower courts continued to apply the test distinguishing between direct and collateral consequences in determinations of ineffective assistance of counsel.⁸³

In a watershed decision in 2010, the Court directly confronted the issue of counsel’s duty to advise clients about the possible consequences of a guilty plea.⁸⁴ In *Padilla v. Kentucky*, the defendant, a U.S. permanent resident, was charged with felony trafficking in marijuana.⁸⁵ He asked his lawyer whether pleading guilty would lead to deportation and was incorrectly assured that he need not worry about deportation.⁸⁶ The Court held that, before a guilty plea, defense counsel

criminal punishment, did not constitute ineffective assistance because it was not a “definite practical consequence of the plea”).

77. See *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (applying the *Strickland* test to guilty pleas); *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984) (determining whether counsel was ineffective based on (1) whether “counsel’s representation fell below an objective standard of reasonableness” and (2) whether counsel’s “deficient performance prejudiced the defense”).

78. 466 U.S. at 687–88.

79. *Id.* at 690.

80. *Id.* at 694.

81. 474 U.S. at 59.

82. *Id.* at 60.

83. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (explaining that “eleven federal circuits, more than thirty states, and the District of Columbia” still rely on the distinction between direct and collateral consequences).

84. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

85. *Id.* at 359.

86. *Id.*

must advise clients about the civil collateral consequence of deportation to satisfy the Sixth Amendment right to effective counsel.⁸⁷ In reaching this decision, the Court emphasized the “weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk” and the ease of determining the consequence of deportation.⁸⁸

Although the Court noted that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance,’” it delayed consideration of whether the distinction is appropriate because “deportation is intimately related to the criminal process.”⁸⁹ Since issuing the decision in *Padilla*, however, the Court has not revisited this question or extended the requirement to communicate other collateral consequences. Lower courts therefore continue to apply the direct/collateral consequences distinction.⁹⁰

The Supreme Court, however, recently extended additional plea bargain protections in a related area. In *Lafler v. Cooper* and *Missouri v. Frye*, a pair of 2012 decisions, the Court considered whether a defendant’s right to counsel was violated when the defendant received deficient advice during pretrial plea bargaining that led to severe consequences.⁹¹ The majority affirmed a defendant’s Sixth Amendment right to effective assistance of counsel during pretrial negotiations, focusing on the *Strickland* prejudice test and casting further doubt on the continued use of the test distinguishing collateral and direct consequences used by most lower courts.⁹² Importantly, in rendering the decision in *Frye*, the Court explicitly denounced the notion that regulated jury trials provide adequate protection for defendants at the plea negotiation stage, stating:

Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas . . . The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have

87. See U.S. CONST. amend. VI; *Padilla*, 559 U.S. at 360.

88. *Padilla*, 559 U.S. at 357.

89. *Id.* at 357, 365.

90. See, e.g., *United States v. Youngs*, 687 F.3d 56, 61 (2d Cir. 2012) (holding that a guilty plea is valid when the defendant was unaware of the collateral consequence of civil commitment); *United States v. Nicholson*, 676 F.3d 376, 382 (4th Cir. 2012) (holding that a guilty plea is valid where defendants are unaware of collateral consequences such as the loss of benefits).

91. *Missouri v. Frye*, 566 U.S. 134, 138–39 (2012) (noting that defendant’s counsel neglected to communicate a plea offer proposed by the prosecution to the defendant and the Supreme Court found that counsel has an effective assistance of counsel duty to communicate such offers); *Lafler v. Cooper*, 566 U.S. 156, 161–68 (2012) (stating that defendant went to trial and was convicted after counsel advised against accepting a plea offer “on the grounds he could not be convicted at trial,” which the Court deemed ineffective assistance of counsel).

92. See *Frye*, 566 U.S. at 147–49; *Lafler*, 566 U.S. at 166–67.

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responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.⁹³

Thus, although the Court has historically treated plea bargaining as outside the scope of many constitutional protections afforded to defendants during jury trials, recently it has begun taking steps to provide greater protections to defendants convicted through plea bargaining.

II. A REALITY CHECK ON THE DOMINANT THEORY OF PLEA BARGAINING

A. *The Shadow of a Trial Theory*

In part, the Court's hands-off approach to plea bargaining reflects an underlying "shadow of a trial" theory that mirrors settlement theory in civil cases. Conventional settlement theory posits that litigants bargain toward settlement in the shadow of expected trial outcomes.⁹⁴ The basic model predicts that rational parties forecast the expected outcome of a trial and reach a bargain that leaves both sides better off by splitting the saved costs of trial.⁹⁵ For example, a tort plaintiff who suffered \$100,000 in damages and anticipates that they have a seventy-five percent chance of winning at trial would be willing to settle for \$75,000 minus the expected expense of going to trial. The defendant in the case, meanwhile, may anticipate that the plaintiff has a seventy percent chance of winning at trial and will be willing to settle for \$70,000 plus the expected costs of trial. Assuming the costs of going to trial are \$3,000, the parties can settle for between \$75,000 – \$3,000 and \$70,000 + \$3,000, or \$72,000 and \$73,000.

93. *Frye*, 566 U.S. at 143–44 (citations omitted).

94. See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

95. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2464 (2004). Priest & Klein, *supra* note 94, at 11–13, provide a detailed model of the settlement decision. At its most basic, two parties will settle when the plaintiff's minimum ask, A , is less than the defendant's maximum offer, B . $A = P_p(J) - C_p + S_p$, where $P_p(J)$ is the plaintiff's expected value of the case (the plaintiff's estimated probability of a favorable judgement multiplied by the size of the judgement, J), C_p is the litigation cost to the plaintiff, and S_p is the settlement cost to the plaintiff. Similarly, $B = P_d(J) + C_d - S_d$, where $P_d(J)$ is the defendant's expected costs of the case (the defendant's estimated probability of a favorable judgement for the plaintiff multiplied by the size of the judgement), C_d is the litigation cost to the defendant, and S_d is the settlement cost to the defendant. Thus, the parties will settle when $P_p(J) - C_p + S_p < P_d(J) + C_d - S_d$.

The same theoretical framework has been adapted to the criminal context.⁹⁶ A number of scholars have argued that plea bargaining is simply another iteration of bargaining in the shadow of a trial.⁹⁷ In the criminal context, the prosecutor and defendant forecast the expected outcome of going to trial and reach a bargain when the prosecutor's sentence offer is lower than the defendant's expected sentence at trial.⁹⁸ The prosecutor's minimum sentence demand is determined by the product of the sentence upon conviction at trial and the anticipated likelihood of obtaining a conviction. The maximum sentence a defendant will be willing to accept is similarly determined by the product of the sentence upon conviction at trial and his anticipated likelihood of being convicted (excluding any monetary costs present when a defendant is paying his own legal expenses). When the maximum sentence a defendant is willing to accept is longer than the prosecutor's minimum sentence demand, a bargain may be reached.⁹⁹ In an effort to minimize postconviction sanctions, a defendant will weigh the expected sentence at trial—the product of the expected sentence at trial and the perceived likelihood of conviction—against the deal offered by the prosecutor.¹⁰⁰

For example, consider a defendant charged with a crime that carries a ten-year potential sentence. If the prosecutor perceives a fifty percent chance of winning at trial, making the expected sentence at trial five years (.5 x 10 years), he would be willing to offer the defendant a plea bargain for between five and ten years. If the defendant perceives a 70 percent chance of being convicted at trial, making the expected sentence at trial seven years (.7 x 10 years), he would be willing to accept a plea bargain for any sentence less than seven years. Thus, the prosecutor and defendant may strike a deal for a sentence between five and seven years. As the likelihood of conviction at trial decreases, the discount offered in a plea bargain must increase to incentivize a defendant to accept the offer. Continuing the previous example, if the defendant anticipates a thirty percent chance of conviction, he will not accept a plea bargain that involves more than a three-year sentence.

96. For a critical account of the functional differences between settlements in the civil and criminal contexts, see Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1609 (2017) (noting that “[t]he civil system facilitates settlement in a very different way” than the criminal system).

97. See, e.g., Church, *supra* note 28, at 512–14, 523; Easterbrook, *Criminal Procedure*, *supra* note 28, at 309–17; Easterbrook, *Compromise*, *supra* note 28, at 1969–72; Ruttenburg, *supra* note 28, at 353; Scott & Stuntz, *supra* note 28, at 1910.

98. See Bibas, *supra* note 95, at 2464–66.

99. Easterbrook, *Criminal Procedure*, *supra* note 28, at 297.

100. Bibas, *supra* note 4, at 1119; Easterbrook, *Criminal Procedure*, *supra* note 28, at 297.

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But, if he anticipates a ninety percent chance of conviction, he will accept any offer for less than nine years.

Importantly, proponents of the shadow of a trial theory endorse plea bargains because they expect the resulting plea bargains roughly to reflect the outcomes that would occur at trial, therefore ensuring that plea bargains allocate punishment fairly.¹⁰¹ They contend that strict regulation of plea bargaining is unnecessary because highly regulated trials serve as the backdrop for plea negotiations and are thus incorporated into the negotiations.¹⁰² A defendant considering a plea bargain theoretically bases his perceived chance of conviction on the chance of conviction in a highly regulated, fair trial, and thus he should not be willing to accept an offer that deviates greatly from that perceived chance of conviction.¹⁰³ Proponents also argue that plea bargains calibrate sentences to culpability, allow prosecutors to pursue the most dangerous criminals, and more effectively mirror trial outcomes than settlements in civil cases because sentencing is more predictable.¹⁰⁴

There are reasons to doubt that this model accurately reflects reality, however. It assumes that individuals act rationally and on the basis of complete information, but psychologists and behavioral economists have amassed evidence that people—including professionals in the criminal justice system—fail to act in strictly rational ways.¹⁰⁵ Further, in the name of simplification, the model excludes many factors that are important in the decision to plead guilty and waive trial, such as poor lawyering, agency costs, and bail and pretrial detention rules.¹⁰⁶ Consequently, some scholars have criticized

101. Bibas, *supra* note 4, at 1124–25.

102. *Id.*

103. *Id.*

104. *Id.*

105. See, e.g., Bibas, *supra* note 95, at 2496–2526 (discussing the psychological pitfalls in plea bargaining); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (demonstrating that judges are susceptible to anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases that produce systematic errors in judgement); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974) (explaining the biases leading to use of representativeness, availability, and adjustment and anchoring heuristics). Proponents of the shadow of a trial theory sometimes acknowledge the theory's shortcomings, but often in passing and without due consideration of the consequences of its shortcomings. See Easterbrook, *Criminal Procedure*, *supra* note 98, at 309–17 (acknowledging market failure challenges to plea bargaining, such as risk preferences, time discounting, financial limitations, and agency costs, but dismissing them as relatively unimportant); Scott & Stuntz, *supra* note 28, at 1925–28, 1938–39 (acknowledging some important caveats, such as framing, poor judgement, and risk preferences, but dismissing them).

106. See Bibas, *supra* note 95, at 2469–96 (discussing the structural distortions in plea bargaining).

the shadow of a trial theory for failing to accurately explain observed plea bargaining behavior; these scholars argue that a nontrivial portion of guilty pleas are entered by factually innocent defendants.¹⁰⁷ As discussed below, the failure to communicate collateral consequences to defendants creates both structural and behavioral problems for the shadow of the trial theory and suggests that failure to communicate such consequences distorts outcomes.

B. Reality Check on the Shadow of a Trial Theory

The Supreme Court's decision not to require communication of collateral consequences violates the assumptions of the shadow of a trial theory because it enables uninformed and irrational plea acceptances. Assuming the shadow of a trial theory of plea bargaining is appropriate, complete information about the costs of entering a guilty plea is necessary for defendants to appropriately weigh the merits of accepting an offer and going to trial.¹⁰⁸ But even assuming a defendant has some knowledge of collateral consequences, failure to disclose them during plea bargaining negotiations implicates psychological and behavioral economic departures from rational decisionmaking because individuals generally are loss averse, give priority to salient information, and frame decisions narrowly.¹⁰⁹

107. See David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. (SPECIAL ISSUE) 200, 220 (2011) (using administrative data to determine that the value of a plea deal is typically worse than the expected trial outcome); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 175–80 (2014) (providing several reasons why innocent defendants enter guilty pleas); Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCHOL. PUB. POL'Y & L. 204, 205 (2018) [hereinafter Edkins & Dervan, *Freedom*] (testing whether the shadow of a trial theory describes defendant decisions using a vignette study); Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining's Innocence Problem*, 21 CURRENT RES. IN SOC. PSYCHOL. 14, 18 (2013) [hereinafter Edkins & Dervan, *Pleading Innocents*] (finding in an experiment that fifty-six percent of innocent participants preferred accepting a plea deal); Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 299–300 (1975) (finding that more than two-thirds of marginal plea bargain defendants would be acquitted or dismissed if they were to contest their cases). *But see* Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of the Trial" a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437 (2012) (finding that the theory was supported by evidence combining statistical modelling with trial evidence to determine whether plea bargained cases would have had harsher outcomes at trial).

108. See Easterbrook, *Criminal Procedure*, *supra* note 28, at 297 (discussing negotiations between the prosecutor and the defendant).

109. See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (describing violations of assumptions of neoclassical economics due to bounded rationality, bounded self-interest, and bounded willpower and introducing behavioral approaches to law and economics); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND.

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1. Incomplete Information

The shadow of a trial theory of plea bargaining assumes that defendants have the requisite information needed to determine whether the cost-minimizing course of action is going to trial or pleading guilty.¹¹⁰ When only the immediate, direct consequences of a conviction are communicated to defendants, they are likely to miscalculate the cost of pleading guilty to that offense.¹¹¹ For example, consider a defendant facing a ten-year sentence if convicted at trial. If he anticipates a fifty percent chance of conviction at trial, the true expected cost of going to trial is a five-year sentence (.5 x 10 years) *and* the discounted cost of collateral consequences (.5 x the cost of collateral consequences). If the prosecutor offers him a plea bargain for a four-year sentence, the true cost of the offer is the four-year sentence *and* the total cost of collateral consequences. Without information about the costly consequences of collateral sanctions, the defendant cannot appropriately weigh the relative merits of the two options and will underestimate the cost of a guilty plea. Consequently, even assuming a rational model is appropriate, failure to communicate collateral consequences to defendants distorts the shadow of a trial theory.

2. Irrational Decisionmaking

Failure to communicate collateral consequences to defendants also implicates deviations from the rationality assumptions of the shadow of a trial theory. Behavioral law and economics concepts of loss aversion, salience, and narrow framing all suggest that the shadow of a trial theory of plea bargaining may neglect important considerations relevant to the communication of collateral consequences.¹¹²

L. REV. 1499 (1998) (providing an overview of the legal literature incorporating behavioral economic and psychology concepts).

110. See Easterbrook, *Criminal Procedure*, *supra* note 28, at 297 (discussing negotiations between the prosecutor and the defendant).

111. See, e.g., *United States v. Youngs*, 687 F.3d 56, 61 (2d Cir. 2012) (holding that a guilty plea was valid when the defendant was unaware of the collateral consequence of civil commitment); *United States v. Nicholson*, 676 F.3d 376, 382 (4th Cir. 2012) (holding that a guilty plea is valid even though the defendant was unaware of collateral consequences such as the loss of benefits); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973) (distinguishing between direct and collateral consequences by examining whether the consequence was a “definite, immediate and largely automatic effect on the range of the defendant’s punishment”); *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir. 1971) (per curiam) (holding that the defense attorney’s failure to advise on an administrative punishment, in addition to the criminal punishment, did not constitute ineffective assistance because it was not a “definite practical consequence of the plea”).

112. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979) (discussing loss aversion); see also Amos Tversky & Daniel

A critical insight of psychology and behavioral economics is that most people are loss averse, and often avoiding loss is more important to individuals than avoiding risk.¹¹³ Consequently, when making decisions under risk, individuals tend to be risk seeking with regard to losses and risk averse with regard to gains.¹¹⁴ With respect to plea bargaining, this suggests that a defendant who is weighing the sure losses associated with a guilty plea against the risky option of trial will prefer the latter. But, behavior is sensitive to both the degree of risk and the framing of a risky decision. In situations where there is a chance of an extremely large loss, individuals appear to prefer certain, smaller costs instead of risking the realization of the extreme loss.¹¹⁵ If the cost of conviction at trial is extremely high compared with the plea offer, defendants may instead accept the plea bargain despite the sure loss. Again, without communication of collateral consequences, however, the defendant is likely misperceiving the costs of pleading guilty as lower than they are. If collateral consequences are communicated, the perceived difference between trial outcomes and plea acceptance may shrink and result in the defendant choosing trial. Further, because individuals prefer certain outcomes with regard to gains, if a plea bargain is framed as a gain, defendants are likely to be more prone to accept the offer.¹¹⁶ Thus, when a plea bargain is framed as the benefit of fewer years of incarceration as opposed to being framed with regard to the costly collateral consequences after release because those consequences are not communicated, defendants may be more likely to accept a plea offer.

The concepts of salience and narrow framing also provide important insights for plea bargaining decisions. Salience refers to the observation that individuals are more likely to focus on items or information that are more prominent and ignore those that are less so, creating a bias in favor of things that are striking and perceptible.¹¹⁷

Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S258 (1986) [hereinafter Tversky & Kahneman, *Rational Choice*] (discussing loss aversion).

113. Tversky & Kahneman, *supra* note 105.

114. *Id.*

115. *See id.* at 274–85 (discussing risk theory); *see also* Milton Friedman & L. J. Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 279, 279–80, 300 (1948) (noting that generalizations about risk aversion hold true for moderate degrees of risk, but perhaps not small or large risks); Marieke Huysentruyt & Daniel Read, *How Do People Value Extended Warranties? Evidence from Two Field Surveys*, 40 J. RISK & UNCERTAINTY 197 (2010) (explaining decisions to purchase expensive warranties as an insurance policy against an extreme loss).

116. *See* Tversky & Kahneman, *Rational Choice*, *supra* note 112, at S254–60 (demonstrating that framing decisions as gains induces individuals to favor certain outcomes over equivalent uncertain outcomes).

117. *See* Tversky & Kahneman, *supra* note 105 (discussing the heuristics “employed to assess probabilities and predict values”). *See generally* Raj Chetty, Adam Looney & Kory Kroft, *Salience*

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Narrow framing refers to the observation that individuals often consider decisions in isolation, rather than as a part of the bigger picture, and consequently fail to make the most advantageous combination of choices.¹¹⁸ With respect to collateral consequences, salience suggests that defendants are unlikely to consider collateral consequences when they are not explicitly disclosed *even if* they have some preexisting knowledge of the consequences. And, because the salient factor during plea negotiations is the sentence or charge, defendants may narrowly frame jail time and collateral consequences as individual decisions, rather than part of the whole, in deciding whether to accept a plea bargain. Thus, even assuming defendants are acting from a place of complete information—admittedly a bold assumption—failing to communicate collateral consequences may result in deviations from the shadow of a trial theory, leading to inaccurate or unfair results.

III. AN EXPERIMENTAL TEST OF PLEA BARGAINING AND COLLATERAL CONSEQUENCES

A. *Experiment Design and Hypotheses*

1. Experiment Design

Although there is abundant scholarship on plea bargaining and collateral consequences considered separately,¹¹⁹ and some scholarship considering the relationship between the two,¹²⁰ empirical research on

and Taxation: Theory and Evidence, 99 AM. ECON. REV. 1145 (2009) (demonstrating that individuals are more sensitive to taxes when they are included in the posted price of a good rather than assessed at the register).

118. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 334–41 (2011) (explaining that individuals make individual decisions rather than in the aggregate to maximize utility and that such narrow framing results in deviations from rational utility maximization); Tversky & Kahneman, *Rational Choice*, *supra* note 112, at S255–56 (demonstrating that individuals will choose strictly dominated sets of options when presented separately).

119. *E.g.*, Bibas, *supra* note 95; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Meghan Sacks & Alissa R. Ackerman, *Pretrial Detention and Guilty Pleas: If They Cannot Afford Bail They Must Be Guilty*, 25 CRIM. JUST. STUD. 265 (2012).

120. See Chin & Holmes, *supra* note 83 (contending that effective assistance of counsel should require communicating collateral consequences); Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 167–93 (2009) (arguing that the Supreme Court should require communication of collateral consequences to protect the personal values that underlie a defendant's decision whether to plead guilty and because such consequences overshadow direct penal sentences in criminal cases).

the relationship between the two is quite undeveloped.¹²¹ One reason for the dearth of empirical work is the absence of instructive observational data related to plea bargaining and collateral consequences. In the absence of observational data, this Note employs an experimental vignette study designed to elicit the effect of communicating collateral consequences on the decision to accept a plea bargain.¹²²

The vignette study developed for this Note expands on the work of Edkins and Dervan (2018), who found that communicating collateral consequences—loss of voting rights and loss of professional licensure—did not affect decisions to plead guilty when the plea bargain involved no prison time.¹²³ Like their study, each scenario in the present experiment revolves around a nurse charged with felony assault. This characterization is desirable for several reasons. First, felony convictions often carry collateral consequences that misdemeanor convictions do not. Second, loss of professional licensure is a common collateral consequence of felony conviction. And, third, felony assault carries potential sentences between one and twenty years—depending on the jurisdiction and the circumstances surrounding the crime—and therefore provides a realistic range of potential sentences. In contrast to the Edkins and Dervan study, this experiment tests the importance of collateral consequences in a situation where a plea bargain involves jail time, includes a more robust set of collateral consequences (including the loss of public benefits), and asks respondents to consider accepting a plea bargain in relation to increasingly severe sentences if convicted at trial.

121. See Edkins & Dervan, *Freedom*, *supra* note 107 (using an experimental vignette study to test the effects of communicating collateral consequences on plea acceptance. The author's vignette study involved a single nurse charged with felony assault, a plea bargain involving no jail time, and communication about collateral consequences related to loss of voting rights and professional licensure); see also Stephanie Madon et al., *Temporal Discounting: The Differential Effect of Proximal and Distal Consequences on Confession Decisions*, 36 L. & HUM. BEHAV. 13 (2011) (finding in an experiment that participants altered how frequently they admitted to criminal behaviors during an interview to "avoid a proximal consequence even though doing so increased their risk of incurring a distal consequence").

122. Experimental-vignette studies have become increasingly common in the legal literature to test whether inter- and intra-subject responses meaningfully differ across scenarios involving an issue of interest. See Christiane Atzmüller & Peter M. Steiner, *Experimental Vignette Studies in Survey Research*, 6 METHODOLOGY 128 (2010) (defining vignette experiments and describing their utility).

123. Edkins & Dervan, *Freedom*, *supra* note 107 (using an experimental vignette study to test the effects of communicating collateral consequences on plea acceptance. The author's vignette study involved a single nurse charged with felony assault, a plea bargain involving no jail time, and communication about collateral consequences related to loss of voting rights and professional licensure).

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Experimental subjects in the study were recruited via Amazon's Mechanical Turk (mTurk) service.¹²⁴ Subjects were compensated \$0.70 for about five minutes of their time. To ensure that participants were attentive during the experiment, the survey included an attention check question at the end and subjects who answered incorrectly were dropped from the sample used for analysis. Table 1 presents selected demographics of the final sample of 316 subjects who participated in the study. The sample was 62% male and 61% white. The average age of subjects was slightly under thirty-five. Forty-four percent of subjects had a household income of over \$50,000. More than half of participants had a bachelor's degree or higher education level. Sixteen percent of subjects reported that they had been arrested or charged with a crime, and 42% reported knowing somebody who has been charged with a felony. Three quarters of participants believe that criminal sentencing needs reform.

TABLE 1: SAMPLE SUMMARY STATISTICS

Variable	Mean
Age	34.6
Male	0.62
White	0.61
Income over \$50k	0.44
Bachelor's Degree or Higher	0.63
Arrested/Charged with a Crime	0.16
Know a Felon	0.42
Sentencing Reform Needed	0.75

The study presented all subjects with the same basic underlying vignette. Subjects assumed the role of a single nurse charged with felony assault, who is not being detained before trial and is offered a plea deal involving a guaranteed three-month sentence.¹²⁵ Each subject was randomly assigned to one of four conditions: (1) guilty and no

124. For a detailed discussion on the use of mTurk samples in legal decisionmaking studies, see David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595 (2016).

125. Although most plea deals involve a recommended sentence, making the plea outcome less than one hundred percent certain, I chose to use a guaranteed sentence (similar to Edkins and Dervan). Using a guaranteed sentence prevents introducing differing perceptions about the likelihood of the recommendation being followed in respondent's decisions. Concerns about the generalizability of findings to recommended sentences are mitigated by research finding that the greatest predictor of a judge's sentence is the recommendation of the prosecutor. See Eugenio Garrido Martín & Carmen Herrero Alonso, *Influence of the Prosecutor's Plea on the Judge's Sentencing in Sexual Crimes: Hypothesis of the Theory of Anchoring by Tversky and Kahneman*, in *ADVANCES IN PSYCHOLOGY AND LAW: INTERNATIONAL CONTRIBUTIONS* 215–26 (Redondo et al. eds., 1997).

communication of collateral consequences, (2) guilty and communication of collateral consequences, (3) not guilty and no communication of collateral consequences, or (4) not guilty and communication of collateral consequences. Subjects assigned to one of the conditions in which collateral consequences were communicated were told that as a consequence of pleading guilty to the offense they would lose the right to vote, lose their nursing license, and no longer be eligible for federal benefits such as foods stamps and public housing.

After reading the vignette, subjects were asked whether they would accept the proposed plea bargain when the sentence if convicted at trial was one, three, six, or ten years. After each decision, subjects were asked to state how confident they were in their decision on a scale from 0 to 100 percent. In all scenarios, after making decisions about whether to accept the plea bargain at each sentence level, subjects were asked to rank factors that contributed to their decisions on a scale of one to five, where one represented no consideration and five represented great importance. The five factors that the subjects ranked were: their guilt or innocence, the length of jail time, the desire to put the issue behind them, the chance of losing their nursing license, and the chance of losing other benefits.

At the end of the survey, subjects were asked about demographic information, including age, gender, race and ethnicity, household income, and educational background. Additionally, subjects were asked whether they regularly drive more than ten miles per hour over the speed limit, whether they have been arrested or charged with a crime, whether they know anyone who has been charged with a felony, and whether they think that criminal sentencing needs reform. The speeding question was intended to act as a proxy for risk preferences. The questions about personal criminal history and acquaintance criminal history were intended to act as proxies for familiarity with the criminal justice system. And the question about sentencing reform was intended to elicit underlying beliefs about the criminal justice system. A sample of the complete survey is included in the Appendix.¹²⁶

126. One commentator suggested that the language used to convey the imposition of collateral consequences (“As a consequence of pleading guilty to the offense you will lose your right to vote, will lose your nursing license, and will no longer be eligible for federal benefits such as foods [sic] stamps and public housing”) may have caused some respondents to believe that the consequences only attached if they pleaded guilty, not if they were found guilty at trial. It is possible that some respondents did so, and results may be overstated if they did. Extensive pre-testing and review of the survey, however, mitigate such concerns. About thirty individuals—comprised of individuals with legal expertise and those without such expertise—participated in taking an earlier version of the experiment and provided feedback without raising such concerns. An additional ten individuals pre-tested the current survey and provided feedback, similarly without raising such concerns.

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Though the survey directly addresses only a subset of guilty pleas—those made in response to a guaranteed-sentence plea offer when a defendant is not in pretrial detention—there are reasons to believe the results may be more broadly applicable. With regard to more common recommended-sentence plea bargains, research suggests that the greatest predictor of sentence duration is the prosecutor’s recommendation even though there is greater defendant uncertainty about the ultimate sentence a judge will assign.¹²⁷ Extending the results to “straight up” pleading, where a defendant pleads guilty without any bargaining, is more complex. Although the defendant may plead guilty in the hope that the judge will be more lenient at sentencing, there is substantially greater uncertainty. This uncertainty is likely to increase the expected cost of pleading guilty. Therefore, communicating collateral consequences and making the full cost of conviction apparent should make defendants less likely to waive their right to trial.

2. Hypotheses

Responses to the survey questions are used to test four hypotheses deriving from the discussion of the shadow of a trial theory in Part II.

Hypothesis 1: Guilty defendants will be more likely to plead guilty and waive the right to trial.

Hypothesis 2: Defendants will be more likely to plead guilty and waive the right to trial as the potential post-trial sentence increases.

Hypothesis 3: Defendants will be more likely to plead guilty and waive the right to trial when collateral consequences are not communicated.

Hypothesis 4: Defendants will be less likely to consider collateral consequences when they are not explicitly disclosed.

The first two hypotheses derive from the conventional shadow of a trial theory of plea bargaining and are likely to be relevant regardless of whether collateral consequences are communicated.¹²⁸ Even if the theory fails to explain the universe of plea bargaining behavior, it is likely that a defendant’s guilt informs his expectation of being convicted at trial and increases the expected cost of going to trial, thus making a

127. Martín & Alonso, *supra* note 125.

128. *See supra* Section II.A.

given plea offer more attractive. Similarly, as the severity of the sentence increases, the expected cost of going to trial increases, making a given plea offer more attractive and more likely to be accepted.

The second two hypotheses are informed by the imperfect information and behavioral deviations from rational decisionmaking discussed in Part II.B. Defendants are unlikely to spend much time considering collateral consequences when the consequences are not explicitly communicated, because defendants are either not aware of the existence of such consequences or they are not salient during plea negotiations if not explicitly communicated (or both). Consequently, defendants are hypothesized to be more prone to either fail to incorporate the cost of collateral consequences into their analysis or narrowly frame the decision as one only about prison, making them more likely to accept the offer. Conversely, making collateral consequences salient may encourage defendants to update their perception of the cost of accepting the plea offer, thus making them more likely to make the risky decision to go to trial because the cost of trial is less outsized relative to the offer.

B. Experiment Results

Results from the experiment demonstrate that communicating collateral consequences is important for making plea bargain decisions. Aggregate results across the different sentence possibilities demonstrate that communicating collateral consequences decreases the rate of plea acceptance. Results disaggregated by length of sentence further reveal that communicating collateral consequences has a greater impact when the potential sentence at trial is lower, and the effect dissipates as the difference between the plea bargain sentence and the sentence at trial grows larger. Finally, the results suggest that communicating collateral consequences affects decisions by increasing defendant awareness of the consequences. It is not possible, however, to determine whether such increased awareness comes from encountering new information or from making previously held information salient in the defendant's decisionmaking.

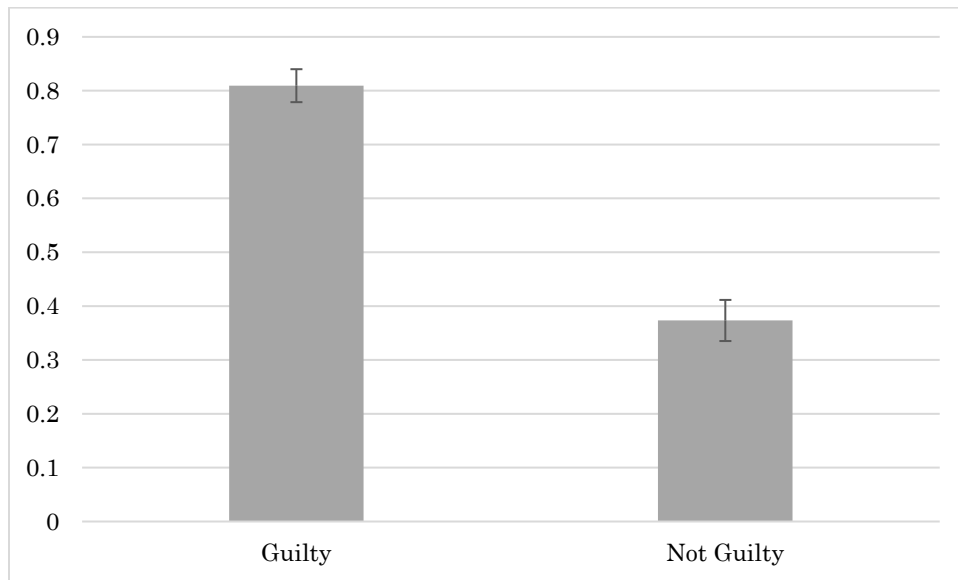
1. Pooled Results

To examine the overall impact of guilt and collateral consequences on decisions to accept a plea offer, responses were pooled across all potential sentence lengths. Figure 1 presents the pooled results for acceptance by guilty and not guilty respondents. Respondents assigned to a guilty condition accepted the plea offer 80%

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of the time. In contrast, respondents assigned to the not guilty condition accepted the plea offer only 37% of the time. The difference in acceptances between the two conditions is statistically significant.¹²⁹ This result supports Hypothesis 1 that guilty defendants are more likely to accept plea bargains. It provides some support for the shadow of a trial theory because guilty defendants likely perceive a greater likelihood of conviction at trial.

FIGURE 1: PLEA ACCEPTANCE – GUILT

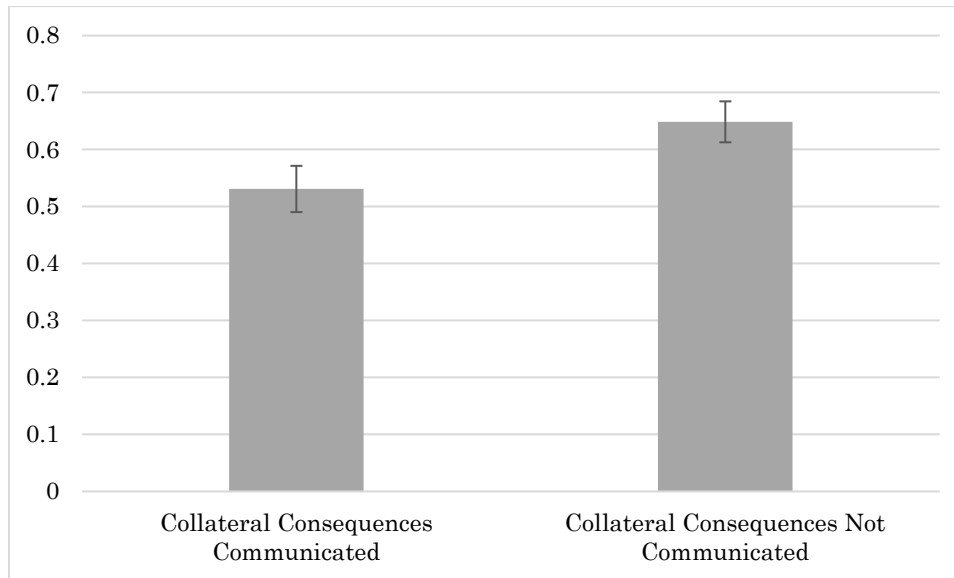


Note: Error bars represent the 95% confidence interval.

Figure 2 presents the pooled results for acceptance based on whether respondents received communication of collateral consequences. Respondents who did not receive communication about collateral consequences accepted the plea offer 65% of the time, while respondents who did receive communication accepted the offer only 53% of the time. This difference is statistically significant. This finding—that respondents who receive communication about collateral consequences are less likely to accept the offer—supports Hypothesis 4.

129. A difference is statistically significant at a given level if the probability of observing a difference as large as the difference observed in a sample would be less than the given level if no true effect existed. JEFFREY WOOLDRIDGE, *INTRODUCTORY ECONOMETRICS* 133–35 (5th ed. 2012). The level at which something is significant is determined by a “p-value.” An estimate is generally considered strongly significant at the 1% level (if $p < 0.01$), significant at the 5% level (if $p < 0.05$), and weakly significant at the 10% level (if $p < 0.10$). *Id.*

FIGURE 2: PLEA ACCEPTANCE – COLLATERAL CONSEQUENCES



Note: Error bars represent the 95% confidence interval.

2. Results by Sentence Severity

Examining the impact of communicating collateral consequences on plea bargaining decisions across different sentence severities provides more detailed information about the factors influencing the respondent's choices. It helps identify the distributional impact of communicating collateral consequences by eliciting information about when respondents are likely to care about collateral consequences. Furthermore, it demonstrates the importance of the sentence defendants can expect after conviction at trial. Figure 3 presents results on the rate of plea acceptance for each sentence severity and condition (guilty or not guilty and collateral consequences communicated or not communicated). Across conditions, respondents were generally more likely to accept the plea offer as the severity of the sentence increased, innocent respondents were less likely to accept the plea offer, and communicating collateral consequences decreased the rate of acceptance.

FIGURE 3: PLEA ACCEPTANCE – SENTENCE AND CONDITION

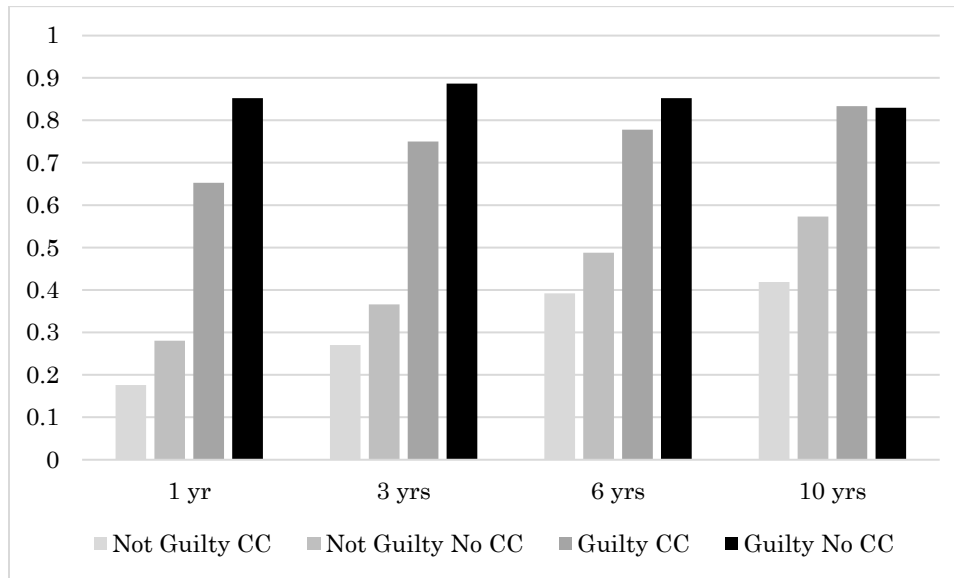
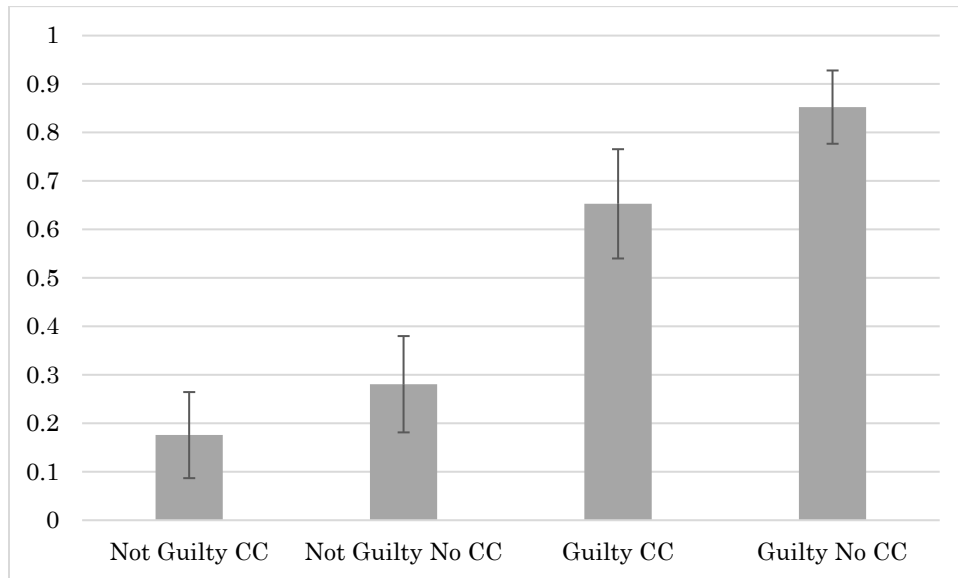


Figure 4 presents results for the decision to accept the plea offer when the sentence if convicted after trial was one year. Eighty-five percent of guilty respondents accepted the offer when collateral consequences were not communicated and 65% accepted when they were communicated. Among innocent respondents, 18% accepted the offer when collateral consequences were communicated, while 28% accepted when collateral consequences were not. Additional regression analysis¹³⁰ results reveal that communicating collateral consequences decreased the likelihood of acceptance by about 15% (significant at the 5% level), while being guilty increased the likelihood of acceptance by about 50% (significant at the 1% level).

130. Regression analysis is a statistical method that allows for the examination of the relationship between multiple variables. It enables inferences about which of various factors, or independent variables, are affecting an outcome one is interested in, the dependent variable. *See id.* at 68–71.

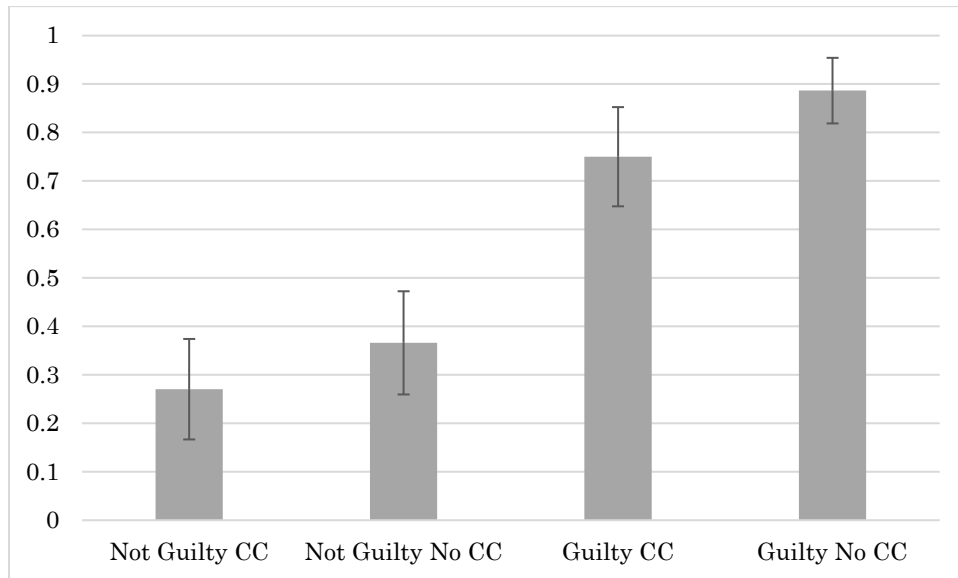
FIGURE 4: PLEA ACCEPTANCE – 1 YEAR



Note: Error bars represent the 95% confidence interval.

Figure 5 presents results for the decision to accept the plea offer when the sentence if convicted after trial was three years. When collateral consequences were not communicated, 89% of guilty respondents accepted the plea offer and 37% of innocent respondents accepted the plea offer. In contrast, when collateral consequences were communicated, 75% of guilty respondents and 27% of innocent respondents accepted the offer, respectively. Regression results demonstrate that communicating collateral consequences decreased the likelihood of acceptance by about 12% (significant at the 10% level), while being guilty continued to increase the likelihood of acceptance by about 50% (significant at the 1% level).

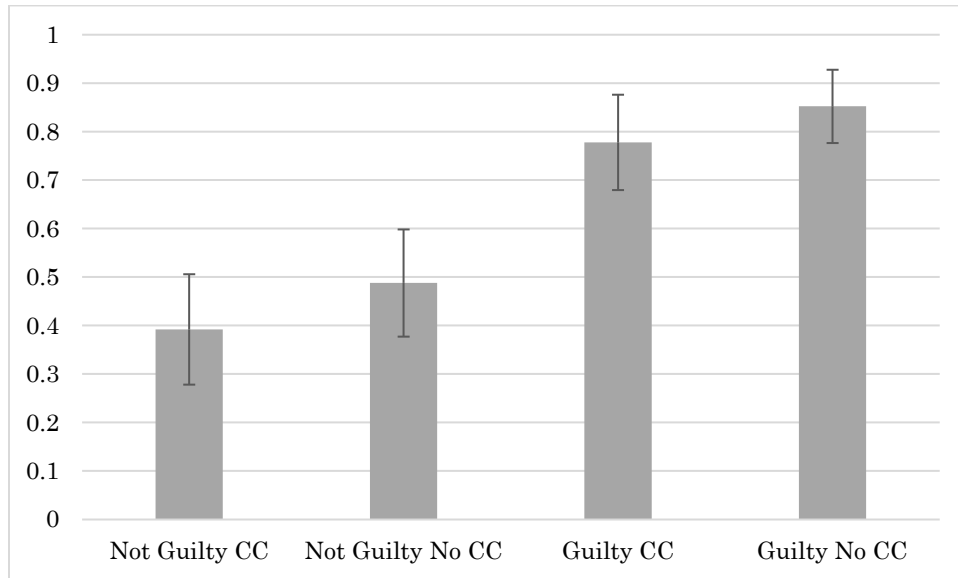
FIGURE 5: PLEA ACCEPTANCE – 3 YEARS



Note: Error bars represent the 95% confidence interval.

Figure 6 presents results for the decision to accept the plea offer when the sentence if convicted after trial was six years. When collateral consequences were not communicated, 85% of guilty respondents accepted the plea offer and 48% of innocent respondents accepted the plea offer. In contrast, when collateral consequences were communicated, 78% of guilty respondents and 39% of innocent respondents accepted the offer. Regression results demonstrate that communicating collateral consequences is no longer statistically significant in determining acceptance, while being guilty increased the likelihood of acceptance by a smaller 37% (significant at the 1% level).

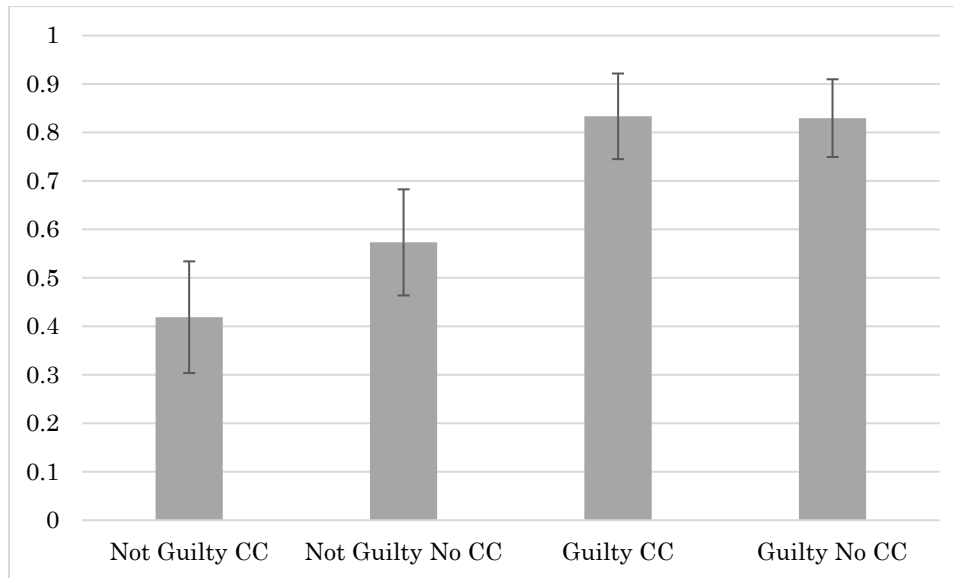
FIGURE 6: PLEA ACCEPTANCE – 6 YEARS



Note: Error bars represent the 95% confidence interval.

Figure 7 presents results for the decision to accept the plea offer when the sentence if convicted after trial was ten years. About 83% of guilty respondents accepted the plea offer, regardless of communication about collateral consequences. Among innocent respondents, 41% accepted the offer when collateral consequences were communicated and 57% accepted the offer when collateral consequences were not communicated. Again, regression results demonstrate that communicating collateral consequences was not statistically significant in determining acceptance, while being guilty increased the likelihood of acceptance by about 33% (significant at the 1% level).

FIGURE 7: PLEA ACCEPTANCE – 10 YEARS



Note: Error bars represent the 95% confidence interval.

Collectively, these results reinforce the findings from the pooled responses. The results suggest that communicating collateral consequences is important to ensuring that defendants are making informed, considered decisions. The decreasing sensitivity of respondents to collateral consequences, however, suggests that when the trial tax or plea discount grows, we should be wary that the resulting pleas are fair and accurate.

3. Contributing Factors

The results regarding which factors were important to respondents' decisions to accept or reject the plea offer provide further evidence that communicating collateral consequences is important to decisionmaking. Figure 8 presents the frequency of responses related to guilt status. Across conditions, guilt was generally very important to respondents, both motivating guilty respondents to accept the plea offer and motivating innocent respondents to reject the plea offer.

FIGURE 8: IMPORTANCE OF GUILT

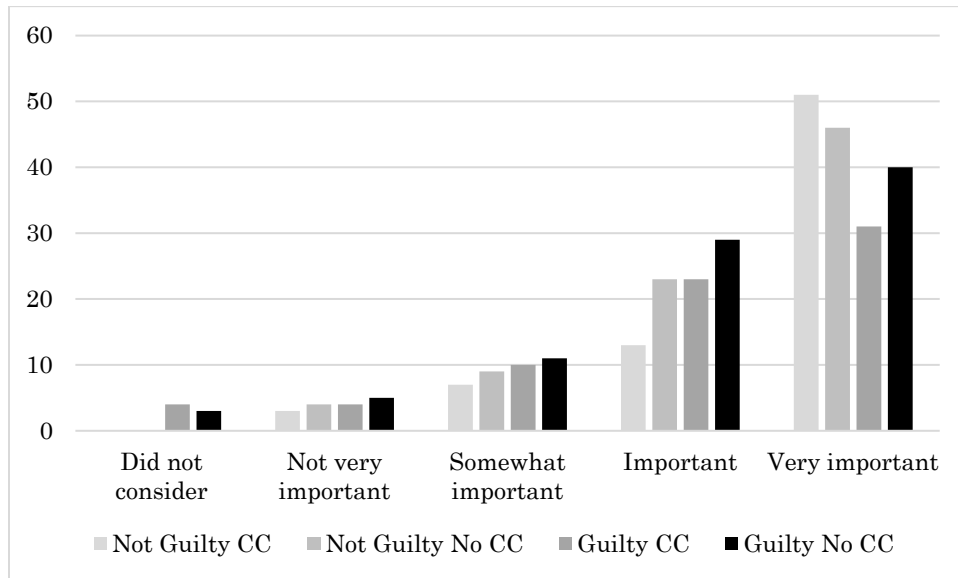


Figure 9 presents the frequency of responses related to jail time. Across conditions, the possibility of jail time was also very important to respondents, with only a handful of respondents rating it as either somewhat important or important and very few respondents rating it not very important.

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FIGURE 9: IMPORTANCE OF JAIL TIME

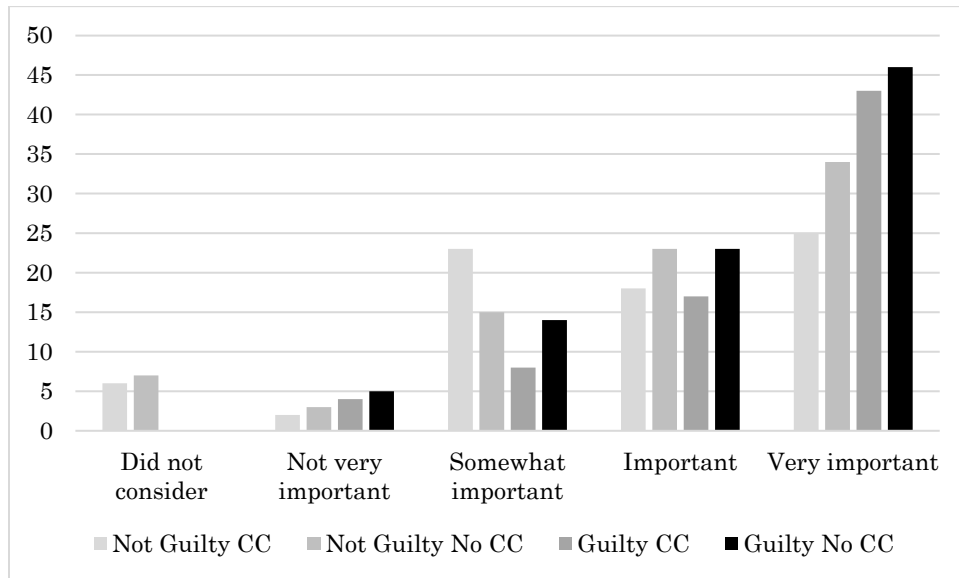


Figure 10 presents the frequency of responses related to wanting to put the issue behind them. The importance of this factor appears to be very individually driven, with responses similar across all conditions.

FIGURE 10: IMPORTANCE OF PUTTING THE ISSUE BEHIND YOU

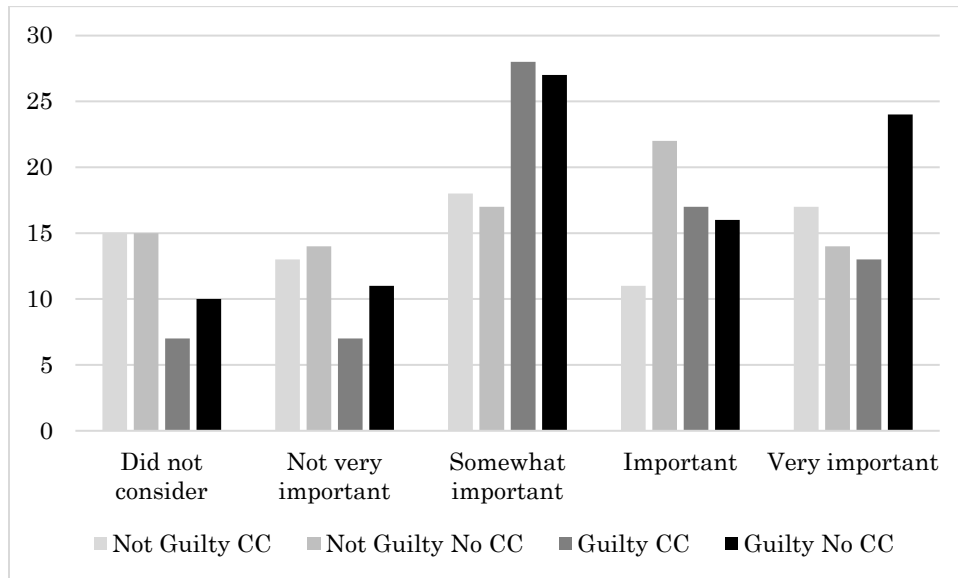


Figure 11 presents the frequency of responses related to losing one's nursing license. Among both innocent and guilty respondents, communicating collateral consequences had a significant impact on how important they considered this factor to be. This pattern supports Hypothesis 4—that individuals do not pay attention to collateral consequences, either because they are unaware of them or inattentive to them, unless the consequences are explicitly communicated. Further, it provides evidence that the mechanism driving differences in acceptance rates is indeed communication of collateral consequences.

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FIGURE 11: IMPORTANCE OF LOSING NURSING LICENSE

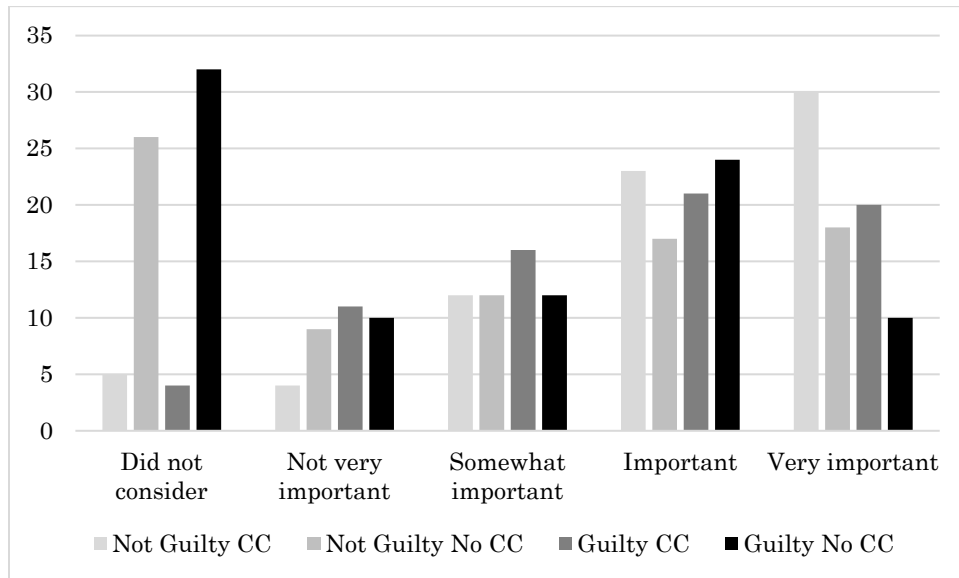
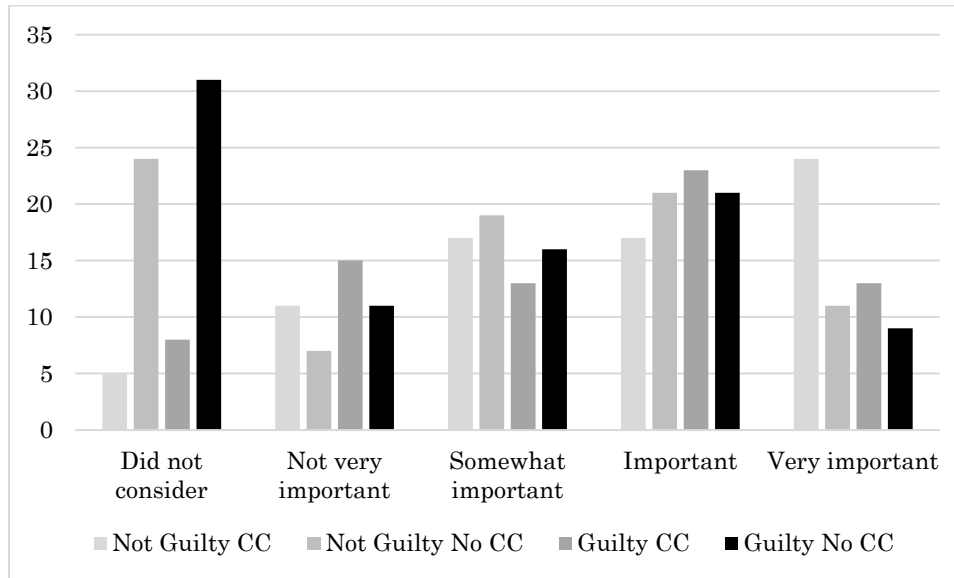


Figure 12 presents frequency of the responses related to losing other benefits. Similar to the trend above, among both innocent and guilty respondents, communicating collateral consequences had a significant impact on how important they found this factor. This provides further support for Hypothesis 4 and the finding that communicating collateral consequences is important for plea bargain acceptance decisions.

FIGURE 12: IMPORTANCE OF LOSING OTHER BENEFITS



IV. PROTECTING THE RIGHTS OF DEFENDANTS

The experimental findings provide evidence of two important outcomes related to plea bargaining and collateral consequences. First, communicating collateral consequences matters—respondents were significantly more likely to exercise their right to trial when collateral consequences were communicated as part of the plea bargain offer. Second, the effect of communicating collateral consequences dissipates when the difference between the plea offer sentence and the potential sentence at trial grows larger. Recognizing that plea bargaining is entrenched in the justice system, this Part suggests one way to mitigate unfair and inaccurate results stemming from unaddressed shortcomings of the shadow of a trial theory of plea bargaining.¹³¹ The Supreme Court should find that failing to communicate relevant collateral consequences constitutes ineffective assistance of counsel under the *Strickland* standard.¹³²

Requiring communication of collateral consequences by counsel has several advantages. First, requiring judges to explain the collateral consequences of a guilty plea would require overturning the well-established precedent in *Brady* that judges need only communicate the

131. See sources cited *supra* note 107.

132. *Strickland v. Washington*, 466 U.S. 668 (1984).

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direct consequences of guilty plea.¹³³ Second, counsel has the opportunity to communicate collateral consequences to defendants in conditions much more conducive to considered reflection than judges. When defendants are at the stage of entering a guilty plea, they are more likely to have locked in their decision than when they are merely considering such a plea in the context of plea bargaining.

The Supreme Court has already laid the groundwork needed to ensure that defendants understand the collateral consequences associated with a guilty plea. In *McMann*, the Court held that defendants have a right to competent legal advice regarding guilty pleas.¹³⁴ In *Hill*, the Court extended the two-prong test for ineffective counsel developed in *Strickland* to guilty pleas and clarified that prejudice in the plea context is demonstrated when there is “a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.”¹³⁵ And in *Padilla*, the Court emphasized the “weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation” and the ease of determining the consequence of deportation while casting doubt on the notion that the “distinction between direct and collateral consequences . . . define[s] the scope of constitutionally ‘reasonable professional assistance.’”¹³⁶ In light of this precedent, the Court should adopt a straightforward application of the *Strickland* standard and explicitly reject the test distinguishing between direct and collateral consequences still used by most lower courts.¹³⁷

As the Court recognized in *Padilla*, the first prong of *Strickland*—whether counsel’s conduct fell below an objective standard of reasonableness—is measured against “prevailing professional norms.”¹³⁸ In reaching its decision in the case, the Court reiterated its long-held practice of relying on “American Bar Association standards

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

134. *McMann v. Richardson*, 397 U.S. 759, 770 (1970) (holding that “a defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant’s confession”).

135. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (applying the *Strickland* test to guilty pleas); *Strickland*, 466 U.S. at 687–88 (determining whether counsel was ineffective based on (1) whether “counsel’s representation fell below an objective standard of reasonableness” and (2) whether counsel’s “deficient performance prejudiced the defense”).

136. *Padilla v. Kentucky*, 559 U.S. 356, 365, 367 (2010).

137. *See, e.g., United States v. Youngs*, 687 F.3d 56, 61 (2d Cir. 2012) (holding that a guilty plea is valid when the defendant was unaware of the collateral consequence of civil commitment); *United States v. Nicholson*, 676 F.3d 376, 382 (4th Cir. 2012) (holding that a guilty plea is valid where defendants are unaware of collateral consequences such as the loss of benefits).

138. *Padilla*, 559 U.S. at 357; *Strickland*, 466 U.S. at 687–88.

and the like” as guides for determining what is reasonable.¹³⁹ The ABA Criminal Justice Standards provide:

Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.¹⁴⁰

Further, the responsibilities contemplated in the ABA standards are consistent with other materials and guides predating the current ABA standards, demonstrating that this professional norm is well established.¹⁴¹ In its opinion, the Court also noted the ease with which counsel could determine the deportation consequences at issue in *Padilla*.¹⁴² The advent of the National Inventory of Collateral Consequences Inventory makes determination of all collateral consequences easily accessible to counsel and supports extension of *Padilla*'s reasoning to other collateral consequences.¹⁴³

Fears regarding significant increases in ineffective assistance of counsel claims resulting from subjecting communication of collateral consequences to the effective assistance of counsel requirements of *Strickland* are tempered by the second prong of the test, a showing of prejudice.¹⁴⁴ As the Court recognized in *Padilla*, history teaches that pleas are infrequently the subject of collateral challenges relative to trial convictions; although “[p]leas account for nearly 95% of all criminal convictions . . . they account for only approximately 30% of the habeas petitions filed.”¹⁴⁵ Indeed, the standard for prejudice announced in *Hill*—“a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial”—is likely self-enforcing, for a defendant who collaterally attacks his guilty plea seeks to trade the benefit of the bargain for a trial.¹⁴⁶ Indeed, such disclosure brings the decision to accept a plea offer more in line with the theory underlying the shadow of a trial theory. Individuals who would have accepted the plea bargain with full

139. *Padilla*, 559 U.S. at 366.

140. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard 4-5.4 (2015).

141. See Chin & Holmes, *supra* note 83, at 714–17.

142. 559 U.S. at 368.

143. See *Collateral Consequences Inventory*, *supra* note 8.

144. 466 U.S. at 687–88.

145. 559 U.S. at 372.

146. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (applying the *Strickland* test to guilty pleas); see *Padilla*, 559 U.S. at 373 (“Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea.”).

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information about collateral consequences in the first instance should not be expected to seek a trial, but those who would have rejected the plea offer given full information will be given their opportunity for trial. Thus, an earnest application of precedent should lead the Court to require communication of collateral consequences, and concerns that doing so will open the gate to an unprecedented number of challenges should not be overstated.

CONCLUSION

The overwhelming majority of criminal convictions in the United States are obtained through guilty pleas, yet the system of justice overwhelmingly protects the rights of defendants who participate in trials, not plea bargaining. The Supreme Court has historically relied on an erroneous, or at the very least, incomplete, theory of what motivates defendants to accept plea offers. As the experimental outcomes in this Note demonstrate, communicating collateral consequences is important to ensure that defendants are making informed decisions when accepting a plea bargain offer. Communicating collateral consequences to defendants at the plea bargaining stage is an important step in protecting the rights of defendants, but a modest one. As Edkins and Dervan's research demonstrates, in cases of pretrial detention defendants' desire to be released immediately may induce guilty pleas despite such communication. And, as the study in this Note demonstrates, when the potential sentence at trial grows very large, such communication is unlikely to influence defendant decisionmaking, making broad prosecutorial charging discretion problematic.

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* J.D./Ph.D. in Law and Economics, expected 2022, Vanderbilt University Law School; B.A., 2014, Scripps College. Thank you to all members of the *Vanderbilt Law Review* who provided feedback and edited this Note, including Emily Sasso, Sadie Shourd, Jeff Turner, and Katie Clemmons. I owe further thanks to Professor Kip Viscusi for helping to design this experiment and to Professor Nancy King for providing thoughtful feedback.

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APPENDIX

For the purposes of this survey, assume you are **GUILTY**.

You are a single nurse without children and have been charged with felony assault. You are not being detained before trial. If you are convicted of the crime at trial, you will be sentenced to time in prison. If you are acquitted, there will be no consequences. The police have an eyewitness identifying you as the culprit and who is willing to testify against you at trial.

The prosecution has approached you with the following offer: plead guilty to the offense and spend 3 months in prison.

In addition, as a consequence of pleading guilty to the offense you will lose your right to vote, will lose your nursing license, and will no longer be eligible for federal benefits such as foods stamps and public housing.

Please indicate if you will accept the plea offer and your confidence in your decision in each of the following circumstances:

Will you accept the plea offer when the prison sentence if you are convicted at trial is 1 year?

Yes

No

How confident are you in this decision on a scale of 0 to 100 percent, where 0 is no confidence and 100 is total confidence?

0 10 20 30 40 50 60 70 80 90 100

Confidence



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Will you accept the plea offer when the prison sentence if you are convicted at trial is 3 years?

Yes

No

How confident are you in this decision on a scale of 0 to 100 percent?

0 10 20 30 40 50 60 70 80 90 100

Confidence



Will you accept the plea offer when the prison sentence if you are convicted at trial is 6 years?

Yes

No

How confident are you in this decision on a scale of 0 to 100 percent?

0 10 20 30 40 50 60 70 80 90 100

Confidence



1204

Will you accept the plea offer when the prison sentence if you are convicted at trial is 10 years?

Yes

No

How confident are you in this decision on a scale of 0 to 100 percent?

0 10 20 30 40 50 60 70 80 90 100

Confidence



Which of the following factors were most important to your above decisions? Please indicate the importance of each according to the following scale:

	Did not consider	Not very important	Somewhat important	Important	Very important
That you are guilty	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The length of jail time	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Wanting to put the issue behind you	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Chance of losing your nursing license	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Chance of losing other benefits	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Were you guilty or not guilty in this scenario?

Guilty

Not guilty

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Now we would like to ask a few questions about you.

What is your gender?

Male

Female

I would prefer not to respond

What is your age?

What is your racial and ethnic background? Check all that apply.

White

Black/African American

Asian

Hispanic/Latino

Other

I would prefer not to respond

What is your household income?

Less than \$25,000

Between \$25,000 and \$34,999

Between \$35,000 and \$49,999

Between \$50,000 and \$74,999

Between \$75,000 and \$99,999

Between \$100,000 and \$149,999

Between \$150,000 and \$199,999

\$200,000 or more

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What is the highest level of education you have completed?

High school or less

Some college, technical degree, or associate degree

Bachelor's degree

Graduate or professional degree

Have you ever been arrested or charged with a crime?

Yes

No

I would prefer not to respond

1208

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Do you know anybody who has been charged with a felony?

Yes

No

I would prefer not to respond

How often do you drive more than 10 mph over the speed limit?

Less than 50 percent of the time

50 percent of the time

More than 50 percent of the time