BARGAINING AWAY SEX

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Abstract

Nearly all felony sex offenses and many misdemeanor sex offenses in the United States require the defendant to register as a sex offender. One way to avoid sex offender registration is to negotiate around a sex offense charge through plea bargaining. This study examines how prosecutors and defendants navigate around the sex elements of sex crimes charges during plea bargaining to avoid the severe collateral consequences of sex offense convictions. Through analysis of serious sex crimes cases resolved by guilty pleas in two Ohio counties, we document how cases initially charged as sex offenses ultimately result in convictions for nonsexual crimes or significantly reduced sex offenses. Our findings challenge traditional assumptions about plea bargaining. First, while pleas typically move "downward" from more serious to less serious charges, we identify cases involving lateral moves between charges of similar severity, and occasionally "upward" movements to technically more serious offenses. Second, we provide the first systematic examination of "fictional pleas"—plea bargains bearing no factual relationship to the original charges—in sex crimes cases within a specific jurisdiction. Our detailed analysis of these pleas reveals common patterns and circumstances that predict when parties are likely to employ fictional pleas, including their frequent use to facilitate (often lateral) charge agreements in cases involving young victims. Our findings suggest that the avoidance of sex offender registration often takes precedence over traditional sentencing considerations, raising important questions about whether current registration schemes may inadvertently undermine their intended purposes by incentivizing plea bargains that remove sexual elements from charges entirely. Finally, the paper reframes the very concept of punishment in sex crimes cases. The harshness of registration and the stigma of being labeled a sex offender impact how the parties view other parts of a defendant's potential punishment, making bargaining in sex crimes cases fundamentally different from other crimes of violence.

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INTRODUCTION

Across the country, sex offenses carry some of the harshest punishments and most serious collateral consequences of any category of crime. Every state has adopted mandatory sex offender registration for nearly all felony sex offenses and even some misdemeanor sex offenses.[1] A sex crimes conviction carries with it the potential of a huge sentence, lifetime registration requirements, and the stigma of being labeled a sex offender.[2] Further, it is difficult (or impossible, depending on the state) to exit the sex offender registry once someone has been added.[3] As a

1. Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 858 (2019) [hereinafter *Fictional Pleas*]; National Sex Offender Public Website, https://www.nsopw.gov [https://perma.cc/5BYM-8RFV].

2. Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L.L. REV. 435, 447–53 (2010).

3. Wayne Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 225–27 (2015).

result, defendants are eager to escape sex offender convictions before registration is even triggered. On the other side of the aisle, prosecutors argue that plea bargaining in sex crimes cases can be a way of protecting vulnerable victims who will be retraumatized by the experience of trial and cross-examination.[4] Recognizing that rape cases can be difficult to win, especially when there is little additional evidence apart from the word of the complaining witness, a prosecutor with a reluctant witness may view a lenient plea agreement as the only viable option to keep a defendant they believe to be guilty from walking free. Both defendants and prosecutors may be eager to avoid rape trials in ways that may align their interests at the plea-bargaining phase of a case.

This paper explores the ways in which defendants and prosecutors maneuver around the "sex" in sex crimes cases, sometimes in dramatic ways, during plea bargaining. This maneuvering allows them to avoid trial and reach a disposition that excises the "sex" from the crime. To observe this maneuvering, we examined serious sex crimes cases resolved by a guilty plea in two jurisdictions, focusing on cases with defendants who pleaded guilty to nonsexual offenses or much less severe sex offenses. Despite the prevalence of plea bargaining in the modern criminal system, it remains difficult to study the practice of plea bargaining because it is so often performed outside of public view.[5] Plea bargaining writ large deserves our scholarly attention, but negotiations in sex crimes cases represent an important subcategory of plea bargaining that can shine a light on many intersecting avenues of scholarship, including work on prosecutorial discretion, the "sex exceptionalism" of criminal law, and fictional pleas.

This paper draws on a unique and detailed dataset of cases culled from the wider universe of rape and sexual assault cases in these jurisdictions. Many of these cases are what are known as fictional pleas—plea bargains that do not correspond in any way to the original charge and facts.[6] For instance, in our data, we saw several cases where defendants facing possession of child pornography charges pleaded guilty to assault, even though there were no allegations of any physical contact between the defendant and a victim, let alone a physical injury that would meet the elements of assault.[7] We also observed rape cases that were transformed into the crimes of "inducing panic," obstruction of official business, or interference with the custody of a minor.[8] None of these convictions could have been sustained at trial because there were simply no facts to support the charges. And yet, the parties negotiated agreements that made these fictions possible.

4. Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 97 (2020).
5. Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 975–76 (2021).
6. *Fictional Pleas*, *supra* note 1, at 860.
7. *See infra* Part III.C.
8. *See infra* Part III.C.

Other cases in the dataset are not fictional, meaning there is indeed some thread linking the original charge to the final charge of conviction, but the charge of conviction has removed the sex elements from the original charge. In this way, the possibility of sex offender registration or the stigma of a sex offense has been eliminated. For instance, a substantial minority of rape cases in our study became assault convictions through plea bargaining.[9] But rape also transformed into simple domestic violence or child endangerment.[10] In these cases, the plea conviction was not a "fiction," but it also did not remotely represent the full scope of the defendant's alleged conduct.

Despite certain limitations, this dataset provides some of the richest available evidence for examining how plea bargaining functions around collateral consequences, particularly through fictional pleas. In this paper, we trace the life cycle of these bargains and observe how serious sex offenses transform into nonsex offenses. From these data, we make two observations that inform the study of plea practice and reform.

First, despite the common perception that pleas tend to travel downward from the original charge to a lower charge of conviction or lower sentence, we observed numerous cases for which the plea travelled laterally to a charge at the same level as the indicted charge without any attendant sentencing benefit. Indeed, in a small number of cases in our dataset, the plea of conviction even went "up" to a higher charge from the original charge (for instance, from a third-degree felony of gross sexual assault to a first-degree felony of kidnapping). Although most of the pleas in our dataset followed the traditional assumptions about plea bargaining, these lateral and "up" pleas demonstrate that these assumptions miss something critical about the nature of plea bargaining, namely that the charge and the sentence are not the only variables the parties consider in their negotiation.

Second, we observed commonalities across cases that ended in fictional pleas, which may help explain why lawyers turn to fictions. In this paper, we do a deep dive into the details of 176 fictional pleas disposed between 2008 to 2019. We found, for instance, that fictional pleas often allowed the parties to reach mutually beneficial lateral bargains, particularly in cases involving child victims. Indeed, the factor most strongly associated with fictional pleas was whether the defendant had been indicted on unlawful sexual conduct with a minor.

The patterns we observed—both in the direction and common factual bases of conviction charges—suggest that fictional plea bargains primarily serve to circumvent sex offender registration and other severe collateral consequences associated with sex crimes convictions, including social stigma. Prior research has demonstrated that when jurisdictions implement stringent sex offender registration requirements, defendants in sex offense cases increasingly accept pleas to nonsexual

9. In our study, 16.7% of cases (n=44) indicted as Rape ended with a top conviction charge of Assault.
10. *See infra* Part III.A.

offenses or lesser charges that do not trigger registration obligations.[11] Our data indicate a similar pattern: defendants systematically negotiate away from sex crimes charges. In essence, the parties are bargaining away the "sex" element of these offenses.

While the defendants' motivations appear straightforward, our data suggest several explanations for prosecutors' willingness to facilitate sex offender registration avoidance. Although we cannot definitively determine the reasoning behind individual plea decisions, we identify three primary categories of justification: prosecutors seek case resolution where a nonsexual offense charge represents the only viable path to avoid trial; prosecutors believe a sex offense charge would not serve the interests of justice; and prosecutors are dealing with young or vulnerable victims.

Our goal is not to pass normative judgment on these negotiation practices, but rather to illuminate how parties navigate around a major collateral consequence now mandated at both the state and federal level. By examining these practices, we gain deeper insight into the criminal justice system's operation and the practical limitations and possibilities of specific reform initiatives.

But our findings here also support the conclusion that the typical understanding of "punishment," particularly as adopted by courts in the plea bargaining context, is missing a critical dimension when it comes to sex crimes. Plea bargaining negotiation has long included factors outside of the charge and sentence.[12] Courts have acknowledged this reality,[13] but still tend to evaluate how "good" a plea is based on whether the defendant received a better charge, a better sentence, or both than would have been available after trial.[14] This view is too narrow. It fails to account for the many penalties that inform a plea negotiation.

Further, it misses how the "exceptionalism" of rape in the law informs the nature of plea bargaining in these cases.[15] This exceptional status impacts plea negotiations, as defendants may evaluate otherwise similar sentences differently when one carries the sex offender label and its accompanying registration requirements and stigma. The profound difference in how rape charges are perceived by the defendant (and the public) compared to, say, assault charges of similar severity, alters the framework for the negotiations for both defendants and prosecutors. A defendant indeed may be willing to take a plea to a same-level, nonsex charge—or even a more serious charge—to avoid a sex offense conviction. Our study helps reframe

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11. Elizabeth J. Letourneau, Kevin S. Armstrong, Dipankar Bandyopadhyay & Debajyoti Sinha, *Sex Offender Registration and Notification Policy Increases Juvenile Plea Bargains*, 25 SEXUAL ABUSE 189 (2013) [hereinafter *Sex Offender Registration*].

12. Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901 (2017) [hereinafter *Measuring the Creative Plea Bargain*].

13. *See* Padilla v. Kentucky, 559 U.S. 356, 364–66 (2010).

14. *See* Missouri v. Frye, 566 U.S. 134, 144–47 (2012); Lafler v. Cooper, 566 U.S. 156, 161–62 (2012).

15. *See* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 STAN. L. REV. 755 (2023).

how we understand the relationship between plea bargaining and punishment in sex crimes cases.

This paper proceeds in four parts. Part I reviews the relevant literature on plea bargaining, including the influence of sex crimes registration on the negotiation of the plea, the use of fictional pleas to avoid collateral consequences, and how "sex exceptionalism" creates certain pressures during the plea process. We also briefly review relevant Ohio law to give the reader context for our study. Part II provides an explanation of our dataset and methodology. Part III turns to our findings. Part IV concludes with what our findings might reveal about why prosecutors are agreeing to deals that allow defendants to avoid the "sex" in sex crimes. We further explore how our findings help us reframe the concept of punishment during plea bargaining.

I. PLEA BARGAINING IN SEX CRIMES CASES

This paper sits at the intersection of several bodies of research, including research into how parties in the criminal system plea bargain around collateral consequences, the impact of sex offender registration on plea bargaining, and the "exceptionalism" of sex crimes in criminal law. In Parts I.A. and I.B., we trace the relevant literature in these fields to situate the paper more broadly. In Part I.C., we turn to relevant Ohio law that helps explain our findings.

A. Sex Crimes and Plea Bargaining: Registration, Stigma and Exceptionalism

Every state and the federal system has a sex offender registry.[16] These registries are the result of legislative action by states and the federal government.[17] Further, nearly every felony sex offense and some misdemeanor sex offenses require mandatory registration.[18] This means that if a defendant pleads guilty to a charge carrying registration, there is no ability to negotiate around such registration.

Being on the sex offender registry is highly stigmatizing. Some scholars have even referred to it as a form of "social death," in which the defendant is cut off from the activities and connections that allow for a full and socially-connected life.[19] In one study by Tewksbury, individuals on the registry reported that registration led to negative consequences that included losing their job, being denied a promotion at work, losing their housing, being asked to leave a business, losing a

16. *All 50 States Linked to Department of Justice National Sex Offender Public Registry Web Site*, U.S. OF JUST. (July 3, 2006), https://www.justice.gov/archive/opa/pr/2006/July/06_ag_414.html [https://perma.cc/9GY7-VASL].

17. Yung, *supra* note 2, at 447–53 (describing the varied local, state and federal government legislation that has expanded the sex offender registry).

18. *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences [https://perma.cc/8RU5-P52R] (last visited May 4, 2026).

19. Elizabeth Megale, *The Invisible Man: How the Sex Offender Registry Results in Social Death*, 2 J.L. & SOC. DEVIANCE 92, 109 (2011).

friend who found out about registration, being harassed or assaulted, or receiving harassing telephone calls or mail.[20] The same study found that registrants felt high levels of shame about being on the registry.[21] Incarcerated sex offenders report that they fear violence and harassment in prison.[22] For these reasons, some offenders would prefer added incarceration over the prospect of being put on the registry.[23]

Letourneau and colleagues have written about the increase in plea bargaining in sex crimes cases in juvenile and adult courts in South Carolina after the state enacted particularly harsh notification policies as part of its sex offender registration regime. They found that youth defendants started plea bargaining in higher numbers after enactment of the law, likely because it allowed them to avoid sex offender registration, an outcome both defendants and prosecutors were seeking.[24] As their study noted, prosecutors used these nonsex offense pleas as a way to keep juvenile sex offenders "hidden," thereby avoiding the penalties imposed by registration.[25]

The sex assault offenses in the Letourneau study were dropped to nonsex offenses, most commonly to assault offenses.[26] But other offenses appeared among the nonsex disposition charges; for instance, public disorderly conduct, disturbing schools, simple larceny, and trespassing.[27] The authors also studied juvenile defendants charged with assault and robbery and found that there was significantly less bargaining in those types of cases than in the sex offense cases.[28] For instance, almost none of the assault defendants were able to negotiate out of assault charges, even if the charge severity was lowered.[29]

The few studies that have focused on adult plea bargaining in sex offender cases show mixed results. One study in New York found that there was no increase in plea bargaining rates for defendants who were charged with sex crimes.[30] This contrasted with another study by Letourneau and colleagues that indicated that plea bargaining rates among adults increased dramatically after South Carolina enacted its registration policies and required online notification.[31] Of these differences, Letourneau speculated:

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20. Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 76 (2005).

21. *Id.* at 78.

22. Richard Tewksbury, *Stigmatization of Sex Offenders*, 33 DEVIANT BEHAV. 606, 613 (2012).

23. *Measuring the Creative Plea Bargain*, *supra* note 12, at 906.

24. Letourneau et al., *supra* note 11, at 201.

25. *Id.* at 202.

26. *Id.* at 195.

27. *Id.*

28. *Id.* at 202.

29. *Id.* at 195.

30. Naomi J. Freeman, Jeffrey C. Sandler & Kelly M. Socia, *Does a Watched Pot Boil?: A Time-Series Analysis on the Impact of Sex Offender Registration and Community Notification Laws on Plea Bargaining Rates*, 22 CRIM. JUST. STUD. 153, 153–165 (2009).

31. Elizabeth J. Letourneau, Jill S. Levenson, Dipankar Bandyopadhyay, Debajyoti Sinha & Kevin S. Armstrong, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, NAT'L INST. OF JUST. 1, 17 (2010) [hereinafter *Evaluating Effectiveness*].

> [T]he differences are due to policy characteristics of the New York vs. South Carolina SORN [Sex Offender Registration and Notification] policies. Specifically, New York's policy bases registration and notification requirements on risk assessment outcomes, thereby subjecting only higher risk offenders to notification and longer duration of registration. In contrast, South Carolina's policy is offense-based and permits no judicial discretion. It might be that, when judicial discretion is limited or removed, judicial actors find other means of reinstating that discretion, resulting in changing charging decision patterns or dispositional outcomes.[32]

Despite their ubiquity, several studies indicate that sex offender registration laws do not achieve their aims, namely, to decrease recidivism and protect children. At least ten major studies on the effects of sex offender registration have found little to no impact on recidivism or future violence for those on the registry.[33] Some studies have found that sex offender registration deters crime generally, but not sex crimes specifically.[34] Sex crimes legislation might also create a false sense of security, as research suggests that only about five percent of new sex offenses are committed by persons on the registry.[35]

Importantly, though, studies on recidivism may be impacted by the very problem we are studying here—convictions might not tell us much about the defendant's conduct if indeed those convictions are fictions or gravely undersell the reality of what happened. Indeed, in one study of recidivism rates in New York in 2009, the authors acknowledged that sex offender tier level may not be an accurate predictor of reoffending rates because the tier level may be based on a conviction which "may not be an accurate indication of the type of offense that was committed. . . . [I]t is possible that crime of conviction does not accurately reflect the

32. *Id.*

33. *Sex Offender Registration*, *supra* note 11, at 203; Elizabeth J. Letourneau & Kevin S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEXUAL ABUSE 393, 394 (2008) [hereinafter *Recidivism Rates*]; Elizbeth J. Letourneau, Dipankar Bandyopadhyay, Debajyoti Sinha & Kevin Armstrong, *Effects of Sex Offender Registration Policies on Juvenile Justice Decision Making*, 20 CRIM. JUST. POL'Y REV. 136, 153 (2009) [hereinafter *Juvenile Justice Decision Making*]; Elizabeth J. Letourneau, Dipankar Brandyopadhyay, Kevin S. Armstrong & Debajyoti Sinha, *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?*, 37 CRIM. JUST. & BEHAV. 553, 566 (2010) [hereinafter *Juvenile Sex Crimes*]; Freeman, et al., *supra* note 30, at 165; Donna D. Schram & Cheryl D. Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism*, WASH. ST. INST. FOR PUB. POL'Y 1, 3 (1995); Bob Edward Vásquez, Sean Maddan & Jeffery T. Walker, *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME AND DELINQ. 175, 185–88 (2008); Bonita M. Veysey, Kristen Zgoba & Melissa Dalessandro, *A Preliminary Step Towards Evaluating the Impact of Megan's Law: A Trend Analysis of Sexual Offenses in New Jersey from 1985 to 2005*, 10 JUST. RES. & POL'Y 1, 18 (2008); Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 CRIM. JUST. STUD. 193, 208 (2006); Kristen Zgoba, Philip Witt, Melissa Dalessandro & Bonita Veysey, *Megan's Law: Assessing the Practical and Monetary Efficacy* (Dec. 2008), https://www.ojp.gov/pdffiles1/nij/grants/225370.pdf [https://perma.cc/5QUE-2464].

34. *Evaluating Effectiveness*, *supra* note 31, at 8–16.

35. Freeman, et al., *supra* note 30, at 297.

offense that was committed and, therefore, may be a poor predictor of future risk of reoffending."[36] The risk of fictional pleas in sex crimes cases should give us pause about using convictions alone as symbols of the truth of what happened in a particular case.[37] All of this is to say that it is far from decided whether sex offender registries are effective tools to stopping future victimization.

The widescale imposition of sex offender registration[38] reflects what Gruber has termed "sex exceptionalism."[39] Because sexual violations are viewed as particularly tragic crimes, they receive particularly harsh treatment compared to other forms of violence and little push back from even liberal-minded reformers. As Gruber puts it: "[O]nce conduct is characterized as *sexual* harm, it receives a wholly different legal and sociocultural treatment than all nonsexual harm."[40]

This exceptional treatment has relevance for the study of plea bargaining in sex crimes. Defendants labeled as a sex offenders are considered "worse than their nonsexual counterparts."[41] Once someone is a sex offender they are singled out for harsh and often violent treatment in prison.[42] They are excluded (separate and apart from the requirements of registration) from society. Admitting to rape is, in some ways, considered worse than admitting to murder.[43] The combination of strong stigma and the material harm of registration are powerful motivating factors to avoid pleading guilty to sex crimes; defendants in sex crimes cases are often more motivated to avoid being labeled as a sex offender "than they are to avoid long prison sentences, GPS monitoring, mandated treatment or extended probation supervision" because being labeled a "sex offender" increases "the vulnerability of individuals accused of, or indicted for sex crimes, to coercion by law enforcement as well as prosecutors."[44]

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36. Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUST. POL'Y REV. 31, 44 (2009).

37. *Fictional Pleas*, *supra* note 1, at 899–900.

> Fictional pleas skew the data, telling false stories not only about individual defendants but about patterns and trends more generally . . . . Fictional pleas may give accurate information about what sorts of cases are disposed of in criminal court, but they slant the data about what sorts of crimes are being committed and by whom.

Id.

38. We note that sex offender registration is only one of many penalties that defendants charged with sex offenses. Other special penalties include provisions that allow sex offenders to be sent to civil facilities for continued treatment after their release, mandatory minimum sentences, mandatory consecutive sentences, and chemical castration. *See* Yung, *supra* note 2, at 448–49.

39. Gruber, *supra* note 15, at 769–70; Yung, *supra* note 2, at 459.

40. Gruber, *supra* note 15, at 765.

41. *Id.* at 766.

42. Tewksbury, *supra* note 22, at 613.

43. Anette Bringedal Houge, *Imageries of Self: Guilty Plea Statements in Sexual Violence Cases at the ICTY*, 33 INT'L CRIM. JUST. REV. 179, 192 (noting in her study of confessions by defendants in war tribunals that they would rather confess to mass murder than rape); *Measuring the Creative Plea Bargain*, *supra* note 12, at 923 (recounting a defendant who pleaded guilty to attempted murder to avoid pleading guilty to rape).

44. Annabelle Frazier, Kristy Shockley, Jaime M. Keenan, Miko M. Wilford & Joseph E. Gonzales, *When a Plea is No Bargain At All: Comparing Sentencing Outcomes for Massachusetts Defendants in Non-Sexual and Sexual Crimes*, 82 ALB. L. REV. 775, 779 (2019).

B. Fictional Pleas and Bargaining Around Collateral Consequences

The wiggle room that allows prosecutors and defense attorneys to plea bargain "around" the sexual elements in a sex crimes case is part of the broader story around the flexibility of plea bargaining. Plea bargaining is appealing to criminal justice system actors precisely because this flexibility allows the parties to resolve cases efficiently.[45] As the number of penalties has expanded beyond the traditional criminal sentence to include a range of collateral consequences, scholars have noted how these additional consequences have increasingly become bargaining chips. Collateral consequences include the loss of a job, loss of housing, and the loss of the right to vote, among hundreds of other consequences.[46] Some of these consequences—like sex offender registration—are the result of legislative action, while others—like the loss of professional licensing—are imposed by private or public institutions.[47] At least some scholars and courts have also included the stigma or shame of a conviction as a collateral consequence that defendants may want to avoid and may be willing to negotiate around.[48]

Collateral consequences may impact the negotiation of the plea and the types of trades that parties are willing to make, separate and apart from any calculation the parties are making about trial. As Roberts noted in her work on how parties consider deportation during plea negotiations, collateral consequences have nothing to do with whether a defendant will win or lose after trial, rather they have a lot to do with how the parties negotiate. For instance, a defendant may "get a different or better plea bargain if his attorney and the prosecution factor an automatic, harsh consequence like deportation into the bargaining equation. Indeed, the bargained-for sentence might actually be longer in exchange for a charge bargain that allows the defendant to avoid imposition of the collateral consequence."[49] Roberts and others have demonstrated that the shadow-of-trial model, typically used to evaluate the decisions that defendants make at plea bargaining, fails to account for the many bargaining chips that have little to do with one's chances at trial.[50]

Although collateral consequences are not formally categorized as punishment, they are treated as part of the package of penalties that a defendant may face as the result of a criminal conviction. Perhaps the consequence that has gotten the most

45. Thea Johnson, *The Efficiency Mindset and Mass Incarceration*, 75 OKLA. L. REV. 115, 121–25 (2022).

46. *Collateral Consequences Inventory*, *supra* note 18.

47. *Id.*

48. *Measuring the Creative Plea Bargain*, *supra* note 12, at 908 (noting that public defenders identified "stigma" as a collateral consequence they are bargaining "around" during the plea process); People v. Freeman, 149 A.D.3d 555, 556 (N.Y. App. Div. 2017) (upholding a fictional plea that defendant entered to avoid the stigma of the original charges, animal abuse).

49. Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 HOW. L.J. 693, 697 (2011) [hereinafter *Proving Prejudice*].

50. *Id.* at 697–98; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2464 (2004); Thea Johnson & Emily Arvizu, *Proving Prejudice After* Lee v. United States*: Ineffective Assistance of Counsel in the Crimmigration Context*, 25 HARV. LATIN AM. L. REV. 11, 16–17 (2022).

attention is the risk of deportation for non-citizen defendants that accompanies a huge range of criminal convictions.[51] The Supreme Court in *Padilla v. Kentucky* held that deportation occupies a grey space between formal punishment and collateral consequence, requiring that defense attorneys inform their clients of deportation consequences before a plea.[52] But for the purposes of plea bargaining, deportation is very much treated as a collateral consequence by actors on the ground. Deportation, like sex offender registration, is often an important factor, if not the most important factor, for a defendant facing a criminal charge.[53]

Further, because immigration consequences often attach to a range of cases in a particular category, like drug crimes, they may force the parties into a bargain that requires the use of a fictional plea.[54] A fictional plea is "one in which a defendant pleads guilty to a crime he has not committed, with the knowledge of the defense attorney, prosecutor, and judge."[55] Although Justice Stevens in *Padilla* encouraged the parties to negotiate creatively around the deportation consequences of the defendant's serious drug charges, any plea that would have avoided removal would necessarily involve a fiction.[56] Roberts proposed two such pleas for Mr. Padilla: a solicitation offense or misprision of a felony.[57] Both options would be a fiction because there would be no accurate factual basis to support either of these charges.[58] Mr. Padilla neither solicited a crime under Kentucky law, nor concealed the felony after discovery.

Sex offender registration and the stigma of a sex charge operate in a similar way to the deportation consequence. Defendants are willing to make significant concessions in exchange for a plea to an offense that avoids immigration removal, including by pleading "up" to a more serious charge.[59] But they are also willing to plead to fictional charges. In our dataset, we found rape charges transformed into a range of fictions, including "inducing panic" and interference with custody.[60] Fictional pleas involve an extreme form of charge bargaining where the parties sub in fictional charges that satisfy a particular need, like avoiding deportation or sex offender registration, even if those charges are unsupported by the facts.[61]

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51. *See, e.g.*, Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. 141, 149 (2021); Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 246 (2016); Jason Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1755 (2013).

52. Padilla v. Kentucky, 559 U.S. 356, 364–66 (2010).

53. *See* Lee v. United States, 582 U.S. 357, 366 (2017).

54. *Fictional Pleas*, *supra* note 1, at 883–88 (explaining how fictions are often necessary in drug cases because nearly all felony and many misdemeanor drug offense convictions carry the risk of deportation).

55. *Id.* at 855.

56. Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653–54 (2013) [hereinafter *Effective Plea Bargaining*]; *Fictional Pleas*, *supra* note 1, at 885.

57. *Effective Plea Bargaining*, *supra* note 56, at 2653–54.

58. *Fictional Pleas*, *supra* note 1, at 885 (finding that, because "[n]either [crime] covers the factual allegations in the *Padilla* case . . . he would have pleaded guilty to a crime everyone agrees he did not commit").

59. *Measuring the Creative Plea Bargain*, *supra* note 12, at 923 (discussing a criminal defendant willing to take an additional year and a half in prison on an attempted murder charge to avoid the sex offender registration that came with the accompanying rape charge).

60. See *infra* Part III.C. for a full discussion of fictional pleas in the dataset.

61. *Fictional Pleas*, *supra* note 1, at 864–65; Thea Johnson, *Lying at Plea Bargaining*, 38 GA. ST. U. L. REV. 673, 691–94 (2022) [hereinafter *Lying at Plea Bargaining*].

Related to these questions about fictional pleas and bargaining around collateral consequences more generally are concerns about the use of prosecutorial discretion. As we explain more in Part IV.A., we think the reasons that defendants are willing to make concessions or accept fictional pleas are straightforward. But it is less clear why prosecutors will engage in these fictions. As such, part of the purpose of our project is to contribute to an understanding of *why* prosecutors make these decisions, which is integral to understanding the limits of their discretion.[62]

McJunkin and Prescott hypothesized that one reason that prosecutors are willing to negotiate around sex crimes is to help defendants avoid sex offender registration in jurisdictions outside of their own to encourage those same defendants to leave the state or locality.[63] Levine has studied the use of prosecutorial discretion in statutory rape cases and found that prosecutors dole out an "intimacy discount" in statutory rape cases where they determine that there are signs of commitment, family support, or even the potential for marriage between the parties.[64] Prosecutorial discretion in this context is linked to the prosecutor's assessment of whether the defendant is a "predator" or a "peer" of the victim.[65] The use of leniency flows from this distinction.[66]

Other scholars, like Green and Roiphe, have argued that helping defendants avoid things like immigration consequences is a fair use of discretion as long as it is done in the interest of justice as measured by certain duties of loyalty to the public.[67] Similarly, Bellin posits that prosecutorial lenience in plea bargaining and elsewhere should be non-arbitrary, equally applied, and abundant.[68] But in applying his framework, he also encourages us to ask *why* the prosecutor is making a particular decision to be lenient. Are they "doing justice," as is their mandate, or merely trying to get the case closed as soon as possible?[69] The framework justifies certain decisions better than others.

Indeed, the scholars engaged in this area are asking why prosecutors make certain decisions to understand whether those decisions are ethical or legal. In Part

62. *See, e.g.*, Ben A. McJunkin & J. J. Prescott, *Collusive Prosecution*, 108 IOWA L. REV. 1653, 1721 (2023); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 806–09 (2020); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 178–82 (2022); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–18, 1420–25 (2021); Jeffrey Bellin, *Theories of Prosecution*, 180 CALIF. L. REV. 1203, 1218–20 (2020); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 474, 495–98 (2016); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 633–37 (1999).

63. McJunkin & Prescott, *supra* note 62, at 1722. *But see* Thea Johnson, *The "Why" and the "Should" of Plea Bargaining in Sex Crimes Cases: A Response to Collusive Prosecution*, 110 IOWA L. REV. ONLINE 67 (2024) [hereinafter *The "Why" and the "Should"*] (arguing that expulsion is not likely to be a driving motivator for prosecutors in plea negotiations in sex crimes cases).

64. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 695 (2006).

65. *Id.* at 715.

66. *Id.*

67. Green & Roiphe, *supra* note 62, at 806–10.

68. Jeffrey Bellin, *Principles of Prosecutor Lenience*, 18 TEX. L. REV. 1541, 1543 (2024).

69. *Id.*

IV.A., we contribute to this conversation by positing several reasons why prosecutors might be making decisions to allow defendants to plead around sex charges. As our work here makes clear, it is difficult to decipher why prosecutors make the decisions they do. The criminal system is designed to give prosecutors leverage by providing them with a range of tools, including mandatory minimums and numerous criminal statutes to pull from.[70] In this context, one may ask: what is the point of the sex offender registry? Is it one of many tools that prosecutors can use as a bargaining chip to trade with defendants (as we posit they have done in the cases we examined here) or is it a true mandate that is being surreptitiously avoided through plea bargaining? Although we do not answer these questions here, our study tees up these important questions about prosecutorial discretion.

C. Sex Offenses in Ohio

For the purposes of this paper, it is important to understand how sex offense charges, sex offender registration, and sentencing work in Ohio. In Ohio, as elsewhere, defining the degree of a felony or misdemeanor is often a complicated and fact-specific task.[71] For many of the offenses found in our dataset, the degree of the offense varies widely depending on the facts of the case. For instance, the offense of interference with custody[72] can be classified as a fifth- or fourth-degree felony, or a third- or first-degree misdemeanor, depending on which subsection of the statute was violated.[73] Violations of different divisions of this statute carry different levels of severity and punishment. Although the level of offense can often be determined through identifying the exact section of the final conviction, some facts must be known to accurately determine the level of offense. For example, if an individual is convicted of interference with custody under § 2919.23(A)(1), this would typically be a first-degree misdemeanor, but if the child involved suffered

70. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

71. In Ohio, as in most states, felonies are classified by degrees. The most serious felonies, like aggravated murder, are "unclassified" felonies that carry mandatory sentences. The least serious felonies are in the fifth degree. Misdemeanors are also classified by degree, with the most serious being a first-degree misdemeanor and the least serious being a "minor" misdemeanor. The maximum jail time on a first-degree misdemeanor is 180 days. OHIO REV. CODE ANN. § 2901.02 (West 2011).

72. OHIO REV. CODE ANN. § 2919.23 (West 2011).

73. *Id.* (defining interference with custody). The statute provides:

> (A) No person, knowing the person is without privilege to do so or being reckless in that regard, shall entice, take, keep, or harbor a person identified in division (A)(1), (2), or (3) of this section from the parent, guardian, or custodian of . . . (1) A child under the age of eighteen, or a child with a mental or physical disability under the age of twenty-one; (2) A person committed by law to an institution for delinquent, unruly, neglected, abused, or dependent children; (3) A person committed by law to an institution for persons with mental illnesses or an institution for persons with intellectual disabilities.
>
> (B) No person shall aid, abet, induce, cause, or encourage a child or a ward of the juvenile court who has been committed to the custody of any person, department, or public or private institution to leave the custody of that person, department, or institution without legal consent.

Id.

physical harm, the level would change to a fourth-degree felony. These complexities in Ohio law make it difficult to quickly determine what degree of offense a particular defendant was convicted of. As discussed in Part II, we took a conservative approach to determining the *potential* sentences defendants could receive if convicted on the charges for which they were indicted.

The practice of plea bargaining is often controlled by state and local procedural rules.[74] Ohio has an equivalent to Federal Rule of Procedure 11, which requires the judge to assess that a plea is given willingly, knowingly, and voluntarily.[75] Ohio's Rule 11 also requires that any negotiated plea of guilt be stated on the record in open court, and that the alleged victim be given an opportunity to raise any objections to the plea.[76] Further, in theory, Ohio restricts plea bargaining through Rule 7(D) by prohibiting an amendment to an indictment that would change the name or identity of the crime charged.[77] However, Ohio appellate courts have held that this rule does not prevent a defendant from pleading guilty to an indictment amended to change the name/identity of the offense "when the defendant is represented by counsel, has bargained for the amendment, and is not prejudiced by the change."[78]

Further, Ohio enacted "truth-in-sentencing" legislation in 1996, which requires that a judge give a definite sentence and that the defendant serve the full sentence.[79] "Truth-in-sentencing" means that the sentence imposed by the judge is the actual time served, with limited exceptions. Under the current system, judges impose "definite sentences"—specific prison terms rather than ranges. For example, instead of sentencing a defendant to a range from five to twenty-five years, the judge would impose a definite sentence of eight years. In theory, these laws were designed to make sentencing more predictable and transparent, ensuring that victims and the public know exactly how long an offender will serve.

Additionally, an understanding of Ohio's sex offender registration laws is useful. In Ohio, there are three tiers of sex offenses. All tiers require that the registered person report their address, place of employment, and other information to the sheriff.[80] Beyond those basic requirements, each tier places additional burdens on the registered person. Tier III is the most serious tier and requires that the offender register every ninety days for life and be subject to community notification.[81] Tier II requires the offender to register every 180 days for a term of twenty-five years.[82]

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

75. OHIO R. CRIM. P. 11.

76. *Id.* at 11(F).

77. *See id.* at 7(D).

78. State v. Rohrbaugh, 934 N.E.2d 920, 922 (Ohio 2010).

79. OHIO REV. CODE ANN. § 2929.14 (West 2025); *see also* OHIO ATT'Y GEN., OHIO ATTORNEY GENERAL'S GUIDE TO OHIO'S SORN LAWS (2024), https://www.ohioattorneygeneral.gov/Files/Law-Enforcement/Law-Enforcement-Gateway/2018-Guide-to-Ohio-SORN-Laws.aspx [https://perma.cc/72LC-C35N].

80. *Id.* § 2950.04.

81. *Id.* §§ 2950.01(G)(3), 2950.07(B).

82. *Id.* §§ 2950.01(F)(3), 2950.06(B), 2950.07(B).

Tier I, the least serious registration level, requires the offender to register once a year for fifteen years.[83]

II. THE DATASET AND THE METHODOLOGY

A. The Current Project

This project was largely exploratory, with a primary aim of describing the trajectory from indictment to final charges for a set of cases that began as serious sex offenses and ended as nonsex offenses. We had a particular interest in identifying cases wherein defendants pleaded to charges that were entirely inconsistent with the facts in the case, which we refer to as fictional pleas; pleaded to charges that were of equal (or worse) severity than the original charges, which we refer to as lateral (or "up") pleas; or both. Additionally, we wanted to examine whether cases that were resolved in non-traditional or factually inconsistent ways differed from those that were not in terms of case facts (e.g., victim age, indictment charges) and final dispositions.

B. The Dataset

The data we relied on for this paper were provided to us by Michael Donnelly, formerly an Ohio trial judge and a justice of the Ohio Supreme Court. Donnelly has written extensively on issues within the plea system and has a particular interest in the lack of transparency that allows for fictional pleas.[84] Donnelly requested the court clerk identify cases that were indicted as felony sex offenses and resolved without a sex crime (or with a much less serious sex crime).[85] Donnelly and a group of law students then used the physical case files and electronic court records to develop as complete a picture as possible of each case.

The dataset we received contained 464 unique case records from two Ohio counties (Cuyahoga County, n=408, disposed between 2008 and 2016; and Hamilton County, n=56, disposed between 2017 and 2019). Two cases were removed because they were missing indictment charges, leaving 462 cases for analysis.[86] Each record included the case number, the defendant's name, indictment charges, a summary of the findings of fact from the indictment (when available), final disposition charges, and sentence information from the record; the Hamilton County cases also included the defendant's race.

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83. *Id.* §§ 2950.01(E)(3), 2950.06(B), 2950.07(B).

84. *See, e.g.*, Justice Michael P. Donnelly, *Truth or Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 OHIO STATE J. CRIM. L. 423, 423 (2020).

85. In Ohio, felony criminal cases are required to be heard by a grand jury. See CONST. art. I, § 10.

86. Three additional cases appear to have been included erroneously in the original dataset as they did not match the initial selection criteria as articulated to us by Donnelly. Two of these cases started as misdemeanor sex offenses; the other was a rape case that ended as a rape case. We did not remove these cases from the dataset, but we make note when these cases impact reported analyses or were removed from a particular analysis or data summary. The final dataset for analyses comprised 462 total cases, 459 of which were cases that began as felony sex offenses and, through the plea process, were resolved as nonsex offenses, or as much less serious sex offenses.

Strengths and limitations of the data. The cases in our dataset represent a subset of felony sex offenses that were selected for compilation specifically because they were resolved as nonsex offenses (or much less severe sex offenses). Without base rates for the dispositions of all felony sex offenses charged in these counties during these time periods, we can make no statement as to the percentage of cases in each charge category that were resolved with a fictional plea. Additionally, we can make no inferences as to the factors that might differentiate cases in this dataset from other sex crime cases that were disposed in any other way (e.g., plea, trial, dismissal). To facilitate such inferences in future work, we have approved requests pending with Cuyahoga and Hamilton counties for complete administrative records on all sex crime cases and dispositions (e.g., dismissals, trial outcomes) for the same years as those in our dataset.[87]

Despite its limitations, this dataset enables the first in-depth study of fictional pleas within a single jurisdiction. Prior research has relied on three primary sources. The first is interviews with defense attorneys.[88] These interviews provide rich source material for exploring how defense attorneys think about the negotiation of pleas, and it gives a window into the thoughts of defendants, albeit a limited one. The second has involved collecting and reviewing case law involving fictional pleas.[89] These cases provide useful examples but are constrained in their ability to capture the day-to-day practice of plea bargaining. In contrast, examining a large set of cases within a single jurisdiction allows for the identification of patterns and practices that isolated case law cannot reveal. The third source has been the review of criminal procedure law and court rules that regulate plea bargaining from state to state.[90] None of this prior work has involved a systematic review of a large set of cases with sufficient detail to identify those that ended as fictional pleas, because it is nearly impossible to obtain the kind of detailed information we received without the direct cooperation of a court or district attorney. For these reasons, our dataset represents a uniquely rich resource for studying fictional pleas.

C. Methodology

This paper reports both quantitative and qualitative analyses of the cases in the dataset, with a primary aim of highlighting similarities and differences among fictional and factual pleas and the variables that may distinguish them from one another *within* the subset of cases analyzed. We also observe trends in pleas where the parties have negotiated around the "sex" elements.

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87. We also note that it is difficult even to estimate the number of indictments or convictions for rape in Ohio more generally. Ohio does not produce any summary materials that provide the number of sex assault arrests, indictments or dispositions.

88. *Measuring the Creative Plea Bargain*, *supra* note 12, at 901.

89. *Fictional Pleas*, *supra* note 1, at 864.

90. Tina M Zottoli, Tarika Daftary-Kapur, Vanessa A. Edkins, Allison D. Redlich, Christopher M. King, Lucian E. Dervan & Elizabeth Tahan, *State of the State: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 BEHAV. SCI. & LAW 388 (2019).

Data Preparation. We received the Cuyahoga and Hamilton data in two separate files; there was a great deal of inconsistency in variable names between the two files and some information available in one set of records had not been compiled in the other. Data on victims were not available or were embedded within text summaries of case facts. In addition, the variables central to our analyses (i.e., charge classes and degrees, offense types, statutes) were combined in text fields in a non-standardized manner. To prepare the dataset for analyses, we developed a single set of consistent variable names and combined the datasets into one file. Research assistants at Rutgers Law School further developed the dataset by adding information from the public record that had not been captured in the initial compilation: defendant race for the Cuyahoga County data (when available); identity of the judge, prosecutor, and defense attorney; any information that could be found on the victim, including age and relationship to the perpetrator; any recorded appeals; and, finally, whether the case received any media attention. To facilitate quantitative analyses, the research assistants manually reviewed text fields to identify and systematically code the number, class, and degree of the top indictment and top plea charges, as well as the associated sex offender registry tier. If insufficient information was available to determine the class or degree of an indictment or plea charge (e.g., degree depended on which section of a statute was triggered, but the specific section was not provided in the record and case facts were not detailed enough to make a judgment), we used the lowest possible severity for indictment charges and the highest possible severity for plea charges. This coding decision resulted in conservative estimates of charge and sentence discounts. Lexical searches were subsequently conducted to verify the degree of the top charge and top sex charge in the indictment (which were not necessarily the same) and the top plea charge and top plea sex charge (if any) were identified correctly and properly coded. The authors manually reviewed any conflicting cases and reached consensus. Several additional variables were subsequently created from these original variables; these included straightforward mathematical derivations (e.g., number of charges dropped) as well as variables coding for plea direction (down, lateral, up) and factual basis of the plea (factual, fictional and suspected fictional).

Plea Direction. We created a variable called *plea direction* with three levels: Down, Lateral, and Up. When the top conviction charge was lower in severity than the top indicted charge, we coded the plea direction as *Down;* these pleas follow the typical or expected trajectory of a plea bargain, wherein a defendant pleads guilty to lesser charges, often with an associated reduction in sentence. We coded the plea direction as *Lateral* when the top conviction charge was the same class and degree as the top indicted charge, and as *Up* when the top conviction charge was of higher severity than the top indicted charge. It might be expected that such pleas would be rare since the defendant may receive no attendant sentencing benefit, but we contemplated the potential that these pleas might be more likely in sex crimes cases wherein the benefit might be related to collateral consequences or stigma.

Fictional pleas. The first author and two research assistants from Rutgers Law School systematically reviewed indictment charges, plea charges, and the available factual records to identify cases that were resolved by fictional pleas. We defined a fictional plea as one for which the final charge of conviction had no factual overlap with the original charges or where the charge of conviction could not have been supported at trial by the initial factual record available to us.

We took a conservative approach to identifying fictions. We did not count as fictions convictions that could be proved at trial based on the facts or that had overlapping elements with the indictment charges, even if the final conviction was not reflective of the gravity of the charges. For instance, in one case in our dataset, a defendant was charged with rape and the crime of intimidation.[91] The victim, who was the defendant's estranged wife, alleged that the defendant raped her by entering her bedroom while she was asleep and forcing her into sex.[92] The case was resolved with a plea to domestic violence.[93] Similarly, a defendant who was charged with ten counts of rape for sex with a child who was between the ages of eight and eleven at the time of the incidents resolved his case with a plea to a single count of child endangerment.[94] In neither case did we code the plea as a fiction because both domestic violence in the first case and child endangerment in the second case were supported by the facts and could have been proven at trial. Assuming the truth of the indictment, though, neither plea would reflect the gravity of the allegations. While we may argue that these plea charges represent a sort of "half-truth," we did not code them as fictional pleas.

When factual allegations were not available, we coded a case as fictional only when it was clear from the statute that the conviction charges could not have been sustained at trial. For example, in the dataset there are cases involving possession of child pornography that end in convictions for assault and receiving stolen property.[95] These possession of child pornography charges have no discernable shared legal elements with either assault or receiving stolen property. Further, none of the original charges indicated any use of force, that a victim suffered physical injury, or that the defendant knowingly received stolen goods. Simply put, there were no facts or shared elements that would support the convictions. Finally, there were thirty-six cases for which the factual allegations were unavailable but the initial charges and conviction charges had no apparent overlap as to the required elements; these cases were considered fictional for these analyses.

91. Case 14 (on file with authors).
92. *Id.*
93. *Id.*
94. Case 89 (on file with authors).
95. *See, e.g.*, Case 54 (assault) (on file with authors); Case 322 (receiving stolen property) (on file with authors).

Quantitative analyses. We employed a variety of descriptive statistical techniques to analyze the dataset. Initially, we generated basic descriptive statistics and frequency tables to understand the distribution and central tendencies of our key variables, such as charge class, degree, and plea direction. This preliminary analysis provided a foundational understanding of the dataset's structure and highlighted potential areas for deeper investigation. Subsequently, we utilized cross-tabulations to explore the relationships between various categorical variables, particularly focusing on the connections between plea direction, charges, sentence, and the factual basis of the plea. These analyses were instrumental in identifying patterns and trends that warranted further exploration.[96]

D. Summary of Cases

Overview of charges and pleas. Table 1 presents an overview of cases in the dataset in terms of the most severe sex offense charged at indictment and the percentage of cases that ended in fictional versus factual pleas. The most common top sex offense charged at indictment was rape (57.1%), followed by gross sexual imposition (19.7%) and, in nearly all cases in the dataset (99.4%), the defendant faced mandatory sex offender registration if convicted on the indicted charge. Ultimately, only 4.5% of the cases ended with a conviction of any sex offense, with mandatory registration in only 3.5% of the cases. Just under 40% of those convicted received a carceral sentence (sentence information was missing for ten cases). While most defendants pleaded guilty to charges that were lower than the top charge in the indictment, in 12% of the cases the class and degree of the top plea charge were the same as that in the indictment and in 4% it was higher. Finally, of the 460 records that had sufficient information to permit coding, we identified 38.3% ($n = 176$) as ending in fictional pleas.

Victim and defendant demographics. Table 2 shows, for cases with data available, victim and defendant demographics, as well as information about the relationship between the victims and the perpetrators. Just over half the defendants were Black (52.9%), 40.9% were white, and 3.6% were identified as ethnically Hispanic. The average age of the defendants at the time of indictment was 34.2 years (SD=12.8)[97] and the vast majority were male (95%). Victim information was scant.

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96. We employed logistic regression models to assess relationships among various factors and whether a plea is categorized as factual or fictional and to identify the factors that best distinguished between fictional and factual pleas. To select among nested models, we relied on classification performance metrics, changes in log likelihood and model fit indices, such as the Akaike Information Criterion. See Stéphanie Portet, *A primer on model selection using the Akaike Information Criterion*, 5 INFECTIOUS DISEASE MODELLING 111 (2020). Analyses were conducted in R version 4.2.2. *The R Project for Statistical Computing*, THE R FOUNDATION, https://www.r-project.org/[https://perma.cc/WZY5-SHC9] (last visited Jan. 27, 2026). Data wrangling was performed using the {tidyverse} suite of packages. Hadley Wickham et al., *Welcome to the Tidyverse*, 4 J. OPEN SOURCE SOFTWARE 1686 (2019). Text manipulation and lexical searches were facilitated by the {stringr} package. Hadley Wickham, *Simple, Consistent Wrappers for Common String Operations*, https://cran.r-project.org/web/packages/stringr/index.html [https://perma.cc/Y2ZL-4648] (last visited Jan. 27, 2026).

97. Standard deviation (SD) describes how spread out a set of numbers is. Specifically, it is a measure of how much the values in a dataset typically differ from the average—whether they cluster closely around the average or vary widely.

Only eighty-two records included information about victim age. Of those cases, 79.2% of the victims were under age seventeen and 18.3% were ten or younger. About a third of the records provided information about gender (35.5%) or victim-perpetrator relationship (32%). In the majority of these cases, the victims were female (95.5%), and the perpetrator was known to the victim—either familial (39.2%) or other personal relation (45.3%).

Notably, while the difference in the number of Black and white defendants in our dataset is disproportionate to the populations of Cuyahoga and Hamilton Counties, the disparity in our dataset is lower than within the Ohio legal system generally and with respect to those charged with sex offenses.[98] Although we cannot answer it with our data, this disparity raises a question for future research as to whether white defendants charged with sex crimes are more likely than Black defendants to end up with plea charges that circumvent the sexual offense.

Table 1 —Summary of case records

Indictment		
Sex Offense Charged		
	Rape	57.1%
	Attempted Rape	3.0%
	Sexual Battery	5.0%
	Gross Sexual Imposition	19.7%
	Unlawful Sexual Conduct w/Minor	8.9%
	Other	6.3%
	SOR	99.40%
Plea		
Plea Direction		
	down	84%
	lat	12%
	up	4%
Fictional Plea (n = 460 records)		38.30%
Convicted of Any Sex Offense		4.5%
	SOR	3.50%
Custodial Sentence (n=432 records)		39.4%

98. We based this conclusion on 2020 census data. Hamilton: 63% white, 25% Black; Cuyahoga: 58% white, 29% Black. Ohio: 2020 Census, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/ohio.html [https://perma.cc/8Z9G-4UV9].

Table 2 —Defendant and Victim Demographics

Defendant Race / Ethnicity	n=418 records
Black	52.9%
White	40.9%
Hispanic	3.6%
Defendant Gender	n=421 records
Male	95.0%
Defendant Age	n=420 records
	34.2 (12.8)
Victim Gender	n=164 records
Female	95.5%
Victim Age*	n=82 records
10 years and under	18.3%
11-13 years	26.8%
14-16 years	34.1%
17-21 years	22.0%
>21 years	12.2%
Perpetrator Relationship to Victim	n=148 records
parent / guardian	18.9%
partner of parent/guardian	14.9%
other family relation	5.4%
other personal relation	45.3%
non-related authority figure	12.2%
stranger	3.4%

*percentages sum to over 100 for Victim Age because some cases have multiple victims.

III. PLEADING AROUND SEX

In this Part, we provide an analysis of our findings. In Part III.A., we trace the pathway from indictment to plea for five major felony sex offenses found in our data. This gives a sense of how and why certain types of charges are resulting in fictional versus factually based pleas, the ways in which victim age and victim-defendant relationship influence plea bargaining, and the most common types of pleas we see in the data. In Part III.B., we then explore the movement pleas, particularly those bargains that break with traditional assumptions about pleas. Here we discuss the cases where defendants plead laterally from like-charge to like-charge or even "up" to a more serious charge. Finally, Part III.C. provides a detailed exploration of the fictional pleas in our data.

A. The Pathway of Pleas

In this section, we examine how five major felony sex offense charges in our dataset progress from indictment to final plea disposition. We focus on rape, attempted rape, sexual battery, gross sexual imposition, and unlawful sexual conduct with a minor,[99] because these were the most frequent charges in our dataset.[100] Table 3 shows the trajectory of cases from initial charges through plea charges (Table 3a) and pleas sentences (Table 3b).

Rape constituted the most prevalent charged offense in our dataset, appearing in 264 cases. Notably, rape charges rarely stood alone; prosecutors often (n=167; 64.3%) paired them with other serious offenses, predominantly kidnapping. This charging pattern may serve a strategic purpose: kidnapping with sexual motivation carries a potential life sentence, while rape alone triggers a life sentence only when accompanied by specific aggravating factors. This dual charging provides prosecutors with strategic flexibility post-trial, as they can elect for the judge to sentence under either conviction when both charges stem from the same underlying conduct. This approach effectively enhances the government's leverage in determining the ultimate sentence severity.

While three rape cases in our dataset resolved with first-degree kidnapping charges (originally co-charged with rape), and one resolved with a first-degree burglary charge, the majority of cases followed more predictable patterns of pleading to reduced charges.[101] Second-degree felony pleas dominated, accounting for 29.5% of dispositions, though in one notable outlier a rape charge was reduced to attempted assault, a second-degree misdemeanor. Approximately 28% of cases concluded with fictional pleas, with aggravated assault emerging as the most common fictional resolution for rape cases across our dataset. Aggravated assault requires victim provocation under a heat-of-passion theory,[102] making it inherently fictional in this context. Fictional pleas to aggravated assault were a common pattern for non-rape cases as well, occurring in 33% of third-degree felony gross sexual assault cases and 25% of fourth-degree cases, and in about 45% of fourth-degree cases of unlawful sexual conduct with a minor. Interestingly, first-degree felony gross sexual assault cases showed a different pattern, most commonly resolving to simple assault (24%). We did not categorize these as fictional pleas since assault, unlike aggravated assault, requires no victim provocation and could conceivably fall within the broader scope of gross sexual assault conduct. We discuss fictional pleas and aggravated assault pleas more specifically in Part III.C.

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99. OHIO REV. CODE ANN. §§ 2907.02 (rape), 2907.02 (attempted rape), 2923.02 (attempted rape), 2907.03 (sexual battery), 2907.05 (gross sexual imposition), 2907.04 (unlawful sexual conduct with a minor) (West 2019).

100. *See* Table 3a & 3b *infra*, pp. 438.

101. As noted earlier, one of the rape cases was resolved with a plea to rape. We believe this case was included in the dataset in error and excluded it from the pathways analysis.

102. OHIO REV. CODE ANN. § 2903.12(A) ("No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force . . . .").

Table 3b shows the percentage of cases in each pathway that received a custodial sentence, and the average length of the sentence received in those cases. We had information on the actual sentence imposed for all but ten cases. The last two columns in the table show the average custodial sentence as a percentage of the minimum and maximum potential sentence faced if the defendants had been convicted of the charges on which they were indicted. These values were calculated by taking the actual sentence imposed at conviction for each defendant and dividing it by the minimum (and maximum) potential sentence faced at indictment; these results were then averaged across all defendants (who received custodial sentences) in each pathway.

To understand how to read this table: consider the pathway for the twelve defendants charged with attempted rape, and for whom the top charge was a first-degree felony. The minimum and maximum potential sentences faced by these defendants, if convicted at trial on the indicted charges, were 36 and 132 months, respectively. Five (~45.5%) of these individuals received a custodial sentence and the average sentence received was six months. The average custodial sentence as a percentage of the minimum (36 months) and maximum (132 months) potential trial sentence was 17% and 5%, respectively. In other words, the average plea discount (with respect to incarceration) realized by these defendants ranged from 83% to 95%— excluding, of course, the seven defendants who received no jail/prison time (effective discounts of 100%). Importantly, the estimated plea discounts in the table are based on the sentencing bands associated with the highest charge in the indictment and assume that sentences to any other charges would have been served concurrently. Moreover, the sentencing bands listed for the indicted offenses account neither for aggravating factors that can increase the maximum potential sentence nor for the Reagan Tokes Law,[103] which gives Ohio judges the discretion to set indefinite sentences in certain rape and murder cases. Therefore, the estimated plea discounts in this table are conservative estimates, likely underestimating the true discounts in many of these cases, especially the rape cases.

103. The Reagan Tokes Law, OHIO REV. CODE ANN. § 2901.011 (West 2023) (stating that for non-life felonies of the first or second degree, the judge must impose a minimum sentence that falls within the "currently established" sentencing range. The Department of Corrections reserves the right to extend the sentence to +50% of the minimum once that time has been served. F3-F5 offenses cannot be extended.); OHIO REV. CODE ANN. § 2929.144(B)(2) (West 2023).

Table 3a & Table 3b—Case Pathways
Table 3a–Charge Pathways

Indictment Charges and Potential Sentence					Plea Charges								
Cases (%)[a]	Most Serious Sex Offense[b]	Class/Degree of Top Charge	Potential Sentence[c]		Conviction Offense			Class/Degree of Top Charge			Plea Direction		Fictional
			min	max	highest	modal	lowest	highest	modal	lowest	lateral	up	
263 (56.8%)	Rape	F1	36	132	Kidnapping (n=3); Other (n=1)	Ag. Assault (19.3%)	Att. Assault (n=1)	F1	F2 (29.5%)	M2	4 (1.5%)	0	73 (27.6%)
12 (2.6%)	Attempted Rape	F1	36	132	Fel. Assault (n=1)	Abduction (n=3)	Assault (n=1)	F2	F4 & M1 (33.3%, each)	M1	0	0	4 (33.3%)
2 (0.4%)	Attempted Rape	F2	24	96	Att. Felonious Assault	--	Inducing Panic	F3	--	M1	0	0	1 (50%)
1 (0.2%)	Sexual Battery	F1	36	132	Felonious Assault	--	--	F3	--	--	0	0	0
21 (4.5%)	Sexual Battery	F3	9	36	Felonious Assault (n=1)	Assault (33.3%)	Assault; Interference with custody (n=1)	F2	M1 (38.1%)	M1	3 (14.3%)	1 (4.8%)	11 (52.4%)
1 (0.2%)	Sexual Battery	F4	6	18	Felonious Assault	--	--	F3	--	--	0	1 (100%)	0
25 (5.4%)	Gross Sexual Imposition	F1	36	132	Att. Murder (n=1)	Assault (24.0%)	Assault	F1	F3 (32.0%)	M3	1 (4.0%)	0	6 (24%)
18 (3.9%)	Gross Sexual Imposition	F3	9	36	Felonious Assault (n=1)	Ag. Assault (33.3%)	Assault (33.3%); Child Endangerment (n=2)	F2	M1 (38.9%)	M3	1 (5.6%)	2 (11.1%)	9 (50%)
48 (10.4%)	Gross Sexual Imposition	F4	6	18	Att. Abduction (n=1)	Ag. Assault (25.0%)	Indecency (n=1)	F2	M1 (41.7%)	M4	15 (31.3%)	7 (14.6%)	25 (52.1%)
1 (0.2%)	Unlawful Sexual Conduct with a Minor	F2	24	96	Fel. Assault	--	--	F2	--	--	1 (100%)	0	1 (100%)
2 (0.4%)	Unlawful Sexual Conduct with a Minor	F3	9	36	Ag. Assault	--	Child Endangerment	F4	--	M1	0	0	1 (50%)
38 (8.2%)	Unlawful Sexual Conduct with a Minor	F4	6	18	Fel. Assault (n=2)	Ag. Assault (44.7%)	Child Endangerment (n=2)	F2	F4 (50.0%)	M1	19 (50%)	6 (15.8%)	34 (89.5%)

a. This table excludes the one case that was charged as rape and ended in rape and the 29 cases for which the most serious sex offense charged at indictment was coded as other; percentages in this column are out of the full sample (n=463);
b. The most serious sex offense charged at indictment is not necessarily the top indicted charge.

Table 3b–Sentence Pathways

Indictment Charges and Potential Sentence					Potential Plea Sentence		Actual Plea Sentence[e]			
Cases (%)[a]	Most Serious Sex Offense[b]	Class/Degree of Top Charge	Potential Sentence[c]		Potential Sentence[d]		Received Custodial Sentence	Average Length Custodial Sentence	Average Custodial Sentence as Percentage of Potential Trial Sentence	
			min	max	min	max			min	max
263 (56.8%)	Rape	F1	36	132	24	96	43.8%	20.2 (17.2)	56.1%	15.3%
12 (2.6%)	Attempted Rape	F1	36	132	6 / 0	18 / 6	45.5%	6.0 (4.4)	17.0%	5.0%
2 (0.4%)	Attempted Rape	F2	24	96	9 / 0	36 / 6	n=0	--	--	--
1 (0.2%)	Sexual Battery	F1	36	132	9	36	n=1	9	25.0%	7.8%
21 (4.5%)	Sexual Battery	F3	9	36	0	6	33.3%	11.5 (5.5)	128.0%	32.0%
1 (0.2%)	Sexual Battery	F4	6	18	9	36	n=0	--	--	--
25 (5.4%)	Gross Sexual Imposition	F1	36	132	9	36	41.7%	18 (27.7)	50.0%	14.0%
18 (3.9%)	Gross Sexual Imposition	F3	9	36	0	6	37.5%	18 (19.3)	200.0%	50.0%
48 (10.4%)	Gross Sexual Imposition	F4	6	18	0	6	23.3%	10.4 (10.4)	173.0%	58.0%
1 (0.2%)	Unlawful Sexual Conduct with a Minor	F2	24	96	24	96	n=1	48	200.0%	50.0%
2 (0.4%)	Unlawful Sexual Conduct with a Minor	F3	9	36	6 / 0	18 / 6	n=1	12	133.3%	33.3%
38 (8.2%)	Unlawful Sexual Conduct with a Minor	F4	6	18	6	18	27.3%	11.3 (5.6)	188.9%	63.9%

a. This table excludes the one case that was charged as rape and ended in rape and the 29 cases for which the most serious sex offense charged at indictment was coded as other; percentages in this column are out of the full sample (n=463);
b. The most serious sex offense charged at indictment is not necessarily the top indicted charge;
c. This is the potential sentence, in months, associated with the highest charge in the indictment, assuming sentences to other charges would be served concurrently. Sentencing bands listed do not account for aggravating factors that can increase the maximum potential sentence or for the Regan Tokes Law, OHIO REV. CODE ANN. § 2901.011 (West 2019), which gives judges discretion to set indefinite sentences in rape and murder cases. Therefore, the high end of the sentence range should be understood as a conservative estimate, especially for the rape cases;
d. Potential plea sentence in months. Except for pathways with only one or two cases, the sentence range in this column is based on the modal plea charge (e.g., for persons indicted on rape, these values reflect the minimum and maximum potential sentences for an F2, the modal plea charge for rape cases);
e. Average sentences, in months, were calculated after excluding cases for which the no carceral sentence was imposed and for which no sentence information was available.

B. The Movement of Pleas: Traditional, Lateral, and "Up" Pleas

The common assumption about plea bargaining is that a defendant pleads "down" from the original charge or charges for a better sentence, a better charge, or both. This is the logic underlying much of the Supreme Court jurisprudence on plea bargaining.[104] Indeed, defendants pleading ineffective assistance of counsel in plea bargaining cases only have a viable claim if they can prove that, with effective counsel, they would have had a better outcome.[105] According to the Court, that "better outcome" was a lower charge or more favorable sentencing outcome than what the defendant received after their lawyer's ineffective performance.[106] The Supreme Court has referred to the benefits of plea bargaining as securing the "mutuality of advantage."[107] But the Court has largely focused on the better charge or sentence as the advantage secured by the defendant. This assumption relies on the idea that the defendant is either pleading to a lower charge that may or may not carry some sentencing advantage or that the defendant is pleading guilty to the original charge but with a sentencing benefit. When courts talk about the benefit of plea bargaining, they are contemplating the charge remaining the same or dropping

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104. Lafler v. Cooper, 566 U.S. 156, 161–62 (2012); Missouri v. Frye, 566 U.S. 134, 138–139 (2012).

105. *Frye*, 566 U.S. at 147.

106. *Id.*

107. Courts have referred to the benefits of plea bargaining as securing a "mutuality of advantage." Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Brady v. United States, 397 U.S. 742, 752 (1970).

down, with some attendant sentencing benefit. These assumptions line up with public assumptions about plea bargaining. Mostly the public sees plea bargaining as a practice that allows defendants to escape accountability through the negotiation of much lower charges or sentences.[108]

At least some courts have acknowledged that defendants may plead guilty to *more* serious charges for some sentencing benefit. For instance, a Virginia court approved a plea bargain where a defendant pleaded guilty to a more serious crime which did not carry the same mandatory minimum as the original charge against the defendant.[109] The court acknowledged that pleading "up" was necessary for the defendant to avoid the mandatory minimum and approved the deal since the defendant fully understood that he was pleading "up."[110]

Scholars have identified that defendants do not always plead in a straight line down. As Eagly notes about noncitizens navigating criminal cases, a "lateral move" in plea bargaining may allow a noncitizen defendant the opportunity to accept a similar punishment to his original charges while avoiding deportation.[111] McJunkin and Prescott note that "a prosecutor may be able to propose a 'lateral move' that does not sacrifice the overall criminal penalty but avoids other consequences of import to a defendant, such as the opportunity for an undocumented defendant to plead to a simple assault instead of a removal-eligible intentional assault."[112] The first author of this article, Professor Thea Johnson, has also written about how defendants might plead "up" to achieve some goal.[113] In one example, a defendant was willing to take an attempted murder conviction plus additional prison time over a lower-tier sex assault conviction and less prison time, so he could escape both registration and the stigma of being a sex offender in prison.[114]

Although our data largely supports the idea that defendants are pleading guilty in exchange for a more lenient charge or sentence, we found a significant minority of cases where the defendant pleaded either "laterally" to a charge that is the same class or degree as the indicted charge and carrying the same potential sentence, or pleaded "up" from a less serious charge to a *more* serious charge. Overall, we found 12% of the cases pleaded "laterally" and 4% pleaded "up." Within the major charging categories presented in Table 3, four cases (1.5%) that were initially charged as first-degree rape pleaded to a different first-degree crime. Although most of the third-degree sexual battery cases dropped down to a first-degree misdemeanor (38.1%), there were three cases that pleaded laterally (14.3%) and one case (4.8%) that pleaded "up." Half of the cases charged as fourth-degree unlawful sexual conduct with a minor were lateral pleas and 15.8% were "up" pleas. Interestingly,

108. Thea Johnson, *Public Perceptions of Plea Bargaining*, 46 AM. J. CRIM. L. 133, 149 (2019).
109. Commonwealth v. Ayala, 99 Va. Cir. 374, at *1 (Va. Cir. Ct. July 20, 2018).
110. *Id.* at *5.
111. Eagly, *supra* note 51, at 306.
112. McJunkin and Prescott, *supra* note 62, at 1665.
113. *Measuring the Creative Plea Bargain*, *supra* note 12, at 926.
114. *Id.* at 923.

nearly 90% of the fourth-degree unlawful sexual conduct cases were resolved with fictional pleas, most commonly aggravated assault.

Indeed, across the board, fictional pleas were more likely than factual pleas to be resolved in this non-traditional way. Pleas with a factual basis made up 61.7% of our dataset. Of that number, 4% were "up" pleas and 5.6% were "lateral." On the other hand, 21.6% of the fictional pleas were lateral and 3.9% were "up." In these cases, defendants are, potentially, getting the benefit of the fiction by trading away the traditional benefit of a better charge. The fiction achieves some result that the original charge cannot. We posit that this benefit is the avoidance of sex offender registration and other negative aspects of pleading guilty to a sex crimes charge.

The natural question that flows from the realization that defendants are pleading guilty to lateral or higher charges is to ask what sorts of sentences these defendants are facing. Perhaps the common assumptions still apply. For instance, a defendant may still be getting the benefit of a better sentence, even if the charge is unmoving or, even perhaps, if it moves up.

However, sentencing seems like an unlikely driving force in these cases. Nearly all the sentences in our dataset are multilayered, consisting of some mix of jail/prison, probation, programming (e.g., anger management), fines, restitution, and other collateral consequences (e.g., giving up a teaching license or a license to practice as a therapist). They demonstrate the nature of modern American sentencing, in which there is an array of options to mix and match. We found that 39.4% of the defendants were sentenced to some jail time. Most of the sentences were either nonincarceratory or involved suspended sentences. This was also true of the sentences in the "lateral" and "up" plea categories. Most of these pleas did not involve prison or jail. As a result, it seems unlikely that the defendant could have *only* achieved the final sentencing outcome with the benefit of the lateral or up charge. Instead, we suspect they are pleading guilty for the purpose of avoiding some other, non-sentencing outcome.

Perhaps the best evidence for this comes from the cases in which defendants were charged with both rape and kidnapping and pleaded guilty to kidnapping. Although kidnapping with a sexual motivation offers a *higher* sentence after trial than most rape charges,[115] these defendants did not get a higher sentence than would have been available if they had pleaded guilty to rape. To put it another way, the actual sentence the defendants received in those cases would have been possible if they had pleaded guilty to rape instead of kidnapping. The defendant did not avoid, say, a mandatory sentence by laterally pleading from a first-degree felony to a first-degree felony. The same goes for other lateral pleas we saw in the dataset. Defendants did not achieve a sentencing goal that could only be achieved by pleading guilty to a nonsex offense versus a sex offense.

Even for the majority of cases that followed the traditional formula of pleading "down," the defendant could have pleaded down to a lower-level sex crimes

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115. OHIO REV. CODE ANN. § 2905.01(C)(3) (West 2019).

charge, thereby securing the traditional benefits of plea bargaining (i.e., receiving a lower charge/sentence) while still having to register as a sex offender. Even the lowest level felonies could be dropped to several possible sex crimes misdemeanors that carry registration. The misdemeanors of sexual imposition, public indecency, and disseminating matter harmful to juveniles can all trigger registration under certain circumstances.[116] For these reasons, we do not think sentencing is the driving force for the pleas we see in our dataset.

Finally, we note that the pleas in our dataset also demonstrate how charge stacking works. Charge stacking or "piling on," as Crespo has called it, is the practice of prosecutors "inflat[ing] the quantity of charges the defendant faces, by piling on overlapping, largely duplicative offenses—increasing with each new charge the defendant's potential sentence, his risk of conviction, and the 'sticker shock' of intimidation that accompanies a hefty charging instrument."[117]

We found in our study that the average number of charges dropped was three. In one case, however, a whopping seventy-one charges were dropped. The average percentage decrease in the number of charges was 39.7%. In this dataset, nearly all the original charges were for serious felonies, so the charges being dropped were often also serious felony charges.

Indeed, we found many cases where several serious felonies were dropped down to one misdemeanor or one low-level felony charge, as with the case we described earlier, for which ten counts of rape of a minor were resolved by the defendant pleading guilty to a single count of endangering children.[118]

Another defendant resolved eleven counts of pandering sexually oriented material involving a minor; sixty counts of illegal use of minor in nudity-oriented material or performance; and one count of possessing criminal tools to six counts of possessing criminal tools.[119] In another, nineteen counts of illegal use of a minor in nudity-oriented material or performance and one count of possessing criminal tools became eleven counts of attempted unauthorized use of property/computer system.[120] In Part IV, we posit that the negotiation from sex crimes to nonsex offenses is likely not the result of prosecutors discovering new evidence which fundamentally changes the nature of the case. Charge stacking raises similar issues.

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116. OHIO REV. CODE ANN. § 2907.06 (West 2024) (classified as a Tier I offender and subject to registration and verification requirements once every 12 months for 15 years); *id.* § 2907.09 (West 2007) (classified as a Tier I offender under § 2907.09(B)(4) and subject to registration and verification requirements once every 12 months for 15 years); *id.* § 2907.31 (West 2004) (may be classified as a Tier I offender if the offense involved the use of force, violence, or threat of violence, or if the perpetrator has been convicted of a previous sexual offense).

117. Crespo, *supra* note 74, at 1313; Marc Miller & Ronald Wright, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003); Stuntz, *supra* note 70, at 594 (defining charge stacking).

118. Case 89 (on file with authors).

119. Case 110 (on file with authors).

120. Case 352 (on file with authors).

C. Fictional Pleas

Nearly two-fifths of the cases in our dataset were resolved by fictional pleas. Of course, as explained in the methodology section, these cases were selected with fictional pleas in mind. But we classified pleas as fictional only when there was no overlap at all between the facts and the final charges.[121]

These fictional pleas did not just excise the sex elements of the original charges but resulted in conviction charges that were entirely divorced from the facts alleged or the elements required by law to sustain the charge. As Letourneau and colleagues found in their work on juveniles charged with sex offenses in South Carolina, sex offender registration encourages defendants to plead guilty, but to charges *other than the ones they initially face*.[122] In other studies, defense attorneys report that the modern collateral consequences regime has encouraged creative bargaining, through which defendants can plead guilty to charges that avoid certain collateral consequences in exchange for charges that do not such carry consequences or carry less problematic consequences.[123] As we saw in some of the cases we examined, defendants may avoid sex offender registration but face other collateral consequences, like the loss of a license that allows them to continue in their profession.[124]

We start with a description of some cases that were resolved with fictions to give the reader a sense of the nature and degree of difference between the original indictment charges and the final disposition charge. Some extreme examples observed in the data were cases involving the possession of child pornography that were transformed into charges of assault.[125] In one of these cases, forty-two counts of pandering sexually oriented matter involving a minor became one count of felonious assault.[126] There were no overlapping elements between the charges. The defendant was not alleged to have created child pornography, but only to have accessed it from the internet.[127] In another case, a defendant was alleged to be in possession of a cell phone that contained material showing a minor participating in sexual activity.[128] He was charged with three counts of illegal use of a minor in nudity-oriented material or performance and one count of possessing criminal tools.[129] He pleaded guilty to one count of receiving stolen

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121. See *supra* Part I for the full description of how we coded fictional pleas.

122. *See supra* discussion in Part I.A.

123. *Fictional Pleas*, *supra* note 1, at 900; *Measuring the Creative Plea Bargain*, *supra* note 12, at 901.

124. *National Inventory of the Collateral Consequences of Conviction*, *supra* note 18; OHIO ADMIN. CODE § 3301-73-23 (2023) (Teachers and administrators may have their certifications revoked if they are convicted of a felony or misdemeanor); OHIO REV. CODE ANN. § 505.49 (West 2011) (An individual working for a township police department or department shall have their employment terminated if they plead guilty to a felony or misdemeanor); OHIO REV. CODE ANN. § 5920.11 (West 1985) (Commissions of officers of the military reserve shall be vacated by the recommendation of an efficiency board if an officer has been convicted of an "infamous" crime).

125. Case 60 (on file with authors).

126. Case 54 (on file with authors).

127. *Id.*

128. Case 322 (on file with authors).

129. *Id.*

property.[130] In other child pornography cases, the sex element was wiped away in favor of possession of criminal tools or illegal use of a computer.[131]

Other extreme examples of fictions in the dataset included a rape and kidnapping case that was pleaded down to "corrupting another with drugs," where there were no allegations of drug use or possession,[132] a gross sexual imposition charge that ended in a conviction to attempted possession of criminal tools,[133] and an attempted rape that was resolved with a conviction on attempted disrupting public service.[134] In addition, there were rape cases in the dataset that were resolved with the following charges: interference with custody,[135] contributing to the delinquency of a minor,[136] inducing panic,[137] and obstructing official business.[138]

1. Differentiating Fictional and Factual Pleas in the Dataset

Part of the aim of this project was to see if we could identify trends in fictional pleas that might give us some guidance on how and why the parties used fictions. To begin, we focus on how fictional pleas were related to the initial indictment charge, the age of the victim, and the relationship between the victim and the defendant.

We only had information on the victim-perpetrator relationship for 146 cases, limiting the extent to which we could use this variable to differentiate cases. As demonstrated in Table 2, the most common victim-perpetrator relationship among these cases was a personal, but non-familial relationship (45.3%). This category includes people in romantic relationships or people who knew each other personally before the incident. The next most common relationship was a parent/guardian (18.9%) or partner of parent/guardian (14.9%). In 12% of cases the perpetrator was a non-related authority figure, like a teacher or police officer. The final two identified groups were other family members (5.4%) and strangers (3.4%).

130. Case 322 (on file with authors). Receiving Stolen Property requires that the defendant: "receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense." OHIO REV. CODE ANN. § 2913.51 (West 2013).

131. Case 110 (on file with authors) (11 counts of pandering sexually oriented material involving a minor and 60 counts of illegal use of minor in nudity-orientated material or performance; and 1 count of possessing criminal tools. Defendant pleads guilty to 6 counts of Possessing Criminal Tools, and the other counts are dismissed).

132. Case 297 (on file with authors).

133. Case 199 (on file with authors).

134. Case 56 (on file with authors). Disrupting Public Service requires that "no person, purposely by any means or knowingly by damaging or tampering with any property shall do any of the following . . . substantially impair the ability of law enforcement officers, firefighters, rescue personnel, emergency medical services personnel, or emergency facility personnel to an emergency or to protect and preserve any person or property from serious physical harm." OHIO REV. CODE ANN. § 2909.04(A)(3) (West 2004).

135. Case 100 (on file with authors).

136. Case 57 (on file with authors).

137. Case 30 (on file with authors).

138. Case 148 (on file with authors).

As Table 4 demonstrates, cases involving an authority figure or parent/guardian were more likely than those involving other relationships to be coded as fictional pleas. Specifically, 47% of cases with a defendant who was the victim's parent/guardian and 51.9% of the cases with a defendant who was the partner of the victim's parent/guardian were resolved through fictional pleas. For cases involving a non-relative authority figure, 55.6% were resolved with a fictional plea. For a different view, when breaking out plea type by relations, approximately 14% of fictional pleas involved parent/guardians or the partner of a parent/guardian, compared to 6% of cases resolved by factual pleas (see Appendix Table A2).

Table 4. Victim-Perpetrator Relationship by Factual Basis & Plea Direction

Relation	Cases	%Fictional		%Up/Lat	
Unknown	314	117	37.3%	42	13.4%
Parent/guardian	21	10	47.6%	4	19.0%
Partner of parent/guardian	27	14	51.9%	11	40.7%
Other family relation	8	2	25.0%	1	12.5%
Other personal relation	67	23	34.3%	12	17.9%
Non-relative authority figure	18	10	55.6%	4	22.2%
Stranger	5	0	0.0%	0	0.0%
Total	460	176	38.30%	74	16.10%

The dataset also contains limited information on the age of the victims. Of the cases for which we have information, over 70% were sixteen years old or younger. It makes sense that age was generally excluded from the available information unless the victim is a minor since the very fact of the victim being a minor is often an element of a sex charge. For instance, the victim's status as a minor is, of course, necessary for the defendant to be charged with unlawful sexual conduct with a minor. But there are many other charges in our dataset that are charged more seriously if the victim is a minor, requiring the state to explicitly state the victim's age. Cases involving minor victims were somewhat more likely to be resolved with fictional pleas than those with adult victims or those for which we did not know the age of the victim. As can be derived from the data presented in Table 5, over 46% of the cases involving victims sixteen and under were resolved by fictional pleas, and this rate is higher than that of cases for which we did not know the age of the victims. Again, we can break out plea type by age and see that approximately 15% of fictional pleas involved victims aged sixteen and under in comparison to about 10.5% of factual pleas.[139] Importantly, we cannot draw conclusions about the relative likelihood of cases involving parent/guardian relations, or young victims, to end in fictional pleas without knowing how many of these cases were charged during the time-period studied and how the cases not included in our dataset were resolved.

Table 5. Victim Age by Factual Basis and Direction

Victim age	Cases	%Fictional		%Up/Lateral	
Unknown	380	143	37.6%	58	15.3%
<10	14	6	42.9%	1	7.1%
11-13	20	9	45.0%	3	15.0%
14-16	22	11	50.0%	11	50.0%
17-21	14	6	42.9%	0	0.0%
>21	10	1	10.0%	1	10.0%
Total	460	176	38.30%	74	16.10%

The variable that best differentiated fictional from factual pleas was the charge that the defendant was initially indicted on. Specifically, cases that ended in fictional pleas were more likely than those with a factual basis to begin with a charge of unlawful sexual conduct with a minor (20.5% vs. 1.8%, respectively) and less likely to begin with a charge of rape (44.3% vs. 69.7%, respectively).[140] Given the higher percentage of fictional pleas that started out as unlawful sexual conduct with a minor charges, it is not surprising that we also found that cases ending in fictional pleas were more likely than those ending in factual basis pleas to involve victims age sixteen and under and defendants who were the parent/guardian of the victim. From these high-level data we cannot say whether it is the age of the victim, the stigma of a charge that indicates a crime against a child, or a combination of the two that is driving the fictional plea effect, but these factors are all strong candidates.

Most interesting, defendants who started out with charges of unlawful sexual conduct with a minor and ended their case with a fictional plea were *more* likely to go to jail than defendants who started with the same charge and pleaded guilty to a non-fictional plea, like child endangerment. And they were more likely to serve

139. *See* Appendix Table A.1, *infra* p. 463.
140. *See* Table 3a, *supra* pp. 438.

jail time. Indeed, as we discussed at some length in the previous section, fictional pleas generally did not seem to convey any sentencing benefit to defendants. Defendants with fictional convictions were sentenced to a carceral sentence in approximately 30% of cases, compared to 40% for those with factual convictions, but this difference was entirely accounted for by the maximum length of the potential sentence the defendant was facing. On average, defendants with fictional pleas were facing shorter maximum plea sentences than their counterparts to begin with. This makes sense given that fictional pleas were most likely to occur in cases indicted on unlawful sexual conduct with a minor, most of which were fourth-degree felonies, and least likely to occur in rape cases, which were all first-degree felonies. Stated another way, given the same maximum plea sentence, the type of plea (fictional or factual) was unrelated to whether the defendant would actually serve time. Moreover, of the defendants who were sentenced to incarceration, those with a fictional plea served *more* time (relative to their maximum potential sentence) than those whose pleas were factual. Specifically, defendants who pleaded guilty to charges with a factual basis were sentenced to terms that were, on average, about 60% of the maximum potential plea sentence they could have received (and 20% of the maximum associated with indictment charges), whereas those whose pleas were fictional received, on average, a sentence that was about 75% of their maximum potential sentence (and 28% of the maximum associated with indictment charges).

Finally, we found that fictional pleas compared to pleas with a factual basis were more likely to result in a conviction charge that was the same ("lateral") or higher ("up") than the most severe indictment charge. Approximately 26% of the fictional pleas were "lateral" or "up" charges, compared to approximately 10% of the pleas with a factual basis. Taken together, these findings suggest that fictional pleas seem to satisfy the parties in cases where they want to achieve a similar serious offense for the record but excise the sex element from the conviction.

2. Trading Collateral Consequences

In a handful of cases, we observed that the fictional plea was accompanied by serious collateral consequences other than sex offender registration. These collateral consequences, almost always related to the defendant's employment, were often referenced specifically as part of the sentence in the record. There are hundreds of collateral consequences available for any given felony charge,[141] many of which are never mentioned on the record simply because it would not be possible to list them all. That these collateral consequences made it into the record potentially indicates the nature of these deals: the defendant may be trading the explicit penalty of losing his job for the benefit of avoiding sex offender registration. The

141. *National Inventory of the Collateral Consequences of Conviction*, *supra* note 124.

parties want to make this trade of one non-criminal punishment for another clear on the record.

There are several cases that began as some form of statutory rape involving a minor victim and an authority figure that ended in assault, even though there is no indication of physical harm, as required by Ohio law.[142] For instance, a high school teacher who performed oral sex on a student pleaded guilty to assault with a suspended sentence plus probation.[143] The factual recitation from the case did not indicate any injury that would align with an assault charge.[144] We found several cases of sexual battery stemming from sexual relationships between teachers and students in which the teachers pleaded guilty to charges like interference with custody, endangering children, and aggravated assault.[145] In these cases, the teachers appear to have traded the sex crimes elements for other elements (like force/injury), and the sex offender registry for loss of their state teaching certification and ability to teach again in the future.

In another case where we observed this trading, the defendant was the victim's former therapist-turned-boyfriend.[146] He was charged with two counts of rape and one count of kidnapping with a sexual motivation specification.[147] He pleaded guilty to one count of a crime called "patient abuse" and one count of unlawful restraint.[148] We categorized this plea as fictional because under the patient abuse statute, the state is required to prove that the abuse is against a "resident or patient of the facility" of which the defendant is "an agent or employee."[149] By the time of the assault, the defendant and the victim had been in a long-term relationship, which had ended.[150] The victim was no longer the defendant's patient.[151] By pleading to patient abuse, the defendant avoided sex offender registration but had to give up his license from the state board to practice in any social work related field.[152] Other cases involving professional collateral consequences involved police officers and prison guards who lost their licensure in exchange for fictional pleas that wiped the "sex" out of the charges.[153]

To be clear, if these defendants had pleaded guilty to sex offenses, they would have also lost their jobs. On the flip side, if they had gone to trial and won then

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142. OHIO REV. CODE ANN. § 2903.11 (West 2019); *id* § 2903.13 (West 2023).

143. Case 411 (on file with authors).

144. *Id.*

145. Case 211 (aggravated assault) (on file with authors); Case 319 (attempted inference with custody) (on file with authors); Case 399 (endangering children) (on file with authors); Case 454 (interference with custody) (on file with authors).

146. Case 305 (on file with authors).

147. *Id.*

148. *Id.*

149. OHIO REV. CODE ANN. § 2903.34(A) (West 1996).

150. Case 305 (on file with authors).

151. *Id.*

152. *Id.*

153. Case 42 (correction officer) (on file with authors); Case 160 (correction officer) (on file with authors).; Case 243 (police officer) (on file with authors).

they would neither have been subjected to registration nor have lost their jobs, where (from the perspective of the prosecutor who believes them to be guilty) they would continue to be exposed to vulnerable victims. Given the strong motivations of the parties to resolve these cases, discussed further in Part IV.A., the defendants here are likely offering something to the prosecutor in return for the certainty of conviction. They are willing to give up their jobs, thereby eliminating the possibility of an acquittal and the possibility of continuing in their role. Prosecutors are giving something back: a nonsex charge and no sex offender registration.

Given the sheer number of collateral consequences in Ohio, we suspect that many other defendants in our dataset were penalized with collateral consequences that were not listed as part of the sentence. But the fact that, in at least some of the cases, the mandatory collateral consequence was listed as part of the sentence indicates that the state was nodding to the central role the collateral consequence played in the deal.

3. Aggravated Assault: A Case Study in Fictional Pleas

To further illustrate the nature of the fictions in these cases, we turn briefly to a case study of the most common fictional pleas we observed in the dataset: pleas to aggravated assault. Under Ohio law, aggravated assault is a heat-of-passion offense, where the assault is "brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force."[154]

Except in certain circumstances, aggravated assault is a felony in the fourth degree, making it the second-lowest level felony in Ohio.[155] The statute has been on the books since 1972.[156] The language of the statute indicates that, like the classic common law heat of passion defense, aggravated assault serves as a form of mitigation to allow a defendant to plead down from the more serious charge of felonious assault.[157] Ohio courts have interpreted the statute in ways that will feel familiar to a student of criminal law. For instance, to be convicted under the statute the defendant must have subjectively been in a sudden passion or fit of rage as a result of provocation.[158] That provocation, however, must be objectively reasonable, meaning it "must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control."[159]

There is limited legislative history, but the case law makes clear that aggravated assault is intended for cases where the defendant reacts with violence after serious

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154. OHIO REV. CODE ANN. § 2903.12 (West 2019).

155. *Id.* § 2903.02.

156. *Id.* § 2903.12.

157. State v. Spencer, 105 N.E.3d 418, 421, 423 (Ohio Ct. App. 2018) (finding that fear alone is insufficient for "sudden passion or fit of rage," to reduce the offense from felonious assault to aggravated assault).

158. OHIO REV. CODE § 2903.12 (West 2019) ("No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadline force, shall knowingly . . . .").

159. State v. Shane, 590 N.E.2d 272, 276 (Ohio 1992).

provocation from another person (the victim or someone else).[160] Ohio courts have found that a "victim's simple pushing or punching does not constitute sufficient provocation to warrant an aggravated assault instruction."[161] Rather, the defendant had to be provoked in such a way that a reasonable person in their position would respond with violence rising to the level of a felonious assault, a third-degree felony.[162] There is no indication from the statute or case law that the statute was intended to provide mitigation in rape or sexual assault cases.

We coded aggravated assault cases as fictions because regardless of whether there were accompanying facts in the dataset, the case law made clear that there is no legal basis for claiming that a victim of a sexual assault reasonably provoked the attack against them.

Courts in Ohio have struggled with the fictional nature of aggravated assault convictions in rape cases. For instance, in *State v. Holloway*, an unreported case from 2012, the defendant pleaded to aggravated assault after an initial charge of rape, gross sexual imposition, and kidnapping for the alleged sexual assault of his nine-year-old stepdaughter.[163] Each of those charges carried a sexually violent predator specification, which marks a defendant as an individual who is likely to engage in future sexually violent offenses.[164] This specification, which is determined by the fact finder, results in harsher sentencing guidelines for defendants.[165] In this case, a sexually violent predator specification on the rape charge would result in the defendant facing life imprisonment without parole.[166]

After pleading to aggravated assault, the defendant was still ordered to be supervised by the probation department as a sex offender and placed on the sex offender registry.[167] Because he was sentenced as a sex offender despite having pleaded guilty to a charge that avoided sex offender status, he sought to withdraw his plea.[168] The appellate court found that, as a result of his plea, Holloway could *not* be considered a sex offender, but could still be supervised by the sex offender unit.[169] The court found that "[t]he mere fact that a defendant reaches a plea agreement for a

160. State v. Shepherd, 81 N.E.3d 1011, ¶ 36 (Ohio Ct. App. Jan. 30, 2017).

161. *Id.* at ¶ 31.

162. Aggravated assault requires both a subjective and objective test. The objective prong asks whether the provocation was sufficient to "arouse the passions of an ordinary person beyond the power of [their] control." State v. Spencer, 105 N.E.3d 418, 422 (Ohio Ct. App. 2018). If this standard is met, the court then moves to the subjective prong, which asks whether the defendant actually was under the influence of sudden passion or in a sudden fit of rage at the time of the offense. *Id.* If both prongs are met, the charge can be mitigated. *Id.*

163. State v. Holloway, 2012 WL 5289950, at *1 (Ohio Ct. App. Oct. 25, 2012). Holloway is included within the dataset.

164. OHIO REV. CODE ANN. § 2971.01 (West 2008).

165. *Id.* §§ 2971.02–.03.

166. *Id.* § 2971.03.

167. *Holloway*, 2012 WL 5289950, at *3.

168. *Id.* at *1.

169. *Id.*

lesser offense does not mean that a trial court should disregard the underlying facts giving rise to the indictment and ultimate conviction."[170]

But the concurrence noted the elephant in the room, which was that "it is virtually impossible to imagine a circumstance in which a 9-year-old girl could have 'by serious provocation . . . incite[d]' her stepfather 'into using deadly force' within the meaning of [the statute]."[171] The concurrence further questioned "whether justice and the public interest were served by the state in this case in agreeing to accept the defendant's guilty plea to a lesser offense in the amended indictment that he could not have possibly committed based on the alleged facts."[172] Other courts have similarly found that defendants were pleading to aggravated assault when they had actually committed sexual assaults.[173]

The cases in our dataset confirm this view. Indeed, the most common conviction charge for defendants charged with unlawful sexual conduct with a minor (in the fourth degree) was a plea to aggravated assault (44%), also a fourth-degree felony. Unlawful sexual conduct with a minor in the third-degree was also resolved by aggravated assault in at least one instance. Other cases involving children or incapacitated adults were also resolved with the defendant pleading guilty to aggravated assault. For instance, in one case, the defendant was charged with sexual battery under the subsection that required that "[t]he offender knows that the other person's . . . ability to appraise the nature of or control the other's own conduct is substantially impaired."[174] The defendant pleaded guilty to attempted aggravated assault.[175] Similarly, in another case, the victim alleged she was provided drugs at the defendant's house and became substantially impaired as a result.[176] While she was in this state, the defendant inserted his finger and penis into her vagina.[177] The defendant was charged with rape, sexual battery, and aggravated possession of drugs.[178] In that case, the defendant went to trial and the jury hung.[179] After the court declared a mistrial, the defendant accepted a plea to aggravated assault with no prison or jail time.[180] In a case like this, we can see the likely benefit of the aggravated assault statute in action. The prosecutor, having faced a hung jury, likely knew that they were facing an uphill battle at a second trial, and the defendant knew he was not yet in the clear from the criminal system. A plea to aggravated

170. *Id.* at *2.
171. *Id.* at *4.
172. *Id.*
173. *See, e.g.*, State v. Webb, No. 06AP-147, 2006 WL 2474356, at *1 (Ohio Ct. App. Aug. 29, 2006). This case is not included in the dataset because it occurred in different Ohio counties from the ones studied for this paper.
174. OHIO REV. CODE ANN. § 2907.03(A)(2) (West 2025).
175. Case 462 (on file with authors).
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. Case 417 (on file with authors).

assault allowed the defendant to end the case without sex offender registration and for the prosecutor to still secure a felony conviction.

IV. How Sex Impacts Plea Bargaining

In this Part, we turn to the implications of our findings. First, we explore why we think the parties—defendants, prosecutors, and judges—participate in such pleas. We further address the role of victims—or their lack of role—in these pleas, and what that might mean for our conception of justice. Finally, we turn in Part IV.C. to what these pleas might tell us about the nature of punishment when defendants are charged with sex crimes versus other types of crimes.

A. Party Motivations for Pleading Around Sex

As we have made clear throughout the paper, we hypothesize that defendants are pleading guilty to nonsex offenses in these cases to, at least in part, avoid sex offender registration and other negative consequences associated with sex crimes, like stigma or the threat of violence in jail. Although the parties may all come to the table for different reasons, as a primary matter we note that anecdotal reports indicate a high level of agreement among defendants, prosecutors, and judges about the need for extreme flexibility in plea bargaining, including the need for fictional pleas. In states that have debated whether to adopt more stringent plea standards, defense counsel, prosecutors, and judges have rallied against plea standards that would inhibit the use of fictional pleas.[181] One benefit of this paper is identifying potential motivations—across stakeholders—to maintain the ability to negotiate to a fiction.

As Part I.A. makes clear, there are multiple reasons why defendants do not want to be labeled as sex offenders. We add here that defendants potentially avoid any future sentencing under Ohio's sexually violent predator statute, which provides for enhanced sentences for those who are designated as sexually violent predators at conviction.[182] Because the defendants in these cases largely received low sentences (compared to the potential sentence they were facing at initial charging), we do not think that avoiding the immediate designation was a primary factor in these pleas, but it would certainly help defendants in the future if they were ever subsequently charged with a sex offense. For that reason, if a defense attorney is concerned about a defendant reoffending, a plea to a nonsex offense is particularly enticing.

The question about why prosecutors agree to such charges is somewhat trickier, and we turn to this question here. We acknowledge that we have no "right" answers. Instead, we are presenting a series of hypotheses that are generated by the data. Partly, the fact that we do not know why prosecutors do what they do is itself an important observation. Prosecutorial discretion exists in a black box. But even

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181. *The Efficiency Mindset*, *supra* note 45, at 122 (explaining that a proposed rule change in Michigan that was explicitly targeting fictional pleas was struck down after local defense attorneys, the Prosecuting Attorneys' Association of Michigan, and the Michigan District Judges' Association all fought the rule change).

182. OHIO REV. CODE ANN. §§ 2941.148, 2971.03 (West 2025).

after a deep dive into these cases, we are left with a mystery about the "why" question. Whether prosecutors should be required to answer the "why" question is one implication of this work. We hypothesize here, though, some answers to the "why" question we believe are supported by the data.

To begin, we want to address reasons we do *not* think underlie this prosecutorial lenience. We acknowledge that at least one reason for lenience might be that prosecutors have no evidence of a sex offense. Although we concede that prosecutors may, on occasion, continue with cases for which there is shaky evidence of guilt, we proceed with the premise that prosecutors—as is their ethical duty—negotiate pleas only in cases where they have evidence of guilt. We find it unpersuasive that prosecutors are making these deals just to end a case for which they have no or little evidence. This is particularly true since the cases we are dealing with in our dataset are post-indictment. This means that the prosecutor had to have some minimum amount of evidence to sustain the felony charges before a grand jury.

Additionally, and for similar reasons, we find it unpersuasive that the pleas in our dataset can be explained by further investigation by prosecutors that led to new discoveries in the case. Of course, prosecutors may discover evidence during investigation that strengthens or weakens the case. They may realize the complaining witness will not make a good witness, or they might discover eyewitnesses or video evidence of the crime to paint a better or worse picture for them. They may realize that a search for evidence did not pass constitutional muster, and the evidence will be thrown out during pretrial hearings. The list goes on of how and why a case may develop and change. But we are unpersuaded that—particularly post-indictment—a prosecutor discovers that a case that was a rape case is now actually an aggravated assault or mere child endangerment; or that a possession of child pornography charge with no allegations of physical conduct between the defendant and any victim is now an assault case. To put it another way, we reject the idea that in all of these cases, prosecutors discovered new evidence that indicated that some other crime—not the original sex crime—was the actual crime committed.

Lastly, we do not think these pleas are a product of the trend of progressive prosecution. None of the chief prosecutors during the data's timeframe defined themselves, publicly at least, as adopting the ethos of progressive prosecution.[183] Further, even the most progressive prosecutors have not come out in support of

183. Cuyahoga County prosecutors: William D. Mason was the chief prosecutor from 1999–2012. One of his goals before taking office in 1999 was taking a tough stance on crime. *Cuyahoga County Prosecutor Bill Mason to Step Down*, CLEV. 19 NEWS (Sept. 17, 2012, 4:15 PM), https://www.cleveland19.com/story/19562560/cuyahoga-county-prosecutor-bill-mason-to-step-down/ [https://perma.cc/63AT-YDZA]. Timothy J. McGinty was the prosecutor from 2012–2016. Jen Picciano, *Who is Cuyahoga County Prosecutor Tim McGinty?*, CLEV. 19 NEWS (Dec. 28, 2015, 7:55 PM), https://www.cleveland19.com/story/30756759/tamir-rice-prosecutor-tim-mcginty/ [https://perma.cc/6FSE-6Z7R]. He was former law enforcement and evinced no progressive agenda. *Id.* Joe Deters was the prosecutor in Hamilton County during the years of our study, and also was not considered a progressive prosecutor. Sharon Coolidge, *Deters Unswayed After Jesuit Leader's Rebuke on Death Penalty*, CIN. ENQUIRER (Aug. 20, 2018), https://www.cincinnati.com/story/news/2018/08/20/vatican-priest-embarrassed-scandalized-prosecutor-deters-death-penalty-stance/1045682002/ [https://perma.cc/8FBE-5HV7].

allowing sex offenders to avoid registration.[184] We have no reason to believe that these deals arise from a broad theory of prosecutorial discretion adopted by a particular prosecutor.

With this in mind, and building from prior work, this paper hypothesizes three major reasons that prosecutors are willing to negotiate the sex out of these sex crimes. First, these pleas allow the parties to "get to yes" in cases where it may be difficult for the prosecutor to otherwise secure a conviction via plea bargain or trial. When it comes to plea bargaining in sex crimes cases, defendants may be unwilling to plead guilty to a sex crimes offense because of the far-reaching effects of sex offender registration, the stigma of the charge or the seriousness of the sentence. It may make more sense for a defendant to roll the dice at trial than to take a plea involving a sex offense.[185] A prosecutor interested in ending a case may be willing to creatively bargain to get to a resolution. As noted, we see this same pattern in criminal cases involving potential immigration consequences.[186] Even the Supreme Court has acknowledged that because avoiding immigration consequences might be a primary goal for some defendants, prosecutors will have to bargain around immigration consequences to get to a resolution.[187]

In rape cases, the desire to "get to yes" may be even more prevalent since research demonstrates that jurors tend to disbelieve rape victims more often than victims of other violent crimes.[188] If securing a conviction at trial will be difficult for the prosecutor not because of a lack of evidence, but rather because of juror bias, then it may well make sense to offer a plea that a defendant might actually accept. In one classic study of juror decision-making, researchers found that jurors were four times more likely to convict in a sexual assault case that involved aggravating factors, like stranger assailants, multiple assailants, or violence.[189] Although attitudes continue to evolve, prosecutors face an uphill battle in rape and sexual assault cases.

Second, there may be many cases in which the prosecutor does not see a sex offense as aligning with their vision of justice. As Green and Roiphe argue, a prosecutor's role is to do justice as defined by the law, and by norms and internal policies.[190] A substantial minority of the cases in the dataset involve a defendant and victim who are related or have a personal relationship, and those cases are more

184. *The "Why" and the "Should," supra* note 63, at 72.

185. Rachel Marshall, *I'm a Public Defender. My Clients Would Rather Go To Jail Than Register as Sex Offenders*, VOX (July 5, 2016), https://www.vox.com/2016/7/5/12059448/sex-offender-registry [https://perma.cc/V6QL-6TEA].

186. McJunkin & Prescott, *supra* note 62, at 1721; Eagly, *supra* note 51, at 306.

187. *The "Why" and the "Should," supra* note 63, at 79 ("As the Supreme Court acknowledged in *Padilla v. Kentucky* [559 U.S. 356, 365–66 (2010)], many noncitizen defendants will take their chances at trial rather than accept a plea that carries deportation consequences, even if those chances are bad. Defendants charged with sex offenses may have the same mindset.").

188. *See* Mary Graw Leary, *Is the #MeToo Movement for Real? Implications for Jurors' Biases in Sexual Assault Cases*, 81 LA. L. REV. 81, 95 (2020).

189. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 253 (1966) (Table 72).

190. Green & Roiphe, *supra* note 62, at 806–09.

likely than others in our dataset to be resolved with fictional pleas. But even in the cases without fictional pleas, many of these cases were resolved with less serious charges of child endangerment.[191] In these cases, the victim may not have an interest in seeing the defendant convicted of a sex offense, which may limit the defendant's ability to work, live in the place of their choosing, or have interactions with their children. This is especially true in cases where victims are children of the defendant. Sex offender registration may cease all interactions between the defendant and their child and may lead to child protective services removing the children (or the parent) from the home. A fear of entirely losing the parent-child relationship may lead some victims to request nonsex pleas. This behavior is in line with work by scholars like Bazelon and Green, who have observed that even sex crimes victims may not always want the defendant to face the full force of the criminal process.[192] In her work on statutory rape prosecutions, Levine notes that prosecutors in those cases will do an early assessment to probe the depth of the relationship between the victim and defendant, and make important decisions about how to treat the case based on the level of intimacy between the parties, among other factors.[193] Here too, we may be seeing prosecutors responding to a close relationship between victim and defendant with the exercise of leniency.

We acknowledge that, as some prosecutors have noted about the challenges of these sorts of cases, victims with a relationship to the defendant may also recant their accusations after the arrest. The tendency of victims to recant genuine allegations of assault continues to be a hurdle in domestic violence cases of all sorts.[194] If a prosecutor does not want to proceed with an unwilling witness, but believes the defendant is guilty, a plea that excises the sex element may be the "best" solution.

There may also just be cases where the prosecutor does not think it fair to subject the defendant to sex offender registration. For instance, we found a handful of cases in which the defendants who got the benefit of these deals also appeared to have a severe mental illness. In their study on how the sex offender registry impacts plea bargaining in sex assault cases with juvenile defendants, Letourneau and colleagues hypothesized that prosecutors were reluctant to subject young people to severe registration laws, which meant that they declined to charge sexual assault cases, and in the instances where they did charge sexual assault, were

191. We also note that there is some chance in these cases that while the defendant may avoid the sex offender registration, they may not avoid other state registries. For instance, Ohio has a private registry that tracks people who have been designated as child abusers. *Ohio SACWIS Alleged Perpetrator Search (OSAPS)*, OHIO DEP'T OF CHILDREN & YOUTH, https://childrenandyouth.ohio.gov/for-providers/foster-care-licensing/osaps [https://perma.cc/RW99-ESCW] (last visited Feb. 1, 2026).

192. Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 331–32 (2020).

193. Levine, *supra* note 64, at 725–33.

194. Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 439–40 (recounting how some prosecutors deal with this issue by imprisoning unwilling witnesses).

willing to amend the initial charges to nonsex offenses.[195] Perhaps we see a similar pattern of helping vulnerable defendants stay off the registry.

Third, prosecutors themselves often argue that the reason they come to a resolution in sex crimes cases is because a trial will be traumatizing for the victim. As the executive director of the Ohio Prosecuting Attorneys Association noted, "[a] lot of these [sex crimes] cases involve child victims who you don't want to put on the stand and force them to relive this really traumatic event and force them to face the defendant, who might be a family member or a family friend."[196] In a case where the defendant refuses to plead guilty and the victim fears testifying, a plea to a nonsex offense might provide an avenue of relief for all parties. Of course, prosecutors still have a duty to weigh public safety concerns against the needs of the victim, but avoiding victim trauma may be a strong reason to agree to a favorable plea. In addition, young victims might also be easy witnesses for the defense to undermine through rigorous cross-examination. By negotiating these plea agreements, prosecutors simultaneously protect traumatized victims from additional psychological strain and shield their cases from the risks posed by potentially compromised witness testimony.

The special treatment of unlawful sexual conduct with a minor in our sample supports the idea that prosecutors are proceeding differently in cases with child victims. For instance, unlawful sexual conduct with a minor is more likely to end in both a fictional plea and a lateral plea than other types of crimes in our dataset. It is also more likely to end in a carceral sentence when the defendant gets the benefit of the fiction. This indicates that prosecutors may be avoiding trials on the sex crimes charge, while trying to preserve the seriousness of the charge. These may be places where the prosecutor wants to protect the child victim or avoid the risk of losing at trial but needs some carrot to entice the defendant to plead guilty. The prosecutor may be trading a charge or sentence of equal severity to the original charge for the certainty of a deal.

This section has largely focused on prosecutors. But as a concluding note we offer some reflections on why judges sign off on these pleas. It is possible, of course, that certain individual judges may not understand the scope of "creativity" that the parties used to reach the deal.[197] Judges may sign off on pleas without understanding the nature of the bargain either because they do not inquire into the bargain or they are actually misled by the parties.[198] But we suspect that most judges were aware of the mismatch between the original charges and facts, and the final charge in these cases, especially given the severity of the crimes. Interestingly, in at least one study on plea bargaining in sex crimes cases, the authors found "significant variation between . . . judges (and not between prosecutors) with respect to plea outcomes [in sex offense cases]," and posited that it might have something to do with judge shopping, i.e., the

195. Letourneau et al., *supra* note 11, at 190–91.

196. Megan Henry, *Ohio Supreme Court Justice, Crime Victim Advocates Want Charges in Pleas to Be Based in Facts*, OHIO CAP. J. (Nov. 13, 2024), https://ohiocapitaljournal.com/2024/11/13/justice-michael-donnelly-ohio-crime-victim-advocates-want-charges-in-pleas-to-be-based-in-facts/ [https://perma.cc/7M8J-JEX9].

197. *Fictional Pleas*, *supra* note 1, at 877.

198. *Id.*

practice of lawyers strategizing to end up in front of a particular judge.[199] There may be, for instance, certain judges who are more open to bargaining in sex crimes cases than other judges.

We also suspect that, compared with prosecutors, judges have a more limited set of motives for agreeing to such pleas, mostly rooted in a desire for efficiency. In Michigan, the District Judges Association of the state justified their position on such efficiency grounds.[200] As their letter noted:

> Eliminating the possibility of taking proofs [that do not correspond to the conviction charges] will make it more difficult to negotiate resolutions to some cases. The busy schedules of many judges would be negatively impacted by a court rule change that makes it more difficult for attorneys and defendants to negotiate guilty pleas to reduced charges.[201]

In other words, judges are busy, and they need the parties to be able to resolve cases quickly.

In their study of modern judging in criminal courts, King and Wright propose that, despite the perception that judges remain hands-off during plea negotiations, many judges take an active role in the plea process.[202] The nature of their involvement differs from county to county and even courtroom to courtroom, but King and Wright note that docket control provides a strong motivator for judges to become involved in pleas.[203] And this motive extends to the legislative and policy realm as well. Meaning, not only are judges willing to become involved in or smooth the way for pleas at the individual level, but they also advocate for flexibility of plea bargaining at the policy level.

B. Victim Concerns About Pleading Around Sex

While we do not know why prosecutors make the decisions they do, at least some of our hypotheses rely on the premise that prosecutors work towards victim interest. For this reason, it is important to note that victim's rights advocates in Ohio have railed against fictional pleas and other forms of negotiating around sex crimes. These advocates claim that victims are often erased from these plea agreements.[204] It is hard to know how frequently victims are consulted about these pleas, even though the law requires that, upon their request, victims be kept in the loop.[205]

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199. Frazier et al., *supra* note 44, at 807–08.

200. *Id.*

201. *The Efficiency Mindset*, *supra* note 45, at 124 (quoting Letter from Julie H. Reincke, Chair, Michigan District Judges Association to the Michigan Supreme Court on the proposed rule change).

202. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 394 (2016).

203. *Id.* at 356–57.

204. Meg Garvin & Elizabeth Well, *'Baseless' Plea Bargains Deny Ohio Rape Victims Justice, Erase Their Voices*, COLUMBUS DISPATCH (Apr. 12, 2022), https://www.dispatch.com/story/opinion/columns/guest/2022/04/12/opinion-victims-must-included-offenders-plea-bargaining-process/7264985001/ [https://perma.cc/7WLS-VP3X].

205. OHIO REV. CODE ANN. § 2930.06 (West 2023).

An op-ed in the Cincinnati Enquirer written by three victims of the same serial rapist claimed that, despite their requests, the district attorney largely excluded them from the negotiation process.[206] They opposed the ultimate deal, but they were never consulted or even updated on the case as it proceeded.[207] There was generally no information on the victims' wishes anywhere in the record that was available to us.

Of course, the same bias against rape victims that may impact jurors might also influence prosecutors. Such bias may lead prosecutors to judge a case as "weak" and make a favorable offer to the defendant. Indeed, a group of law professors in Ohio and Kentucky wrote an open letter criticizing an Ohio prosecutor for his remarks defending a favorable plea deal in a violent rape case.[208] The prosecutor had publicly criticized the victim, a lawyer, for having dinner with the defendant, who had previously been her client in a civil suit, and drinking wine with him, an attitude that the law professors characterized as victim blaming and public shaming.[209]

Although there is robust literature on the role of victims in the plea process, there is less work on victim perceptions and experiences with the sex offender registry.[210] Victims have sought a meaningful role in the plea process.[211] Several scholars have suggested ways to better include victims in the plea process; and many states have legislated a larger role for victims in the plea process.[212] At least thirty-three states and the federal system now require that prosecutors inform the victim about any offers made in the case, and inform the court if the victim objects to a plea deal.[213] Ohio has a similar law,[214] but victim advocates in Ohio complain that they have been left out of the plea process. All of which is to say that although the law mandates that victims be consulted about the plea, it is not clear how often that actually happens. Some of these pleas may be the result of the prosecutor making an assessment about the strength of the case, regardless of the victim's opinion about how the case should be resolved.

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206. KM, CB & AF, *Opinion: Plea Bargains Fail to Protect Sexual Assault Victims*, CIN. ENQUIRER (Feb. 23, 2022), https://www.cincinnati.com/story/opinion/2022/02/23/opinion-plea-bargains-fail-protect-sexual-assault-victims/6796598001/ [https://perma.cc/EEG6-7YSG].

207. *Id.*

208. Jennifer A. Kreder & Amy E. Halbrook, *Opinion: Prosecutors' Remarks About Rape Victim Were Wrong, Unprofessional*, CIN. ENQUIRER (Oct. 4, 2019), https://www.cincinnati.com/story/opinion/2019/10/04/opinion-prosecutors-remarks-rape-victim-were-wrong-unprofessional/3823124002/ [https://perma.cc/6GFH-TVJ5].

209. *Id.*

210. There is some work on this topic, including: Sarah W. Craun & Catherine A. Simmons, *Taking a Seat at the Table: Sexual Assault Survivors' Views of Sex Offender Registries*, 7 VICTIMS & OFFENDERS 312 (2012) (noting that although survivors of sexual assault tend to favor registries, they also feel that the registry provides a false sense of security).

211. *See, e.g.*, Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN'S L.J. 45, 47–58 (2017).

212. *See, e.g.*, *id.* (arguing the need for victim participation in plea agreements); Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 100 (2014) (asserting the need for victims to be active participants in all aspects of criminal prosecution).

213. Jones, *supra* note 212, at 114 n.96.

214. OHIO REV. CODE ANN. § 2930.06 (West 2023).

In other parts of the world, sex offender registries require only that the police keep track of sex offenders and distribute that information in limited circumstances, such as to childcare providers who make specific requests about individuals.[215] In the United States, by contrast, the sex offender registry is often available for public view.[216] In Ohio, as elsewhere, members of the public can look up people who have been convicted of sex crimes.[217] If the registry serves a protective purpose (and, as we have noted, there is debate about whether it effectively acts in such a way[218]), then one obvious complaint from community members is that they are being denied information that could lead to their future victimization.

These concerns about public safety raise important questions for debates regarding the interaction between legislative purpose and plea bargaining. The Stuntzian view is that legislators enact an expanding array of criminal statutes with accompanying sentences, cognizant that prosecutors will use these tools to shape outcomes primarily through their charging and plea-bargaining authority.[219] Whether expansive and often harsh sex offender registries serve a similar function merits serious consideration. Do legislators view these registries as valuable in their own right, or rather as additional leverage enabling prosecutors to secure agreements? And further, if registries are considered legitimate by legislators, then are the pleas in this study proof that the registries have gone too far? If system actors are avoiding sex offender registration, then would a more moderate penalty for sex offenses actually provide more protection for the community? The tensions between victims and prosecutors in cases where plea negotiations circumvent "sex" charges bring these critical questions to the fore.

C. How Sex Changes Conceptions of Punishment During Plea Bargaining

We make no judgments about whether allowing a defendant to avoid sex offender registration or the stigma of a sex offense is inherently good or bad. As noted previously, there is significant evidence that the sex offender registry is not effective at preventing the type of harm it is intended to prevent. We suspect this is one reason that prosecutors are willing to make the deals we observe in our study. We also leave for a different day a broader question about whether prosecutors avoiding sex offender registration is an appropriate use of their power. In the context of growing literature about how we should understand the prosecutor's role, we acknowledge that some reasons for these prosecutorial deals are more

215. Alessandro Corda, *Sex Offense Registries in Europe and Around the World*, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 4, 2020), https://ccresourcecenter.org/2020/11/24/sex-offense-registries-in-europe-and-around-the-world/ [https://perma.cc/A4WA-V2AE].

216. Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 370, 375 (2009).

217. *Ohio Sex Offender Registry*, OHIO.GOV, https://ohio.gov/residents/resources/sex-offender-search [https://perma.cc/E7G7-5L8N] (last visited Jan. 30, 2026).

218. *See supra* Part I.A.

219. Stuntz, *supra* note 70, at 509.

legitimate than others. We encourage further study on the "why" question that engages directly with ongoing debates in the field over whether prosecutors "should" make these deals.[220]

Our focus here is on what this use of discretion reveals about the nature of plea bargaining, regardless of prosecutorial motivation. Specifically, we argue that the pleas we have studied demonstrate that sex crimes cases involve factors significantly influencing resolution that traditional analyses may overlook. Conventional measures of plea bargaining success examine whether defendants secured a "good" deal.[221] As previously discussed, the standard approach evaluates deals by assessing whether defendants negotiated downward from higher to lower charges or secured more favorable sentences than those faced at trial. These measurements, however, fail to capture the full spectrum of exchanges occurring in practice. This is especially true since the lack of transparency at plea bargaining makes it very difficult to even understand the nature of the bargain.[222]

Sex crimes cases provide particularly fertile ground for studying this issue because numerous factors likely influence plea negotiations. For instance, sex offender registration, while not formally classified as "punishment," carries negative consequences potentially more severe and enduring than imprisonment. Indeed, if we think of sex offender registration as a form of "social death" that will cut the defendant off from engaging in the typical activities of life, even after release from prison, then the cost of registration is much higher than merely being put on a public list or having to check in regularly with a probation officer. Like being deported, sex offender registration has the potential to fundamentally upend the defendant's life, whether incarcerated or not. As such, it is a powerful bargaining tool.

Moreover, the stigma associated with sex offenses—separate from the tangible punishments of registration or incarceration—represents an amorphous yet significant penalty defendants seek to avoid. In one case in our prior qualitative work, we found evidence of a defendant who was willing to take a plea to attempted murder rather than rape just to escape the "sex offender" label.[223] The designation carries such profound damage that individuals make substantial concessions to avoid it.

This phenomenon extends beyond the United States. International law scholars have documented how defendants in international tribunals strategically maneuver around admitting to sex offense charges when they plead guilty because of the charges' intense stigma.[224] War criminals would prefer to be labeled as

220. We have begun to enter this debate, but think further study is warranted. *The "Why" and the "Should," supra* note 63, at 72.

221. *Measuring the Creative Plea Bargain*, *supra* note 12, at 912–15.

222. Miller & Wright, *supra* note 117, at 1410 ("Charge bargains, even more than sentencing concessions, make it difficult after the fact to sort out good bargains from bad in an accurate or systematic way.").

223. *Measuring the Creative Plea Bargain*, *supra* note 12, at 923.

224. Houge, *supra* note 43, at 192.

murderers rather than rapists.[225] As Houge notes in her work on international guilty pleas in sex offense cases:

> [T]he essentializing discourse on the inhuman, deplorable, convicted sex offenders coexists with discourses that condone, neutralize, and deny sexual violence, blame victims; and render most offenders ordinary rather than aberrant. Yet, once offenses get prosecuted and convicted . . . a large apparatus goes to show they are deviant, different, monsters—feeding into the hierarchy of violence that constructs [sexual violence] as a particularly heinous crime.[226]

In this context, Gruber's framework of "sex exceptionalism" offers a compelling analytical lens. Gruber's scholarship illuminates how sexual offenses occupy a distinctive position within the legal system, characterized by harsh punishment, diminished procedural safeguards for defendants, and expansive statutory definitions.[227] Sex crimes constitute a seemingly inviolable category within criminal law, despite Gruber's demonstration that their enforcement has historically been selective and inconsistent.[228] The exceptional treatment of sex crimes influences defendants' decision-making processes. Our research suggests that all parties—prosecution, defense, and judge—recognize rape's distinctive status. This recognized "difference" becomes a significant variable during plea negotiations.

Consider a defendant confronting equivalent sentencing outcomes for rape and assault charges—hypothetically, a ten-year term of incarceration. The defendant likely perceives these equivalent sentences asymmetrically when one carries the sex offender designation, particularly if it involves a minor victim, while the other can be viewed as merely an assault conviction. Consequently, meaningful comparison between assault and rape charges of ostensibly similar severity becomes problematic, as the registration requirements and profound stigma associated with sex offenses fundamentally alter the framework for both negotiating parties. The way these pleas play out in real life shows us how difficult it is to measure and evaluate the success of one plea bargain versus another.

It also lends support for the argument that the traditional view of plea bargaining as a negotiation over the charge and sentence is far too limited. This is true in the context of many collateral consequences, which the parties view as additional punishment that must be calculated into the negotiation. But it is particularly true for sex crimes cases, where the stigma of the conviction creates an additional layer of punishment that defendants will trade for.

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225. *Id.* ("[Defendant] included more detailed reference to his participation in a massacre of civilians. It is his *sexual* violence that eludes his attention, which suggests that wartime murder may be less stigmatizing for offenders than it for [conflict-related sexual violence].").

226. *Id.*

227. Gruber, *supra* note 15, at 764–68.

228. *Id.*

CONCLUSION

As is often the case with the study of plea practice, we are left with important questions that need further study. What does it mean that some defendants are getting these deals while others are not? If sex offender registration is not effective, as some studies conclude, then is the use of prosecutorial discretion in this manner the best way to deal with these flaws, particularly if repeal of registration laws is unlikely? Like all questions of prosecutorial discretion, what does it mean that we leave questions about how to apply collateral consequences to individual line prosecutors?

Because of the lack of hard data on plea bargaining paths and outcomes, we think more qualitative work that focuses on how defense attorneys and prosecutors approach these cases is warranted. How do defense attorney strategies and negotiation tactics differ based on the specific sex offense charge, the defendant's characteristics, and the potential for sex offender registration? What factors influence prosecutors' decisions—from their perspective—to offer or accept plea bargains that remove "sex" from the sex offense? Importantly, because we have at least some evidence that victims feel a sense of voicelessness in sex crimes cases, more qualitative work with victims is necessary to assess the full impact of these pleas.

Of course, this Article also leaves us with questions about how sex offender registration laws might be reformed to reduce the pressure on defendants to avoid sex offense convictions through plea bargaining. Might sex offender registration not be mandatory, but rather based on the facts and circumstances of each case? Such a system poses the typical risks of arbitrary enforcement, but the pleas here indicate that such arbitrary enforcement may be happening anyway.

Part of the problem with addressing these questions is the lack of data. As we noted in Part II, we have struggled to get comparative data on Ohio sex crimes for this paper. Indeed, even locating how many sex offenses are prosecuted each year across jurisdictions is difficult to locate. Several groups have suggested that data collection be a core feature of court reform efforts.[229] We strongly agree. In order to understand the system and the how and why prosecutors use their discretion, we need more data about how plea bargaining works on the ground. While we recognize the significant administrative burdens facing criminal justice system actors, the outsized role plea bargaining plays in adjudicating criminal cases demands more rigorous, systematic data collection. Without such evidence, our understanding of criminal justice processes remains fundamentally incomplete.

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229. *See, e.g.*, Thea Johnson, *A.B.A. Plea Bargain Task Force Report*, ABA CRIM. JUST. SECTION 19 (2023), https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/reports/plea-bargain-tf-report.pdf [https://perma.cc/PN92-WSZH].

APPENDIX A[230]

Table A.1 —Factual Basis by Age of Youngest Victim

Factual Basis	Victim Age	%age of cases	
NF	< 10	8	2.8%
	11 to 13	11	3.9%
	14 to 16	11	3.9%
	17 to 21	8	2.8%
	> 21	9	3.2%
	unknown	237	83.5%
F	< 10	6	3.4%
	11 to 13	9	5.1%
	14 to 16	11	6.3%
	17 to 21	6	3.4%
	> 21	1	0.6%
	unknown	143	81.3%

Table A.2 —Factual Basis by Victim-Perpetrator Relationship

Factual Basis	Relation	%age of cases	
NF	authority figure	8	2.8%
	other family	6	2.1%
	other personal	44	15.5%
	parent partner	13	4.6%
	parent/guardian	11	3.9%
	stranger	5	1.8%
	unknown	197	69.4%
F	authority figure	10	5.7%
	other family	2	1.1%
	other personal	23	13.1%
	parent partner	14	8.0%
	parent/guardian	10	5.7%
	stranger	0	0.0%
	unknown	117	66.5%

230. Under the "Factual Basis" heading of Table A.1 and Table A.2, "NF" refers to Non-Fictional and "F" refers to Fictional.