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Standardization and Routine in Criminal Law

*Eric S. Fish**

The criminal justice system processes millions of cases per year. To handle so much volume, it needs to operate like a factory. The system requires an efficient information economy that takes complex fact patterns and reduces them to abstract, simplified, and standardized inputs. Each defendant who comes into the courthouse is thus reduced to a limited set of well-defined data points—their current criminal charge and their past arrests and convictions. This simplification renders defendants legible to the system and capable of efficient processing. The courthouse workgroup (prosecutors, defense lawyers, and judges) decides case outcomes based on a well-defined plea bargain market that is keyed to those inputs. This plea bargain market is structured by statutes, sentencing guidelines, prosecutorial policies, and local courthouse norms. The courthouse workgroup determines how the plea bargain market functions and shares a collective sense of each case's "value" based on these limited inputs. The lawyers negotiate efficiently around standard plea offers and keep the factory humming.

This high-efficiency case-processing model leaves limited room for individual consideration. It thus impairs efforts at holistic justice. Context-dependent facts about a criminal defendant that make them sympathetic—things like being a victim of abuse, suffering from homelessness or drug addiction, or being coerced into committing the crime—are illegible to the case-processing machinery. They do not register as standard inputs. If the system is to consider them, it must diverge from its normal efficient mode. Defense lawyers must make an extra effort to present the defendant's equities to judges and prosecutors. Judges and prosecutors, in turn, must grant extra attention and special consideration. If the system is operating in its default mode, such high-

* Law Professor, University of California Davis. For their extremely helpful feedback the author would like to thank Nila Bala, Jeffrey Bellin, Chesa Boudin, Federica Coppola, Max Etchemendy, Farhang Heydari, Jamelia Morgan, Christopher Slobogin, Jenia Turner, Ron Wright, Rebeca Wexler, and the participants in the Holistic Criminal Justice symposium at Vanderbilt Law School. Special thanks to Hadar Dancig-Rosenberg and to the editors of the *Vanderbilt Law Review*.

quality deliberation will be the exception and not the norm. Alternative dispositions like diversion and dismissal are more likely to thrive if they are standard outputs in the plea bargain market. For example, diversion can be automatically granted to first-time offenders without slowing the system down. But if alternative outcomes require special, qualitative, individual consideration, they will normally be foreclosed by the system's efficiency imperative.

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INTRODUCTION

Each year, American criminal courts hear more than ten million cases.[1] To process so much volume, the criminal justice system must work efficiently.[2] Courthouses, for the most part, function not as sites of adversary adjudication, but rather as fast-paced manufacturers of case dispositions. Nearly all criminal cases end in a guilty plea, a dismissal, or another type of informal outcome.[3] Trials represent a rare failure state where the efficiency norm breaks down. Prosecutors,

1. *See Court Statistics Project: Trial Court Caseload Overview*, NAT'L CTR. FOR STATE CTS. (Oct. 2024), https://www.ncsctableauserver.org/t/Research/views/TrialDashboards/Overview [https://perma.cc/CV6Q-5TC6] (click the "Caseload Detail" tab in the navigation menu and select the "Total Criminal" icon) (surveying criminal caseloads in thirty-four states and reporting annual totals ranging from approximately eleven million to thirteen million cases between 2019 and 2023); Alexandra Natapoff, *Misdemeanors*, *in* ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM 73, 73 (Erik Luna ed., 2017) ("With over 10 million minor cases filed every year, compared to 3 to 4 million felonies, misdemeanors constitute approximately 80% of state dockets.").

2. *See* Jeffrey Bellin, *Symposium Introduction: The Volume Problem*, 65 WM. & MARY L. REV. 777, 780 (2024) ("Enormous volume has transformed the system into a kind of loosely controlled bureaucratic chaos, an assembly line approach to enforcing criminal law.").

3. *See* RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 1 (2020), https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf [https://perma.cc/YUU2-ERH2].

defense lawyers, and judges (the "courtroom workgroup") are all incentivized to dispose of each new case quickly.[4] Whatever their other professional goals, they all want to move cases from the inbox into the outbox. Consequently, the system's default output is an informal disposition, swiftly agreed to, taking up few adjudicative resources, that lets the lawyers move on to the next case.

This efficient case processing model requires a streamlined information economy.[5] That means the system's inputs must be simplified and standardized. Each new case needs to be fitted into a well-defined category that the members of the courtroom workgroup recognize and know what to do with. Criminal charges serve that function.[6] The facts of the case—what the defendant is accused of doing—are reduced to one (or several) of a limited number of criminal charges. These charges are usually familiar to the courtroom workgroup, which sees the same kinds of cases day after day. The defendant's past criminal cases are also treated as inputs. Prior convictions, as well as prior criminal charges that fell short of conviction, help dictate what will happen in the current case.[7]

The courtroom workgroup—prosecutors, defense lawyers, and judges—takes these standardized inputs and uses them to negotiate case outcomes. This happens through a mutually understood plea bargain market. Prosecutors and defense lawyers share a common, local sense of a particular case's "value" in punishment terms.[8] The market

4. This phrase comes from JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 63 (1977). *See also* Christi Metcalfe, *The Role of Courtroom Workgroups in Felony Case Dispositions: An Analysis of Workgroup Familiarity and Similarity*, 50 LAW & SOC'Y REV. 637, 639 (2016) (noting that prosecutors, defense lawyers, and judges alike feel pressured to "move[ ] cases quickly to resolution").

5. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 10 (1964):

> Speed, in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court; it follows that extrajudicial processes should be preferred to judicial processes, informal to formal operations.

6. *See* Nancy Merritt, *Courtroom Communities: Criminal Case Processing and Sentencing Reform*, NAT'L INST. OF JUST. (Nov. 28, 2022), https://www.ojp.gov/pdffiles1/nij/304622.pdf [https://perma.cc/HGV6-3TGX] ("The majority of felony cases naturally fall into one of a number of standard categories in terms of the factors most frequently used to determine sentences: offense type, prior record, aggravating or mitigating circumstances, and strength of evidence.").

7. *See* Eric S. Fish, *The Paradox of Criminal History*, 42 CARDOZO L. REV. 1373, 1393–1411 (2021) (explaining how the criminal justice system relies on criminal history in processing defendants' cases).

8. For further discussion of plea bargaining as a market, see Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 921 (2016); DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW

rate for a first-time shoplifter might be diversion and dismissal. For a first-time drunk driver, it might be three years of unsupervised probation. For a third-time drunk driver, it might be ninety days in jail. And so forth.[9] The norms of the plea market are set by a variety of different policy decisions—statutes, sentencing guidelines, judicial sentencing practices, dictates from the prosecutor's office.[10] The system's default mode is to dispose of cases quickly at around the prevailing market rate.[11] A defense lawyer might sometimes negotiate for a better outcome, for example by using a legal issue to try to improve a plea bargain offer. Nonetheless, the norms of the local plea bargain market anchor case outcomes.

But what of holistic justice? This model of standardized case processing leaves little room for considering the whole defendant: their history, their needs, what they did, and why they did it. Indeed, holistic justice is impossible in the system's default mode. If the system is to consider the defendant as a whole person, it must slow down its case processing machinery. The lawyers must engage in substantive factfinding about the defendant's life and actions. And the point of a fast-paced plea system is to avoid factfinding. This is not to say that no one gets individualized consideration in the American criminal justice system. Some people do. Defendants in more serious cases (like murders and violent felonies). Wealthy defendants. Defendants in a politically popular category, such as military veterans.[12] The system is willing to slow down for certain people and give them a higher quality of justice. But such defendants are aberrations. If the system gave full, resource-intensive, individualized consideration to every defendant, it would

91 (2016); and Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 551 (2013).

9. These are roughly the market rates for these crimes in San Francisco misdemeanor court, where the author was a public defender, circa 2017.

10. *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1305 (2018).

11. *See* Packer, *supra* note 5, at 10–11:

> Informality is not enough; there must also be uniformity. Routine stereotyped procedures are essential if large numbers are being handled. The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly line or a conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file.

12. *See* Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZ. L. REV. 697, 699 (2017) ("In 2008, the first official [veteran treatment court] was established and by early 2014, there were approximately 350 [veteran treatment courts], veteran dockets, or tracks for veterans in an existing specialized docket throughout the United States, with hundreds more planned.").

slow down considerably. Caseloads would grow, calendars would be overloaded, and the courthouse workgroup would find work unpleasant.

The system's default mode thus distorts criminal justice. By focusing on standardized inputs, especially current and prior crimes, it deemphasizes qualitative and holistic variables. James Scott has provided a useful vocabulary for describing such distortion. In *Seeing Like a State*, Scott observed that state institutions simplify the objects of their regulation.[13] One of Scott's key concepts is *legibility*. For a complex phenomenon to be legible to the state, and therefore amenable to rational governance, the phenomenon must be abstracted, simplified, and standardized.[14] Often this means actually transforming the objects of governance. Standardized last names replace traditional naming conventions.[15] Common languages are imposed in place of local dialects.[16] Homogenous units of measurement replace local measuring norms.[17] Cities are built on easy-to-administer grids.[18] Chaotic forests are supplanted by neat rows of trees.[19] Everywhere standard, simplified, measurable knowledge replaces complex natural arrangements. This replacement happens not because it is better for the people being governed—often it is much worse.[20] Rather, it happens because governments need to efficiently control the objects of governance. And rendering those objects legible is crucial to efficient administration. Like standard measuring units and neatly lined trees, the plea bargain market is a Scottian project of legibility-making. It takes a complex underlying reality (the defendant's life and actions up through the moment of the crime) and reduces it to a small number of well-understood inputs (the current criminal charge and past criminal cases). Professionals then use those inputs to produce criminal case outcomes.[21] Naturally, those outcomes are insensitive to the complex underlying reality.

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13. JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 309 (1998).

14. *Id.* at 11, 22–27.

15. *Id.* at 64–71.

16. *Id.* at 72–73.

17. *Id.* at 30–33.

18. *Id.* at 53–63.

19. *Id.* at 15–22.

20. *See id.* at 309–11 ("In each case, the necessarily thin, schematic model of social organization and production animating the planning was inadequate as a set of instructions for creating a successful social order. By themselves, the simplified rules can never generate a functioning community, city, or economy.").

21. Herbert Packer's classic article attributes this feature of the system to a "crime control" model of criminal justice, as opposed to a "due process" model. Packer, *supra* note 5, at 13–14. This is an important insight. The choice to turn the system into a factory is downstream of the choice to mass produce convictions in response to crime. *See id.* at 9–10.

This Article proceeds in three parts. Part I describes how the criminal justice system reduces a defendant's case to legible inputs—criminal charges and prior cases. It then shows how these inputs are used to produce standard offers in a well-defined plea bargain market. Part II examines the incentives of prosecutors, defense lawyers, and judges as they process cases through the plea bargain market. Part III diagnoses the conflict between efficient case processing and holistic justice. It points out that holistic justice is incompatible with the system's default mode.

I. STANDARDIZATION

The criminal justice system reduces complex facts about a criminal defendant into simplified inputs that facilitate easy case processing. The two main inputs are the defendant's current criminal charges and the defendant's past criminal cases. Defining defendants through these limited data points renders them legible to the system. First, regarding criminal charges, most courthouses process a limited range of crimes on a day-to-day basis. While there are a very large number of crimes in the statute books, in practice, criminal courts mostly deal with a short list of common crimes. This standardization of criminal charges is driven by police choices about what kinds of behavior to target for arrest. It is also a product of court and attorney specialization. Each new defendant's actions are thus generally shoehorned into a well-understood criminal category, which necessarily omits much information about what the defendant did and why they did it. Second, criminal records are also standardized. A person's past criminal record reduces the complex factual reality of their past actions to arrests, charges, and sentences. And a past criminal record is the most important factor, aside from the current crime, in determining what will happen in the current case. Third, these inputs—the current charge and the past record—are translated into standardized plea bargain offers. Each criminal courthouse has a market rate for frequently charged crimes. This plea bargain market is set by sentencing guidelines, statutory sentencing rules, and local courthouse norms. Defense lawyers, prosecutors, and judges all understand the local plea bargain market and the prevailing rate for each combination of charge and criminal history. This mutual knowledge allows the system to process cases efficiently.

A. Standard Charges

When prosecutors charge someone with a crime, they reduce a complex set of real-world facts into a simplified legal category like "robbery," "drug possession," or "driving while intoxicated." This simplification renders the events in question legible to the legal system. But it also excludes a great deal of qualitative information about what happened. Take, for example, a drug smuggling case. If someone is arrested driving a car with concealed drugs from Mexico into the United States, they will be charged with importing a controlled substance.[22] The charging document will reflect the amount and type of drugs, as well as the allegation that the defendant was intentionally bringing them into the United States. And all of these facts, if proven or admitted, will trigger punishment. But many other facts are omitted from the criminal charge. How old is the person? Were they coerced into drug smuggling? Are they a drug addict? Do they have children? What was their life like up to the moment of arrest? Such information is relevant to moral culpability, and perhaps also relevant to the appropriate punishment. But it is not reflected in the standard criminal charges. A criminal charge thus simplifies a complex underlying reality into a limited set of salient data points. It abstracts the messy, local, and contingent substantive facts into an elegant, low-information legal category. The substantive facts may influence the decision of what crime to charge, for example more serious facts (like vulnerable victims or repeated conduct) might convince prosecutors to bring more severe charges. But these facts wash out once the charging decision is made. This simplification facilitates case processing by limiting the decisionmaking resources that must be applied in each case. It creates a convenient, if ultimately inaccurate, administrative shorthand.

The use of criminal charges also standardizes cases as they come into the court system. This is because courthouses in the United States, for the most part, process only a limited universe of crimes.[23] Each new case that comes in usually belongs to a category with which the courtroom workgroup is already familiar. It is true that the statute books are full of crimes, many of them exotic and obscure. Numerous scholars have critiqued the criminal justice system on this basis, arguing that it overcriminalizes.[24] But the day-to-day work of criminal

22. 21 U.S.C. § 952.

23. *See* Robert Leider, *The Modern Common Law of Crime*, 111 J. CRIM. L. & CRIMINOLOGY 407, 423–28 (2021) (observing that the most criminal cases in the state and federal systems involve a small number of core criminal charges).

24. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 229

courthouses is mostly limited to processing a small number of well-known charges. Consider, for example, federal courthouses along the U.S.-Mexico border. These are the busiest courthouses in the federal criminal justice system.[25] But they basically only deal with three kinds of cases: unlawful immigration, drug smuggling, and immigrant smuggling.[26] When one of these cases comes in on an average Tuesday, the prosecutors, defense lawyers, and judges are very familiar with the charge. An average state criminal courthouse deals with a somewhat larger variety of charges, but most cases still clump into a few familiar categories. The same kinds of charges recur day after day: larceny, drunk driving, simple assault, drug possession, etc. And the courtroom workgroup is commonly divided into specialized units that each deal with a more limited universe of crimes. Prosecutors' offices, for example, have prosecutors that focus only on certain kinds of cases—domestic violence, smuggling, drug dealing, etc.[27] Public defenders' offices also commonly divide their attorneys into different units, most commonly a misdemeanor and a felony unit. And judges are often assigned to subject matter–specific courtrooms that handle certain kinds of cases, like misdemeanors or domestic violence cases.[28] Indeed, these specialized courts are sometimes created for the specific purpose of making case processing more efficient.[29] This specialization further limits the variety of crimes that each lawyer and judge will see on a weekly basis.

(2007); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704–08 (2005); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 760 (2005).

25. *See* ADMIN. OFF. OF THE U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 2024, at tbl. D-3A (2024) (showing a significantly higher caseload for border districts than other districts).

26. *Id.*; 8 U.S.C. § 1326; *id.* § 1324; 21 U.S.C. § 952.

27. *See, e.g.*, Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1144–46 (2013) (describing the structure of three prosecutors' offices and their respective offense-based "units").

28. *See, e.g.*, Samantha Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature*, CTR. FOR CT. INNOVATION 1 (2009), https://www.innovatingjustice.org/wp-content/uploads/2009/12/DV_Court_Lit_Review.pdf [https://perma.cc/2LL7-8KVR] ("Although these courts vary substantially from jurisdiction to jurisdiction, they typically aggregate all or most of a jurisdiction's domestic violence cases in one or more courtrooms to be heard by one or more specially trained judges.").

29. *See, e.g.*, STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 117 (2005):

> In the late 1980s, with 26th Street's trial judges swamped in drug cases, Presiding Judge Thomas Fitzgerald established a drug night court program, shifting most of the building's drug cases to five courtrooms that commenced business at four P.M., after daytime staff had left. The program was aimed at easing the workload of the trial judges so they could concentrate on more serious cases. Fitzgerald also reasoned that judges and lawyers who specialized in drug cases would learn routines for disposing of them more efficiently.

The criminal justice system thus both simplifies and standardizes incoming cases. It reduces the facts of each incident to stylized criminal charges containing only a few pieces of information. And it processes a limited variety of typical charges. Such simplification and standardization render criminal incidents legible to the courtroom workgroup. Lawyers see the same kinds of crimes over and over. The underlying facts are different in each case, as are the defendants' lives and circumstances. But the charges are the same, and the arrest reports are similar, and the cases keep coming in. To the lawyers who churn through these prosecutions every day, one case quickly starts to look like all the others.

B. Standard Priors

A defendant's criminal record is normally quite important in a criminal case. Indeed, aside from the facts underlying the new charge, the defendant's prior record is usually the most decisive factor in determining their fate.[30] This can happen in several different ways. A prior conviction can trigger more serious charges in the new case. A DUI defendant with prior DUI convictions, for example, can sometimes be charged with a felony.[31] A prior conviction can also give rise to a more punitive sentence. A drug trafficking defendant with past drug convictions, for example, can get a longer mandatory minimum sentence.[32] And having a record makes prosecutors and judges less open to lenience. People with prior criminal cases are less likely to receive pretrial diversion, dismissal, or reduction of a felony to a misdemeanor, and they are more likely to be charged with a more serious crime. This happens even when the prior case didn't result in a conviction—a mere arrest can mark a defendant as undeserving of special consideration.[33] Your past record thus helps dictate what track the system puts you on, and ultimately what happens in your case.

Prior criminal records are also quite legible to the system. There is a nationwide system of databases that contains people's arrests, charges, convictions, and sentences. Courts and police agencies throughout the United States record that information electronically, and the FBI makes it accessible through a central database called the

30. *See* Fish, *supra* note 7, at 1383–90 ("Prior criminal convictions dictate what happens to a person as they are processed through the American criminal and immigration systems.").

31. *See, e.g.*, CAL. VEH. CODE § 23550.5 (West, current through Ch. 136 of 2025 Reg. Sess.).

32. *See, e.g.*, 21 U.S.C. § 841(b)(1)(A) (imposing minimum sentences of ten, fifteen, and twenty-five years depending on offenders' prior felony convictions).

33. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–22 (2015) (describing the consequences of having an arrest on your record, even where it does not trigger a conviction).

National Crime Information Center (NCIC).[34] The NCIC database can be used to quickly produce a "RAP sheet" that summarizes someone's encounters with the criminal legal system.[35] Police and prosecutors generate such RAP sheets by using the defendant's fingerprints to look them up.[36] This is much faster than gaining the information through other methods, like going to other courthouses to pull the case records. Thus, prosecutors can quickly learn about the defendant's past record at the start of each criminal case. This information is then used to make charging decisions and set the terms of plea negotiations.

Criminal history databases thus render certain facts about a person's past easily usable. But they also omit a great deal of substantive information. A RAP sheet only provides a chronological list of arrests, criminal charges, case dispositions (e.g., conviction or dismissal), and sentences. It does not contain any factually rich account of what actually happened in a past case. A typical entry will say something like "Count 1 Felony armed Robbery; Disposition Guilty; Sentence 2 years."[37] But it will not provide substantive information like what was stolen, what weapon was used, where the crime happened, and what events in the defendant's life led up to the robbery.[38] The system knows the case outcome, but it doesn't know what really happened. Much as with criminal charges themselves, the specific facts are washed out in a process of simplification. This renders criminal priors legible to the system and a useful input for case processing.

C. Standard Offers

We have established the two main inputs in the criminal justice system's information economy: criminal charges and criminal priors.[39] Now we will look at how the system's case processing machinery uses these inputs. The system operates mainly as a plea bargain market. In this market, the prosecutor assigns new cases an initial value. This value is the standard offer—the plea deal that this kind of defendant

34. *Privacy Impact Assessment Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) Biometric Interoperability*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/freedom-of-information-privacy-act/department-of-justice-fbi-privacy-impact-assessments/iafis-ngi-biometric-interoperability [https://perma.cc/KNS4-HR6Q] (last visited Nov. 6, 2025).

35. *Id.*

36. *Id.*

37. *See* Fish, *supra* note 7, at 1402–06 (illustrating the limited information included in a standard RAP sheet).

38. *See id.* at 1405.

39. *See supra* Sections I.A., I.B.

receives by default.[40] The standard offer is determined mostly by (1) the facts in the current case and (2) the defendant's prior criminal record. To illustrate: A first-time shoplifter may get a standard offer of pretrial diversion. A second-time shoplifter may get a misdemeanor offer with probation. A fifth-time shoplifter may get a felony offer with prison time. The standard offer can be a charge bargain, e.g., an offer to plead guilty to a misdemeanor and avoid a felony conviction. It can also be a sentence bargain, e.g., an offer for one month in jail when the defendant would get six months after trial. And it is determined locally: The district attorney's office in one county often gives very different offers from the district attorney's office in a neighboring county.[41]

A district attorney might sometimes change the standard offer as a matter of policy. For example, if there is public outrage about a certain kind of drug, the DA might make the standard offer worse in cases involving that drug. And judges and defense lawyers can also push back against the standard offer. Defense lawyers, especially public defenders, can systematically recommend that their clients reject the standard offer as a negotiating tactic.[42] And judges can also exert influence over standard sentencing by rejecting or undercutting agreed-upon punishments.[43] Thus, while prosecutors initially set the standard offer, the rest of the courtroom workgroup can influence it. The key is that the standard offer is what a criminal defendant can expect to get

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40. *See* MALCOLM M. FEELEY, *The Process is the Punishment*, *in* CRIME, LAW AND SOCIETY 139, 152–53 (1979) (noting that bail conditions are usually negotiated before either party has "had an opportunity to give the case file anything more than a fleeting glance").

41. *See* Cynthia Alkon & Andrea Kupfer Schneider, *How to be a Better Plea Bargainer*, 66 WASH. U. J.L. & POL'Y 65, 74 (2021) ("Even within the same state, or county, there can be vast differences in how individual cases are treated, what standard offers are, and therefore, what the zone of possible agreement is in that court or county or state."). *But see* Brimage *Guidelines 2*, N.J. OFF. OF THE ATT'Y GEN. (July 15, 2004), https://www.nj.gov/lps/dcj/agguide/directives/brimage_all.pdf [https://perma.cc/PU4H-MV8F] (detailing statewide prosecutorial plea bargaining guidelines and providing standard offers for drug cases).

42. *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1251 (1974):

> Use of the "craft union strike" by public defenders caused one New York prosecutor to reject my inquiry whether public defenders secured more or less favorable plea agreements than private defense attorneys. "It is not a matter of doing better," he said. "The Legal Aid Agency simply sets the standard. The Agency may decide that first offenders charged with street robbery should not plead guilty to anything more serious than the highest grade of misdemeanor. The Legal Aid policy ultimately becomes the law, and street-robbers who are represented by private attorneys then receive the same benefits as those who are represented by Legal Aid attorneys."

The author has witnessed such office-level negotiation over standard pleas while in practice.

43. *See* Jeffrey Bellin & Jenia I. Turner, *Sentencing in an Era of Plea Bargains*, 102 N.C. L. REV. 179, 197–215 (2023) (detailing various forms of judicial involvement and influence over negotiated sentences).

just for pleading guilty, with no negotiation and no litigation. Prosecutors extend it as a matter of course.

A jurisdiction's sentencing rules dictate the form that standard plea offers will take. The most straightforward kind of system is one where the prosecutor and defendant can agree on a specific sentence, and the judge simply signs off on the deal. In such jurisdictions, the prosecutor can name any legally available term of punishment as the standard offer. For example, in 2017 the standard offer for misdemeanor gun possession in San Francisco was ninety days in jail. Such an offer is unilaterally determined by the district attorney's office, which can change the standard offer if it sees fit. Some prosecutors' offices even establish plea bargain guidelines that create a fixed menu of standard offers.[44] Things get more complicated in jurisdictions with a norm of judicial discretion at sentencing, such as those with judicial sentencing guidelines. In the federal system, for example, most felony sentences are determined by a complex set of sentencing guidelines that provide a recommended sentence based on the facts of the crime and the defendant's criminal history.[45] About half of the states also have sentencing guideline systems.[46] In guideline jurisdictions, the parties cannot simply dictate the sentence by agreeing to it. Standard offers must therefore take another form. They can be charge bargains, i.e., agreements to a lower criminal charge that carries a lesser punishment. They can also be offers for a reduced sentence within the guidelines framework. For example, the federal sentencing guidelines provide an explicit sentence reduction for agreeing to plead guilty, and prosecutors also have the unilateral power to offer further reductions within the guidelines.[47] This lets prosecutors create standard offers that judges will predictably follow, because the reductions are built into the guidelines. The norm of a standard offer thus transcends different sentencing frameworks. The system always finds a way to generate standard offers, because they are essential to an efficient plea bargain market.

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44. *See, e.g.*, N.J. OFF. OF THE ATT'Y GEN., *supra* note 41.

45. *See Federal Sentencing: The Basics*, U.S. SENT'G COMM'N 15–20 (Nov. 1, 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf [https://perma.cc/7ZJW-Z7Z2].

46. Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies*, NAT'L CONF. OF STATE LEGISLATURES 5 (June 2015), https://documents.ncsl.org/wwwncsl/Criminal-Justice/sentencing.pdf [https://perma.cc/Z6AS-BXVV].

47. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2023) (reduction for "acceptance of responsibility"); *id.* § 5K1.1 (reduction for cooperation with the government); *id.* § 5K3.1 (reduction for "Fast Track" programs established by federal prosecutors to encourage rapid guilty pleas).

The standard offer is a useful shorthand for case processing. If prosecutors, defense lawyers, and judges share a common understanding of a case's "value," they can quickly agree about how to resolve it. A defense lawyer can get a case, receive the standard offer, meet their client, convince their client to plead guilty, and sit through a short plea hearing. The case gets resolved, and no waves are made. This is not to say that everyone always accepts the standard offer. A defendant may reject it and seek to litigate their case (or threaten to litigate to get leverage for a better offer).[48] Rejecting the offer is risky, because the standard offer is designed to create a clear decision tree: If you reject it and lose, the punishment is supposed to get worse. If the prosecutor offers a standard misdemeanor deal, for example, and you reject it and go to trial on the felony instead, you are taking a gamble. Sometimes the gamble pays off. Litigating might lead to better outcomes for the defendant, like dismissal, acquittal, or leverage to negotiate a better deal. The defense lawyer could also make an equities pitch to the prosecutor, seeking to convince them that this defendant is the exception and deserves a lesser punishment. If the prosecutor's heartstrings are pulled, perhaps they will make the offer more lenient. But these strategies—litigating (or threatening to) and making equities pitches—require time and resources. If they are used in every case, it will slow the system down considerably. The easiest way to get through cases is to dispose of them right away at or near the market rate.

II. ROUTINE

Prosecutors, defense lawyers, and judges collectively dispose of cases through the plea market. All three actors are dealing with the pervasive fact of case overload. While they each have different professional identities, they share a common interest in moving cases along.[49] They thus use the simplified information economy described above—standard charges, standard priors, and standard offers—as an

48. *See* Alkon & Schneider, *supra* note 41, at 80:

> There are cases that lend themselves to standard deals, like driving under the influence or possession of drugs. To agree to a deal that is outside the norm requires that there is something different about the case (e.g., are there problems with the evidence? Is the defendant in a unique situation?). In these types of cases, lawyers should know what the standard deals are and should be able to decide if there is some reason to set a different goal for a plea outcome.

49. *See* BOGIRA, *supra* note 29, at 21:

> The system is run by people, but, as with many systems, it often seems the other way around. The courtroom staff works as it must, reflexively, not reflectively. The workers have no time to give much thought to any but the most extraordinary case, or to examine what they are doing.

efficient shorthand to process defendants. Here we will consider the system's default mode from each of their perspectives. Prosecutors' default mode involves receiving a new case, reading the police report, looking up the defendant's criminal record, and coming up with a charge and plea bargain offer based on those inputs. The prosecutor need not do any further substantive investigation into the case (e.g., watching body camera footage, learning more about the defendant) unless the defense lawyer pushes them to. Defense lawyers' default mode involves receiving the initial charge and the offer, bringing it to the client, and trying to convince the client to take the standard offer. In exceptional cases they may push for a better offer or threaten trial. But generally, their incentives are aligned with the efficient processing of pleas. Judges, for their part, pressure prosecutors and defense lawyers to resolve cases. Judges even, in some states, get directly involved in plea bargaining to encourage dispositions. All three actors have a strong incentive to process cases quickly. Doing so helps with workflow management. Rapid pleas free up time and courtroom space for the next case. And, in a lot of courtrooms, the judges and lawyers must deal with a crushing volume of cases. Moving them into the outbox is necessary for keeping one's head above water. If a case receives significant attention beyond this fast-paced, low-information plea bargain market, it is being treated as exceptional.

A. Prosecutorial Routine

New cases come into the prosecutor's office on a daily basis. The prosecutor's job is to move these cases from the inbox into the outbox. That normally means turning them into convictions.[50] The quickest way to achieve convictions is through plea bargains. Thus, prosecutors convey the standard offer to defense lawyers at the outset of a case. The case can go away for the standard terms, as dictated by the charge and the defendant's criminal record. Consider, for example, a federal prosecutor who processes drug smuggling cases along the U.S.-Mexico border. The prosecutor may get five to ten of these cases each week. Each case, as it comes in, is assigned a certain value according to the local plea-bargaining norms. Most defendants are offered the same standard sentencing discount if they plead guilty, amounting to a few years off the baseline sentence. Some defendants, such as those who qualify for mandatory minimum sentences due to their criminal histories, will get more severe offers. They might, for example, be

50. Depending on the circumstances, dismissal and diversion can also be acceptable options to the prosecutor's office.

offered to plead guilty to a mandatory five-year sentence to avoid a mandatory ten-year sentence. If the plea bargain market creates a stark punishment differential, as the market for federal drug cases certainly does, relatively few defendants will reject the offer. In the system's default mode, the prosecutor gets a fast conviction without expending significant resources.

This default mode saves the prosecutor from needing to conduct further investigation. The case comes in, charges are filed, the deal is offered, the deal is accepted, the defendant pleads guilty and is sentenced. In some cases, even the charging decision is made by police before a prosecutor gets involved.[51] The prosecutor does not have to do things like interview witnesses, examine a forensic download of the defendant's cell phone, or view police body-worn camera footage. Investigative time is best reserved for the few cases that look like they are actually going to be litigated. Thus, the plea market helps prosecutors manage their workload through triage. The majority of cases, those resolved with the standard offer, require no additional resources. Many prosecutors do not turn over crucial evidence until shortly before a case goes to trial.[52] Indeed, some prosecutors will refuse to even review evidence at the defense lawyer's request unless the defendant rejects the initial plea bargain offer.[53] This approach makes sense from a case triaging perspective. The prosecutor has a lot of cases to deal with, and investigating a case that will end in a quick plea is wasted effort. Thorough reviews of the evidence are thus reserved for the few cases that escape the system's default mode. If a defendant is just going to take the standard plea, the case deserves no further work.

Sometimes defense lawyers push prosecutors for better plea deals by pointing out sympathetic facts about their clients. These equities pitches can involve the circumstances of the crime—maybe the crime was a consequence of coercion, abuse, or treatable addiction. Equities pitches can also involve the defendant's broader life circumstances—maybe the defendant is young and deserves a second chance, or is old and will likely die in prison if given a long sentence, or wants to join the military and a criminal conviction will prevent that, or has children that need their parent. The system's default mode

51. *See* Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 980–88 (2024) (showing the high rate at which prosecutors rubber-stamp police charging decisions in misdemeanor cases).

52. *See, e.g.*, Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html [https://perma.cc/665N-H3D2] (detailing how delayed access to evidence pressures defendants into premature plea deals).

53. The author has witnessed cases where prosecutors do this.

cultivates prosecutorial resistance to such equities pitches. From prosecutors' perspective, they receive ten of this kind of case per week, and the cases are generally resolved for a certain sentence. A high justificatory threshold must be overcome to deviate from the standard offer. Add to this a natural prosecutorial skepticism of the defendant's claims—the prosecutor does not normally meet the defendant or hear their story firsthand, and the prosecutor is normally primed to think of the defendant as a lawbreaker. A drug trafficker who claims they were forced into it, for example, is rarely believed by the prosecutor even when their story is true. It is thus unusual to get better deals based solely on the claim that someone else forced you to commit the crime. The prosecutor also faces pressure from within their office not to give away the farm. A prosecutor's supervisor, for example, might look down on them if they give too many lenient offers based on defense sob stories. This is not to say that all prosecutors are heartless, or that equities pitches never work. Sometimes they do work. But such cases are exceptional by design. The prosecutor's default mode is to resolve cases quickly at the market rate. They want to move each case from the inbox to the outbox in a way that keeps their supervisor happy.

B. Defense Lawyer Routine

Most criminal defendants in the United States are represented by court-appointed indigent defense lawyers.[54] Much like the prosecutors, these defense lawyers see the same kinds of cases week after week. And the system sets up a very easy way for defense lawyers to approach their job. The defense lawyer can meet each new client, explain the maximum possible penalty for the crime, and convince the client to take the standard offer.[55] This approach is an efficient way to get the case off your plate. If the client agrees to the initial offer, then an indifferent defense lawyer does not have to review the evidence, make an equities pitch, or engage in any other time-intensive work. The meet-and-plead approach helps one manage a large case load. And

54. *See Criminal Justice Act: Protecting the Right to Counsel for 60 Years*, U.S. CTS. (Aug. 15, 2024), https://www.uscourts.gov/data-news/judiciary-news/2024/08/15/criminal-justice-act-protecting-right-counsel-60-years [https://perma.cc/K535-8F6G] ("Today, nearly 90 percent of federal criminal defendants are aided by lawyers, investigators, and experts paid for under the [Criminal Justice Act]."); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/73VT-4LXF] ("At felony case termination, court-appointed counsel represented 82% of State defendants in the 75 largest counties in 1996.").

55. *See* Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 L. & SOC'Y REV. 15, 23 (1967) ("The defense attorneys, therefore, . . . ultimately are concerned with strategies which tend to lead to a plea.").

public defenders in the United States famously have far too many cases.[56] Defense lawyers do, of course, sometimes make an equities pitch, or negotiate for a better deal, or even go to trial. But those activities require dedicating extra resources to a case and asking the prosecutor and judge to dedicate extra resources as well. The system is set up to discourage such extra work. The glide path is a quick resolution for the standard offer.

Many defense lawyers in the United States approach every single case through this default mode.[57] They view their only job as getting clients to take the standard offer. The existence of such lawyers raises an interesting question about the professional ethics of defense lawyering. In a certain sense, do-nothing defense lawyers have abandoned the duty to zealously represent their clients. They do not raise a finger to fight the charges or negotiate for a better outcome. This should be considered unethical. But the system is set up to reward their approach. It is rare to see clients sue such defense lawyers for malpractice or succeed on ineffective assistance of counsel motions because such claims have high evidentiary thresholds and are contingent on a showing of prejudice.[58] It is more likely to see such defense lawyers given prizes by the local bar for their collegiality. The legal system does not punish criminal defense lawyers for always convincing their clients to take the first offer. Such defense lawyers are very popular with prosecutors and judges. They keep the system running smoothly and the calendar clear.

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56. *See* NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, NATIONAL PUBLIC DEFENSE WORKLOAD STUDY, at xv–xvi (2023) ("[T]he results of this study strongly suggest that the caseloads of public defense attorneys are more excessive than previously thought and that decisive action is needed to ensure that public defense clients receive the effective assistance of counsel required by the Constitution.").

57. *See, e.g.*, Jenia I. Turner, Ronald F. Wright & Michael Braun, *Neglected Discovery*, 73 DUKE L.J. 1173, 1191–98 (2024) (showing that a substantial number of defense lawyers in Texas never even look at discovery in their cases); Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769 (2016) ("There is a serious cultural problem in many indigent defense delivery systems nationwide: too many lawyers appointed to represent poor criminal defendants do not perform their intended role in the system, because they have been conditioned not to fight for their clients."); Eric S. Fish, *Resisting Mass Immigrant Prosecutions*, 133 YALE L.J. 1884, 1903–05 (2024) (describing defense lawyers in Operation Streamline, a program where defendants always plead guilty at the first court appearance).

58. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 669 (1984) ("With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); Wiley v. County of San Diego, 966 P.2d 983, 989 (Cal. 1998) ("Such relief is afforded even to those clearly guilty as long as they demonstrate incompetence and resulting prejudice . . . .").

C. Judicial Routine

Judges also have an interest in efficiently getting rid of cases. This makes them fans of the default system, where defendants quickly plead to the standard offer. From judges' perspective, court time is a scarce resource. If a case goes to trial, it makes a courtroom unavailable for multiple days. This takes up judges' time, as well as the time of court staff. And it means the backlog of cases will continue to pile up. Judges are thus motivated to convince lawyers to dispose of cases through quick plea agreements. Indeed, many courthouses explicitly evaluate judges on their ability to efficiently dispose of cases. Federal district courts have a "six-month list" that shames judges for keeping cases around for too long.[59] And some state courthouses keep track of how many cases a judge disposes of each week. More efficient judges gain the esteem of their colleagues and are promoted to more desirable assignments. Less efficient judges are looked down upon. Tom Wolfe observed this pattern in a Bronx courthouse in *The Bonfire of the Vanities*:

> The scorecard showed how many cases the judge in that part had on his docket and how many he had disposed of that week, through plea bargains, dismissals, and trials. On the wall of the courtroom, over the judge's head, it said in God we trust. On the scorecard, however, it said case backlog analysis, and a judge's effectiveness was rated almost entirely according to case backlog analysis.[60]

Journalistic accounts of state courts also document this judicial scorekeeping.[61]

Judges can encourage the lawyers to dispose of cases in a few different ways. One is through trial taxing.[62] Judges often communicate to defense lawyers that their clients will suffer a worse punishment if they lose at trial.[63] This provides an incentive to take the standard offer. There are also many jurisdictions where judges can become directly

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59. *See* Miguel F. P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORN. L. REV. 363, 375 (2020).

60. TOM WOLFE, THE BONFIRE OF THE VANITIES 222 (1987).

61. *See* BOGIRA, *supra* note 29, at 39:

> The judges here get weekly printouts from the presiding judge listing the disposition totals for the week, the month, and the year, for each judge in the building. When a judge is up for retention . . . his disposition totals will be published and disseminated before the election by the Chicago Crime Commission.

62. Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019).

63. Dan Trevas, *Allegations that Judge's Harsher Sentence Is Vindictive Must Be Supported with Evidence*, CT. NEWS. OHIO (Apr. 18, 2017), https://www.courtnewsohio.gov/cases/2017/SCO/0418/151892.asp [https://perma.cc/Z9ZK-TQWU] (detailing an alleged instance of judicial "trial tax[ing]").

involved in plea bargaining.[64] In California, for example, a judge can make an "open" plea deal directly with the defendant.[65] This can lead to more lenient sentences, especially when the court is overloaded with cases. For example, if the prosecutor refuses to offer a deal for less than two years in prison, a defense lawyer can circumvent the prosecutor and agree directly with the judge for one year in prison. There are, however, practical limits to judges' willingness to undercut prosecutors. Judges are generally elected in the United States. If they get a reputation for letting defendants off too lightly, that could be politically harmful.[66] This limits judges' willingness to undercut the standard offer, especially in more serious cases. If it is widely known that gun cases receive ninety days in jail in a certain jurisdiction, for example, a judge may be unwilling to go lower and risk being perceived as soft on guns.[67] But, within the constraints set by politics and local courthouse norms, the judge's goal is to help lawyers resolve their cases efficiently.

III. THE LIMITS OF HOLISTIC JUSTICE

This Article has presented a bleak view of the criminal justice system. It describes the system as a conveyor belt. As cases come in, they are reduced to a few easily digestible pieces of information: the criminal charge and the defendant's prior record. These data points map the defendant onto a certain standard offer which is well understood by the courthouse workgroup. The members of the courthouse workgroup—prosecutors, defense lawyers, and judges—presume that each case will be resolved for that standard offer. And they all share an incentive to make sure that happens: the incentive of

64. *See* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326 (2016) ("[J]udicial involvement in negotiations is now institutionalized and embedded in the very structure of many court systems . . . .").

65. *See* People v. Vessell, 42 Cal. Rptr. 2d 241, 249 (Cal. App. 2d Dist. 1995) ("Here, the record shows that the court gave an indicated sentence and respondent entered into an open plea."); People v. Superior Court (*Smith*), 147 Cal. Rptr. 554, 557–58 (Cal. App. 2d Dist. 1978). For a concrete illustration, see BOGIRA, *supra* note 29, at 37–38:

> In Locallo's courtroom, when the parties can't agree on a sentence, the courtroom PD will frequently ask Locallo for a 402 anyway, knowing the clearance-sale offers he makes to dispose of his 'bullshit' cases. In these instances, Locallo and the lawyers will indeed confer during the 402—for perhaps two minutes. . . . Then Locallo will announce his offer, the defendant and his lawyer will whisper briefly, and the defendant will usually accept.

66. This may be less of a concern for federal judges, who enjoy lifetime appointments. *See, e.g.*, Bellin & Turner, *supra* note 43, at 210 (finding that federal judges depart from sentencing recommendations in favor of leniency "fairly often").

67. This was the author's experience as a defense lawyer in San Francisco. The judges were reluctant to undercut prosecutors' offers in misdemeanor gun cases.

every bureaucratic worker to move tasks from the inbox into the outbox with a minimum of fuss. This way of viewing the system is dehumanizing. It treats defendants as objects to be processed in the abstract, not as concrete people with histories and needs.[68] The fundamental fact of this system is case overload. And the major imperative is workflow management.

So where can we find room for holistic justice in such a system? Can the criminal justice system just described conduct rich, fact-intensive evaluations of people's life histories and reasons for turning to crime? Can it treat the people it processes by addressing their underlying problems instead of just cycling them through jail? Absolutely not. This highly efficient case processing machinery is not designed to fix people's lives. It is designed to assign them a number. Holistic justice requires resources. Returning to James Scott, it requires deep contextual knowledge of local facts. And the criminal justice system, at least in its default mode, operates off of abstract knowledge. The defendant's charge and criminal history are legible to the system. The defendant's actual life circumstances and therapeutic needs are not. To substantively evaluate people's needs and treat them, the system must abandon its default mode. It must engage in deep, individualized, resource-intensive consideration of a specific person. In short, holistic justice is inconsistent with efficient case processing.

Which is not to say that no defendants ever receive special attention. Some do. More serious cases, for example murders and other violent felonies, are given more substantive attention. So are people in certain preferred categories. Military veterans, for example, often benefit from special pretrial diversion programs designed to treat their psychiatric problems and help them avoid criminalization.[69] Holistic assessments of a defendant and a crime are resource intensive. They require more investigation, more interviews, and more time on the part of the lawyers. And, to be clear, holistic assessment is not always beneficial to the defendant. There are cases where a more intensive look at the circumstances results in worse punishment. Some defendants benefit when the system does not see the real them. Other defendants suffer.[70] But holistic assessment cannot be the system's default mode,

68. *Cf.* Bennett Capers, *Bringing Up the Bodies*, U. CHI. LEGAL F. 83, 84 (2022) (observing courthouse employees dehumanize defendants by treating them as, and explicitly referring to them as, "bodies").

69. *See* Huskey, *supra* note 12, at 699, 708.

70. Although I do suspect that the criminal justice system devotes a lot more resources to making inculpatory facts legible than exculpatory facts. Prior convictions are a prime example—a nationwide network of criminal history databases has been established to make these legible. There is no similar system to quickly establish potentially positive facts about a person, like their family commitments or employment history. There is also no national social work database.

because it is simply too expensive. Criminal courts cannot process tens of millions of people per year if they are going to treat each person holistically. Individual consideration is a scarce resource. Most cases need to be resolved with the standard offer.

This does not mean that pre-trial diversion and other forms of mercy have no place in the current system. They do exist. But they are normally part of the low-information case-processing system, not a deviation from it. Diversion is a great way for the court system to offload low-level (usually misdemeanor) cases.[71] A first-time shoplifter can be sent to diversion classes and have their case dismissed. That disposition leaves all the courtroom insiders happy. The case went away for a price that was acceptable to the prosecutor, the defense lawyer, and the judge. Indeed, some misdemeanor systems rely on outright dismissals as a standard case outcome.[72] Dismissals move the case from the inbox to the outbox with a minimum of effort and mark the defendant in any future interactions with the justice system.[73] Lenient dispositions like diversion and dismissal are thus normally just another workload management tool. Indeed, nonpunitive dispositions are essential components of many high-volume adjudication systems. They get rid of cases, but do not require substantive consideration of defendants' actual lives and needs.

CONCLUSION

There once was a nineteen-year-old woman who had just graduated from high school. This woman was coerced into smuggling a relatively small amount of drugs into the United States. The smugglers taped the drugs to her body and threatened her with harm if she did not walk the drugs across the border. She got arrested. Her duress story

71. Problem-solving and treatment courts are vulnerable to a similar critique—that they focus less on actually helping defendants deal with their needs, and more on making defendants fit into a treatment narrative that the institution accepts. *See* Evelyn Lia Malavé, *Distorted Narratives in the Treatment Program Complex*, 93 FORDHAM L. REV. 843, 843 (2024) ("Defendants' voices are suppressed because, to successfully bargain for and stay in treatment, defendants must conform to a particular narrative of suitability that both reflects and reinforces stereotypes about addiction and recovery.").

72. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 643 (2014):

> [T]hese dismissals and noncriminal convictions do not represent a release valve in the form of prosecutors or judges routinely throwing out cases or handing out massively discounted sentences simply to secure quick and easy pleas. As the courts shifted away from the adjudicative model toward the managerial model, criminal justice actors increasingly used the misdemeanor process to mark, classify, and supervise people, often without securing a conviction or imposing a sentence.

73. *See id.*

was credible, but the threatened harm was not immediate enough for her to actually win at trial. Nonetheless, she was coerced into crossing the drugs. And her life story was completely at odds with that of a conventional drug smuggler doing it for pay. She had graduated high school second in her class and had been admitted to college when she was arrested. She intended to become a doctor. The prosecutor did not care about any of this. Neither did the judge. To them, she was just another drug smuggler. She spent eleven months in jail. Her charge and sentence were dictated by the amount and type of drugs taped to her body.

This is the way the system normally works. There is a well-defined plea bargain market for these cases. Sympathetic facts are mostly illegible to that plea bargain market. The courtroom insiders cultivate indifference to the defendants' actual lives. Most cases involve a small number of well-known charges, the prosecutors give standard offers for these charges, and the plea negotiation process involves dickering around the norm set by the standard offer. Zealous defense lawyers can seek ways to create leverage and improve on the standard offer, while indifferent defense lawyers just sell the standard offer to their clients. Prosecutors' goal is to resolve cases acceptably close to the norm set by the standard offer, so as not to displease their supervisors. Judges encourage quick dispositions at or near the established punishment norms. For all the courthouse actors, there is a strong imperative to resolve cases in order to keep on top of the crushing workload. This highly efficient case-processing system is not compatible with holistic justice. The system's operational logic resists giving defendants special attention. Individual consideration is a scarce resource. It is reserved for exceptional cases.