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ORIGINAL ARTICLE

Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?

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Abstract Research on racism in the criminal justice system generally focuses on the role of the jury; yet, the vast majority of convictions are obtained through plea bargains. This research addresses the role of the defense attorney and proposes that disparities in sentence length and incarceration rates between African Americans and Caucasian Americans are in part due to the plea bargains that defense attorneys recommend these clients accept. Using practicing defense attorneys from around the country, findings indicate that the pleas attorneys felt they could obtain with a minority client contained higher sentences (adjusted $M = 2.88$) than those they felt they could obtain with a Caucasian client (adjusted $M = 2.22$) and were significantly more likely to include some jail time. Reasons for the disparate recommendations were not due to increased perceptions of guilt with the minority client nor to perceptions that the minority client would fare worse at trial. Theoretical and practical implications are discussed as well as possible future directions.

Keywords Plea bargaining · Racism

According to the Bureau of Justice Statistics, not only do disparities in incarceration rates between African American and Caucasian American defendants exist, but those disparities have actually been increasing over the past three decades (Tonry & Melewski, 2008). As it stands right now, a young African American man is seven times more likely to be incarcerated than his Caucasian American counterpart (Harrison & Beck, 2006). While the effect of race on incarceration may not be a direct one (Spohn & DeLone, 2000; Spohn, Gruhl, & Welch, 1981) and part of the disparity may be due to an inequality in sentencing for drug and violent crimes (Tonry & Melewski, 2008), research has concluded that the disproportionate incarceration rates cannot be explained simply by higher rates of crime or higher rates of arrest for minorities (*Proposed Amendments*, 2010). A meta-analysis of 71 studies examining the effect of race on sentencing found that a small effect persists even after controlling for socioeconomic status, type of representation (public defender or private attorney), criminal history, use of a weapon, and offense seriousness (Mitchell, 2005).

Most research looking at racism in the justice system has focused on the role of the juror or jury (see Sommers & Ellsworth, 2003) and while we can be confident that there is at least a small effect of juror bias on racial disparities in the justice system (Mitchell, Haw, Pfeifer, & Meissner, 2005; Sweeney & Haney, 1992), somewhere between 90 and 95% of all criminal cases end in a guilty plea (Pastore & Maguire, 2003) with this trend increasing (Hollander-Blumoff, 2007). This means that over 90% of the guilty verdicts handed down in our justice system have nothing to do with a jury. If we are to fully explain the disparate incarceration rates, we need to look at the individuals involved in negotiating the large number of guilty pleas. Surprisingly, little research has been directed toward the role that the prosecutor or defense attorney may have in adding to (or at least perpetuating) disparate rates of incarceration between minority and majority race Americans.

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Plea Bargained Justice

Historically, the view on plea bargaining decisions was that the parties involved had two main considerations in reaching an agreement: the likelihood of conviction and the length of sentence if convicted (Bibas, 2004). Prosecutors can reduce the number of charges or reduce the sentence if a defendant will plead guilty (Burke, 2007) all the while keeping the possibility of taking the case to trial as their bargaining chip.

The enticements for accepting a plea seem to be effective, and the decision to plead guilty is often the more rational choice for the defendant. In 2006, roughly 94% of offenders in state court pleaded guilty (Rosenmerkel, Durose, & Farole, 2009). That year, 89% of violent felons convicted at trial or by a judge ended up serving at least part of their sentence in prison or jail; compare this to 76% of violent felons who accepted a plea. The average sentence for felons convicted at trial was also approximately 5 years longer than for those accepting a plea, and those convicted of murder or non-negligent manslaughter ended up serving life in prison or receiving the death penalty roughly 47% of the time; those who pleaded guilty received such a sentence only 13% of the time. While these comparisons are made within the same crime categories (e.g., sexual assault, robbery, drug possession, etc.), the data are archival and reported in the aggregate, meaning that there are certain factors we cannot parse out. Perhaps it was the case that individuals with particularly serious or heinous crimes were not offered the chance to plead guilty. One could imagine those cases would naturally warrant more prison time. Even so, looking at the data presented by Rosenmerkel and colleagues, one valid conclusion is that the system is constructed in such a way to reward those who agree to take a plea bargain and punish (by way of longer sentences for guilty convictions) those who instead take their chances at trial. Trial, then, seems to be a very effective bargaining chip.

At the same time, this "shadow-of-trial" model (Mnookin & Kornhauser, 1979) in which the threat of taking a case to trial—and thus, risking a higher sentence than the one offered in the plea deal—motivates bargaining likely oversimplifies the process in criminal trials, neglecting some of the psychological constructs that may be at play (Bibas, 2004). Bibas (2004) argues for a model of the plea bargaining process that takes into account the various psychological processes that research has shown prevent us from being completely rational actors. While his discussion of heuristics and biases is comprehensive, including such topics as overconfidence, risk aversion, and anchoring and adjustment, his focus is on how lawyers can assist their *clients* in overcoming these biases—not on how the *lawyers* might avoid them. Bibas acknowledges that lawyers are not exempt from these cognitive biases but he feels that they have the added benefit of past experience to curb the effects of some of the biases (such as unrealistic optimism or the effect of anchoring).

A less optimistic assessment of lawyer "debiasing" abilities is put forth by Hollander-Blumoff (2007). She correctly points out that, "there is no body of social science research that suggests that attorneys are free from cognitive bias and heuristic processing" (p. 173). In fact, Hollander-Blumoff suggests that the structure of the criminal justice system may promote a lawyer's reliance on heuristics, and other cognitive shortcuts, during plea negotiations.

One heuristic that may lead to disparities in incarceration rates is that of stereotyping. Perhaps lawyers are using stereotypes about African American's and criminal behavior to inform their negotiations, leading to that group being more likely to be incarcerated or more likely to receive a longer sentence. There is some real-world evidence to suggest that this may be the case and that sentencing disparities exist within the world of plea bargains. Looking at burglary cases across different jurisdictions in the United States, when the defendant pleaded guilty and forfeited his right to a trial, minority defendants were 20% more likely to be given a sentence that included some prison time than were their Caucasian counterparts (Humphrey & Fogarty, 1987). This effect was most pronounced in the southern jurisdictions studied.

One study investigated the issue of disparities in plea deals in the U.S. Army courts-martial system (Verdugo, 1998). Just as the nation has struggled with the issue of overrepresentation of minorities in prison population so has the U.S. Army justice system. In 1995, African American men made up 27.5% of those enlisted but 46.1% of those receiving General Courts-Martial. Caucasian American men, in contrast, made up 61.1% of enlisted and 44.5% of those receiving General Courts-Martial. The reason for the discrepancy seemed to be that Caucasian American men were more likely to be receiving "Article 15" citations (nonjudicial punishments including forfeiture of pay, extra duties, arrest in quarters, etc.) than their African American counterparts (59.3% of total Article 15s compared to 32.8%); in other words, the Caucasian American soldiers were getting a "slap on the wrist". Verdugo (1998) also found that the African American soldiers were not getting offered plea deals as often as the Caucasian American soldiers. For example, in aggravated assault cases tried between 1986 and 1992, the rate of pretrial agreements for the Caucasian American soldiers was 69% compared to 51% for African American soldiers. This trend of offering pleas more often to Caucasian American defendants has also been noted on the civilian side (Marcus, 1992; Schmitt, 1991).

The U.S. Army courts-martial study (Verdugo, 1998) uncovered two possible routes for disparity: the type of plea deal offered and the nature of the charges filed. But, do Verdugo's findings indicate that Caucasian American soldiers are receiving leniency or that African American soldiers are being treated more harshly? An earlier study (Radelet & Pierce, 1985) suggests that it may be a combination of the two.

In the mid-1980s, Radelet and Pierce (1985) took on the gargantuan task of assessing whether race was a factor in prosecutors' decisions to seek the death penalty for homicide cases. Comparing the original police reports (gathered from the FBI's Uniform Crime Reports submitted annually by each police precinct) and the charges filed by the prosecutor's office for 1,017 homicide cases, the researchers analyzed whether race of the victim, race of the offender, or an interaction between victim and offender race predicted upgrading charges to a death penalty offense from what was filed at the time of the initial arrest. Race of the victim did matter—cases with Caucasian victims were more likely to be upgraded between the initial arrest and the filing of the felony charges. The most revealing trend with these Caucasian victim cases was that if the defendant was African American, 52.6% of the time the case was upgraded compared to 19.1% of the time if the defendant was Caucasian American. Of the cases that could have been *downgraded* from a death penalty offense, 22.5% of Caucasian American defendant cases were downgraded compared to only 7.9% of the African American defendant cases. The disparity, it seemed, was a combination of leniency for Caucasian defendants and harsher treatment for the African American defendants.

In a more contemporary study investigating whether race was playing a role in the pleas being offered by prosecutors, Ball (2006) analyzed the content of 2,578 guilty pleas in Chicago. In contrast to the previous study, Ball found that legally irrelevant factors (race, gender, age, and employment status) had no effect on prosecutors' decisions to reduce the number of charges against a defendant. But, the Chicago study cannot discredit the findings of Radelet and Pierce (1985) since original arrest reports were not taken into account, making it impossible to assess whether or not prosecutors had added or upgraded charges in a disparate manner prior to the offering of plea bargains. Ball (2006) suggests that this limitation, as well as a lack of analysis for plea bargains that occurred *without* charge reduction promises, means that while the findings are encouraging, they are not the final word on the issue—disparities still exist, and they must be arising from somewhere.

The studies looking at disparities in sentences and rates of incarceration in plea bargains seem to focus on the prosecutor as the culprit. What about the defense attorney? Of course defense attorneys have sworn to zealously represent their clients, and in a perfect world one would like to assume that an African American defendant's last line of defense against a possibly biased justice system is the individual presenting his or her side of the story. The fact of the matter is, even if defense attorneys truly believe that they can zealously represent their clients and put aside all personal biases, unconscious racism or implicit bias may still be a factor.

Research examining implicit biases of capital defense attorneys using the Implicit Association Test (IAT) showed that Caucasian defense attorneys pair pictures of white-skinned faces with stereotypically "good" words faster than with stereotypically "bad" words and pictures of black-skinned faces with "bad" words faster than with the "good" words; what this means is that Caucasian defense attorneys showed an implicit preference for their own ethnicity (Eisenberg & Johnson, 2004). The researchers noted that the trends found with the defense attorneys mirrored that found in the general U.S. population. Considering that vast majority of the attorneys in the U.S. are Caucasian—approximately 88% (United States Department of Labor [USDL], 2009)—if the research generalizes, the vast majority of attorneys in the U.S. have what Eisenberg and Johnson (2004) would say are "automatic reactions that make associating white with good easier than associating white with bad" (p. 1554).

Whether scores on the IAT translate into actual differential treatment of Caucasian American and African American clients is a different matter. In the field of implicit bias research, an amalgamation of 122 research reports found a modest correlation ($r = .27$) between IAT scores and observable behavior (Greenwald, Poehlman, Uhlmann, & Banaji, 2009). What that represents is roughly 7% (i.e., $.27^2$) of the variance in observable behaviors accounted for by measures of implicit bias. Even though the effect is not large, there is no reason to assume that defense attorneys would be immune to it. Research looking at another group in the legal system that has sworn to uphold egalitarian principles—trial judges—was able to show that scores on the IAT were predictive of harsher sentences in conditions where the judges were primed with words associated with African Americans prior to considering a case (Rachlinski, Johnson, Wistrich, & Guthrie, 2009).

This leaves us with the knowledge that disparities in sentencing and incarceration rates exist, that biases may influence legal decisions, and that we have no reason to assume that defense attorneys are immune from the biases that we find in the rest of the population. This research proposes that some of the disparities we see in incarceration rates can be attributed to the deals defense attorneys try to, or feel they can, secure for Caucasian clients compared to African American clients.

Empirical Research on Plea Bargaining Decisions

There is a dearth of prior empirical research looking at the factors that affect plea negotiations. Older research has investigated the defendant's role in the process by using role-playing (Bordens, 1984; Gregory, Mowen, & Linder, 1978) as well as making participants actually "guilty" of small violations, such as having prior information about the content of a test (Gregory et al., 1978). More relevant to the current study is the empirical research focusing on the attorney's role in plea bargaining.

A comprehensive study by McAllister and Bregman (1986) focused on practicing prosecutors and defense attorneys (in all 50 states) and assessed how important severity of sentence and probability of conviction were on decisions to recommend a plea bargain. Not surprisingly, as severity of sentence and probability of conviction rose, prosecutors were less likely to consider a plea bargain and defense attorneys were more likely. McAllister and Bregman also found a bias toward pleading a case out in prosecutors and bias toward taking a case to trial in defense attorneys, concluding that this is good news for critics who feel that plea bargains are coercive or unfair (and also, presumably for defendants).

More recent research looking at criminal defense attorneys focused on not just severity of sentence and likelihood of conviction but also included the most legally relevant factor in any plea agreement: the defendant's preference (Kramer, Wolbransky, & Heilbrun, 2007). Congruent with previous findings the researchers showed that strong evidence was an important factor in recommending that the defendant take a plea. Length of sentence was also important, but there was an interesting interaction between sentence length, evidence strength, and the defendant's preference: attorneys indicated the strongest recommendations for clients to take a plea when the evidence was strong, the sentence was long, and the defendant indicated a preference to take his case to trial. Presumably, attorneys saw the defendants in this predicament as most in need of guidance (perhaps in the form of a stronger recommendation to take a plea).

The Kramer et al. (2007) and the McAllister and Bregman (1986) studies suggest that defense attorneys are more concerned with the "zealous representation" of their client and less with clearing caseloads or quick resolutions as some have suggested (see Blumberg, 1979). In the McAllister and Bregman (1986) research this concern was demonstrated by a bias toward trial and in the Kramer et al. (2007) research it was demonstrated by a tendency to give stronger recommendations to clients when they felt clients were headed in the wrong direction (i.e., to trial, when the evidence was insurmountable). The current research tests the possibility that this zealous representation—and the drive to hold out for a good bargain for your client—may not be serving all defendants equally. Previous studies have neglected to include extralegal (and potentially biasing) information to assess the effect that it may have on plea recommendations.

Current Study

This study seeks to empirically test whether defense attorneys are relying on strength of evidence and ignoring race of the defendant when recommending plea deals to their clients. The hypothesis here is that, consistent with previous research (Kramer et al., 2007; McAllister & Bregman, 1986), evidence strength is an important variable—the stronger the evidence, the less discrepancy between the sentence that attorneys feel they could obtain (and the maximum sentence they would recommend) and the sentence if convicted at trial. With stronger evidence, attorneys will indicate that the deal they could obtain will be worse than the deal they could obtain with weak evidence.

In addition, I am hypothesizing a racial bias: the deals that defense attorneys feel they can obtain with an African American client will include a longer sentence, and be more likely to include some jail time, than the deals they feel they could obtain for a Caucasian American client. The same discrepancy will exist in the maximum amount of jail time the attorney would recommend the client accept before opting to instead take the case to trial.

If, as hypothesized, the recommendations for African American clients include longer sentences than those for the Caucasian American clients, two possibilities exist: (1) the defense attorneys, perhaps based on their personal experience, expect that jurors will react less favorably to an African American defendant and therefore recommend higher sentences in plea deals simply based on the belief that the client should do whatever possible to avoid trial, or (2) the defense attorneys' own personal biases are inflating the recommendations given to the African American client.

Addressing the first possibility, past research has shown that juror bias does lead to racial disparities in sentencing and convictions (Mitchell et al., 2005). If attorneys are willing to recommend plea bargains with longer sentences to their African American clients compared to their Caucasian American clients, this may be a reflection of the attorney acknowledging the danger of leaving the African American's fate to a jury. Attorneys will be asked to assess chances of conviction in order to measure whether or not disparity in recommendations is in part due to a conscious strategy to account for a biased system. As discussed, African Americans in our justice system experience bias from all sides—juries, judges, and prosecutors—and there

is no reason to believe that defense attorneys are a special group. I believe that what will drive the disparity between plea recommendations will more likely be some form of bias on the part of the defense attorney, rather than a logical reaction to the recognition that the system is unjust.

While defense attorneys have sworn to uphold egalitarian values and zealously represent their clients, personal bias may lead to disparate treatment. To assess this, attorneys will be asked to indicate how certain they are about the client's actual guilt. Expressions of racial bias would predict that the African American client would be more likely to evoke stereotypes of guilt (i.e., African American man = criminal) and would be more likely to be seen as guilty.

I am also seeking to investigate what defense attorneys self-report as important factors when they are considering plea recommendations. Consistent with previous research (Kramer et al., 2007) I expect that attorneys will rate likelihood of conviction and strength of evidence as the most important factors in deciding whether or not to recommend a plea bargain. One of the aims with this research will be to assess what attorneys feel are the most important and the least important considerations when considering a plea bargain, and also to develop a measure on which to compare the attorneys, by such factors as years in practice and whether or not they practice as a public defender or private attorney. Beyond anecdotes (Bibas, 2004; Heumann, 1978) little has been published on how these groups may differ in their plea bargaining styles so hypotheses will not be formed regarding these comparisons; rather, the aim will be to understand the groups better and how their tasks and experiences affect which factors they consider relevant in plea decisions.

Method

Participants

Participants were practicing defense attorneys contacted through e-mail and the study was run in two rounds. Round one consisted of sending 480 e-mails to attorneys listed on the American Bar Association's Lawyer Locator website. Owing to a large number of returned e-mails and individuals contacting the researcher indicating that they did not belong on the list, I looked for a more reliable source of information. The Florida Association of Criminal Defense Lawyers provides contact information for currently practicing defense attorneys in the state of Florida and 360 e-mails were sent using this list. The first round yielded an 11% response rate and the second round yielded a 14% response rate.

Even with the relatively low response rate, the final sample closely matched national characteristics based on the Bureau of Labor Statistics reports (USDL, 2009) and publications from the American Bar Foundation (Carson, 2000). Of the 101 participating attorneys, 20 were currently practicing as public defenders, 64 as private defense attorneys, five as both, six other and six did not indicate. Sixty-nine of the 95 participants indicated that they had a private practice (73%), which mirrors the national average of 74% (Carson, 2000). Seventy-one participants were male (approximately 74% of those who indicated), 25 female and five did not indicate; the national rates show that 68% of lawyers in the United States are male (USDL, 2009). Eighty-six of the lawyers who indicated their ethnicity were Caucasian (approximately 91%), seven were of Hispanic descent (approximately 7%), two indicated other and six did not specify; nationally, 88% of lawyers in the United States are Caucasian and approximately 3% are Hispanic (USDL, 2009). Forty-nine were from Florida, 47 were from 30 other states and five did not indicate.

The sample also showed a large diversity in experience, further promoting the idea that the low response rate did not lead to an unrepresentative sample. Years of practice ranged from one to 42 ($M = 16.96$, $SD = 10.97$), with a median of 15 years and a mode of 8 years.

Materials

Case Summary. The case described a robbery at a jewelry store and was split into three parts: *The Crime*, *Suspect*, and *Evidence*. The section depicting the crime was uniform across all conditions. Race was manipulated in the description of the suspect: "Robert Williams, a 23 year-old African American [Caucasian American] male…" and strength of evidence was manipulated in the last part of the case summary. For *weak evidence*, the case discussed two tentative eyewitness identifications, Mr. Williams pawning watches matching the description of those taken from the jewelry store but with the serial numbers filed off, a red t-shirt similar to that worn by the perpetrator found in Mr. William's house, and the suspect's girlfriend as an alibi. The *strong evidence* conditions discussed a fingerprint matching Mr. William's found at the scene, one confident and one tentative eyewitness identification, Mr. Williams pawning watches with the same serial numbers as those stolen, a red t-shirt and black backpack similar to those worn by the perpetrator found in the suspect's house, and no alibi.

Considerations in Plea Bargaining Recommendations. In order to understand how defense attorneys utilize plea bargaining, participants were presented with a list of 12 factors that may be associated with a case, and

indicated on a seven-point Likert scale (Completely unimportant to Completely important) how important each was in determining whether or not they would advise their client to consider accepting a plea. Some of the factors were adapted from Kramer et al. (2007) (e.g., "The likelihood of the defendant's conviction based on the strength of the evidence" was adapted to "The likelihood of a conviction based on the evidence"; and "Your current caseload is high" was adapted to "Your current caseload") while other items were the result of informal conversations with attorneys and with laypeople to assess common perceptions of why cases are plead out.

Principal components analysis with the current data revealed a three factor solution (Varimax rotation utilized): *Attorney-related considerations*, *Case-related considerations*, and *Outcome-related considerations*.

The *Attorney-related considerations* factor accounted for approximately 26% of the total variance and had a Cronbach's alpha of .77. This factor contained three items: "Your current caseload," "Your personal relationship with the prosecutor handling the case," and "Your personal relationship with the judge assigned to the case."

The *Case-related considerations* factor accounted for approximately 15% of the total variance with an unimpressive Cronbach's alpha of .68. This factor contained four items: "The defendant's prior record," "The defendant's previous convictions for the same offense with which he/she is currently charged," "The seriousness of the crime," and "The crime involved a gun."

The *Outcome-related considerations* factor accounted for approximately 12% of the total variance with a low Cronbach's alpha of .62. This factor contained two items: "The severity of the sentence outlined in the plea bargain compared to the severity of the sentence if the defendant were found guilty after a trial," and "The likelihood of conviction based on the evidence."

Procedure

Lawyers were randomly assigned to receive one of four QuestionPro.com links, which corresponded to one of the four case summaries. The link leads the individual to an informed consent statement summarizing the research and its purpose, outlining the procedure, and stressing that we are only looking for the individual attorney's opinion on the case and what the attorney would recommend to the client, keeping in mind that the decision to plea bargain is ultimately that of the client.

After reading the case summary, participants were asked to put themselves in the place of the suspect's defense attorney and were informed the prosecutor had said that if the case goes to trial, the accused will be charged with robbery and with selling stolen property. With his prior offenses, he will be looking at 6–8 years in prison. Participants were asked, "As Robert's attorney, if the prosecutor offers a plea bargain, realistically, which of the following deals do you think you could obtain for your client?" and subsequently, "As Robert's attorney, if the prosecutor offers a plea bargain, what is the maximum negotiated sentence that you would recommend your client accept?" Options for both questions included probation, 1 year in prison, 2 years in prison, 3 years in prison, 4 years in prison, or 5 years in prison. Participants also had the option of stating that they would not accept a plea but would take the case to trial.

In order to measure the attorneys' beliefs about whether or not a jury could be fair with a minority client and their personal biases toward African American clients, participants indicated on a scale from 0 to 100 the chances of a conviction if the current case were to go to trial, and on a 5-point Likert scale (Absolutely NOT GUILTY to Absolutely GUILTY), how certain they are about the accused's actual guilt.

Subsequent to this, participants responded to the scale assessing considerations taken when deciding whether or not to advise a client to accept a plea bargain. Attorneys were also asked to think back to their last ten resolved cases and indicate how many were resolved through a plea bargain then to estimate the percentage of cases each year that may end in a plea bargain.

The demographics collected focused on attributes of the attorney answering the survey as well as attributes of their "usual" client. They were asked to, "describe your prototypical case; that is, the type of case you most often work on, including the type of client you most often represent." Information provided included: the prototypical charge; whether or not a gun would have been used, whether or not a deadly weapon other than a gun would have been used; the prototypical client's gender, ethnicity, age, and criminal history; and how the case would usually be resolved. The subsequent demographics collected for the attorney participant included: state in which they are currently practicing (for the Florida sample, they were also asked to indicate county); whether they are practicing as a public defender, private criminal defense attorney, both, or other; numbers of years practicing as a private defense attorney/public defender; gender; and ethnicity.

Results

Gender and type of attorney (public or private) did not affect any of the four main dependent measures (plea they felt they could obtain, maximum plea they would recommend, perceived chances of conviction, and likelihood of guilt) nor the amount of time taken to complete the online survey; therefore, results presented are collapsed across

those groups. Results were also collapsed across race due to the low numbers of minority participants. Attorneys from the first (National sample) round of surveys differed in their responses on perceived chances of conviction, likelihood of guilt, and the time taken to respond from attorneys in the second round (Florida sample) of surveys. To control for this difference, blocking was employed and round became a third independent variable for the analysis of those three measures. The range of attorneys' years of practice was from 1 to 42 with a mean of 16.57 years ($SD = 11.02$) and a median of 15 years. Owing to the very wide range of experience, the number of years practicing was used as a covariate. A 2 (client race) × 2 (strength of evidence) ANCOVA was performed for each of the first two dependent measures (assessing plea recommendations), controlling for attorney experience. A 2 (client race) × 2 (strength of evidence) × 2 (round) ANCOVA was performed for the last two dependent measures (assessing chances of conviction and likelihood of guilt) and for time taken to complete the survey. Analyses performed weighted cells by their sample sizes to adjust for unequal numbers of participants per cell.

Participants were asked to estimate what percentage of their cases ended in plea bargains each year to insure that the sample was representative of the often-cited statistic that 90–95% of cases end in a plea bargain (Pastore & Maguire, 2003). The mean reported percentage here was 86.02 ($SD = 14.71$), and the mode and median were both 90%. Asking participants to think back to the resolution of their last ten cases, the mean number ending in a plea bargain was 8.32 ($SD = 2.08$) with a median of 9 and a mode of 10.

Plea Recommendations

Six individuals who stated that they would not accept a plea were excluded from the analysis looking at the first dependent variable: the plea the attorney felt he or she could obtain for the client. The scale for this dependent variable was: 1 = Probation, 2 = 1 year in prison, 3 = 2 years in prison, 4 = 3 years in prison, 5 = 4 years in prison, and 6 = 5 years in prison. As hypothesized, there was a significant difference ($F(1, 83) = 5.57, p = .021, \eta^2 = .06$) in the plea participants would recommend when the client was Caucasian (adjusted $M = 2.22$, $SE = .20$, 95% CI [1.82, 2.61]) compared to when he was African American (adjusted $M = 2.88$, $SE = .20$, 95% CI [2.49, 3.27]). Strength of the case only approached significance ($F(1, 83) = 2.70$, $p = .105$, $\eta^2 = .03$) with the stronger case (adjusted $M = 2.78$, $SE = .20$, 95% CI [2.39, 3.16]) warranting slightly higher sentences than the weaker case (adjusted $M = 2.32$, $SE = .20$, 95% CI [1.91, 2.92]). The interaction between race and case strength was not significant ($F(1, 83) = .18$, $p = .675$). There was a strong relationship between the number of years an attorney had practiced and the type of plea they recommended as indicated by a η^2 value of .11. See Table 1 for adjusted and unadjusted cell means.

When asked what the *maximum* negotiated sentence they would recommend their client accept, the expected main effect for strength of case was found ($F(1, 84) = 8.91$, $p = .004$, $\eta^2 = .10$) with weak evidence (adjusted $M = 3.09$, $SE = .21$, 95% CI [2.68, 3.50]) leading to a lower maximum sentence recommendation than strong evidence (adjusted $M = 3.96$, $SE = .21$, 95% CI [3.55, 4.37]). The effect of race was not significant ($F(1, 84) = 2.25$, $p = .138$) nor was the interaction between race and case strength ($F(1, 84) = .10$, $p = .748$). Once again, the numbers of years practicing had an effect on plea recommendations, as indicated by a η^2 value of .07. Three individuals who stated that they would not accept a plea were excluded from this analysis (see Table 1 for adjusted and unadjusted cell means).

Guilt Certainty and Chances of Conviction

With regard to what participants felt the chances of a conviction were, only the strength of the case had an effect: $F(1, 85) = 14.96$, $p < .001$, $\eta^2 = .15$. The stronger

Table 1 Mean plea decisions for each condition adjusted to control for the effect of attorney experience

Case strength	Plea obtained				Maximum plea recommended			
	n	Unadjusted *M* (*SD*)	Adjusted *M* (*SE*)	95% CI	*n*	Unadjusted *M* (*SD*)	Adjusted *M* (*SE*)	95% CI
Caucasian client								
Weak	22	2.18 (1.33)	2.04 (.28)	[1.48, 2.61]	22	3.05 (1.43)	2.92 (.30)	[2.32, 3.51]
Strong	21	2.29 (1.19)	2.39 (.29)	[1.81, 2.96]	21	3.62 (1.40)	3.70 (.30)	[3.09, 4.30]
African American client								
Weak	20	2.50 (1.61)	2.59 (.30)	[2.00, 3.17]	22	3.18 (1.47)	3.26 (.30)	[2.67, 3.85]
Strong	25	3.20 (1.38)	3.17 (.26)	[2.65, 3.69]	24	4.25 (1.39)	4.23 (.28)	[3.67, 4.79]

Note: Likert scale with 1 = Probation, 2 = 1 year in prison, 3 = 2 years in prison, 4 = 3 years in prison, 5 = 4 years in prison, 6 = 5 years in prison. Six individuals stated that they would not accept a plea and were excluded from analysis

Table 2 Mean chances of conviction adjusted for attorney experience

Case strength	Unadjusted *M* (*SD*)		Adjusted *M* (*SE*)			
	National	Florida	National	95% CI for National	Florida	95% CI for Florida
Caucasian client						
Weak	72.50 (15.12)	61.67 (18.29)	70.55 (5.85)	[58.92, 82.18]	61.93 (4.03)	[53.91, 69.94]
Strong	77.50 (9.50)	70.27 (19.10)	77.62 (4.93)	[67.83, 87.42]	70.95 (4.75)	[61.51, 80.38]
African American client						
Weak	66.25 (14.79)	59.50 (16.96)	66.36 (4.50)	[57.42, 75.30]	59.98 (4.52)	[50.99, 68.97]
Strong	76.94 (16.38)	85.00 (5.59)	76.63 (3.79)	[69.10, 84.17]	85.14 (5.19)	[74.81, 95.47]

Note: Chances of conviction were measured on a scale from 0 to 100

Table 3 Mean perceptions of guilt adjusted for attorney experience

Case strength	Unadjusted *M* (*SD*)		Adjusted *M* (*SE*)			
	National	Florida	National	95% CI for National	Florida	95% CI for Florida
Caucasian client						
Weak	3.75 (.46)	3.20 (.78)	3.76 (.25)	[3.26, 4.25]	3.20 (.17)	[2.86, 3.54]
Strong	3.70 (.48)	3.73 (.47)	3.70 (.21)	[3.28, 4.12]	3.73 (.20)	[3.32, 4.13]
African American client						
Weak	3.54 (.66)	2.54 (1.05)	3.54 (.19)	[3.17, 3.91]	2.54 (.19)	[2.17, 2.91]
Strong	3.59 (.51)	3.56 (.53)	3.59 (.16)	[3.27, 3.91]	3.56 (.22)	[3.11, 4.00]

Note: Likelihood of guilt was measured on 5-point Likert scale: 1 = Absolutely NOT GUILTY, 2 = Probably NOT GUILTY, 3 = Unsure, 4 = Probably GUILTY, 5 = Absolutely GUILTY

evidence (adjusted $M = 77.59$, $SE = 2.34$, 95% CI [72.92, 82.25]) led to a higher perceived chance of conviction than the weaker evidence (adjusted $M = 64.70$, $SE = 2.35$, 95% CI [60.04, 69.37]). Neither the effect of the defendant's race ($F(1, 85) = .28$, $p = .596$) nor the interaction between race and case strength ($F(1, 85) = 2.02$, $p = .159$) reached the level of significance. See Table 2 for adjusted and unadjusted cell means.

Race ($F(1, 87) = 4.23$, $p = .043$, $\eta^2 = .05$) and case strength ($F(1, 87) = 7.31$, $p = .008$, $\eta^2 = .08$) both had an impact on perception of guilt. The Caucasian client was seen as slightly more likely to be guilty (adjusted $M = 3.60$, $SE = .10$, 95% CI [3.39, 3.80]) than the African American client (adjusted $M = 3.31$, $SE = .10$, 95% CI [3.12, 3.49]) and when the case was strong guilt was seen as more likely than when it was weak (adjusted $M = 3.64$, $SE = .10$, 95% CI [3.44, 3.84]; adjusted $M = 3.26$, $SE = .10$, 95% CI [3.06, 3.46], respectively). The effect of case strength on perceptions of guilt seemed to be driven by the Florida sample; the interaction between round and case strength was significant ($F(1, 87) = 7.45$, $p = .008$, $\eta^2 = .08$) with the national sample perceiving guilt at the same level whether the evidence was strong (adjusted $M = 3.64$, $SE = .13$, 95% CI [3.34, 3.96]) or weak (adjusted $M = 3.65$, $SE = .16$, 95% CI [3.38, 3.91]) but the Florida sample perceiving the stronger evidence as more indicative of guilt (adjusted $M = 3.64$, $SE = .15$, 95% CI [3.34, 3.94] compared to adjusted $M = 2.87$, $SE = .13$, 95% CI [2.61, 3.12] for weak evidence). The interaction between race and case strength was not significant ($F(1, 87) = 1.08$, $p = .302$). See Table 3 for adjusted and unadjusted cell means.

Likelihood of Imprisonment

The dependent variable representing the plea the attorney felt could be obtained was dummy-coded to represent jail time or no jail time and a binary logistic regression was performed to assess the impact of race, strength of case, and (the continuous variable) years of practice on this decision. Initial hypotheses only discussed the possible effects of race and strength of case, but after observing the amount of variance in the dependent measures that was accounted for the lawyer's experience, the variable representing years practicing was also included in the model as a predictor. The model was significant, $\chi^2(3, N = 91) = 14.86$, $p = .002$; it explained between 14.3% (Cox & Snell R^2) and 20.6% (Nagelkerke R^2) of the variance with 74% of the cases correctly classified (see Table 4). Race of the defendant was a predictor of imprisonment—being an African American defendant increased the odds of receiving jail time by 3.08 times ($B = -1.12$, $p = .026$). Strong cases

Table 4 Decisions to incarcerate

	B	*SE*	Wald	*p*	Odds ratio	95% CI for odds ratio
Defendant's race	−1.12	.51	4.95	.03	.33	[.12, .88]
Strength of case	−.89	.51	3.04	.08	.41	[.15, 1.12]
Years practicing	.07	.03	7.12	.01	1.07	[1.02, 1.12]

Note: The variable indicating what plea attorneys felt they could obtain for their client was dummy-coded to represent jail time versus probation

increased the odds of imprisonment by 2.43 times but this only approached significance ($B = -.89, p = .081$). Years practicing had the strongest effect showing that for every year the attorney has practiced, the odds of recommending a plea that includes jail time increased by 1.07 times ($B = .07, p = .008$).

Considerations in Plea Recommendations

For the 12 factors that attorneys were asked to rate on importance in deciding to advise a client to plea bargain, there were no differences between the mean scores by condition on 11 of the items (all F obtained values for the 11 items were ≤ 3.06). Mean ratings of the importance of personal beliefs regarding the defendants actual guilt differed depending on the race of the defendant in the vignette the attorneys had read ($F(1, 93) = 4.43$, $p = .04$, $\eta^2 = .05$). While both conditions rated this as the second least important factor, those in the African American defendant condition rated it as less important ($M = 1.66$, $SD = 1.27$) than did those in the Caucasian defendant condition ($M = 2.20$, $SD = 1.66$). Since there was only one significant difference in mean ratings and since this difference did not affect where the item placed in importance within the 12 items (the item placed 11 out of 12 for both the African American and Caucasian defendant conditions) the results for considerations in plea recommendations are collapsed across condition. The item assessing the importance of personal beliefs about guilt did not load on any of the factors.

Consistent with previous research (Kramer et al., 2007) the attorneys rated likelihood of conviction ($M = 6.59$, $SD = .52$) and severity of sentence ($M = 6.51$, $SD = .52$) as the most important factors in their decision to advise a client to consider a plea bargain (see Table 5 for descriptive statistics and correlations between items). The impression that their client may not present well to a jury was a close third ($M = 5.75$, $SD = .88$). The attorneys indicated that the least important factors were personal beliefs about a defendant's guilt ($M = 1.91$, $SD = 1.48$) and current caseload ($M = 1.61$, $SD = 1.27$).

Individuals had scores on three factors: *Attorney-related considerations*, *Case-related considerations*, and *Outcome-related considerations.* The low reliability rates for the last two factors (Cronbach's alpha = .68 and Cronbach's

Table 5 Ratings of possible influences on decisions to recommend a plea bargain

	N	*M*	*SD*	1	2	3	4	5	6	7	8	9	10	11
1. Likelihood of conviction based on the evidence	99	6.59	.52											
2. Severity of the sentence in plea compared to sentence if convicted	99	6.51	.52	.44**										
3. Impression that your client may not present well to a jury	97	5.75	.88	.36**	.18									
4. Defendant's previous convictions for a similar offense to the current	97	5.45	1.32	.16	.16	.16								
5. Defendant's prior record	98	5.40	1.15	.23*	.15	.34**	.50**							
6. Seriousness of the crime	98	5.19	1.46	.19	.03	.22*	.17	.41**						
7. The crime involved a gun	98	5.13	1.64	.04	−.03	.38**	.23**	.29**	.54**					
8. Defendant's age	97	4.61	1.37	.08	.01	.29**	−.01	.12	.34**	.19				
9. Personal relationship with the prosecutor	98	3.07	2.05	.00	−.03	.31**	.07	.04	.14	.26**	.23*			
10. Personal relationship with the judge	98	3.06	2.01	.04	−.03	.27**	.15	.07	.17	.23*	.23*	.83**		
11. You think that the defendant is guilty	98	1.91	1.48	−.06	.06	−.02	.14	.19	.26**	.15	.08	.01	.07	
12. Current caseload	98	1.61	1.27	.00	−.01	.22*	.12	.10	.09	.22*	−.01	.38**	.30**	.16

Note: * $p < .05$, two-tailed; ** $p < .01$, two-tailed. Likert scale ranged from 1 = Completely unimportant to 7 = Completely important

alpha = .62, respectively) mean that the results and trends presented here for case- and outcome-related considerations should be interpreted cautiously. There were no gender differences in scores on the three scales so results presented are collapsed across gender.

In order to look at whether type of attorney or years practicing had an effect on the type of considerations employed in plea decisions, individuals who indicated that they were both a public defender and a private attorney were excluded from analysis. Eighty-four individuals (20 public defenders and 64 private attorneys) were used and a 3 (number of years practicing: 9 years or less, 10–22 years, 23 years or more) × 2 (lawyer: public, private) ANOVA was performed for the three scales.

For the first factor, *attorney-related considerations*, contrary to my hypothesis, no significant differences in scores were found for number of years practicing ($F(2, 78) = .88$), type of attorney ($F(1, 78) = .17$), or the interaction between the two variables ($F(2, 78) = 2.00$). This may have been the result of a floor effect. Responses were recorded on a 1–7 Likert scale and just looking at the overall means for the items contained in this factor (see Table 5, items 9, 10, and 12) the highest is just over three.

The difference between scores on *case-related considerations* between those practicing as a public defender ($M = 4.89$, $SD = .99$, 95% CI [4.46, 5.29]) and those practicing as private attorneys ($M = 5.44$, $SD = .87$, 95% CI [5.21, 5.65]) was significant, $F(1, 78) = 5.67$, $p = .020$, $\eta^2 = .07$. Individuals in private practice were more likely to place importance on things like prior records and seriousness of the crime when considering whether or not to recommend a plea bargain than were public defenders. Neither years practicing ($F(2, 78) = 1.10$, $p = .337$) nor the interaction between years practicing and type of attorney ($F(2, 78) = .59$, $p = .556$) approached significance.

For the third scale, *outcome-related considerations*, there was a significant difference ($F(2, 78) = 3.56$, $p = .033$, $\eta^2 = .08$) between the groups based on number of years practicing. Post hoc analysis (Tukey HSD) showed that the difference was between the attorneys who had been practicing 9 years or less ($M = 6.65$, $SD = .41$, 95% CI [6.49, 6.82]) and those practicing 23 years or more ($M = 6.30$, $SD = .47$, 95% CI [6.09, 6.51]). There was also a significant difference between the scores of public defenders ($M = 6.40$, $SD = .49$, 95% CI [6.20, 6.60]) and private criminal defense attorneys ($M = 6.62$, $SD = .42$, 95% CI [6.52, 6.73]), $F(1, 78) = 3.85$, $p = .053$, $\eta^2 = .05$. Individuals in private practice and those that have less experience were both more apt to see the disparity between sentence at trial versus offer in a plea and likelihood of conviction as more important in deciding when to recommend a plea than those who work as public defenders or those with more experience. The interaction between type of attorney and years practicing was not significant ($F(2, 78) = 1.15$, $p = .322$).

Discussion

Previous research has shown that juror bias may be responsible for some of the disparity we see between African American and Caucasian American incarceration rates (Mitchell et al., 2005), but this study displays a bias that is separate from the courtroom—practicing defense attorneys displayed a tendency to recommend plea bargains for African Americans that were longer than those that they would recommend for Caucasian clients.

Interestingly, this did not seem to be a result of the attorneys actually thinking that the African American clients were more likely to be guilty. On the contrary, they were slightly more likely to see the *Caucasian* clients as guilty. Assessing the true guilt of the client may be seen as a measure of explicit bias—attorneys were asked, after race of their client had been made salient in the case vignette, whether or not this individual was likely to have committed the crime. Lower scores from individuals with the African American client vignette may well represent an effort to appear *un*biased and egalitarian. Similar trends have been found in the research with jurors and race salience in the courtroom (Sommers & Ellsworth, 2000, 2001).

Another explanation for the disparity in plea recommendations would be that the attorneys are acting on how they feel a jury would perceive their client—perhaps experience leads them to believe that an African American defendant would be better off avoiding trial at any cost. The results here do not lend credence to that particular theory; there were no significant differences between the perceived chances of conviction for the two races. If the disparity in plea recommendations was due to some rational assessment of how the average jury treats an African American client, then the African American client should have been seen as more likely to be convicted if the case went to trial. This could also be seen as a measure of whether or not the differential treatment by race was something conscious. Asking attorneys about chances of conviction allows the attorneys to acknowledge that the *system* may be racist (or the individuals constituting juries may be racist) without having to acknowledge that they themselves may possess a similar bias—"I'm not racist, but juries are and so my client should avoid trial." In fact, the supposed "racist system" theory would show that any differential recommendations on the part of the attorney would actually be strategic and quite possibly rational, and *not* a measure of the attorney's personal bias. Perhaps we do not see that trend in this study because the attorneys are not actually aware of the differential treatment.

Interestingly, looking at just the results from the Florida sample (see Table 2), we do start to see a bit of the "I'm not racist, but juries are" trend in the conditions where the evidence is strong. The national sample of attorneys perceived roughly a 77–78% chance of conviction with strong evidence regardless of the race of the client. For the Florida sample, the African American client was perceived as approximately 14% points more likely to be convicted when the evidence was strong; Florida attorneys reported a 71% chance of conviction with Caucasian client and an 85% chance of conviction with the African American client (see Table 2). In those same conditions, the Florida attorneys were no different than the national sample in perceptions of actual guilt—their chances of conviction ratings changed by strength of evidence when the client was African American compared to Caucasian but the likelihood of guilt ratings did not. If Florida attorneys are using the idea that an African American client would fare poorly at trial to inform their plea decisions, this may be acting as a mediator for the disparity in the plea recommendations. Future research utilizing a larger sample of these attorneys could investigate this possibility.

When attorneys self-reported the factors important to plea negotiations and decisions to pursue a plea bargain in their own experience, they focused on rational, legally relevant variables: the likelihood of a conviction based on the evidence and the severity of the sentence if convicted at trial compared to the sentence offered in a plea deal. The next most important variables they listed were based on the defendant: the impression that he may not present well to a jury, previous convictions for similar offenses to the current charge, and prior record. After that, factors such as the seriousness of the crime and the use of a weapon were considered. Attorneys disagreed that the use of extralegal factors associated with themselves or their practice were relevant in deciding whether or not to pursue a plea bargain, including personal relationship with the prosecutor, personal relationship with the judge, believing that the defendant is guilty, and current caseload. It seems as though defense attorneys do not consider themselves as a relevant part of the process. While this may adhere to the idea of zealously representing your client, the fact is that this may blind attorneys to the fact that their own ideologies (or at least their biases) may come into play when they are advocating for their clients.

Study Limitations

Since the survey was housed online (by QuestionPro) there was a record of dropout rates, and from the information provided by the website it was evident that there was no differential attrition by condition; the numbers of individuals dropping out by group did not differ. This does not mean that the sample that responded was necessarily representative of the profession. While the sample used was diverse in the number of years practicing and mirrored national averages for the demographic characteristics of American attorneys, whenever we opt to move away from the safety of undergraduate student research participants, we run the risk of a low response rate. This study was no exception. Owing to the limited information available on the attorneys, I was unable to systematically assess whether the sample that responded differed in some important way from the participants who did not respond.

Another issue to note is that if the differential treatment seen in this study is somehow due to automatic activation of stereotypes or implicit bias that does not mean that in a real-life setting, judgments would be influenced in the same manner. Research has shown that even 10 min of interacting with a member of a stereotyped group can be enough to stop stereotype activation (Kunda, Davies, Hoshino-Browne, & Jordan, 2003). It would seem simplistic to conclude that defense attorneys would *not* develop relationships with the clients they represent—they surely spend more than 10 min with the individuals before deciding on something as important as whether or not to recommend a guilty plea to a criminal charge.

Any vignette research will run into this issue of realism. Participants in this study were presented with the following passage before they were given the crime vignette:

> *Important*: This research only scratches the surface with regard to understanding plea bargaining. What you will read is a far cry from reflecting the true intricacies present in any given criminal case—it is a simplified version of what you would actually encounter. Also, keep in mind that I am only asking for your recommendations as an attorney, based on your experiences. Of course, in an actual case, the final decision of whether to accept a plea is always that of the defendant's.

This passage was constructed after running a pilot study with a small sample of defense attorneys. The overwhelming response was a refusal to participate based on the belief that the process of plea bargaining could not be studied with a simple one-page vignette. Of course, empirically the researcher's job is to show that a significant difference can be found between groups even with the simple vignette (which was shown here) keeping in mind that translating the results to the entire criminal justice system is not the intended effect. At the same time, those differences are based on psychological processes and those same psychological processes are present in real-life, complex plea negotiation cases.

Conclusions

This study demonstrates that in order for us to get to the root cause of the racial disparities present in our justice system, we need to be looking beyond the jury and instead address how race may be affecting attorneys' abilities to zealously represent their clients. Here there was no biased jury, nor was there a prosecutor or a judge to blame. The only person to blame for the differential treatment was the defense attorney, and by the recommendations of the defense attorney, Robert Williams, the African American client, was more than three times more likely to be encouraged to accept a plea that included jail time than Robert Williams, the Caucasian American client. In a system where plea bargaining is the norm and the criminal attorney stands as the last line of defense for the accused, finding differential treatment based on race is a concern to say the least.

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