



2019

Sharkfests and Databases: Crowdsourcing Plea Bargains

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Recommended Citation

Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 *Tex. A&M L. Rev.* 653 (2019).

Available at: <https://scholarship.law.tamu.edu/lawreview/vol6/iss3/4>

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SHARKFESTS AND DATABASES: CROWDSOURCING PLEA BARGAINS

by: Kay L. Levine, Ronald F. Wright, Nancy J. King,
& Marc L. Miller*

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I. INTRODUCTION

The stock image of a plea negotiation in a criminal case depicts two lawyers in frayed business suits, meeting one-on-one in a dim corner of a courtroom lobby. The defendant is somewhere nearby, ready to receive information about the prosecutor's offer and to discuss counteroffers with his attorney and perhaps with his family. The victim or arresting officer may be available by phone, although neither has the power to veto a deal the prosecutor otherwise thinks is reasonable. In this depiction of plea bargaining, the defense attorney and the defendant form one unit, allied against another unit—comprised of the prosecutor, victim, and police officer—while remaining independent of other defense units in terms of information, interests, and goals. Each defendant's case requires and receives individualized attention, and each case is bargained on its own terms.

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But this stock image does not capture the range of negotiation practices observable in many criminal courts across the United States, particularly from the defense side of the aisle. We see variety in practices because defense attorneys begin negotiations with varying amounts of information. To begin with, some lawyers enter negotiations after conducting background checks on the government's witnesses or performing their own independent investigation of the alleged crime. More often, defense counsel is far less prepared.¹

Aside from variance in fact-checking, we can observe variance in background knowledge. A criminal defense attorney who appears only periodically in criminal court—or a civil attorney who takes only the occasional criminal case—is less likely to know local practices and the “going rate” for particular types of cases than attorneys who are regulars in the courthouse workgroup.² In the absence of this background information, the one-shot lawyer may behave in an overly adversarial manner, may misinterpret signals from the judge about the likely post-trial punishment outcome, or may agree too easily to terms that regulars would reject.

Finally, lawyers who practice in larger organizations enter the negotiations with valuable knowledge derived from their professional networks. That is, the background information the lawyers possess stems not just from their own experiences with the workgroup but also from the experiences their professional colleagues have shared over time. Public defenders (like prosecutors) thus are able to draw on three data sets to inform their negotiating tactics in a given case: (1) current values in the local punishment market, (2) the historical tendencies of the courthouse regulars, and (3) the habits and expectations that their own offices instill in them. For this reason, while public defenders might arrive alone to negotiate a case, they do not act independently during the negotiation itself. The ideas and experiences of their colleagues are resources that remain just beneath the surface, ready to be tapped at a moment's notice to alter the trajectory of the deal that might otherwise result.

In this Essay, we dive deeper into this final dimension to discuss the influence of professional networks on plea negotiations. In particular,

1. Much has been written about the need for greater disclosure by the government and more investigative resources in appointed counsel systems to alleviate some of these performance disparities. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1603 (2018).

2. See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 267–69 (1977); DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, *JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES* 273 (7th ed. 2017); Abraham Blumberg, *The Practice of Law as a Confidence Game*, 1 LAW & SOC'Y REV. 15, 20–21 (1967); Christi Metcalfe, *The Role of Courtroom Workgroups in Felony Case Dispositions: An Analysis of Workgroup Familiarity and Similarity*, 50 LAW & SOC'Y REV. 637, 640 (2016).

we examine the effects of crowdsourcing tactics in the negotiation setting. We describe, for example, what happens when lawyers bargain in public, benefitting from an audience that provides information about past practices and deals. And then we speculate about what might happen if that audience were instead a widely shared database that documents plea practices in the jurisdiction. We offer a few preliminary thoughts about the potential influence of such techniques, as we are not in a position to measure empirically the actual effects of crowdsourcing (either by audience or by database) on the rate or substance of pleas.³ Instead, we use anecdotal data to discuss how crowdsourcing techniques might affect party behavior and alter the balance of power among prosecutors, defenders, and judges when it comes to plea deals.

We begin in Part II with a glimpse of crowdsourcing patterns that currently exist: gatherings of defense attorneys and prosecutors who negotiate with each other in the same room at the same time.⁴ During our field research, we learned that the participants in one county called their weekly group meeting a “Sharkfest”—the label we use in this Essay for group negotiation sessions generally. The attorneys who attend these meetings discuss their cases within earshot of each other, offering suggestions to their colleagues and rebuttals to their adversaries, even in cases not assigned to them. In some of these settings, the judge is even present, commenting on the viability of the evidence or on the fairness of the prosecutor’s offer. In other settings, the parties know the bench’s preferences well and bargain in light of what they expect the judge to do. In short, some non-negotiators—both judges and other attorneys—can witness and shape the marketplace of plea deals in real time.

After describing the Sharkfest meetings that we learned about in different jurisdictions around the country, we turn in Part III to the central query of this paper: Could the effects of the group negotiation setting be reproduced, institutionalized, and furthered by the creation of a database about plea negotiations and case outcomes?⁵ If the criminal defense organization of a given jurisdiction encouraged defense attorneys to share among themselves the plea offers they received—much the way prospective law students share with each other admissions offers and financial aid offers received from various law schools—the pricing for pleas would become more transparent, particularly for newcomers to the profession. If defense attorneys were to report all offers received, the time to trial at the moment of each offer, various background characteristics about the defendant, and the estimated strength of the evidence, the *true* market price for certain

3. We do not have any quantitative data about the prevalence of group meetings, or about the content or number of plea deals struck in the jurisdictions we studied.

4. *See infra* Part II.

5. *See infra* Part III.

crimes would be accessible to other defense attorneys before the start of negotiations.

Part III also addresses two potential effects of the database on negotiation practices: anchoring and judicial influence. First, a crowdsourced database would likely exert an anchoring effect on negotiation outcomes because the database publicizes past outcomes and averages. We also anticipate that the greatest advantage would accrue to the newest attorneys and to those who do not practice in a larger organizational setting since they might not otherwise have access to historical plea data. Second, in those jurisdictions where judges have some legally sanctioned role to play in plea negotiations, we believe that crowdsourcing techniques—like a shared database—would allow defense attorneys to gauge the reasonableness of the judge’s prediction about post-trial sentencing. The database might increase the judge’s ability to serve as a counterweight to the prosecution during negotiations. This Part concludes with a look at some of the confidentiality concerns and other practical obstacles that might prevent defense attorneys from creating and relying on a database of plea bargains.

The data necessary to connect individual criminal cases together is arriving slowly in the criminal courts.⁶ Big data is shaping every aspect of criminal justice, from policing⁷ to selecting charges,⁸ and from setting bail⁹ to sentencing.¹⁰ Data now informs the leaders of prosecutor and public defender offices as they set office priorities and manage their attorneys.¹¹ The individual attorneys who negotiate guilty pleas could likewise benefit from access to data beyond their individual caseloads. Crowdsourced plea-bargaining data can help attorneys to connect the dots between cases and escape the illusion that they negotiate alone.

6. See generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009).

7. See generally ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING: SURVEILLANCE, RACE, AND THE FUTURE OF LAW ENFORCEMENT* (2017); Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541 (2016).

8. See Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 734 (2016).

9. See Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, in 3 *REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES* 21, 35 (Erik Luna ed., 2017).

10. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); Marc L. Miller & Ronald F. Wright, *The Wisdom We Have Lost: Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 362 (2005); Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 328 (2015).

11. See Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057 (2015); BESIKI LUKA KUTATELADZE ET AL., *PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE* (2018).

II. CROWDSOURCING AT PRESENT: GROUP NEGOTIATION SETTINGS

Field observations and interviews in various state court settings offer a glimpse into how attorneys engage in plea bargaining in group settings. In this Part, we review some remarkable group negotiations that we learned about during interviews with judges, defense attorneys, and prosecutors in a variety of jurisdictions across the nation. The following features seem particularly noteworthy: the parity (or lack of parity) in the number of prosecutors and defense attorneys participating, the degree to which prosecutors have discretion to alter plea offers on the spot, and the presence (literal or figurative) of the judge during the negotiation.

A. *Sharkfest I: A Roomful of Attorneys*

Arizona's Yavapai County has a population just over 200,000. The elected prosecutor, known as the County Attorney, shares a two-story building with the sheriff just a short drive up the hill from the courthouse. The County Attorney's second-floor office includes a room—approximately twenty by thirty feet, carpeted, and furnished with a table on one side and rows of chairs on the other—that is set aside for conferences. For a few years, this was the setting of a weekly meeting of local attorneys to negotiate guilty pleas in cases assigned to the fast-track Early Disposition Court.¹²

The prosecutor's official name for this gathering was the Case Resolution Conference.¹³ But given the high concentration of attorneys and aggressive negotiations happening in the room, local defense attorneys coined the name "Sharkfest," and it stuck. Sharkfests lasted from 1:00 until closing time every Friday afternoon. During this time, perhaps a dozen defense attorneys would cycle through, but there were usually more prosecutors in the room than defense attorneys. The appeal of Sharkfest for defense attorneys was the chance to resolve a stack of case files in a single afternoon; the session was, therefore, most attractive to the public defenders and the private attorneys with the largest caseloads.

Each defense attorney talked first to the line prosecutor assigned to the case. One defense attorney described the purpose of Sharkfest like this: "We would get together, flesh out issues in the evidence, develop

12. The account here is based on interviews with attorneys and judges in Yavapai County, first in 2011 and then in February 2017. The 2011 interviews were reported briefly in Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265 (2012).

13. Interview with Assistant County Attorneys, in Prescott, Arizona. (Feb. 9, 2017) [hereinafter ACA Interview].

mitigation possibilities, and meet in the middle.”¹⁴ The defenders often knew about mitigation that did not appear in the State’s file. Defense lawyers usually got a fuller statement from the client than the account the suspect gave to the police, and those details sometimes helped defendants. The attorneys also pointed out to the prosecutor viable suppression motions, even when they were not clear winners.

The case negotiation happened in front of a fairly vocal audience. Other prosecutors, for example, would chime in on cases that were not their own, calling out suggestions from across the room. Sometimes four or five people talked at once. The defense attorneys in the room would also listen to the conversations and might add an observation from time to time about similar cases from the past. A few defense attorneys enjoyed the “performance aspect” of arguing with several prosecutors at once; others found the atmosphere hostile because the roomful of prosecutors “just beat up on them.”¹⁵ But mostly the defense attorneys were more hesitant to talk about cases that were not their own. For one thing, they just didn’t know enough about another attorney’s case. Negotiators needed to know particulars about the defendant’s prior record or the evidence that might be inadmissible. Further, when the defense attorney hoped to make the current case seem distinctive, he or she would ask for a result that did not neatly fit within the rules or prior resolutions.

Sharkfest died only a few years after it began when the judges in Early Disposition Court started allowing continuances more often, which reduced the pressure to work out a deal within the narrow time window. Defense attorneys report that they do not miss the Sharkfest era because the atmosphere could sometimes be toxic compared to a one-on-one negotiation: “*When nobody else was watching*, the line prosecutor didn’t have to look tough, didn’t have to prove that there were no cracks in his armor.”¹⁶ Moreover, defense attorneys believed that Sharkfest made it harder for them and for the Assistant County Attorneys to maneuver around the “problem supervisors” who blocked deals in the Sharkfest conference room.¹⁷

14. Interview with Mat Cochran, in Prescott, Arizona. (Feb. 10, 2017) [hereinafter Cochran Interview].

15. See ACA Interview, *supra* note 13. Judge John Napper, a former Public Defender, described it like this: “The defense attorneys would go one at a time. Others were just bullshitting with each other in different parts of the room, waiting for their cases to come up. Nobody was listening to the prosecutor and defense attorney talking about their case. If people did get involved in the conversation, it would become three or four prosecutors against one defense attorney.” Interview with Hon. John Napper, in Camp Verde, Arizona. (Feb. 10, 2017) [hereinafter Napper Interview].

16. Napper Interview, *supra* note 15 (emphasis added).

17. In a regime of one-on-one negotiation, defense attorneys sometimes receive a call from a line prosecutor when a problematic supervisor leaves the building, saying, “Get over here now and let’s sign the agreement while he’s not here to call in for a review.” Cochran Interview, *supra* note 14.

One final reason led defense attorneys to abandon Sharkfest. The ethical quandary of defense work became all too clear when negotiating over a stack of files, implicitly trading concessions in one case for benefits in another. This quandary could happen more slowly and implicitly in other settings, but seeing the connections among cases on a weekly basis unsettled some defense attorneys: “My philosophy was, if you view the cases as a stack of files, you’re not acting as an attorney.”¹⁸

B. *Sharkfest 2: Add Judges and Stir*

Group plea bargaining sessions also take place in Michigan, Florida, and California.¹⁹ The wrinkle in these jurisdictions is the influence of judges, who organize and preside at the conferences; in fact, the meetings often take place in the judge’s chambers or in the jury room adjacent to the judge’s courtroom. Retained and appointed counsel, the public defender, and the prosecutors assigned to these cases all attend. They negotiate the cases on that day’s docket in each other’s presence and in front of the judge. In some jurisdictions, the lawyers on each case quickly summarize the evidence for the judge, what one attorney called “a mini trial in two minutes.”²⁰ In others, the judge listens as the lawyers discuss the case between themselves.²¹ In other words, the meetings involve discussion of “one case at a time with everybody listening.”²² Negotiation in this setting is “a collective endeavor.”²³ A judge described the dynamic in these terms:

The DA has a cart with the cases on the calendar for that morning, and [all the lawyers] come in together and sit down. And the discussions just commence, they go through calendar one by one. They are doing most of the talking to each other. As the judge[,] . . . I listen and see if I can help resolve the case.²⁴

To be clear, in the jurisdictions we examined, not all judges convene plea bargain sessions. Certain judges take this approach, while others do not. But among the group of judges that do, it is their regular practice; this is not a technique reserved only for the handful of cases that have reached an impasse.

18. Napper Interview, *supra* note 15.

19. See Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Involvement in Negotiations*, 95 TEX. L. REV. 325, 342 (2016).

20. *Id.* at 343 n.99.

21. *Id.* at 342–43.

22. See *id.*

23. *Id.* at 343.

24. NANCY KING & RONALD WRIGHT, MANAGERIAL JUDGING AND JUDICIAL PLEA NEGOTIATIONS: FURTHER EVIDENCE 6–7 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2972294 (Report accompanying King & Wright, *supra* note 19).

The defense attorneys and most of the prosecutors told us that they generally favor these sessions because they believe that the judge's presence offers a number of advantages over negotiation sessions occurring between the two attorneys alone. For example, the judge can suggest charging and sentencing options; the judge can correct potential legal errors before they make it into the record; the prosecutor can use predictions about the judge's response to manage victim expectations; and the defense attorney can use predictions about the judge's response to manage defendant expectations. And oftentimes, the judge's view of the case leads to the offer of a more lenient sentence for the defendant, as the prosecutor recalculates the chances of success on the merits.²⁵

Moreover, participants report that the presence of multiple attorneys in the same room provides benefits beyond those added by the judge. First, negotiating a case in front of an audience of experienced litigators creates an incentive for the negotiating lawyers to "be reasonable."²⁶ Assertions of case worth (by either side) that strike the audience as clearly outside the market rate for the alleged crime yield laughter or noisy protests. As one judge said, "Sometimes, when either side is being unreasonable, the attorneys would chime in and say, 'Come on now, nobody ever gets that!'"²⁷ Second, the shared meetings permit more experienced defense counsel to help the rookie attorneys avoid serious errors.²⁸ Veteran attorneys sometimes provide advice directly, but more often, they simply model effective behavior for the junior cohorts. As one attorney explained, the younger attorneys learn a lot when they "watch[] and listen[] to the older attorneys" during these sessions.²⁹

C. *Sharkfest 3: Bargaining in the Shadow of the Judge*

The courts in Fulton County (Atlanta), Georgia present one further variation in the attorneys-plus-judge negotiation setting. In this version, judges influence the outcomes even though they are not present in the negotiation room because attorneys are aware of the judges' reputations for case resolution through non-negotiated pleas.

Pre-trial hearing day in the Non-Complex Division of the Superior Court brings together one or two prosecutors and multiple defenders

25. King & Wright, *supra* note 19, at 328–29.

26. *Id.* at 342–43. Quoting another judge: "It is one case at a time with everybody listening. . . . [Interruptions usually come up] in a good-natured way. . . . The defense lawyers will say to the prosecutor, 'Come on!' or they'll say, 'Gee, Judge, you gotta do something.' And I'll say, 'I'm not looking to take a vote here!'"

27. *Id.* at 343 n.99 (internal citations omitted).

28. *Id.* at 343 (describing a judge who asked one attorney to explain the sentencing guidelines to an attorney who did not understand them).

29. *Id.* at 367.

with cases set for trial the following week.³⁰ They gather in a conference room adjacent to the courtroom—stacks of files in hand—and take seats around a long oval table. Defense attorneys move in and out of the room with ease; the junior prosecutor who is responsible for all of these cases sits uneasily next to the supervisor, and the defense attorneys wait their turn to speak. While the defense attorneys come to this conference ready to negotiate, the line prosecutor has only a formulaic plea offer for each case; he or she has no authority to dismiss charges or depart from the standard charge offer as designated in office guidelines.³¹

Although the supervisor is present in the room, getting her input on every deal dramatically slows down the negotiation process for several reasons. First, the supervisor can consider only one case at a time. Second, defense attorneys believe the supervisor knows nothing about the cases and must learn about the facts from the junior prosecutor.³² One defense attorney summarized the atmosphere like this:

[T]he ADA who's on that track . . . is there, but the decision making capacity [is] the sole responsibility of that supervisory prosecutor [S]o what it boils down to is a very[,] very long day where everybody, in terms of defense attorneys, sits around and waits for this one individual, waits for an opportunity to sit down with that individual and potentially discuss some sort of case resolution. . . . [I]t's a situation where most things don't get resolved. . . . I think it's a lot of pressure and work for the one supervisor to sit and continually go through matters, and in a room full of defense attorneys where everyone's basically asking for a break for their client. And I think it breeds an environment where, in my opinion . . . [i]t becomes so adversarial at times³³

Defense attorneys also perceive the supervisor as lacking legal common sense: “[The supervisor] does not possess the ability to read the case and I don't think she possesses the ability to, understand . . . I

30. This description of courts in Fulton County, Georgia is based on interviews that Kay Levine conducted during 2013 and 2016. The National Science Foundation sponsored the field research reported here. This Essay is based upon work supported by the National Science Foundation under Grant Number NSF SES-1252125. Any opinions, findings, and conclusions or recommendations expressed in this Essay are those of the Authors and do not necessarily reflect the views of the National Science Foundation.

31. Prosecutors explained that the guidelines were adopted over a decade ago to instill uniformity. But one more cynical prosecutor acknowledged that they served a second purpose too: when a case results in a non-negotiated plea with the judge, the prosecutor has gone “on record as having made this recommendation” so “when something blows up,” the office won't be blamed. Interview with Prosecutor 114, in Fulton County, Georgia.

32. “[F]rom my experience it looks like when the supervisor sits down, this is the first time she's looking at these matters. So we're spending time with her actually literally reading the police report. . . .” Interview with Defense Attorney 203, in Fulton County, Georgia.

33. *Id.*

guess, my arguments about humanity,”³⁴ lamented one defender, expressing an opinion widely shared among her colleagues.

Although the weekly conferences in the Atlanta courtroom produce few plea bargains and waste the time of many who attend, defense attorneys treat this outcome more as an opportunity than a disappointment. They know that the presiding magistrate will, in many cases, offer the defendant a non-negotiated plea and impose a sentence lower than the prosecutor’s office guidelines allow. Because the magistrate’s reputation for dispositions is well-known, defense lawyers often advise their clients to take their cases to trial or to enter an open plea of guilty without reaching an agreement with the prosecutor.³⁵ The prosecutors have become largely “irrelevant” to the process of resolving cases in this division³⁶ because the judge is regularly “finding the middle point” to compensate for the absence of prosecutorial discretion.³⁷

Notably, this series of lenient rulings is not unique to this particular magistrate; her predecessor had been known as even more lenient. According to attorneys on both sides, the Superior Court judges hire each magistrate to actively move the caseload and to help reduce the county jail population.³⁸ The magistrate, therefore, is professionally encouraged to give dispositions with small amounts of custody time and to offer probation to all but the worst offenders.

Many of the line prosecutors expressed surprisingly little frustration with this arrangement. Even though they sometimes resent their inability to stray from office guidelines in pursuit of substantive justice, they understand (and sometimes agree with) the tendencies of the magistrates to ignore their office’s sentencing recommendations. For example, Prosecutor 113 said he felt the office guidelines were “a little frustrating” because they did not allow prosecutors to make decisions

34. Interview with Defense Attorney 201, in Fulton County, Georgia.

35. Defense Attorney 211 described it like this: “[T]he idea that they can’t dismiss cases without supervisor approval results in us having a trial calendar with seventy people on it and prosecutors so overwhelmed that I get the result I want . . . [W]hen I push the best cases I have for dismissal, those will get dismissed but on top of that, some of the ones which factually could have gone in our favor or against us, the prosecutor will just dismiss because they need to focus on cases that are winners for them.” Interview with Defense Attorney 211, in Fulton County, Georgia.

36. Interview with Defense Attorney 213, in Fulton County, Georgia.

37. Interview with Defense Attorney 206, in Fulton County, Georgia.

38. Interview with Prosecutor 104, in Fulton County, Georgia (“I think the magistrates’ mission is just to move cases, to keep the people out of jail, to get the jail numbers down, to get us out from underneath that federal decree, to move the cases.”). Prosecutor 118 explained the financial connection, “Jail time equates to money. And so jail space is reserved for those violent offenders [not for the offenders in the Non-Complex Unit].” Interview with Prosecutor 118, in Fulton County, Georgia. Prosecutor 112 was even more cynical: he asserted that in the Non-Complex Unit, it just comes down to whoever “yells the loudest at the judge to be able to have their verdict considered . . . whoever had the last word and yelled loudest would win.” Interview with Prosecutor 112, in Fulton County, Georgia.

“based on the facts.”³⁹ But the longer he was in the Non-Complex Unit, the more comfortable he became making the standard, required recommendations because he understood “the judges were going to do what the judges were going to do.”⁴⁰

III. CROWDSOURCING IN THE FUTURE: PLEA DEAL DATABASES

Each of the courts we described in Part II created an opportunity for plea negotiations to occur among many attorneys simultaneously, sometimes with a judge present or in the judge’s shadow. Our interviews suggest that one consequence of this group negotiation setting is an *audience effect*: Negotiators sometimes behave differently when they know that others are watching the performance.⁴¹ A related consequence is the creation of *precedent*: When the negotiators in one case reach an outcome in front of the group, that outcome might affect later negotiations in other cases because its terms cannot be kept confidential. To be sure, the fear of creating precedent may keep some deals from being struck in this very public way—a concern raised in both Yavapai and Atlanta.⁴²

We believe these same two effects—audience and precedent—could also happen if defense attorneys had access to a shared database that captured key features of past plea negotiations. Those who consult the database prior to a new negotiation might benefit from the visible track record of local practices. And those who commit to adding new data for others to consult later would negotiate with an awareness of that future audience. The database would thus eliminate the need for attorneys to participate in courtroom Sharkfests to get information about how similar cases resolved because all attorneys (retained or appointed, solo practitioners or those in institutional settings) would have access to this information.

39. Interview with Prosecutor 113, in Fulton County, Georgia.

40. *Id.*

41. See generally DANIEL KAHNEMAN, PAUL SLOVIC & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982); see also Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100 (2001).

42. Defense Attorney 203 described it like this: “It’s about perception, how the particular supervisory ADA, or however you want to characterize her, wants to be perceived. So I think definitely, absolutely, undoubtedly having these negotiations take place in front of other attorneys that are not on those cases has a negative impact on resolution or, in my opinion, just resolution. . . . I think when other—the presence of other defense attorneys—it makes the situation, it just becomes a show, if you will. . . . It’s about like, ‘send a message,’ like ‘we’re tough, we’re tough on these things,’ or ‘we’re tough on people with records.’” Interview with Defense Attorney 203, in Fulton County, Georgia.

A. *Comprehensive Negotiation Data*

What data points would a hypothetical database of plea negotiations capture? At a bare minimum, the data collected for each case would include: (1) the initial charge; (2) each offer and counteroffer from both parties; (3) the time elapsed since filing for each offer; (4) the time remaining before any date set for trial at the time of the agreement; and (5) the names of the attorneys and judges assigned to the case. They would also cover the terms of the final agreement: (6) any changes to the charges filed; (7) sentencing recommendations to the judge; (8) cooperation by the defendant; and (9) other terms of the final agreement. These data fields would help readers later to reconstruct the “what” and “when” of a plea agreement.

A more complete database might also address “why” by summarizing the reasons that convinced the parties to agree to a guilty plea. Such reasons might include: (10) the presence or absence of a suppression motion or a motion *in limine* regarding important evidence; (11) any consultations with the victim, the officer, or the defendant; along with (12) the dates of those consultations; (13) an assessment of the strength of the evidence in the case, after the likely resolution of any pretrial motions; and (14) the role of any mitigating factors in the defendant’s background. The reasons might also reflect systemic factors beyond the confines of a single case, such as: (15) the number of other cases set for trial in the same court session; (16) the relevance of an office policy that places an especially high or low priority on the category of case involved; and (17) the availability of non-prison sanctions or non-criminal responses to the social harm that the defendant caused.⁴³

Efforts to assemble rudimentary databases along these lines are starting to appear in practice. A few public defender offices ask their attorneys to record key information about their cases, to share only with their office colleagues.⁴⁴ Statewide administrators of appointed counsel systems collect some information about plea negotiations as part of their quality control efforts.⁴⁵ Prosecutor offices frequently track case data to supplement the data recorded by the clerk of the

43. Metzger and Ferguson proposed data collection in public defense offices, focused on the managerial needs of office leaders. *See Metzger & Ferguson, supra* note 11. For discussion of the value of plea offer databases for individual attorneys and clients, see Paul J. Hofer & William P. Adams, *Using Data for Policymaking, Litigation, and Judging*, 16 *FED. SENT. RPTR.* 8, 11 (2003) (discussing potential value of plea offer data for defense attorneys without specifying data points for collection); Joel Mallord, Note, *Putting Plea Bargaining on the Record*, 162 *U. PA. L. REV.* 683, 716–17 (2014) (proposing three components of a plea offer database for defense counsel).

44. *See Metzger & Ferguson, supra* note 11, at 1076.

45. *See N.C. COMM’N ON INDIGENT DEF. SERVS., REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY PURSUANT TO G.S. 7A-498.9*, at 36–37 (2018).

court.⁴⁶ In federal cases, defense attorneys use information about negotiated sentences in other cases to argue for leniency.⁴⁷ And finally, journalists, trade publications, and academics track the outcomes of plea negotiations in specialized categories of cases, such as federal criminal charges filed against organizational defendants.⁴⁸

If a jurisdiction were to pursue crowdsourcing through a more comprehensive database along the lines previously discussed, we expect it would impact the plea negotiation practices of the jurisdiction in (at least) two interesting ways. First, we anticipate that a shared database would produce an anchoring effect on negotiation outcomes; parties would diverge less often and less severely from the average sentence for each charge. Clients of solo practitioners and of new attorneys who might lack access to this type of data would feel the benefits. Second, widespread knowledge of average sentences will highlight the degree to which a prosecutor's offer may be an outlier, thereby providing cover to a judge who seeks to dispose of the case on more reasonable terms. We discuss each of these potential effects in more detail below.

B. *Stronger Anchoring and Fewer Outliers*

When one negotiator possesses facts the other doesn't have, the latter is less likely to know when a deal is in his or her best interest.⁴⁹ This asymmetry can prevent deals from forming, but it also might help one side bluff about its preferences and enter a deal based on misunderstood facts.⁵⁰

One task of the litigator during negotiation is to determine the likely amount the court would award or impose after a finding of liability. In the criminal context, that means the sentence that a judge would impose after trial, along with the terms of the sentence, that the

46. See KUTATELADZE ET AL., *supra* note 11; Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129–30 (2008). Managers in the prosecutor's office use the supplemental case data to evaluate office performance and sometimes to explain their operations to the public. *Id.* at 130.

47. See ADVISORY COMMITTEE ON CRIMINAL RULES, MEETING OF THE ADVISORY COMMITTEE ON CRIMINAL RULES 149, 165, 177–78 (2017), available at <http://www.uscourts.gov/sites/default/files/2017-10-criminal-agenda-book.pdf>. See also ADVISORY COMMITTEE ON CRIMINAL RULES MINUTES 11, 17–18 (2017), available at http://www.uscourts.gov/sites/default/files/spring_2017_criminal_rules_committee_meeting_minutes_final_0.pdf (noting defense attorneys need access to other defendants' plea and sentencing materials in order to make arguments under 18 U.S.C. § 3553(a)(6) (2018)).

48. See Brandon Garrett, *Corporate Prosecution Registry*, U. VA. ARTHUR J. MORRIS L. LIBR., <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html> (last visited Feb. 9, 2018) [<https://perma.cc/3V9R-825E>].

49. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1987); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

50. See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. DISP. RESOL. 235, 240–41 (1993).

defendant in fact will serve. That prediction of a post-trial sentence, in combination with the odds of success at trial, should lead to a simple rational calculation of the proper punishment amount.

Reference point heuristics, however, make this straightforward process more intricate, even for experienced attorneys who should be able to gauge objectively what the judge will do. According to the “anchoring” heuristic, the first number that a negotiator mentions during the exchange sets the frame of reference.⁵¹ Even when the number amounts to a completely unrealistic proposal to resolve the case, it becomes the anchor of the whole discussion—the number exerts a pull on the eventual amount of the settlement.⁵² For instance, during a plea negotiation, imagine if the prosecutor opens the negotiation by saying, “The last case I had like this resulted in eight years in prison,” or if the defense attorney asserts first, “The last client I had with these charges got six months in county jail.” In either case, the “eight years” or “six months” sets the threshold against which all future numbers will be judged by both parties simply because it was the first concrete number mentioned.

Crowdsourcing plea negotiations through a database is likely to impact the selection of anchors. In an active group negotiation context—like the Sharkfests in Arizona, Georgia, Michigan, and Florida—other lawyers in the room talk about sentences from their similar cases, in terms of jail time, years of probation, or collateral consequences.⁵³ If a comprehensive database were to become available, no longer would lawyers reference simply “the last case I had like this” to set the anchor; information about all similar cases would be accessible by any lawyer, at any time, even if other lawyers were not part of the same practice or were not in the room at the time of the negotiation.⁵⁴ In other words, the database entries would create anchors against which negotiators might frame their own deals.

The database might also produce a deterrent effect. Prosecutors aware of the database might hesitate to propose harsh deals that seem completely outside the local market norms, which would spare defendants from harsher outcomes than normal. But there might be a deterrent effect on the defense side, too. Anchoring effects might discourage audacious defense lawyers from going for broke; they might

51. See Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights From Meta-Analysis*, 21 OHIO ST. J. DISP. RESOL. 597, 597–98 (2006).

52. See Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1485 (2016).

53. See generally Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901 (2017).

54. In that respect, our proposal resembles a sentencing database used by judges in a few countries. See Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1383 (2005).

stop asking for lenient dispositions that are far outside the norms reflected in the database. While some defense attorneys might find it useful to know the market price before making a bold pitch, others might feel constrained by the anchor the database sets.

The beneficial impact of the database becomes particularly important for defense attorneys who do not already have a home office of colleagues with whom to discuss cases. These solo-practice attorneys do not have an institution—like the public defender’s office or a small firm partnership—to return to after court to help inform or advise about whether this plea offer is a good deal. Without the help of comrades who have experience in the jurisdiction, a solo practitioner may be left to wonder about whether this prosecutor is offering a fair deal or whether this officer has a checkered history. Using the language of negotiation theory, the database can correct some of the information asymmetry that the solo defender might otherwise experience because it can improve the lawyer’s ability to compare proposed outcomes to other cases with similar features.⁵⁵ Moreover, the prosecutor’s advantage in prisoner’s dilemma situations probably shrinks in a crowd-source setting, as the database entries can offer insight on the chances that the prosecutor is bluffing.⁵⁶

C. *Judicial Influence Strengthened*

Considering the impact of a database on jurisdictions where judges participate in plea negotiations requires a bit more nuance because judges do not play a uniform role across courtrooms. In the four states where we learned about judicial participation (Florida, Michigan, California, and Georgia), judges were sources of influence in the negotiations—they took it upon themselves to independently evaluate the worth of the case under discussion and to offer their views on how the case should resolve—but they did not always move in the same direction. Given that variation, how might we expect our proposed comprehensive database to influence the judge’s role in negotiations?

Recall that the primary driver of the low plea rate in the Atlanta Sharkfest was the conflict between the judge and the prosecutor’s office: The judge’s reputation for undercutting the prosecutor’s office guidelines was well-known.⁵⁷ The defense attorneys knew, from prior personal experience and from their colleagues’ experience, that they could obtain better outcomes for their clients by dealing directly with the judge. Given this history, a database that documented patterns of lenient judicial decision-making would reinforce a defense attorney’s

55. See Andrea Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations*, 91 MARQ. L. REV. 145 (2007).

56. See Douglas Savitsky, *Is Plea Bargaining a Rational Choice? Plea Bargaining as an Engine of Racial Stratification and Overcrowding in the United States Prison System*, 24 RATIONALITY & SOC’Y 131 (2012).

57. See *supra* note 35.

intuition (and anecdotes) that his client is better off with the judge than with the District Attorney.

In the Michigan, California, and Florida Sharkfests—where judges actively convene the negotiating sessions—the database would have less predictable results. As in Atlanta, the availability of a database would allow attorneys to compare the judge's assessment of a case's worth to the evidence of prior dispositions; depending on the closeness of fit, this comparison might result in the parties striking a quicker deal or the defendant setting his case for trial. But in these jurisdictions, the pattern of judicial behavior is less clear than it is in Atlanta, and interviewees told us that it tends to vary significantly by courtroom.⁵⁸ Given the high levels of variation, particularly if the judge convening the plea conference would also be the trial judge, historical patterns of dispositions across the entire jurisdiction may be less relevant than the judge's asserted, real-time point of view about a particular case. This judge is, after all, the person who would be pronouncing judgment following conviction. Moreover, the judge has no duty to act consistently with prior cases when imposing sentence on this particular defendant. While historical plea evidence might be grounds for argument during a sentencing hearing, the judge would only be bound by statute and court rule (or, where binding, sentencing guidelines) when sentencing after trial.

D. *Barriers to Building Plea Agreement Databases for Defenders*

The database we outlined above is speculative, to be sure. We recognize that the comprehensiveness of the database depends on the willingness of attorneys to provide information about their own cases. The task of data entry is tedious. Attorneys will resist any suggestion that they should take the time to record details about today's case to help unidentified lawyers in the future. They might also raise ethical objections to recording that data because it does not help the particular client whose bargain is being recorded. Attorneys for indigent defendants would likely raise profound confidentiality objections to a database shared with defense attorneys outside the public defender's office.⁵⁹

Thus, if database participation is purely voluntary, it is likely to be minimal and not representative of the jurisdiction's criminal docket. Policies that encourage defense attorneys to participate would need to

58. See King & Wright, *supra* note 19, at 388–92 (describing variation of judicial involvement within ten jurisdictions).

59. The confidentiality concerns for defense attorneys would likely become geometrically more difficult if the database were available to actors other than defense attorneys. Stephanos Bibas speculated about the use of databases of sentencing outcomes and plea offers, available simultaneously to different actors. See Bibas, *supra* note 49, at 2532; John Zeleznikow & Andrew Vincent, *Providing Decision Support for Negotiation: The Need for Adding Notions of Fairness to Those of Interests*, 38 U. Tol. L. Rev. 1199, 1221 (2007).

come from the leadership of the public defender office, the appointed counsel coordinator, or the statewide criminal defense organization.⁶⁰ Those policies might create a presumption of data entry, requiring attorneys who want to exempt their clients to articulate reasons specific to the case at hand.

Under a coordinated system, if some attorneys are careless or dilatory in their submissions, important details about cases settled by plea will be unavailable to other attorneys who need them. The risk of incomplete or delayed information may be particularly salient in low-level cases, which make up the bulk of the criminal court docket, because attorney caseloads in the lower courts are astronomical.⁶¹ Relatedly, some information might be available but controversial to include; the judge's identity, for example, is excluded from the federal case databases available to the public and might need to be excluded from a defense attorney database as well.

The database developers would also need to anticipate that not all users have legitimate purposes in mind. Research by the Federal Judicial Center (documenting incidents of threats and harm to prisoners suspected of cooperating with the government)⁶² recently prompted a committee of the federal judiciary to consider ways to disguise publicly available information about pleas and sentencing so that those accessing information on PACER could not identify who cooperated with the government.⁶³ Cooperation is a key component of some plea negotiations, although it is unknown how many. Eliminating the defendant's name and actual case number helps with anonymity, but other case details may allow identification anyway.⁶⁴ Even excluding cases in which defendants cooperated would flag those excluded cases as involving cooperators.

Given the concerns about confidentiality, the database developer might need to create firewalls within the database, to restrict certain data points to authorized users. Defense attorneys outside the public

60. Privately retained defense attorneys might be allowed access to the database only after agreeing to provide data from their own cases.

61. See ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 958 (2018).

62. The survey was conducted by the Federal Judicial Center. See MARGARET S. WILLIAMS ET AL., FED. JUD. CTR., SURVEY OF HARM TO COOPERATORS: FINAL REPORT (2016).

63. See ADVISORY COMMITTEE ON CRIMINAL RULES, AGENDA BOOK (2016), available at http://www.uscourts.gov/sites/default/files/2016-09-criminal-agenda_book_0.pdf. The Federal Rules Advisory Committee subsequently decided against incorporating the Committee's proposals into a proposed amendment to the Rules. See ADVISORY COMMITTEE ON CRIMINAL RULES, AGENDA BOOK 120–22 (2018).

64. On the need for more anonymized criminal justice data, see Samuel R. Wiseman, *The Criminal Justice Black Box*, 78 OHIO ST. L.J. 349 (2017); David L. Snyder, *Nonparty Remote Electronic Access to Plea Agreements in the Second Circuit*, 35 FORDHAM URB. L.J. 1263 (2008).

defender's office would need to agree to respect the confidentiality of individual client information reflected in the database. Moreover, an attorney's assessment of strength of evidence would reflect work product and would only be available to attorneys working within the same law firm or office as the attorney assigned to the case.⁶⁵ Pursuant to this design, database users with different levels of permission would have access to different data points about each case, while other information about the case would be shared among all practicing defense attorneys in the jurisdiction.

IV. CONCLUSION

The unequal bargaining power of the parties is likely to remain the largest obstacle to improving the quality of deals. Prosecutors derive their power from the state criminal codes, which have grown immensely over the past half-century, and from the relative scarcity of case law governing prosecutorial discretionary choices. The plea offers they make generally reflect those realities, and crowdsourced databases or negotiation settings do not alter that terrain.⁶⁶

If it could overcome all the obstacles, crowdsourced defense information has the capacity to reshape plea bargaining patterns in some places and in some cases. In the jurisdictions we observed, we saw the potential for change when judges were part of the crowd. After hearing negotiations across many cases, some judges were willing to speak up and voice their disagreements with prosecutorial plea offers or express their concern about the weak correlation between the proffered evidence and the charges in the indictment. In so doing, the judges created some real limits on prosecutorial discretion. Prosecutors could still make offers, but they lost the ability to force those offers onto defendants who had no other realistic options.

Crowdsourced plea bargain data, in the short run, might help isolated attorneys avoid selling too cheaply or selling out too early. And in the long run, this data might provide the detailed portrait necessary to convince courtroom actors and political actors—and ultimately the voting public—where and how to change the bargaining options at a deeper level.

65. For examples of comparable handicapping of cases by attorneys or insurance agents, see John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1546 (2017); Catherine T. Harris & Ralph A. Peeples, *Medical Errors, Medical Malpractice and Death Cases in North Carolina: The Impact of Demographic and Medical Systems Variables*, 7 CONTEMP. READINGS IN L. & SOC. JUST. 46, 48 (2015).

66. See Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARO. L. REV. 213 (2007).