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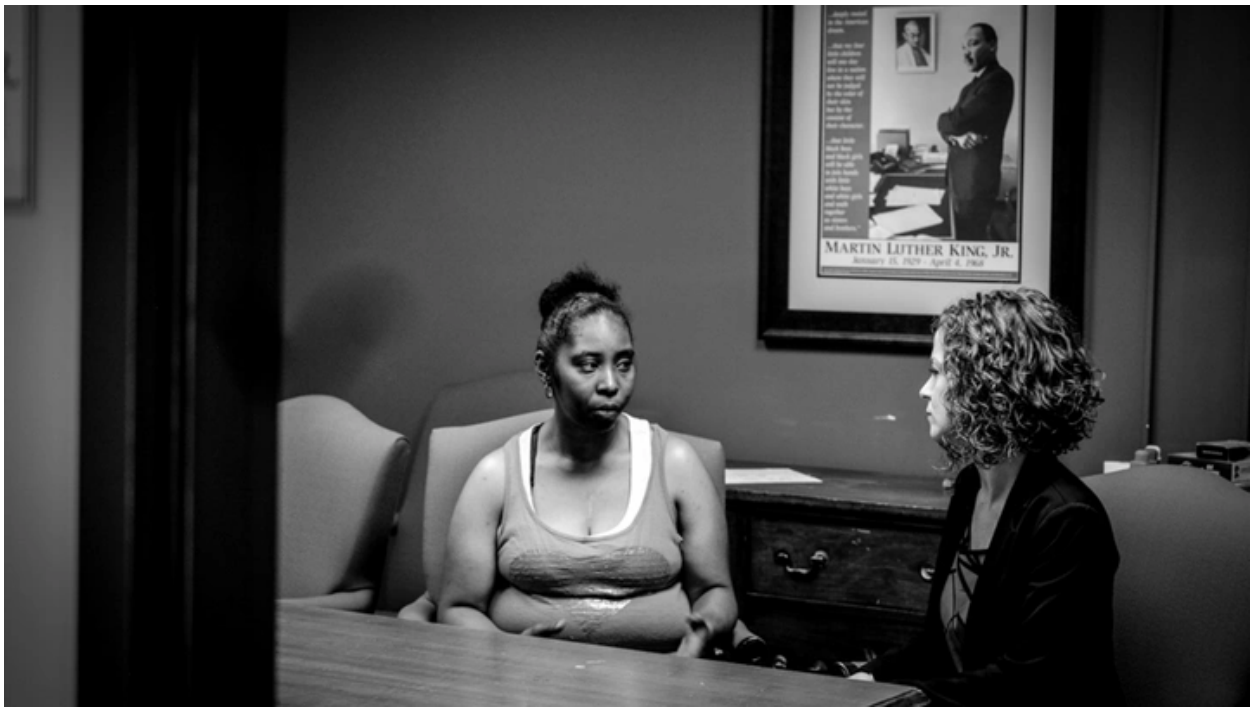
# Innocence Is Irrelevant

This is the age of the plea bargain—and millions of Americans are suffering the consequences.

EMILY YOFFE SEPTEMBER 2017 ISSUE




Shanta Sweatt (left) and her attorney, the public defender Ember Eyster, in Eyster's Nashville office (NINA ROBINSON)

It had been a long night for Shanta Sweatt. After working a 16-hour shift cleaning the Tennessee Performing Arts Center, in Nashville, and then catching the 11:15 bus to her apartment, she just wanted to take a shower and go to sleep. Instead, she wound up having a fight with the man she refers to as her "so-called boyfriend." He was a high-school classmate who had recently ended up on the street, so Sweatt had let him move in, under the proviso that he not do drugs in the apartment. Sweatt has a soft spot for people in trouble. Over the years, she had taken in many of her two sons' friends, one of whom who had been living with them since his early teens.

Sweatt, who is black, didn't know what had led the police to her door. Their report says a complaint had been made about drug dealing from the apartment. After entering, they began systematically searching her apartment. One officer yanked open a junk drawer in her bedroom dresser, and inside he found small baggies of marijuana, containing a total of about 25 grams—a weight equivalent to about six packets of sugar. There was also marijuana paraphernalia in the apartment. When the officer showed the baggies to her, Sweatt immediately knew they had to belong to her boyfriend, who—in addition to having just been smoking in her home—had past drug convictions.

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Sweatt, 36 years old, left high school in 11th grade, but she has the kind of knowledge of the law that accrues to observant residents of James A. Cayce Homes, a housing project in East Nashville. "I'm the lease owner," she told me. "Whatever was there, I would get blamed." It seemed useless to her to say that the drugs must have belonged to her absent boyfriend, who had a common name and no fixed address. She believed that this would result in the police pinning the crime on her sons. Her 17-year-old was at school, but her 18-year-old, who worked on the cleaning crew with her, was home, along with the friend of

his who lived with them. Sweatt told me, "I've seen that where I lived: The parents said no, so everyone in the house gets charged. I'm not going to let my children go down for someone else's mistake. A parent should take ownership of what happens in the house." So she made a quick and consequential decision. To protect her sons, she told the police that the marijuana belonged to her. "I said it was mine, and me and my homegirls were going on vacation to California. I said we were going to take the marijuana with us—I heard it was legal there—and we were going to smoke for a week or two, then come back to normal life."



Sweatt told me this two months after her arrest. She and I were sitting in a conference room at the Metropolitan Public Defender's Office, in downtown Nashville. She was dressed for work in a black sweatshirt, sweatpants, and sneakers. A large ring of keys attached to her belt bespoke her responsibilities as a janitorial supervisor at the arts center, just a few blocks away. I asked how she had come up with such a specific story on the spot. "It's a dream," she said. "I heard California is more lively, more fun, than Nashville. The beaches are pretty. The palm trees." For a moment she looked as if she could actually see the surf. She was born and raised in East Nashville and has spent almost her entire life within the same few square miles. She had no plans to vacation in California, or anywhere else. "All I do is work and take care of my sons," she said.

## Some 97 percent of federal felony convictions are the result of plea bargains.

The police seemed to believe her story (the arrest warrant noted her upcoming trip) and drove her downtown, where they put her in a holding room. By 1 o'clock that afternoon, her bail had been set at $11,500. To be released, she needed to get $1,150 to a bail bondsman. She contacted a friend, and they each paid half. ("That's gone," she says.) She

assumed she'd be out in time to get to work that evening, but the money didn't clear until almost nine, minutes before she was to be sent to jail in shackles. A court date was set for January. Sweatt was facing serious charges with serious consequences, and she was advised to get an attorney.



The fallout began even before the court rendered judgment in her case. Under the rules of the housing agency, her arrest prompted her eviction, which scattered her family. Sweatt moved into a cheap motel, and her sons moved in with her mother, although she still managed to see them every day. She tried to get enough money together to hire what she calls "a regular lawyer," meaning a private attorney, but failed. So in January she turned to the public defender's office—a choice that many people in her situation make reluctantly. That's because of the common misperception, I was told by Dawn Deaner, the head of the office, that public defenders are nothing more than "public pretenders" who are "paid to plead [their clients] guilty."

Sweatt's case was assigned to a lawyer named Ember Eyster. At their first meeting, Sweatt felt reassured. As she put it to me, "Ember wears a dress that says, *I'm going to take you down!*" During their 75-minute discussion, Eyster asked Sweatt what her goals were, and Sweatt responded with a big one: no incarceration. She couldn't bear the idea of being away from her boys. At Eyster's request, Sweatt gathered her time sheets from work and dropped them off at Eyster's office. Eyster planned to use them as evidence that Sweatt was too busy mopping the floors at the arts center day and night to be a drug trafficker.

The next time Eyster and Sweatt saw each other was two weeks later, in court. Sweatt had been charged with a Class D felony, which carried a two-to-12-year prison sentence, and a misdemeanor related to the paraphernalia. Exactly what punishment she would face depended largely on how the district attorney's office weighed several factors. First, there was her confession. Second, there was the police account of the circumstances of the arrest. Third, there was the fact that she lived within 1,000 feet of an elementary school, which meant it was possible that the charges against her would be "enhanced." Finally, there was the fact that she already had a criminal history. In years past, she had pleaded guilty to several minor misdemeanors (most for driving with a suspended license) and one felony. The felony conviction resulted from her involvement in a 2001 robbery at a Jack in the Box. As Sweatt tells it, friends had discussed committing a robbery at the restaurant, where she worked, and then surprised her by actually carrying one out. She was arrested and pleaded guilty to a charge of "facilitation," and in exchange got three years of probation. "I have never gotten into trouble since," she told me, "except for driving without a license." She now relies on the bus.

**Sweatt embraced her attorney and wept with joy. Then she stood before the judge and pleaded guilty to a crime she says she did not commit.**

Eyster believed that Sweatt was innocent of the drug charges against her. "This is a hardworking woman who lived in a heavily policed community for 10 years," she told me. "If she were a drug dealer, she would have already been evicted. She doesn't have a history of drug use." But the idea of taking this case to trial was a nonstarter. The best path forward, Eyster decided, was to humanize Sweatt to the prosecutor—hence those time sheets—and then try to negotiate a plea bargain. In exchange for a guilty plea, the prosecutor might not recommend a prison sentence.

The strategy worked. The prosecutor reduced the charge from a felony to a Class A misdemeanor and offered Sweatt a six-month suspended sentence (meaning she wouldn't have to serve any of it) with no probation. Her paraphernalia charge was dismissed, and her conviction would result in a fine and fees that totaled $1,396.15.

Upon hearing the news, Sweatt embraced Eyster and wept with joy. Then she stood before the judge and pleaded guilty to a crime she says she did not commit.

This is the age of the plea bargain. Most people adjudicated in the criminal-justice system today waive the right to a trial and the host of protections that go along with one, including the right to appeal. Instead, they plead guilty. The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher. These are astonishing statistics, and they reveal a stark new truth about the American criminal-justice system: Very few cases go to trial. Supreme Court Justice Anthony Kennedy acknowledged this reality in 2012, writing for the majority in *Missouri v. Frye*, a case that helped establish the right to competent counsel for defendants who are offered a plea bargain. Quoting a law-review article, Kennedy wrote, " 'Horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.' "

Ideally, plea bargains work like this: Defendants for whom there is clear evidence of guilt accept responsibility for their actions; in exchange, they get leniency. A time-consuming and costly trial is avoided, and everybody benefits. But in recent decades, American legislators have criminalized so many behaviors that police are arresting millions of people annually—almost 11 million in 2015, the most recent year for which figures are available. Taking to trial even a significant proportion of those who are charged would grind proceedings to a halt. According to Stephanos Bibas, a professor of law and criminology at the University of Pennsylvania Law School, the criminal-justice system has become a "capacious, onerous machinery that sweeps everyone in," and plea bargains, with their swift finality, are what keep that machinery running smoothly.

Because of plea bargains, the system can quickly handle the criminal cases of millions of Americans each year, involving everything from petty violations to violent crimes. But plea bargains make it easy for prosecutors to convict defendants who may not be guilty, who don't present a danger to society, or whose "crime" may primarily be a matter of suffering from poverty, mental illness, or addiction. And plea bargains are intrinsically tied up with race, of course, especially in our era of mass incarceration.

Shanta Sweatt and her two sons in front of the James A. Cayce Homes, where she was arrested (Nina Robinson)

As prosecutors have accumulated power in recent decades, judges and public defenders have lost it. To induce defendants to plead, prosecutors often threaten "the trial penalty": They make it known that defendants will face more-serious charges and harsher sentences if they take their case to court and are convicted. About 80 percent of defendants are eligible for court-appointed attorneys, including overworked public defenders who don't have the time or resources to even consider bringing more than a tiny fraction of these cases to trial. The result, one frustrated Missouri public defender complained a decade ago, is a style of defense that is nothing more than "meet 'em and greet 'em and plead 'em."

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When Sweatt got home that night, early in November of last year, she realized that her boyfriend had been smoking marijuana, probably in front of the kids. She was furious, words were exchanged, and he left. Sweatt finally crawled into bed after midnight, only to be awakened at about 8:30 in the morning by an insistent knock at the door. She assumed that her boyfriend was coming to get his stuff and get out of her life.

When she opened the door, police officers filled the frame, and more were waiting at her back door. She could see that squad cars were swarming the parking lot. “There were 12 to 15 cars,” she told me. “For us.” An officer asked whether they could enter. As a resident of public housing, she wasn’t sure whether she had the right to say no. (She did.) But she was certain that if she refused them, they would come back. She had nothing to hide, so she let them in. “I didn’t get smart or give them a rough time,” she said. “I cooperated.”

According to the Prison Policy Initiative, 630,000 people are in jail on any given day, and 443,000 of them—70 percent—are in pretrial detention. Many of these defendants are facing minor charges that would not mandate further incarceration, but they lack the resources to make bail and secure their freedom. Some therefore feel compelled to take whatever deal the prosecutor offers, even if they are innocent.

Writing in 2016 in the *William & Mary Law Review*, Donald Dripps, a professor at the University of San Diego School of Law, illustrated the capricious and coercive nature of plea bargains. Dripps cited the case of Terrance Graham, a black 16-year-old who, in 2003, attempted to rob a restaurant with some friends. The prosecutor charged Graham as an adult, and he faced a life sentence without the possibility of parole at trial. The prosecutor offered Graham a great deal in exchange for a guilty plea: one year in jail and two more years of probation. Graham took the deal. But he was later accused of participating in another robbery and violated his probation—at which point the judge imposed the life sentence.

What's startling about this case, Dripps noted, is that Graham faced two radically different punishments for the same crime: either be put away for life or spend minimal time behind bars in exchange for a guilty plea. In 2010, the Supreme Court ruled, in *Graham v. Florida*, that the punishment Graham faced at trial was so cruel and unusual as to be unconstitutional. The Court found that a juvenile who did not commit homicide cannot face life without parole.

Thanks in part to plea bargains, millions of Americans have a criminal record; in 2011, the National Employment Law Project estimated that figure at 65 million. It is a mark that can carry lifetime consequences for education, employment, and housing. Having a record, even for a violation that is trivial or specious, means a person can face tougher charges and punishment if he or she again encounters the criminal-justice system. Plea bargaining has become so coercive that many innocent people feel they have no option but to plead guilty. "Our system makes it a rational choice to plead guilty to something you didn't do," Maddy deLone, the executive director of the Innocence Project, told me. The result, according to the late Harvard law professor William J. Stuntz, who wrote extensively about the history of plea bargains in *The Collapse of American Criminal Justice* (2011), is a system that has become "the harshest in the history of democratic government."

To learn more about how plea bargaining works in America today, I went to Nashville, where Shanta Sweatt entered her plea. A blue county in a red state, Davidson County, which includes Nashville, has a population of about 680,000. According to District Attorney Glenn Funk, Nashville–Davidson County handles about 100,000 criminal cases a year, 70 percent of which are misdemeanors, 30 percent felonies. Last year, attorneys in the public defender's office dealt with 20,000 misdemeanors and 4,900 felony cases. Of all the defendants processed in Nashville–Davidson County last year, only 86 had their cases resolved at trial.

During my week in Nashville, I attended hearings at the courthouse on a full range of cases. I sat in on the plea discussions between an assistant district attorney and two public defenders. I observed a public defender in conversation with jailed defendants facing felony charges. I saw justice meted out courtroom by courtroom, often determined in part by the attitude, even the mood, of the prosecutor. My experience may not have been representative, but over the course of five days, I saw few defendants who had harmed someone else. Those who were facing felony charges had been arrested for drug offenses; some were clearly addicts with mental-health problems.

I started with the misdemeanor-citation docket, which covers the lowest-level offenses. The defendants on the courtroom benches were white, black, and Latino. Sartorial guidelines were posted on the doors: no “see-through blouses,” no “exposed underwear,” no “sagging pants.” Ember Eyster, Shanta Sweatt’s attorney, was at the courthouse, but very few of the defendants in court that day had requested the services of a public defender or were accompanied by a lawyer.

Misdemeanors are lesser offenses than felonies and are supposed to result in limited penalties. In Tennessee, Class A misdemeanors are sometimes referred to as 1129s: convictions that carry a maximum sentence of 11 months and 29 days. Many people convicted of misdemeanors are given probation or a suspended sentence or simply "time served"—that is, the amount of time they spent waiting in jail for their case to be heard because they couldn't make bond. The most-minor offenses can result in being required to take a class or do community service. Getting put through the system often also means accruing fines, fees, and court costs, which in a single case can run to more than $1,000. The punishments are not designed to be severe, or to create long-lasting consequences. But for many people they do.

Nashville–Davidson County's courthouse, in downtown Nashville (Nina Robinson)

Millions of people each year are now processed for misdemeanors. In a 2009 report titled "Minor Crimes, Massive Waste," the National Association of Criminal Defense Lawyers described a system characterized by "the ardent enforcement of crimes that were once simply deemed undesirable behavior and punished by societal means or a civil infraction punishable by a fine."

In Nashville, I was struck by how many people were in court because they had been picked up for driving with a suspended license. It's a common practice, I learned, for states to suspend the licenses of people who have failed to pay court costs, traffic fines, or child support. In 2011, for example, Tennessee passed a law requiring the suspension of licenses for nonpayment of certain financial obligations. Both Glenn Funk, who must enforce this law, and Dawn Deaner, the head of the public defender's office, agree that it's absurd, in part because the scheme is almost perfectly designed to prevent the outcome it seeks. If people stop driving when their licenses are suspended, they may no longer be able to reliably get to work, which means they risk losing their jobs and going deeper into debt. As a result, many people whose licenses have been suspended drive anyway, putting themselves in constant jeopardy of racking up misdemeanor convictions. It is common for defendants charged with such minor infractions to represent themselves, even if they don't understand the consequences of pleading guilty, and even if there might be some mitigating circumstances that an attorney could argue on their behalf. Plead guilty to enough suspended-license misdemeanors, and a subsequent charge can be a felony.

Funk, who was elected in 2014, has stopped routinely jailing defendants arrested for driving with a suspended license. “Most of the time, driver’s licenses are revoked because of poverty,” he told me. “I want people to have a license. It gives them ownership in society.” Deaner told me that about two-thirds of the people listed on the citation docket are on there because of a driver’s-license violation. And once their names are on the docket, the system strongly encourages them to plead guilty. “It’s a hamster wheel of bureaucracy,” she said, “that does no one any good.”

Plea bargains didn’t exist in colonial America. Law books, lawyers, and prosecutors were rare. Most judges had little or no legal training, and victims ran their own cases (with the self-evident exception of homicides). Trials were brief, and people generally knew one another. By the 19th century, however, our modern criminal-justice system was coming into its own: Professional prosecutors emerged, more defendants hired lawyers to represent them, and the courts developed more-formal rules for evidence. Trials went from taking minutes or hours to lasting days. Calendars became clogged, which gave judges an incentive to start accepting pleas. “Suddenly, everybody operating inside the system is better off if you have these pleas,” Penn’s Stephanos Bibas told me.



The advantages of plea bargains became even clearer in the latter part of the 20th century, after the Supreme Court, under Chief Justice Earl Warren, issued a series of decisions, between 1953 and 1969, that established robust protections for criminal defendants. These included the landmark *Gideon v. Wainwright* and *Miranda v. Arizona* decisions, the former of which guaranteed the Sixth Amendment right to counsel in felony cases (since expanded to some misdemeanor cases), and the latter of which required that police inform those in their custody of the right to counsel and against self-incrimination. The Court’s rulings had the inevitable effect of making trials lengthier and more burdensome, so prosecutors began turning more frequently to plea bargains. Before the 1960s, according to William J. Stuntz,

between one-fourth and one-third of state felony charges led to a trial. Today the figure is one-twentieth.

The legal system provides few rules and protections for those who take a deal. In what has been described as one of the Court's earliest plea-bargain decisions, *Brady v. United States* (1970), the justices found that guilty pleas were acceptable as long as certain conditions were met, among them the following: Defendants had to have competent counsel; they had to face no threats, misrepresentations, or improper promises; and they had to be able to make their plea "intelligently."



This seemed eminently fair. But crime had already started to increase sharply. The rise provoked a get-tough response from police, prosecutors, and legislators. As the rate of violent crime continued to accelerate, fueled in part by the crack epidemic that started in the '80s, the response got even tougher. By the 1990s, the U.S. had entered what Donald Dripps calls "a steroid era in criminal justice," which continued even though violent crime peaked by 1992 and began its now-historic decline. In the late 20th century, legislators passed mandatory-minimum-sentence and "three strikes" laws, which gave prosecutors an effective bludgeon they could use to induce plea bargains. (Some "three strikes" laws result in life imprisonment for a third felony; hundreds of people in California received this punishment for shoplifting. California reformed its three-strikes legislation in 2012 to impose such punishments only for serious or violent felonies.)

The growth of the system took on a life of its own. "No one sets out to create bloated criminal codes," I was told by David Carroll, the executive director of the Sixth Amendment Center, which protects the right to counsel. "But once they exist, vast resources are spent to justify them." In response to the crime wave, the United States significantly expanded police forces to catch criminals, prosecutor's offices to charge them, and the correctional system to incarcerate them. Legislators have added so many acts to criminal

codes that in 2013, Neil Gorsuch—now on the Supreme Court, but then an appellate judge—publicly raised concerns. In a speech sponsored by the Federalist Society, he asked, "What happens to individual freedom and equality—and to our very conception of law itself—when the criminal code comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?"



One morning in nashville, I sat at the prosecutor's table with Emily Todoran, an assistant district attorney, and Ryann Casey and Megan Geer, two young public defenders. (Geer has since left for a private criminal-defense firm.) Before us was a two-inch stack of paperwork that included police reports on everyone who had been picked up the night before, for a variety of misdemeanor violations. None of those arrested had made bond ("Basically, it's all homeless offenses," Geer said), so everyone whose case was being assessed was waiting in jail.

Police officers have wide discretion in deciding whether a person is breaking the law, and they sometimes arrest people for such offenses as sleeping in public and sitting too long on a bench. One case involved a woman whose crime seemed to have been, in the words of the officer who filed the report, "walking down the road around 1:30 a.m." with "no legitimate reason." Casey told me before this meeting that she hoped to get all such cases dismissed. "Walking down the street!" she said. "Imagine if it was you."

**For many of the cases, the assistant D.A. was making her decision in less than a minute. It was justice dispensed at the pace of speed dating.**

Ember Eyster told me it's sometimes possible to get misdemeanor cases dismissed with a bit of investigation. Maybe a trespassing charge doesn't hold up, for example, because the property owner hadn't posted a NO TRESPASSING sign. But this takes time, and clients who can't make bond have to sit in jail until the job is done. It's a choice few are willing to make for the small chance of avoiding a conviction. Many clients tell Eyster as soon as they meet her that they want to plead guilty and get time served.



The choice makes sense under the circumstances. But anybody who makes it is incurring a debt to society that's hard, sometimes impossible, to repay. Those with a conviction in the United States can be denied public housing, professional licenses, and student loans. Many employers ask whether job applicants have been convicted of a crime, and in our zero-tolerance, zero-risk society, it's rational to avoid those who have.

People with a misdemeanor conviction who get picked up for another minor offense are more likely to face subsequent conviction—and that, according to Issa Kohler-Hausmann, an associate professor of law and sociology at Yale, is part of a deliberate strategy. Kohler-Hausmann made this case in a provocative 2014 *Stanford Law Review* article, "Managerial Justice and Mass Misdemeanors," about the rise of misdemeanor arrests in New York City, which occurred even as felony arrests fell. Authorities, she argued, tend to pay "little attention" to assessing "guilt in individual cases." Instead, they use a policy of "mass misdemeanors" to manage people who live in "neighborhoods with high crime rates and high minority populations." These defendants, she wrote, are moved through the criminal-justice system with little opportunity to make a case for themselves. They are simply being processed, and the "mode of processing cases" is plea bargaining. (This year, New York City settled a federal class-action lawsuit against it for issuing hundreds of thousands of unjustified criminal summonses.)

Sitting at the prosecutor's table that morning, I watched Todoran, Casey, and Geer read from the police reports and make deals. Such a ritual takes place, in one form or another, in the courts of each of the country's more than 3,000 counties, which make up what the Fordham University law professor John Pfaff has described in his book *Locked In* as "a vast patchwork of systems that vary in almost every conceivable way." We know little about what happens in these negotiations. Trials leave copious records, but many plea bargains leave little written trace. Instead, they are sometimes worked out in hurried hallway conversations —or, as I witnessed, in brief courtroom conferences.

> CASEY: He was lying across a sidewalk over a vent, because it was cold.
> TODORAN: Dismiss it. You've got to sleep somewhere.
> CASEY: This one is for standing in front of a liquor store.
> TODORAN: Dismiss. For so many of these things, a few hours in jail is punishment enough.
> GEER: This defendant was found in a car with marijuana and 0.7 grams of crack.
> TODORAN: I guess we'll do time served.
> CASEY: This man was at Tiger Mart. He was warned to leave earlier, and then came back.
> TODORAN: Thirty days suspended and stay away from Tiger Mart.
> CASEY: This case, an officer heard him yelling and cussing and arrested him by the rescue mission.
> TODORAN: Dismiss.
> GEER: This is my favorite—the woman who was walking down the road.
> TODORAN: Dismiss.

For many of the cases, Todoran was making her decision in less than a minute. I felt I was watching justice dispensed at the pace of speed dating.

Critics on the left and the right are coming to agree that our criminal-justice system, now so reliant on plea bargaining, is broken. Among them is Jed S. Rakoff, a United States district judge for the Southern District of New York, who wrote about the abuses of plea bargains in 2014, in *The New York Review of Books.* "A criminal justice system that is secret and government-dictated," he wrote, "ultimately invites abuse and even tyranny." Some critics even argue that the practice should be abolished. That's what Tim Lynch, the former director of the Project on Criminal Justice at the libertarian Cato Institute, believes. The Framers adopted trials for a reason, he has argued, and replacing them with plea bargains—for convenience, no less—is unconstitutional.

But plea bargains aren't going away, so reformers have practical suggestions for improving them. Bibas wants a "consumer-protection model." Shoppers, he told me, have more safeguards when making a credit-card purchase than defendants do when pleading guilty. He wants pleas to clearly explain several things: exactly what defendants are pleading to, what obligations (classes, probation) defendants are incurring, what the consequences of their failing to follow through would be, and what potential effects a guilty plea could have on their lives. He has also suggested a "cooling off" period before a defendant takes a plea in serious cases. Stuntz suggested giving those who plead guilty the same protections that are offered in the military system of justice. Before accepting a plea, military judges conduct inquiries to ensure that pleas were not made under duress, and that the facts support them. This, Stuntz argued, would shift some power from prosecutors back to judges and make pleas more legitimate, which in turn would produce "a large social gain."

Ember Eyster believed that Shanta Sweatt was innocent, but the idea of taking her case to trial was a nonstarter (Nina Robinson).



No amount of tinkering, however, will matter much unless Americans stop trying to use the criminal-justice system as a tool for managing social ills. “Why are these cases being pumped into the system in the first place?,” Bibas said to me. He’s not alone in asking. Across the country, in red states and blue states, reformist state and district attorneys have recently been elected on platforms of rolling back harsh sentencing, reducing the enforcement of marijuana laws, and knocking down crimes from felonies to misdemeanors. And change is happening. Last year, for example, the New York City Council passed legislation that made offenses such as public drinking and urination civil rather than criminal violations, and thus subject largely to tickets and fines.

Paring back our criminal code and eliminating many mandatory minimum sentences will be crucial to reform. In the long-running War on Drugs, the government has regularly prosecuted people for possessing small amounts of illegal substances, or for merely possessing drug paraphernalia. Often, on the basis of no evidence beyond a police officer's assertion, officials have charged and prosecuted defendants for the more serious crime of "intent to sell." But during Prohibition, when the manufacture, transport, and sale of alcohol were federal crimes, Americans were not arrested by the millions and incarcerated for drinking. And they certainly didn't plead guilty to possessing martini glasses and other drinking paraphernalia.

To break the cycle, the United States will need to address the disparity in funding for the two sides of its legal system. According to Fordham's John Pfaff, of the $200 billion spent on all criminal-justice activities by state and local governments in 2008, only 2 percent went to indigent defense. But the system needs more than just money, says Jonathan Rapping, who in 2014 won a MacArthur genius grant for his work as the founder of Gideon's Promise, which trains and supports public defenders around the country—including those in Nashville. What's necessary, Rapping argues, is a new mind-set. Defenders need to push back against the assumption that they will instantly plead out virtually every client, rubber-stamping the prosecutor's offer. Ember Eyster did ultimately negotiate a plea bargain for Shanta Sweatt, but in doing so she pushed back, using all the tools at her disposal to ensure that Sweatt was not incarcerated.

The U.S. should also reform the bail system. We are holding people in jail simply because they lack the funds to secure their own release.

The public-housing complex from which Shanta Sweatt was evicted after her arrest. She now lives in a motel, apart from her sons (Nina Robinson).

Making these sorts of changes would allow authorities at the federal, state, and local levels to allocate more resources to the underlying social problems that drive so many arrests. But reform will not be easy. Even though crime rates remain near historic lows nationally, Donald Trump's administration has professed a desire to return to the days of "law and order." U.S. Attorney General Jeff Sessions has announced, for instance, that he wants federal prosecutors to use maximum possible charges for crimes and to enforce mandatory minimums, which would result in harsh plea bargains. Almost all crime is handled not by the federal government but by the states, but with both the president and the country's highest law-enforcement official inflaming public fears, advocates for change worry about the fate of the reform efforts set in motion during Barack Obama's administration.

The United States is experiencing a criminal-justice crisis, just not the one the Trump administration talks about. By accepting the criminalization of everything, the bloat of the criminal-justice system, and the rise of the plea bargain, the country has guaranteed that millions of citizens will not have a fair shot at leading ordinary lives.

Before I left Nashville, I visited Shanta Sweatt at the Tennessee Performing Arts Center. It's an enormous building of glass and concrete with multiple stages. Sweatt gave me a tour that started in the basement. As we made our way to the upper floors and the theaters, she gestured toward the banks of restrooms that she has to keep sparkling. "Thirty-eight stalls for women," she said. "Thirty-eight stalls for men."

Sweatt is still struggling with the consequences of her arrest. "If it weren't for my boys," she told me, "I would have given up a long time ago." At the time of her arrest, she told her employers about her situation, and they rallied to support her. "They stood behind me. They said, 'I got prayers for you.' " Because she wasn't incarcerated, Sweatt was able to keep her job, and her dream is that one day she might be able to buy a house, which would allow her to live together again with her sons. In her mind's eye, the house has three bedrooms, two bathrooms, and a yard, and it promises her and her family privacy and freedom. "Police mess with you in the projects," she said. "You get off the bus, they follow you. They don't mess with you in a house. I want to live like an average Joe."

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