THE CHOICE ARCHITECTURE OF CRIMINAL JUSTICE

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Choice architecture is one of the criminal justice system's most powerful—and overlooked—features. The concept of "choice architecture" refers to how the presentation of options shapes outcomes. For instance, organ donation rates are significantly higher in countries that auto-enroll individuals as donors compared to countries that impose an opt-in scheme, a form of choice architecture that alters decision structure to increase uptake rates. Similarly, individuals tend to select healthier options when a menu specifies each item's calories, or when food packaging uses color-coding to indicate nutritiveness, choice architecture that improves decision information to nudge individuals towards nutritious options. Perhaps more than anything else, choice architecture shapes policing, plea bargains, trials, and sentencing. Yet surprisingly, many do not acknowledge the criminal justice system's choice architecture or even know that it exists.

This is a major oversight. The failure to notice choice architecture limits our understanding of the criminal justice system, the rules and principles that govern criminal law and procedure, and the invisible forces that shape justice system actors' routine decisions. Worse yet, by overlooking choice architecture, we ignore its potential as a cost-effective, evidence-based, and successful criminal justice reform tool that is hiding in plain sight. But it doesn't have to be this way. Nor should it. Once we recognize the power of choice architecture, we can leverage it to improve the criminal justice system's fairness, efficiency, and accuracy.

Drawing on the insights of behavioral economics, this article advances a novel theory about the criminal justice system's choice architecture. It argues that the criminal justice system incorporates various forms of choice architecture that impact outcomes in ways that scholars, attorneys, and courts typically overlook. Its concluding parts demonstrate how choice architecture can be used as a powerful and effective law-reform tool and offers various examples of choice-architecture-based law-reform initiatives. Ultimately, this article offers new insights into the choice architecture of criminal justice and the role of choice architecture in criminal justice reform.

INTRODUCTION

Choice architecture is one of the most powerful—yet overlooked—forces that shape the criminal justice system.[1] The term "choice architecture" implies

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1. On the role of choice architecture in the criminal justice system, see Terry Skolnik, *Precedent, Principles, and Presumptions*, 54 UBC L. REV. 935, 938, 978, 981–82 (2021) [hereinafter Skolnik, *Presumptions*]; Terry Skolnik, *Two Criminal Justice Systems*, 56 UBC L. REV. 285, 325–36 (2023) [hereinafter Skolnik, *Two Systems*]; Terry Skolnik, *Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades*, 60 OSGOODE HALL L.J. 505, 528–31 (2023) [hereinafter Skolnik, *Policing*]; *see generally* Terry Skolnik, *The Regulatory Offence Revolution in Criminal Justice: The Choice Architecture of Regulatory Offences*, 62 ALTA. L. REV. 39 (2024) [hereinafter Skolnik, *Revolution*] (discussing the choice architecture of the plea bargaining, guilt-determination, and sentencing stages of criminal proceedings).

"the background against which decisions are made."[2] The ways in which options are presented can significantly influence individuals' decisions.[3] Cafeterias can steer individuals towards healthier food options that are color-coded according to nutritiveness and are placed at eye level.[4] Employers may increase employees' financial security when they provide an auto-enrollment pension format rather than an opt-in scheme.[5] But choice architecture can also manipulate individuals and push them to make choices that are against their best interests.[6] Casinos may remove clocks and windows so that individuals lose track of time and gamble more.[7] Websites may employ a nefarious form of choice architecture—dark patterns—that make it difficult for individuals to cancel their online subscriptions or make choices that align with their preferences.[8] These are just some examples. But they illustrate how choice architecture can shape outcomes for better or for worse and can be used for good or evil.[9]

Whether we notice it or not, choice architecture pervades the law.[10] Presumptions are a form of choice architecture that directs judges towards default outcomes in the adjudicative process.[11] The burden and onus of proof allocate administrative burdens that parties must satisfy for their legal claim to succeed.[12] Case law—and the role of precedent and stare decisis—provides background conditions under which judges make decisions to maintain the legal

2. CASS R. SUNSTEIN, SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT 35 (2021) [hereinafter SUNSTEIN, SLUDGE]; *see* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: THE FINAL EDITION 3–5 (Penguin Books 2021) (2008).

3. CASS R. SUNSTEIN, THE ETHICS OF INFLUENCE: GOVERNMENT IN THE AGE OF BEHAVIORAL SCIENCE 22 (2016).

4. Anne N. Thorndike et al., *A 2-Phase Labeling and Choice Architecture Intervention to Improve Healthy Food and Beverage Choices*, 102 AM. J. PUB. HEALTH 527, 531–32 (2012).

5. AMANDA COOKE, PENSIONS AND LEGAL POLICY: LESSONS ON THE SHIFT FROM PUBLIC TO PRIVATE 79–83 (2021).

6. *See* Karen Yeung, *The Forms and Limits of Choice Architecture as a Tool of Government*, 38 LAW & POL'Y 186, 195 (2016); Christopher McCrudden & Jeff King, *The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism*, *in* CHOICE ARCHITECTURE IN DEMOCRACIES: EXPLORING THE LEGITIMACY OF NUDGING 75, 112–19 (Alexandra Kemmerer et al. eds., 2016).

7. *See* Karin Jaschke, *Casinos Inside Out*, *in* STRIPPING LAS VEGAS: A CONTEXTUAL REVIEW OF CASINO RESORT ARCHITECTURE 109, 123–24 (Karin Jaschke & Silke Ötsch eds., 2003).

8. *See* Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 52 (2021); Terry Skolnik, *The Dark Patterns of Criminal Justice*, 87 OHIO ST. L.J. (forthcoming 2026) (manuscript at 15) (on file with author).

9. *See* Michal Lavi, *Evil Nudges*, 21 VAND. J. ENT. & TECH. L. 1, 4, 7, 10 (2018).

10. SUNSTEIN, *supra* note 3, at 21, 23; Cass R. Sunstein, *Nudges Do Not Undermine Human Agency*, 38 J. CONSUMER POL'Y. 207, 207 (2015).

11. Skolnik, *Presumptions*, *supra* note 1, at 981–82; Charles M. Yablon, *A Theory of Presumptions*, 2 L., PROBABILITY & RISK 227, 234 (2003).

12. *See* Terry Skolnik, *Criminal Justice and the Erosion of Constitutional Rights*, 66 B.C. L. REV. 1679, 1699–702 (2025).

system's predictability, stability, and coherence.[13] And basic legal doctrines—such as standing, ripeness, political questions, and the cases and controversies requirement—are core aspects of the judicial system's choice architecture: boundaries that constrain the judicial function, maintain the separation of powers, and influence which cases judges decide.[14]

The criminal justice system is no different. It has its own choice architecture that shapes how various actors—judges, prosecutors, defense attorneys, and defendants—make routine decisions.[15] But despite its strong gravitational pull, many overlook choice architecture's role and power in the criminal justice system. This is a mistake. The failure to consider the criminal justice system's choice architecture—or even notice it—limits our understanding of how and why criminal justice system actors make routine decisions that profoundly impact individuals' lives.[16] Overlooking choice architecture discounts some of the main forces that drive persistent problems—such as inefficiency, lack of access to justice, and biased decision making—that plague the criminal justice system.[17] This status quo disregards how choice architecture can be a cheap, simple, and effective tool to reform certain aspects of the criminal justice system and institute positive change.[18]

But it doesn't need to be this way. Nor should it. We develop a deeper understanding of the criminal justice system once we grasp choice architecture's role, power, and potential. We can better identify and begin to address longstanding issues in the criminal justice system once we grasp how choice architecture drives decision making. And we can develop novel and humane law reforms that leverage choice architecture to improve procedures, fairness, and outcomes in the criminal justice process. Once we see choice architecture's role and power in the criminal justice system, we cannot unsee it.

Drawing on the insights of behavioral economics, this article offers a novel theory about the choice architecture of criminal justice. It argues that choice architecture is one of the most crucial and influential features of the criminal justice system that tends to be overlooked.[19] It demonstrates how choice architecture pervades the criminal justice process, underpins its legal rules and

13. Doron Teichman & Eyal Zamir, *Judicial Decision-Making: A Behavioral Perspective*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 664, 674 (Eyal Zamir & Doron Teichman eds., 2014).

14. *See, e.g.*, Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L., ECON., & ORG. 326, 331 (2007).

15. *See* sources cited *supra* note 1.

16. *See, e.g.*, Skolnik, *Revolution*, *supra* note 1, at 46; Skolnik, *Presumptions*, *supra* note 1, at 978–82.

17. *See* Skolnik, *supra* note 12, at 1709–13.

18. *See, e.g.*, Alan J. Tomkins et al., *An Experiment in the Law: Studying a Technique to Reduce Failure to Appear in Court*, 48 CT. REV. 96, 105–06 (2012); Russell Ferri, *The Benefits of Live Court Date Reminder Phone Calls During Pretrial Case Processing*, 18 J. EXPERIMENTAL CRIMINOLOGY 149, 164–65 (2022).

19. *See, e.g.*, Skolnik, *Revolution*, *supra* note 1, at 65–66 (arguing that the criminal justice system's choice architecture tends to be overlooked yet impacts outcomes significantly).

principles, and shapes front-line actors' routine decisions.[20] It elucidates how small changes to the criminal justice system's choice architecture can produce a meaningful impact.[21] As part of its core arguments, this article explains how choice architecture affects the pretrial period, trials, sentencing, and the post-trial process.[22] Its concluding parts offer a set of concrete law-reform proposals that leverage the power of choice architecture and demonstrate how it can be used as a meaningful law-reform tool that can improve criminal justice system outcomes.[23]

The structure of this article is as follows. Part I provides an overview of heuristics, nudges, and sludge and highlights their role in the criminal justice process. Part II sets out the three categories of choice architecture that pervade the criminal justice system: decision information, decision structure, and decision assistance. Part III explains the benefits and risks of choice architecture. Part IV concludes this article. It describes the role of choice architecture as a crucial law-reform tool and offers five examples of choice-architecture-based criminal justice reforms. Ultimately, this article provides new insight into the role and prominence of choice architecture in the criminal justice system and its potential to catalyze meaningful reforms.

I. HEURISTICS, NUDGES, AND SLUDGE

A. Heuristics

As the background conditions for decision making, choice architecture influences how individuals deploy their cognitive systems.[24] Individuals use two cognitive systems to make decisions: System 1 intuition and System 2 deliberation.[25] System 1 cognition is reflexive and is used to make rapid decisions, such as the choice to fight or flee, estimate a distance, or calculate simple arithmetic.[26] Daniel Kahneman observes that "[t]he operations of System 1 are fast, automatic, effortless, associative, and often emotionally charged; they are also governed by habit, and are therefore difficult to control or modify."[27] In contrast, System 2 cognition is analytical and deliberative and

20. *See infra* Part II.

21. *See id.*

22. *See infra* Parts II, IV.

23. *See infra* Part IV.

24. *See* Muireann Quigley, *Nudging for Health: On Public Policy and Designing Choice Architecture*, 21 MED. L. REV. 588, 599–602 (2013).

25. *See, e.g.*, Daniel Kahneman & Shane Frederick, *A Model of Heuristic Judgment*, *in* THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 267, 267–68 (Keith J. Holyoak & Robert G. Morrison eds., 2005); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–24 (2011).

26. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1451–52 (2003); Cass R. Sunstein, *People Prefer System 2 Nudges (Kind of)*, 66 DUKE L.J. 121, 125 (2016).

27. Kahneman, *supra* note 26, at 1451.

is used to make more complex choices, such as to decide which product to purchase, navigate to a location, or answer a complex math problem or legal fact pattern.[28] Kahneman further notes that "[t]he operations of System 2 are slower, serial, effortful, and deliberately controlled; they are also relatively flexible and potentially rule-governed."[29]

Individuals frequently deploy the wrong cognitive system to make decisions, especially when they are faced with risk and uncertainty.[30] They use error-prone heuristics—also referred to as "mental shortcuts" or "rules of thumb"—to make choices.[31] Heuristics rely on cognitive biases to decide rapidly.[32] Subconsciously, they employ System 1 intuition to make decisions when they should instead use System 2 deliberation; the former overrides the latter.[33] The upshot: individuals make mistakes or select options that are against their best interests.[34] Three cognitive biases illustrate these types of errors: the availability heuristic, the representativeness heuristic, and the anchoring effect.

The availability heuristic refers to how people evaluate the frequency or probability of events according to how easily they can recall them.[35] When recalling events, the availability of information shapes how individuals gauge their likelihood.[36] This heuristic explains why individuals systematically overestimate the likelihood of emotionally salient events that effortlessly come to mind, such as plane crashes and natural disasters.[37] The availability and salience of these events mistakenly shapes probability assessments; System 1 intuition overrules System 2 deliberation.[38] As a result of this heuristic, individuals may refuse to travel to certain locations due to overblown fears of crime or may purchase insurance because they believe that natural disasters are more common than they are.[39]

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28. *See id.*; Sunstein, *supra* note 26, at 125.

29. Kahneman, *supra* note 26, at 1451.

30. *See, e.g.*, Adam L. Alter et al., *Overcoming Intuition: Metacognitive Difficulty Activates Analytic Reasoning*, 136 J. EXPERIMENTAL PSYCH.: GEN. 569, 569 (2007).

31. Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 ANN. REV. PSYCH. 451, 452, 454–58 (2011).

32. *See* Jonathan St. B.T. Evans, *In Two Minds: Dual-Process Accounts of Reasoning*, 7 TRENDS COGNITIVE SCI. 454, 457 (2003).

33. *See, e.g.*, Wim De Neys, *Automatic–Heuristic and Executive–Analytic Processing During Reasoning: Chronometric and Dual-Task Considerations*, 59 Q.J. EXPERIMENTAL PSYCH. 1070, 1071–72 (2006).

34. *See, e.g.*, Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 751 (2003).

35. Valerie S. Folkes, *The Availability Heuristic and Perceived Risk*, 15 J. CONSUMER RSCH. 13, 13 (1988); Norbert Schwarz et al., *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCH. 195, 195 (1991).

36. Randy E. Dumm et al., *The Representative Heuristic and Catastrophe-Related Risk Behaviors*, 60 J. RISK & UNCERTAINTY 157, 179 (2020).

37. *See* Cass R. Sunstein, *Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75, 87–88 (2005).

38. *See* Nadia Hanin Nazlan, Sarah Tanford & Rhonda Montgomery, *The Effect of Availability Heuristics in Online Consumer Reviews*, 17 J. CONSUMER BEHAV. 449, 450–51 (2018).

39. Cass R. Sunstein & Richard Zeckhauser, *Overreaction to Fearsome Risks*, 48 ENV'T & RES. ECON. 435, 437, 442–43 (2011); Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 SOC. RSCH. 499, 503–04 (2019).

The bail process offers an example of how the availability heuristic can influence decision making. Prosecutors and judges routinely encounter defendants who violate their pretrial release conditions—information that they can recall easily.[40] When evaluating the risk of flight or recidivism, prosecutors may appeal to easily recallable instances of pretrial misconduct.[41] As a result, they may overestimate the risk that a defendant will violate their release conditions.[42] So they may order more expensive cash bail or deny release to mitigate these inflated risks.[43]

The representativeness heuristic, for its part, refers to how individuals assess an event's statistical probability according to stereotypes or known situations.[44] Individuals tend to evaluate probability according to how a situation or event is "(*i*) similar in essential properties to its parent population; and (*ii*) reflects the salient features of the process by which it is generated."[45] The more that the event or individual appears representative of a parent group, the stronger the belief that the event or individual likely falls within that group.[46] In certain studies, participants are given a description of an individual who is shy, introverted, tidy, and detail-oriented.[47] Researchers ask participants whether the individual is more likely to work as a librarian or a farmer.[48] Participants overwhelmingly respond that the individual is more likely to be a librarian, even though there are roughly 20 times more farmers than librarians in the United States, such that the individual is more likely to work on a farm than in a library.[49]

The prior-offender penalty offers an example of how the availability and representativeness heuristics can affect trial outcomes.[50] Jurors are more likely to convict defendants who are cross-examined on their criminal history.[51] A defendant's prior convictions tend to constitute emotionally salient information that jurors can recall effortlessly.[52] Furthermore, a criminal record conveys that

40. Skolnik, *Two Systems*, *supra* note 1, at 311–12.

41. *Id.*; *see* Cass R. Sunstein, *The Use of Algorithms in Society*, 37 REV. AUSTRIAN ECON. 399, 406 (2023).

42. Skolnik, *Two Systems*, *supra* note 1, at 312.

43. *See, e.g.*, Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 422–23 (2016).

44. *See* Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCH. 430, 431 (1972); Håkan Nilsson, Peter Juslin & Henrik Olsson, *Exemplars in the Mist: The Cognitive Substrate of the Representativeness Heuristic*, 49 SCANDINAVIAN J. PSYCH. 201, 201 (2008).

45. Kahneman & Tversky, *supra* note 44, at 431.

46. Mohammed AlKhars et al., *Cognitive Biases Resulting from the Representativeness Heuristic in Operations Management: An Experimental Investigation*, PSYCH. RSCH. & BEHAV. MGMT. 263, 264–65 (2019).

47. *Id.* at 265.

48. *Id.*

49. *Id.*

50. Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 398, 401–06 (2018).

51. *Id.* at 398; Skolnik, *Two Systems*, *supra* note 1, at 316–20.

52. Skolnik, *Two Systems*, *supra* note 1, at 316–20.

the defendant falls within a parent group of individuals who commit crimes.[53] Together, the availability and representativeness heuristics help explain how prior conviction evidence can leverage jurors' cognitive biases in a manner that adversely impacts defendants.[54]

Lastly, the anchoring effect—one of the strongest cognitive biases—refers to the human tendency to make decisions according to a predisclosed value referred to as "the anchor."[55] Rather than assess a value on its own terms, individuals adjust the estimated value upwards or downwards from the anchor.[56] Individuals are more likely to select values that fall closer to the anchor than if no anchor was disclosed.[57] Furthermore, impossible and arbitrary anchors influence decision making.[58] For instance, studies have shown that individuals who are told that Mahatma Gandhi died before age 142 estimated that he lived until age 67, while another group that was told that he died after age 9 estimated that he lived until age 50.[59] The anchoring effect explains why plaintiffs who request higher damages in their civil complaints tend to receive greater compensation.[60]

The anchoring effect also shapes the criminal justice process. Defendants may receive stiffer sentences when prosecutors initially request harsher punishments, an anchor that shapes judicial decision making.[61] Similarly, defendants may accept harsher plea deals when prosecutors offer an exacting prison sentence—the anchor—followed by a steep discount.[62] Given the severity of the initial offer, hefty plea discounts incentivize defendants to accept plea deals that appear especially lucrative.[63] The anchoring effect is a potent

53. *Id.*; Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH., PUB. POL'Y, & L. 677, 681 (2000).

54. Skolnik, *Two Systems*, *supra* note 1, at 316–20.

55. Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014) (offering this definition); *see* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORN. L. REV. 777, 787–88 (2001).

56. *See* Chris Janiszewski & Dan Uy, *Precision of the Anchor Influences the Amount of Adjustment*, 19 PSYCH. SCI. 121, 121 (2008); Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. REV. 393, 396 (2018).

57. *See, e.g.*, Nicholas Epley & Thomas Gilovich, *The Anchoring-and-Adjustment Heuristic: Why the Adjustments Are Insufficient*, 17 PSYCH. SCI. 311, 311 (2006).

58. Thomas Mussweiler & Fritz Strack, *Considering the Impossible: Explaining the Effects of Implausible Anchors*, 19 SOC. COGNITION 145, 146 (2001).

59. *Id.*

60. *See* Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1668–69, 1669 n.17 (2013); Yuval Feldman, Amos Schurr & Doron Teichman, *Anchoring Legal Standards*, 13 J. EMPIRICAL LEGAL STUD. 298, 303–04 (2016).

61. Piotr Bystranowski et al., *Anchoring Effect in Legal Decision-Making: A Meta-Analysis*, 45 LAW & HUM. BEHAV. 1, 4 (2021).

62. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2518–19 (2004).

63. *Id.* at 2519; Terry Skolnik, *Criminal Justice Reform: A Transformative Agenda*, 59 ALTA. L. REV. 631, 638 (2022).

cognitive bias that prosecutors can exploit to secure convictions and harsher sentences.[64]

B. Nudges

As a form of choice architecture, nudges can attempt to counteract these heuristics and cognitive biases. The term "nudge" refers to "any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid."[65] A nudge orients individuals towards particular options without foreclosing others.[66] Cass Sunstein notes that nudges are distinguished from other types of interventions that shape decision making through coercion, prohibitions, or significantly altered material incentives.[67] He observes that recommendations, information disclosures, warnings, and reminders are nudges.[68] And he notes that penalties, taxes, and subsidies are not.[69] Nudges are associated with the concept of libertarian paternalism.[70] They are libertarian in that nudges allow individuals to retain their freedom of choice.[71] And they are paternalistic in that they direct individuals towards welfare-maximizing options.[72]

Two main categories of nudges exist, each of which shapes individuals' conduct in different ways: educative nudges and noneducative nudges.[73] Educative nudges aim to improve System 2 deliberation and include mechanisms such as "warnings, reminders and disclosure of information (such as calorie labels, allergy warnings and fuel economy labels)."[74] In contrast, noneducative nudges strive to improve System 1 intuition and encompass mechanisms such as "automatic enrolment, mandatory choice, simplification or 'sludge reduction', and design of websites, forms or in-person shops to highlight and draw attention to certain options."[75]

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64. Skolnik, *Policing*, *supra* note 1, at 530, 535.

65. THALER & SUNSTEIN, *supra* note 2, at 8.

66. Cass R. Sunstein, *Nudges That Fail*, 1 BEHAV. PUB. POL'Y 4, 4 (2017); Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1157 (2013).

67. *See* Cass R. Sunstein, *Which Nudges Do People Like? A National Survey*, *in* HANDBOOK OF BEHAVIOURAL CHANGE AND PUBLIC POLICY 285, 285 (Holger Straßheim & Silke Beck eds., 2018).

68. Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. ON REGUL. 413, 417 (2015).

69. *Id.*; Cass R. Sunstein, *Nudging: A Very Short Guide*, 37 J. CONSUMER POL'Y 583, 584 (2014); CASS R. SUNSTEIN & LUCIA A. REISCH, TRUSTING NUDGES: TOWARD A BILL OF RIGHTS FOR NUDGING 2 (2019).

70. Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773, 783 (2014); CASS R. SUNSTEIN, WHY NUDGE? THE POLITICS OF LIBERTARIAN PATERNALISM 58–59 (2014).

71. Adrien Barton & Till Grüne-Yanoff, *From Libertarian Paternalism to Nudging—and Beyond*, 6 REV. PHIL. & PSYCH. 341, 344 (2015); *see* Nicholas Gane, *Nudge Economics as Libertarian Paternalism*, 38 THEORY, CULTURE, & SOC'Y 119, 121–23 (2021).

72. Barton & Grüne-Yanoff, *supra* note 71, at 344.

73. Cass R. Sunstein, *The Distributional Effects of Nudges*, 6 NATURE HUM. BEHAV. 9, 9 (2022).

74. *Id.*

75. *Id.* (footnote omitted).

Nudges are valuable for various reasons. For one, they can be cheaper and more effective than traditional mechanisms such as subsidies, fines, penalties, recoupment efforts, and prosecutions.[76] Research shows that individuals are more likely to pay their delinquent taxes when they receive a letter stating that 90% of their neighbors pay their taxes promptly than if they receive a letter that states potential penalties for nonpayment, a nudge that shapes behavior through reference to social norms.[77] Nudges are also useful because they can shape individuals' conduct that is difficult to monitor and regulate. For instance, airports that etch a fly into their bathrooms' urinals can decrease spillage rates significantly and improve restroom sanitation.[78]

Moreover, nudges are helpful because they can influence behavior in consistent and predictable ways. Certain types of nudges—such as default rules—notoriously increase uptake rates in different domains.[79] And they may do so considerably.[80] For instance, studies indicate that countries that use a default enrollment scheme for organ donation have roughly 90% participation rates, whereas countries that require individuals to opt-in to be an organ donor generally have under 20% participation rates.[81] Interestingly, in countries that employ opt-in schemes, uptake rates remain low even though roughly 85% of individuals support organ donation.[82] Default rules can be useful because they help individuals overcome status quo bias—meaning a preference for current states of affairs—that underpins inertia and procrastination.[83] Indeed, nudges are valuable because they can counteract certain heuristics or cognitive biases to maximize welfare.[84]

The criminal justice system also nudges its actors in various ways that aim to neutralize cognitive biases. Take the example of how courts use nudges to increase defendants' court appearance rates in criminal proceedings.[85]

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76. Andreas T. Schmidt, *The Power to Nudge*, 111 AM. POL. SCI. REV. 404, 412 (2017); Shlomo Benartzi et al., *Should Governments Invest More in Nudging?*, 28 PSYCH. SCI. 1041, 1051 (2017).

77. Michael Hallsworth et al., *The Behavioralist as Tax Collector: Using Natural Field Experiments to Enhance Tax Compliance*, 148 J. PUB. ECON. 14, 19, 26–27 (2017); Kathleen DeLaney Thomas, *Taxing Nudges*, 107 VA. L. REV. 571, 581–82 (2021).

78. Howook Chang, Chang Huh & Myong Jae Lee, *Would an Energy Conservation Nudge in Hotels Encourage Hotel Guests to Conserve?*, 57 CORN. HOSP. Q. 172, 172 (2016); Karen Yeung, *Nudge as Fudge*, 75 MOD. L. REV. 122, 123 (2012).

79. Jeffrey J. Rachlinski, *Nudges, Defaults, and the Problem of Constructed Preferences*, 72 DUKE L.J. 1731, 1733 (2023).

80. Jon M. Jachimowicz et al., *When and Why Defaults Influence Decisions: A Meta-Analysis of Default Effects*, 3 BEHAV. PUB. POL'Y 159, 159 (2019).

81. *Id.* (citing Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCI. 1338, 1338 (2003)).

82. Johnson & Goldstein, *supra* note 81, at 1338.

83. Max Vetter & Florian Kutzner, *Nudge Me if You Can - How Defaults and Attitude Strength Interact to Change Behavior*, 1 COMPREHENSIVE RESULTS SOC. PSYCH. 8, 8–9 (2016); Jean-Francois Gajewski, Marco Heimann & Luc Meunier, *Nudges in SRI: The Power of the Default Option*, 177 J. BUS. ETHICS 547, 550 (2022).

84. R. Paul Battaglio, Jr. et al., *Behavioral Public Administration* Ad Fontes*: A Synthesis of Research on Bounded Rationality, Cognitive Biases, and Nudging in Public Organizations*, 79 PUB. ADMIN. REV. 304, 306 (2019).

85. Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795, 807–08 (2018).

Defendants' failure-to-appear rates are surprisingly high.[86] Some studies indicate that from 2010 to 2020 in Philadelphia, roughly 19% of defendants failed to appear in court.[87] Other studies estimate that failure-to-appear rates range from 7% to 25%.[88] Others posit that close to one-third of defendants fail to appear in court for certain offenses.[89] Defendants who fail to appear in court can face various consequences: bench warrants, criminal charges for contempt of court, higher cash bail amounts, longer periods of pretrial detention, and more.[90] Additionally, failures to appear lengthen delays and increase costs for the criminal justice system.[91]

Justice system actors may employ certain nudges—such as text messages or phone-call reminders—to increase the prospect that defendants appear in court.[92] Defendants may receive their court dates long before they are scheduled to appear.[93] They may forget about their court date or the consequences if they do not show up.[94] Two cognitive biases may underpin this forgetfulness: salience bias and recency bias. Salience bias refers to how individuals may overweigh or underweigh the importance of certain facts or events.[95] Recency bias, for its part, implies that more recent facts or events can be more salient than older ones.[96] Court reminders may attempt to thwart these biases. Courts may send text-message reminders or phone defendants so that they do not miss their court dates, a nudge that increases the salience and recency of information to decrease their failure-to-appear rates.[97]

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86. *See* Christopher T. Lowenkamp, Alexander M. Holsinger & Tim Dierks, *Assessing the Effects of Court Date Notifications Within Pretrial Case Processing*, 43 AM. J. CRIM. JUST. 167, 168 (2018).

87. Lindsay Graef et al., *Systemic Failure to Appear in Court*, 172 U. PA. L. REV. 1, 20 (2023).

88. Lowenkamp, Holsinger & Dierks, *supra* note 86, at 168.

89. David I. Rosenbaum et al., *Court Date Reminder Postcards: A Benefit-Cost Analysis of Using Reminder Cards to Reduce* Failure to Appear *Rates*, 95 JUDICATURE 177, 177 (2012).

90. Chelsea M. A. Foudray, Spencer G. Lawson & Evan M. Lowder, *Jail-Based Court Notifications to Improve Appearance Rates Following Early Pretrial Release*, 48 AM. J. CRIM. JUST. 656, 657–58 (2023); Samantha A. Zottola et al., *Court Date Reminders Reduce Court Nonappearance: A Meta-Analysis*, 22 CRIMINOLOGY & PUB. POL'Y 97, 99–100 (2023).

91. Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1429 (2017).

92. Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCI. 1, 1 (2020).

93. *See, e.g.*, Pat Raburn-Remfry, *Expediting Arrest Processing*, 2 CORN. J.L. & PUB. POL'Y 121, 152–53 (1992); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 721 (2017).

94. Rosenbaum et al., *supra* note 89, at 178.

95. *See id.*; Pedro Bordalo, Nicola Gennaioli & Andrei Shleifer, *Salience*, 14 ANN. REV. ECON. 521, 522–25 (2022); Verena Tiefenbeck et al., *Overcoming Salience Bias: How Real-Time Feedback Fosters Resource Conservation*, 64 MGMT. SCI. 1458, 1458 (2018).

96. Vicky Arnold et al., *The Effect of Experience and Complexity on Order and Recency Bias in Decision Making by Professional Accountants*, 40 ACCT. & FIN. 109, 110 n.1 (2000).

97. *See id.*; Ferri, *supra* note 18, at 151–53, 159–64; BRICE COOKE ET AL., U. CHI. CRIME LAB, USING BEHAVIORAL SCIENCE TO IMPROVE CRIMINAL JUSTICE OUTCOMES: PREVENTING FAILURES TO APPEAR IN COURT 4 (2018), https://www.courthousenews.com/wp-content/uploads/2018/01/crim-just-report.pdf [https://perma.cc/PFU5-25X4]. Note that other studies show how similar reminders for victims and witnesses may not decrease their failure-to-appear rates. *See* Jonathan R. Cumberbatch & Geoffrey C. Barnes,

C. Sludge

Whereas nudges orient individuals towards welfare-maximizing decisions, sludge prevents individuals from achieving objectives or acting consistently with their preferences.[98] More specifically, sludge increases the level of difficulty or friction to make certain choices.[99] Sludge is often associated with red tape, bureaucratic hurdles, poor architectural design, dark patterns (meaning manipulative user interfaces or website designs that decrease welfare), and complex enrollment forms to receive benefits or participate in programs.[100]

Sludge pervades the public and private sectors.[101] Governments may impose onerous administrative processes for individuals to receive social benefits—such as documentation requirements and complicated forms—that decrease a public assistance program's uptake rate.[102] Corporations may nudge individuals towards easy one-click online subscriptions, yet simultaneously require them to navigate a complex cancellation process or phone a representative to end their subscription.[103] These two examples—public benefits enrollment and subscription cancellations—show how sludge can limit access to programs that individuals wish to enjoy or enmesh them in schemes that they wish to exit.

Sludge exists for various reasons, some of which are altruistic or well-intentioned.[104] Public institutions or agencies may impose sludge to prevent fraud, maximize program integrity, or ensure that individuals qualify for certain benefits.[105] Certain types of sludge—such as online prompts that ask whether individuals wish to enable cookies that track their data—aim to protect individuals' privacy or security.[106] Some forms of sludge are used to acquire information to verify whether programs are useful or effective.[107] But

This Nudge Was Not Enough: A Randomised Trial of Text Message Reminders of Court Dates to Victims and Witnesses, 2 CAMBRIDGE J. EVIDENCE-BASED POLICING 35, 48 (2018); Stacie St. Louis, *The Pretrial Detention Penalty: A Systematic Review and Meta-Analysis of Pretrial Detention and Case Outcomes*, 41 JUST. Q. 347, 366 (2024).

98. Richard H. Thaler, *Nudge, Not Sludge*, 361 SCI. 431, 431 (2018); *see* SUNSTEIN, SLUDGE, *supra* note 2, at 1.

99. Sina Shahab & Leonhard K. Lades, *Sludge and Transaction Costs*, 8 BEHAV. PUB. POL'Y 327, 327–28 (2024); Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1850 (2019).

100. Shahab & Lades, *supra* note 99, at 328; Jonas K. Madsen, Kim S. Mikkelson & Donald P. Moynihan, *Burdens, Sludge, Ordeals, Red Tape, Oh My! A User's Guide to the Study of Frictions*, 100 PUB. ADMIN. REV. 375, 375, 377, 379, 384 (2022).

101. *See* Shahab & Lades, *supra* note 99, at 328.

102. Aske Halling & Martin Baekgaard, *Administrative Burden in Citizen–State Interactions: A Systematic Literature Review*, 34 J. PUB. ADMIN. RSCH. & THEORY 180, 181 (2024); Pamela Herd et al., *Shifting Administrative Burden to the State: The Case of Medicaid Take-Up*, 73 PUB. ADMIN. REV. S69, S69 (2013).

103. Sunstein, *supra* note 99, at 1850; Cass R. Sunstein, *Sludge Audits*, 6 BEHAV. PUB. POL'Y 654, 655 (2023).

104. These rationales for sludge are provided by Sunstein. *See* SLUDGE, *supra* note 2, at 73.

105. Cass R. Sunstein & Julien L. Gosset, *Optimal Sludge? The Price of Program Integrity*, 70 DUKE L.J. ONLINE 74, 75–76 (2020).

106. SUNSTEIN, SLUDGE, *supra* note 2, at 80–84.

107. *Id.* at 87–89.

organizations or actors may impose sludge for less benevolent reasons. Corporations may leverage onerous processes or dark patterns so that individuals cannot easily cancel their subscriptions, a tactic that attempts to exploit individuals' status quo bias to maximize profits.[108] For similar reasons, a company's online store may use a countdown clock that pressures consumers to buy things impulsively.[109] Other forms of sludge—such as a casino's confusing layout and architecture—aim to monopolize individuals' time.[110] And actors may levy heavy administrative burdens so that individuals do not participate in schemes or enjoy benefits that are in their best interests.[111]

The consequences of sludge can be significant.[112] First, sludge can consume large amounts of individuals' time and impose steep financial costs.[113] Research indicates that individuals spent roughly 11.6 billion hours on federal paperwork in 2020, which equates to roughly forty hours of paperwork—or one week of lost income—per person if the total paperwork hours were spread equally amongst individuals.[114] Studies estimate that approximately 1.2% of the U.S. gross domestic product—$1.2 billion—is spent to ensure compliance with tax-filing requirements.[115] Individuals may be required to spend significant time to travel to government agencies and wait for services, which can result in lost salary and income.[116] These forms of sludge can disproportionately impact socioeconomically disadvantaged persons who face time-poverty constraints because they work multiple jobs with unpredictable schedules, juggle childcare responsibilities, or take inefficient public transportation.[117]

Second, sludge can negatively impact individuals' physical or mental health.[118] Individuals may not purchase health insurance—or may delay or forgo necessary medical treatment—due to complex enrollment schemes, burdensome forms, documentation requirements, or other administrative

108. *See* Hansika Kapoor & Anirudh Tagat, *Transforming Behavioral Science, Creatively*, *in* TRANSFORMATIONAL CREATIVITY: LEARNING FOR A BETTER FUTURE 183, 188 (Robert Sternberg & Sareh Karami eds., 2024).

109. *Id.*

110. *See* George Ritzer & Todd Stillman, *The Modern Las Vegas Casino-Hotel: The Paradigmatic New Means of Consumption*, 4 M@N@GEMENT 83, 94 (2001).

111. *See, e.g.*, Sunstein, *supra* note 103, at 670.

112. This paragraph's arguments (including references to other articles, reports, and scholarship) were first advanced in Skolnik, *supra* note 12.

113. PAMELA HERD & DONALD MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 3 (2018).

114. OFF. OF INFO. AND REGUL. AFF., INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT, 2018–2021, at 1 (2023); *see* Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279, 280 (2015).

115. HERD & MOYNIHAN, *supra* note 113, at 3.

116. *See* Roni Holler & Noam Tarshish, *Administrative Burden in Citizen-State Encounters: The Role of Waiting, Communication Breakdowns and Administrative Errors*, SOC. POL'Y & SOC'Y 593, 594–96 (2024).

117. *See* Laura M. Giurge, Ashley Whillans & Colin West, *Why Time Poverty Matters for Individuals, Organisations and Nations*, 4 NATURE HUM. BEH. 993, 999–1000 (2021).

118. Donald Moynihan, Pamela Herd & Hope Harvey, *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RSCH. & THEORY 43, 46–47 (2014).

burdens.[119] Sludge can impose onerous psychological costs on individuals.[120] Heavy sludge can be frustrating, stressful, or infuriating.[121] It can worsen anxiety or instill a sense of helplessness.[122] Certain forms of sludge—such as proof of income and budget documentation—may stigmatize individuals and discourage them from participating in programs.[123]

Third, the effects of sludge can undermine a program's intended goals and objectives.[124] Due to sludge, eligible individuals may not apply for schemes that would assist them.[125] Research demonstrates that individuals who qualify to receive public benefits—such as social assistance or disability payments—do not apply to these schemes because of heavy documentation requirements and complex paperwork.[126] Sludge also reduces efficiency and causes delays that prevent individuals from receiving the help that they need.[127] Studies show that roughly one-quarter of individuals delay or forgo medical care due to administrative burdens in the healthcare system.[128] Some studies also suggest that sludge can decrease individuals' trust in public institutions.[129] The advertisement or application process for certain social programs may use stigmatizing language that discourages program participation.[130]

Sludge can be present in various aspects of the criminal justice process. Take the example of how criminal record expungements impose heavy administrative burdens.[131] Criminal records can result in a litany of

119. Michael Anne Kyle & Austin B. Frakt, *Patient Administrative Burden in the US Health Care System*, 56 HEALTH SERV. RSCH. 755, 756 (2021); Meredith Doherty, Bridgette Thom & Daniel S. Gardner, *Administrative Burden Associated with Cost-Related Delays in Care in U.S. Cancer Patients*, 32 CANCER EPIDEMIOLOGY, BIOMARKERS & PREVENTION 1583, 1586–89 (2023).

120. Moynihan, Herd & Harvey, *supra* note 118, at 45–46.

121. Holler & Tarshish, *supra* note 116, at 600; *see* Ayesha Masood & Muhammad Azfar Nisar, *Administrative Capital and Citizens' Responses to Administrative Burden*, 31 J. PUB. ADMIN. RSCH. & THEORY 56, 66 (2021).

122. *See* Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1002 (2019).

123. *See* Matthias Döring & Jonas Krogh Madsen, *Mitigating Psychological Costs: The Role of Citizens' Administrative Literacy and Social Capital*, 82 PUB. ADMIN. REV. 671, 672, 674 (2022); Jessica Lasky-Fink & Elizabeth Linos, *Improving Delivery of the Social Safety Net: The Role of Stigma*, 34 J. PUB. ADMIN. RSCH. & THEORY 270, 272 (2023).

124. *See* Stephanie Casey Pierce & Stephanie Moulton, *The Effects of Administrative Burden on Program Equity and Performance: Evidence from a Natural Experiment in a Foreclosure Prevention Program*, 9 RUSSELL SAGE FOUND. J. SOC. SCI. 146, 146 (2023).

125. David P. Carter, Tyler A. Scott & Nadia Mahallati, *Balancing Barriers to Entry and Administrative Burden in Voluntary Regulation*, 1 PERSPECTIVES ON PUB. MGMT. & GOV. 207, 209 (2018).

126. Carolyn Y. Barnes, *"It Takes a While to Get Used to": The Costs of Redeeming Public Benefits*, 31 J. PUB. ADMIN. RSCH. & THEORY 295, 295 (2021)

127. *See* Carolyn J. Heinrich, *The Bite of Administrative Burden: A Theoretical and Empirical Investigation*, 26 J. PUB. ADMIN. RSCH. & THEORY 403, 417 (2016); Pamela Herd, *Health Care Administrative Burdens: Centering Patient Experiences*, 56 HEALTH SERV. RSCH. 751, 751 (2021).

128. Kyle & Frakt, *supra* note 119, at 761.

129. *See* Lael R. Keiser & Susan M. Miller, *Does Administrative Burden Influence Public Support for Government Programs? Evidence from a Survey Experiment*, 80 PUB. ADMIN. REV. 137, 138 (2020).

130. Lasky-Fink & Linos, *supra* note 123, at 270–71, 279–80.

131. *See* Skolnik, *Two Systems*, *supra* note 1, at 326–36.

consequences, such as barriers to employment and housing, increased scrutiny by law enforcement, prohibitions against international travel, denial or loss of social benefits, child custody restrictions, eviction, disenfranchisement, and more.[132] In many states, the uptake rate—meaning the rate at which eligible persons receive a criminal record expungement—is relatively low.[133] For instance, the uptake rate for criminal record expungements is under 5% in Colorado, Connecticut, Missouri, New York, and Washington.[134] Sludge contributes significantly to low uptake rates.[135] Individuals who wish to apply for a criminal record expungement may be required to fill out complicated forms, take their fingerprints, visit police stations, pay an application fee, and print and mail documentation.[136] These forms of sludge explain why many eligible individuals do not apply for criminal record expungements and face an array of adverse consequences accordingly.[137] More specifically, the choice architecture of criminal record expungements—combining an opt-in scheme with onerous administrative burdens—contributes to low uptake rates.[138]

II. CHOICE ARCHITECTURE IN CRIMINAL JUSTICE

Once we notice the criminal justice system's choice architecture, we begin to see it everywhere. The criminal justice system employs nudges in some places and imposes sludge in others.[139] This is true even in cases where the criminal justice system's actors do not consider heuristics, nudges, and sludge or even know that these concepts exist.[140] Even small changes to choice architecture can produce major consequences.[141] The "framing effect" offers an example.[142] The framing effect implies that the way in which options are framed can influence outcomes.[143] For instance, patients are more likely to select certain forms of treatment when they are informed that a medical procedure's survival

132. *Id.* at 289–302; JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 227–38 (2015); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 976–77 (2013).

133. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 556–57 (2020).

134. *See id.*; Colleen Chien et al., *Estimating the Earnings Loss Associated with a Criminal Record and Suspended Driver's License*, 64 ARIZ. L. REV. 675, 679 (2022).

135. *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2501–26 (2020).

136. *See id.*

137. *See id.*; Alexander L. Burton et al., *Beyond the Eternal Criminal Record: Public Support for Expungement*, 20 CRIMINOLOGY & PUB. POL'Y 121, 141 (2021).

138. Burton et al., *supra* note 137, at 141.

139. *See supra* Parts I.B–C.

140. *See* Ian D. Marder & Jose Pina-Sánchez, *Nudge the Judge? Theorizing the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clustering*, 20 CRIMONOLOGY & CRIM. JUST. 401–02 (2020).

141. Richard H. Thaler, Cass R. Sunstein & John P. Balz, *Choice Architecture*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428–29 (Eldar Shafir ed., 2013).

142. Guthrie, Rachlinski & Wistrich, *supra* note 55, at 794.

143. *Id.*

rate is 90% rather than that the mortality rate is 10%, decisions that can make the difference between life and death.[144] There are three main categories of choice architecture that influence decision making: decision information, decision structure, and decision assistance.[145] And, as discussed more below, each of these forms of choice architecture underpins effective criminal justice reform initiatives.

A. Decision Information

Decision information refers to how a choice architect can present information to influence choices and outcomes.[146] As discussed above, a choice architect can *frame* information positively (in terms of potential gains) rather than negatively (in terms of prospective losses) to encourage welfare-maximizing choices.[147] They can *simplify* information or increase its *visibility* so that decision makers can more easily select amongst options (examples include shorter application forms and menus that indicate each item's calories).[148] A choice architect can provide *feedback*—such as fitness trackers on smartwatches and cellphones—to help individuals understand and monitor their behavior.[149] And they can offer *descriptive norms* of how others act, which can counteract the overestimation of noncompliance rates and encourage certain conduct (think: a reminder that 90% of neighbors file their taxes on time).[150] The concept of decision information helps explain how choice architecture influences certain features of the criminal justice system. Two examples illustrate this point: the

144. Katrina Armstrong et al., *Effect of Framing as Gain Versus Loss on Understanding and Hypothetical Treatment Choices: Survival and Mortality Curves*, 22 MED. DECISION MAKING 76, 76, 81–82 (2002); *see also* Kelsey McDonald et al., *Valence Framing Effects on Moral Judgments: A Meta-Analysis*, 212 COGNITION 1, 7 (2021) (explaining that a doctor's emphasis on a treatment's survival rate versus its mortality rate may affect the patient's choice to accept it).

145. *See, e.g.*, Robert Münscher, Max Vetter & Thomas Scheuerle, *A Review and Taxonomy of Choice Architecture Techniques*, 29 J. BEHAV. DECISION MAKING 511, 514–20 (2016) (providing these three categories); Stephanie Mertens et al., *The Effectiveness of Nudging: A Meta-Analysis of Choice Architecture Interventions Across Behavioral Domains*, 119 PNAS, Jan. 4, 2022, at 1, 3 (same); Barnabas Szaszi et al., *A Systematic Scoping Review of the Choice Architecture Movement: Toward Understanding When and Why Nudges Work*, 31 J. BEHAV. DEC. MAKING 355, 359–62 (2018). Note that this taxonomy and accompanying examples are provided in Münscher, Vetter, and Scheuerle, *supra*, at 514. This Part draws directly on their arguments and examples.

146. Münscher, Vetter & Scheuerle, *supra* note 145, at 514; Felix Mormann, *Climate Choice Architecture*, 64 B.C. L. REV. 1, 10–11 (2023).

147. Münscher, Vetter & Scheuerle, *supra* note 145, at 514–15; Christoph Ungemach et al., *Translated Attributes as Choice Architecture: Aligning Objectives and Choices Through Decision Signposts*, 64 MGMT. SCI. 2445, 2447 (2018).

148. Münscher, Vetter & Scheuerle, *supra* note 145, at 515–16; Cass R. Sunstein, *The Council of Psychological Advisers*, 67 ANN. REV. PSYCH. 713, 722–23 (2016).

149. Münscher, Vetter & Scheuerle, *supra* note 145, at 514–15; Sarah Forberger et al., *Nudging to Move: A Scoping Review of the Use of Choice Architecture Interventions to Promote Physical Activity in the General Population*, INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 1, 3 (2019).

150. Münscher, Vetter & Scheuerle, *supra* note 145, at 516; Thomas, *supra* note 77, at 581–82.

epistemic facets of some constitutional rights and access to justice considerations for pro se defendants.

Consider first the epistemic dimension of certain constitutional rights.[151] Some fundamental rights—such as free legal representation for indigent defendants, *Miranda* rights, and *Brady* disclosure—increase defendants' access to information that protects their interests, promotes fairness, and fosters informed choice.[152] Indigent defendants' right to free legal representation is partly justified by how attorneys provide vital information, help defendants exercise other rights, and guide them through the criminal justice process.[153] Similarly, a defendant's Fifth and Sixth Amendment *Miranda* rights—meaning that police officers must inform arrested persons of their right to silence, the prospect of self-incrimination, and their right to an attorney—augment decision information to help defendants make welfare-maximizing choices.[154] *Miranda* rights provide information that helps defendants decide whether to speak with police officers or cooperate with them.[155] The right to *Brady* disclosure operates similarly.[156] Together, the Fifth Amendment and the Fourteenth Amendment's Due Process Clauses oblige the prosecution to disclose all material exculpatory evidence to the defense prior to trial.[157] *Brady* disclosure improves defendants' knowledge of their case so that they can defend themselves against a criminal charge.[158]

Epistemic constitutional rights incorporate a second form of choice architecture that is discussed more below: default rules.[159] The right to free legal representation, *Miranda* rights, and *Brady* disclosure are all default rules that

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151. LANI WATSON, THE RIGHT TO KNOW: EPISTEMIC RIGHTS AND WHY WE NEED THEM 12–15 (2021). Note that Watson does not discuss the right to free legal representation, *Miranda* rights, or *Brady* disclosure; however, these rights do represent rights to certain types of information that aim to protect defendants. *See id.*

152. *See id.* Again, while Watson does not discuss such fundamental rights directly, her definition of epistemic rights in many respects centers around knowledge, with these fundamental rights involving access to such knowledge and information that protect defendants. *See id.*

153. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); Powell v. Alabama, 287 U.S. 45, 68–69 (1932); Syma Shulman Levine, *Toward Competent Counsel*, 13 RUTGERS L.J. 227, 229–30 (1982); *see also* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 38 (2013) (providing an example of such "vital information" by discussing the need for attorneys to understand immigration consequences of criminal convictions); Terry Skolnik, *The Tragedy of the Criminal Justice Commons*, 58 U.C. DAVIS L. REV. 2475, 2499–501 (2025) (discussing additional constitutional rights of criminal defendants).

154. Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1528–29 (2008).

155. *Id.*; Rinat Kitai-Sangero, *Respecting the Privilege Against Self-Incrimination: A Call for Providing* Miranda *Warnings in Non-Custodial Interrogations*, 42 N.M. L. REV. 203, 219–20 (2012).

156. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 482 (2009).

157. Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1782 (2007).

158. *See, e.g.*, John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 439, 448–56 (2001).

159. *See infra* Part II.B.

resemble an auto-enrollment scheme for defendants.[160] Judges must inquire about a defendant's eligibility for free legal representation.[161] Police officers have a prophylactic duty to inform arrested persons of their *Miranda* rights, which aims to prevent constitutional violations.[162] And prosecutors must automatically disclose material exculpatory evidence to the defense prior to trial.[163] To be clear, defendants can waive their rights to—and opt out of—these forms of legal protection.[164] Yet epistemic rights incorporate mechanisms to improve decision information and leverage default rules so that the maximum number of defendants can acquire knowledge they would otherwise lack.

Second, the access to justice movement elucidates how the criminal justice system can employ decision information to better assist pro se defendants (meaning self-represented defendants).[165] Roughly 80% of defendants are indigent and qualify for free legal representation.[166] But those who do not qualify for free legal representation face two options: pay for an attorney if they can afford to do so or represent themselves.[167] The Supreme Court has recognized that defendants have a constitutional right to represent themselves in legal proceedings.[168]

Many defendants exercise this right. Statistics suggest that somewhere between 0.3% and 0.5% of felony defendants in federal and state courts are unrepresented.[169] But the percentage of pro se misdemeanor defendants is estimated to be significantly higher.[170] Some studies indicate that upwards of 30% of misdemeanor defendants were unrepresented even though they qualified for free legal representation by public defenders or court-appointed counsel.[171] Defendants—including those who are eligible for a public defender or court-appointed attorney—may represent themselves for various reasons.[172]

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160. *See, e.g.*, Skolnik, *Revolution*, *supra* note 1, at 50 (describing the disclosure of evidence as a default rule).

161. *See* John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2136 (2013); Argersinger v. Hamlin, 407 U.S. 25, 42 (1972) (Burger, C.J., concurring in the judgment).

162. Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 106–11 (1985).

163. Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 11 (2015).

164. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831 (2003); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 762–63 (1989).

165. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1804–05 (2001).

166. Samantha Jaffe, "*It's Not You, It's Your Caseload": Using* Cronic *to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1467 (2018).

167. *See, e.g.*, Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 405–06 (2021).

168. Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 425 (2007) (citing Faretta v. California, 422 U.S. 806, 819 (1975)).

169. *Id.* at 447.

170. *See id.* at 478 ("Defendants charged with misdemeanors are overwhelmingly more likely to represent themselves in federal court than felony defendants.").

171. Nancy J. King & Michael Heise, *Misdemeanor Appeals*, 99 B.U. L. REV. 1933, 1947 (2019).

172. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378–79 (2005).

They may distrust attorneys or the legal system, believe that the outcome will be similar with or without legal representation, perceive that public defenders are too busy to devote meaningful time to their case, or posit that they can represent themselves better than attorneys, amongst others.[173] They may also represent themselves because they were not informed of their right to free legal representation, faced recoupment fees if they accepted legal counsel, or sought to avoid attorney-related delays.[174]

Pro se defendants face a litany of challenges that highlight the value of decision information as a form of choice architecture. They may be unable to understand the law, grasp their rights, mount a defense, or navigate the criminal justice process.[175] For these reasons, they may make basic mistakes that increase their conviction prospects.[176] Prohibitive financial costs may restrict pro se defendants' ability to access legal information or obtain legal advice.[177] Unaware of the law, they may be prone to ask questions or make statements that can result in a mistrial.[178]

Various mechanisms aim to maximize decision information and assist pro se defendants. Judges can impose a standby attorney on pro se defendants to guide them through the legal process and ensure fairness, a form of choice architecture that combines simplification and feedback.[179] Although pro se defendants maintain control over their defense, they may ask standby attorneys for legal advice and receive comments on their strategy and tactics.[180] Courts have also recognized that judges have the inherent jurisdiction to simplify information or make it more visible to pro se defendants to promote fairness.[181] For instance, courts can lawfully "inform[] the defendant of the relevant issues to address and assist[] the pro se defendant in asking questions to effectively

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173. *Id.*; Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense, 1996–2011: An Exploratory Study*, 8 FED. CTS. L. REV. 81, 87 (2015).

174. Erica J. Hashimoto, *The Problem with Misdemeanor Representation*, 70 WASH. & LEE L. REV. 1019, 1032–38 (2013).

175. *See* Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 471–72 (2009); Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 677 (2000).

176. *See* Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 810 (2000).

177. Ashley Krenelka Chase, *Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a New Neutrality Information World*, 84 MO. L. REV. 323, 348 (2019).

178. *See, e.g.*, Brittaney N. Eshbach, *The Interplay of Pro Se Defendants, Standby Counsel, and Ineffective Assistance of Standby Counsel Claims: An Examination of Current Law and a Suggestion for Reform in Pennsylvania*, 121 PENN. ST. L. REV. 875, 889 (2017).

179. Jona Goldschmidt, *Autonomy and "Gray-Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J.L. & SOC. POL'Y 130, 130 (2011); Indiana v. Edwards, 554 U.S. 164, 186 (2008) (Scalia, J., dissenting); Brooksany Barrowes, *The Permissibility of Shackling or Gagging Pro Se Criminal Defendants*, 1998 U. CHI. LEGAL F. 349, 355 (1998); J. Vincent Aprile II, *The Nontraditional Roles of a Criminal Defense Attorney*, 32 CRIM. JUST. 45, 45–46 (2018).

180. *See* John H. Pearson, *Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial*, 72 CAL. L. REV. 697, 703–04 (1984); Williams, *supra* note 176, at 805.

181. Finegan, *supra* note 175, at 478.

elicit the desired responses."[182] Judges may also instruct pro se defendants regarding the propriety of certain types of arguments.[183] And courts may also notify defendants of their trial-related rights, the jury selection process, and more.[184] These mechanisms aim to improve decision information and ultimately counteract power imbalances between the State and pro se defendants.

B. Decision Structure

Second, choice architects can leverage decision structure—meaning how options are arranged or presented—to influence outcomes.[185] Perhaps more than any other mechanism, *default options* result in more significant participation rates compared to opt-in regimes.[186] More specifically, default options exploit individuals' preference for the status quo and tendency to procrastinate.[187] The mechanism of *prompted choice* requires individuals to select a particular option, which can encourage deliberation and promote autonomy.[188] Changing requisite *physical-effort levels* will also influence the options that individuals select, which explains why individuals are more likely to select healthy food items that are placed at eye level than unhealthier ones that are more difficult to reach.[189] Similarly, changes to *financial efforts* also shape decision making.[190] Individuals are more likely to select options where they can pay later rather than now, which taps into the human tendency to emphasize current costs and discount future ones.[191] Two mechanisms illustrate how decision structure shapes individuals' trajectories through the criminal justice process and the outcomes they experience: presumptions that promote principled asymmetries and the decision structure of coercive plea bargaining practices.

The criminal justice system's choice architecture imposes various presumptions that promote principled asymmetries.[192] The term "principled asymmetry" refers to asymmetric rules, principles, or presumptions that reinforce a commitment to a liberal criminal justice system's underlying

182. *Id.* at 473–74 (citing Commonwealth v. Jackson, 647 N.E.2d 401, 405 n.6 (Mass. 1995)).

183. *Id.* at 475.

184. *Id.* at 479.

185. *See* Münscher, Vetter & Scheuerle, *supra* note 145, at 514, 516–17.

186. *Id.* at 516–17; *see* Thomas de Haan & Jona Linde, *'Good Nudge Lullaby': Choice Architecture and Default Bias Reinforcement*, 128 ECON. J. 1180, 1180 (2018).

187. *See* Nina Mazar & Scott A. Hawkins, *Choice Architecture in Conflicts of Interest: Defaults as Physical and Psychological Barriers to (Dis)honesty*, 59 J. EXPER. SOC. PSYCH. 113, 116 (2015).

188. *See* Münscher, Vetter & Scheuerle, *supra* note 145, at 517; Sunstein, *supra* note 68, at 428.

189. Münscher, Vetter & Scheuerle, *supra* note 145, at 517; Hannah Ensaff, *A Nudge in the Right Direction: The Role of Food Choice Architecture in Changing Populations' Diets*, 80 PROC. NUTRITION SOC'Y 195, 197–98 (2021).

190. *See* Münscher, Vetter & Scheuerle, *supra* note 145, at 517.

191. *Id.*

192. Skolnik, *Presumptions*, *supra* note 1, at 968–73; *see* Paul Roberts, *Double Jeopardy Law Reform: A Criminal Justice Commentary*, 65 MOD. L. REV. 393, 402–04 (2002); Andrew Ashworth, *Four Threats to the Presumption of Innocence*, 123 S. AFR. L.J. 63, 72–73 (2006).

values.[193] As discussed more below, certain evidentiary presumptions exploit the anchoring effect to nudge decision makers towards default outcomes that exemplify such a commitment.[194] In doing so, presumption-based principled asymmetries allocate sludge in a manner that reinforces the criminal justice system's commitment to liberal values.[195] A party that wishes to refute the presumption bears the onus and burden of proof to steer the outcome away from its default, a tactic that leverages status quo bias and administrative burdens to protect certain individuals.[196]

The presumption of innocence offers a compelling example of principled asymmetries.[197] Defendants are presumed innocent and prosecutors must prove the defendant's guilt beyond a reasonable doubt.[198] This principled asymmetry embodies a "faith in humankind . . . that individuals are decent and law-abiding members of the community until proven otherwise"[199] and that it is "better to let the crime of a guilty person go unpunished than to condemn the innocent."[200] This constitutionally entrenched presumption uses a particular anchor, the defendant's innocence, to orient decision makers towards a default outcome: acquittals.[201] In doing so, the presumption of innocence acknowledges that some default outcomes and the errors that they produce are morally preferable to others.[202] More specifically, it is morally preferable to presume a defendant's innocence and erroneously acquit them than to presume their guilt and mistakenly convict them.[203]

The presumptive inadmissibility of a complainant's sexual history offers a second example of principled asymmetries.[204] Certain rape shield statutes presume that a complainant's sexual history is inadmissible, a default outcome that aims to safeguard sexual assault complainants' dignity and privacy.[205] Such evidence is presumptively inadmissible because it is highly prejudicial, lacks probative value, distorts the criminal trial's truth-seeking function, and discourages complainants

193. Skolnik, *Presumptions*, *supra* note 1, at 968.

194. *Id.* at 968–973.

195. *Id.*

196. *Id.*

197. *Id.* at 960.

198. *E.g.*, *In re* Winship, 397 U.S. 358, 362–65 (1970).

199. R. v. Oakes, [1986] 1 S.C.R. 103, 120 (Can.).

200. Coffin v. United States, 156 U.S. 432, 454 (1895).

201. *See* William W. Berry III, *Eighth Amendment Presumptive Penumbras (and Juvenile Offenders)*, 106 IOWA L. REV. 1, 27 (2020).

202. David Hamer, *Presumptions, Standards and Burdens: Managing the Cost of Error*, 13 L., PROBABILITY, & RISK 221, 222 (2014).

203. *Id.*

204. Skolnik, *Presumptions*, *supra* note 1, at 972.

205. *See* Jessica M. Donels, *Rape-Shield Laws and Third-Party Defendants: Where Iowa's Laws Fall Short in Protecting Victims*, 102 IOWA L. REV. 793, 818 (2017); Rosanna Cavallaro, *Rape Shield Evidence and the Hierarchy of Impeachment*, 56 AM. CRIM. L. REV. 295, 295 (2019).

from denouncing sexual assaults.[206] Presumptive inadmissibility attempts to safeguard complainants against humiliation and the prospect that they are tried on their sexual history rather than on the defendant's conduct.[207] Such presumptions counteract highly prejudicial biases associated with twin myths reasoning.[208] The concept of "twin myths" refers to stereotypical beliefs that a complainant probably consented or should not be believed due to their sexual history.[209] Twin myths reasoning exemplifies the representativeness heuristic: jurors or judges believe that a complainant falls within the broad class of individuals who generally consent to sexual activity.[210] The presumptive inadmissibility of prior sexual history is a form of choice architecture that aims to neutralize this pernicious cognitive bias.[211] Here too, the choice architecture of criminal justice attempts to nudge decision makers towards a default outcome that protects individuals' dignity and privacy.

Two coercive plea-bargaining practices offer another example of decision structure in the criminal justice system: overcharging[212] and exploding offers.[213] The term "overcharging," or charge stacking, implies that a prosecutor charges a defendant with overlapping crimes, which exposes the defendant to a harsher sentence if they are convicted at trial.[214] Prosecutors can use overlapping crimes as bargaining chips that maximize leverage during plea negotiations and encourage guilty pleas.[215]

Charge stacking alters decision structure in important ways. Overcharging produces a powerful anchoring effect that magnifies the perceived value of sentencing discounts.[216] Stacked charges set an artificially high anchor that represents the potential sentence that defendants can receive if they are

206. *See, e.g.*, Elaine Craig, *Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions*, 94 CAN. BAR REV. 45, 60–61 (2016); Skolnik, *Presumptions*, *supra* note 1, at 972.

207. *See* Megan Reidy, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?*, 54 CATH. U. L. REV. 297, 298 (2004) (citing Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 13–14 (1998)).

208. *See* Patrick J. Hines, *Bracing the Armor: Extending Rape Shield Protections to Civil Proceedings*, 86 NOTRE DAME L. REV. 879, 881–83 (2011).

209. R. Michael Cassidy, *Character, Credibility, and Rape Shield Rules*, 19 GEO. J.L. & PUB. POL'Y 145, 148 (2021); Lisa Dufraimont, *Myth, Inference and Evidence in Sexual Assault Trials*, 44 QUEEN'S L.J. 316, 332 (2019).

210. *See* Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 396–97, 424 (2006).

211. Skolnik, *Presumptions*, *supra* note 1, at 972–73.

212. Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENTENCING REP. 284, 285–87 (2019); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 65–66, 72–73 (2011).

213. Mike Work, *Creating Constitutional Procedure: Frye, Lafler, and Plea-Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 481 (2014).

214. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–87 (1968); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001); *see* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 229 (2007).

215. Stuntz, *supra* note 214, at 520; Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018).

216. Bibas, *supra* note 62, at 2519.

convicted at trial.[217] Defendants, in turn, compare all subsequent sentencing discounts to the original anchor.[218] Charge stacking makes sentencing discounts appear significantly more beneficial than they otherwise would, which incentivizes defendants to plead guilty rather than go to trial.[219]

Overcharging also taps into the cognitive bias of "loss aversion," meaning that individuals fear a loss more than they value an equal gain.[220] When weighing options, potential losses are estimated to be roughly two to three times as powerful as comparable gains.[221] Loss aversion may explain why overcharging can exploit a defendant's desire for minimal punishment to incentivize guilty pleas.[222] Charge stacking drives up the potential gain of pleading guilty and the potential loss of going to trial.[223] Defendants may view the sentencing discount associated with a guilty plea as a certain gain that they do not want to sacrifice in favor of a potential acquittal that can be more beneficial.[224] And the greater the differential between a lower sentence that is certain versus a higher sentence that is uncertain, the stronger the incentive to plead guilty and avoid that loss.[225] These considerations show how overcharging alters the decision structure of plea negotiations in a manner that exploits defendants' cognitive biases.

Exploding offers constitute a second coercive plea-bargaining tactic that alters the background conditions for choice.[226] The term "exploding offer" connotes that prosecutors issue defendants a highly beneficial plea offer that expires rapidly.[227] The underlying premise of an exploding offer is that it is the best deal that the defendant will get.[228] Exploding offers are pernicious for various reasons. Faced with an exploding offer, a defense attorney may have

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217. *Id.*

218. *Id.*

219. *Id.*

220. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk,* 47 ECONOMETRICA 263, 268–69 (1979); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193, 199–200 (1991); Jeffrey J. Rachlinski & Andrew J. Wistrich, *Gains, Losses, and Judges: Framing and the Judiciary*, 94 NOTRE DAME L. REV. 521, 522–23 (2018); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 169 (2007).

221. Benedetto De Martino, Colin F. Camerera & Ralph Adolphsa, *Amygdala Damage Eliminates Monetary Loss Aversion*, 107 PNAS 3788, 3788 (2010); Eyal Zamir & Ilana Ritov, *Loss Aversion*, *Omission Bias, and the Burden of Proof in Civil Litigation*, 41 J. LEGAL STUD. 165, 166 (2012).

222. Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 208 (1999); Skolnik, *Policing*, *supra* note 1, at 505, 529.

223. Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 648 (2021).

224. Birke, *supra* note 222, at 244–45; Bibas, *supra* note 62, at 2514. To be clear, both Birke and Bibas observe that defendants may view plea bargains as losses rather than potential gains. Birke, *supra* note 222, at 244–45; Bibas, *supra* note 62, at 2514.

225. *See* Covey, *supra* note 214, at 220; Theodore Wilson, *The Promise of Behavioral Economics for Understanding Decision-Making in the Court*, 18 CRIMINOLOGY & PUB. POL'Y 785, 792–93.

226. Work, *supra* note 213.

227. *Id.*; Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 1013 (2021).

228. *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1281–82 (2008).

little to no time to investigate their client's case.[229] In some cases, these offers may expire before defendants meet their attorney, such that defendants plead guilty without receiving any legal advice.[230] Furthermore, exploding offers tend to be issued very early in the criminal justice process where evidentiary disclosure is at its lowest, such that defendants cannot assess the strength of the prosecutor's case.[231] Exploding offers can also contribute to wrongful convictions.[232] Prosecutors may issue such offers before they adequately investigate the defendant's case and potentially discover exculpatory evidence.[233]

Exploding offers incorporate a familiar form of decision structure that pressures defendants to plead guilty: scarcity cues.[234] A scarcity cue pressures individuals to make certain choices because they express an option's "high exclusivity and value."[235] These types of cues "give[] a perceived benefit of acting quickly."[236] Examples of scarcity cues include time-sensitive offers and information regarding limited quantities.[237] Online shopping websites notoriously use scarcity cues (think: airline websites that advertise, "Hurry! Only two seats left at this price").[238] Scarcity cues are an especially effective form of choice architecture because they exploit defendants' fear of loss to encourage impulsive decision making.[239] And this is exactly what exploding offers do. Prosecutors may issue an exploding offer to magnify the loss of going to trial, increase the perceived value of a plea deal, and pressure defendants to plead guilty.[240]

These two examples of decision structure—principled asymmetries and coercive plea-bargaining practices—highlight several important features of

229. Jenia I. Turner, *Plea Bargaining*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 84–85 (Erik Luna ed., 2017); Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1073–74 (2016).

230. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 453 (2008).

231. Covey, *supra* note 228, at 1282.

232. Allison D. Redlich, Tina Zottoli & Tarika Daftary-Kapur, *Juvenile Justice and Plea Bargaining*, *in* A SYSTEM OF PLEAS: SOCIAL SCIENCES CONTRIBUTIONS TO THE REAL LEGAL SYSTEM 115 (Vanessa A. Edkins & Allison D. Redlich eds., 2019).

233. *See* Covey, *supra* note 228, at 1282.

234. *See* Anindya Ghose et al., *The Effect of Pressure and Self-Assurance Nudges on Product Purchases and Returns in Online Retailing: Evidence from a Randomized Field Experiment*, 61 J. MKTG. RSCH. 517, 517–520 (2023).

235. Siddik Bozkurt & David Gligor, *Scarcity (Versus Popularity) Cues for Rejected Customers: The Impact of Social Exclusion on Cue Types Through Need for Uniqueness*, 99 J. BUS. RSCH. 275, 276 (2019).

236. Pascal Courty & Sinan Ozel, *The Value of Online Scarcity Signals*, 46 INFO. ECON. & POL'Y 23, 23 (2019).

237. Bozkurt & Gligor, *supra* note 235, at 276.

238. Yi Wu et al., *How Does Scarcity Promotion Lead to Impulse Purchase in the Online Market? A Field Experiment*, 58 INFO. & MGMT. 1, 1 (2021).

239. *See* Yi Qu et al., *Impulse Buying Tendency in Live-Stream Commerce: The Role of Viewing Frequency and Anticipated Emotions Influencing Scarcity-Induced Purchase Decision*, 75 J. RETAILING & CONSUM. SERV. 1, 2 (2023); Thomas Friedrich & Kathrin Figl, *Consumers' Perceptions of Different Scarcity Cues on E-Commerce Websites*, *in* PROCEEDINGS OF THE 39TH INTERNATIONAL CONFERENCE ON INFORMATION SYSTEMS 998, 998 (2018).

240. JENNIFER LACKEY, CRIMINAL TESTIMONIAL INJUSTICE 135 (2023).

choice architecture in the criminal justice system. They show how criminal justice system actors can deploy decision structure for better or for worse.[241] But these same examples illustrate how choice architecture can leverage certain cognitive biases to neutralize others.[242] Recall how legal presumptions promote principled asymmetries.[243] The presumption of innocence and the presumptive inadmissibility of prior sexual history evidence deploy the anchoring effect to insulate individuals against decision makers' recourse to the representativeness heuristic.[244] In contrast, coercive plea-bargaining practices—such as overcharging and exploding offers—illustrate how choice architecture can be weaponized against defendants to exploit their cognitive biases.[245] These tactics use the anchoring effect, loss aversion, and scarcity cues to pressure defendants to plead guilty and avoid trials.

C. Decision Assistance

Decision assistance is the third type of choice architecture.[246] The term "decision assistance" refers to various architectural mechanisms that help individuals attain their goals or make choices that align with their preferences.[247] In other words, "decision assistance helps bridge the gap between intentions and behaviors."[248] Examples of decision assistance include reminders (e.g., calendar or text-message reminders), self-commitment strategies (e.g., apps that limit screen time), public commitments (e.g., publishing on social media that one will compete in a marathon), and feedback rewards (e.g., congratulatory messages for completing a daily goal or taking safety precautions).[249]

These forms of decision assistance facilitate decision making in different ways.[250] Reminders increase the salience of information, which taps into individuals' tendency to weigh the present more than the future, a phenomenon

241. *See* Lavi, *supra* note 9, at 4, 7, 10.

242. Skolnik, *Two Systems*, *supra* note 1, at 336.

243. Skolnik, *Presumptions*, *supra* note 1, at 968–73.

244. *Id.*

245. *See, e.g.*, Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 903 (1997); Skolnik, *Policing*, *supra* note 1, at 535–36.

246. Münscher, Vetter & Scheuerle, *supra* note 145, at 519.

247. *Id.*; Mathias Jesse & Dietmar Jannach, *Digital Nudging with Recommender Systems: Survey and Future Directions*, 3 COMPUTS. HUM. BEHAV. REPS. 1, 3 (2021).

248. *See* Guotian Peng et al., *Self-Management Behavior Strategy Based on Behavioral Economics in Patients with Hypertension: A Scoping Review*, 14 TRANSLATIONAL BEHAV. MED. 405, 407 (2024).

249. Münscher, Vetter & Scheuerle, *supra* note 145, at 519 (providing these same examples); Vania Dimitrova & Antonija Mitrovic, *Choice Architecture for Nudges to Support Constructive Learning in Active Video Watching*, 32 INT'L J. A.I. EDUC. 892, 908–09 (2022); Samuel Costa et al., *Nudging Safety Behavior in the Steel Industry: Evidence from Two Field Studies*, 173 SAFETY SCI. 1, 4 (2024).

250. *See* James Alm et al., *Nudges, Boosts, and Sludge: Using New Behavioral Approaches to Improve Tax Compliance*, 11 ECONS. 1, 8 (2023).

referred to as "hyperbolic discounting."[251] Self-commitment strategies encourage self-control, deter procrastination, and reduce the cognitive dissonance between objectives and actions.[252] Public commitment strategies, for their part, leverage social pressure and third-party judgments to help individuals achieve their goals.[253] Feedback rewards reinforce one's positive effect associated with certain goal-oriented conduct so that individuals feel better as they pursue an objective.[254]

Although less common than decision information and decision structure, the criminal justice system employs decision assistance in certain contexts. Previous sections showed how some jurisdictions phone defendants or send text-message reminders to increase the likelihood that they appear in court.[255] Courts may also send similar reminders to witnesses and victims to prevent trial delays.[256] Interestingly, the effectiveness of court reminders varies across criminal justice system participants.[257] Although some studies indicate that phone-call and text-message reminders increase defendants' appearance rates, other studies suggest that these types of reminders did not increase witnesses' and victims' appearance rates.[258] This disparity highlights how some forms of decision assistance can be context-dependent. And it showcases the need for evidence-based analyses of decision-assistance mechanisms more specifically, and choice architecture interventions more generally.[259]

Consider a different example of decision assistance that is both obvious and overlooked: oaths and solemn affirmations.[260] Various criminal justice system actors must swear an oath or make a solemn affirmation to fulfill their institutional role. Police officers swear an oath when they draft affidavits to obtain search warrants or wiretaps.[261] Witnesses must swear to tell "the whole truth, and nothing but the truth."[262] And although the contents of juror oaths vary significantly between jurisdictions, jurors must swear that they will render

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251. *Id.* at 4; Uttara Balakrishnan, Johannes Haushofer & Pamela Jakiela, *How Soon Is Now? Evidence of Present Bias from Convex Time Budget Experiments*, 23 EXPERIMENTAL ECON. 294, 295–96 (2020).

252. *See* Münscher, Vetter & Scheuerle, *supra* note 145, at 519; Peng et al., *supra* note 248, at 407.

253. *See* Munscher, Vetter & Scheuerle, *supra* note 145, at 519; Samuli Reijula & Ralph Hertwig, *Self-Nudging and the Citizen Choice Architect*, 6 BEHAV. PUB. POL'Y 119, 122–23 (2022).

254. *See* Ursula Addison, *Human-Inspired Goal Reasoning Implementations: A Survey*, 83 COGNITIVE SYS. RSCH. 1, 7 (2024).

255. *See supra* Part I.B; Zottola et al., *supra* note 90, at 100.

256. Ferri, *supra* note 18, at 151–52.

257. *See id.*; Fishbane, Ouss & Shah, *supra* note 92, at 1.

258. *See* Fishbane, Ouss & Shah, *supra* note 92, at 7–8; Cumberbatch & Barnes, *supra* note 97, at 48–49.

259. *See, e.g.*, Mertens et al., *supra* note 145, at 2–3.

260. Nadine Farid, *Oath and Affirmation in the Court: Thoughts on the Power of a Sworn Promise*, 40 NEW ENG. L. REV. 555, 557–58 (2006).

261. Laurent Sacharoff, *The Broken Fourth Amendment Oath*, 74 STAN. L. REV. 603, 606 (2022).

262. Allan W. Vestal, *Fixing Witness Oaths: Shall We Retire the Rewarder of Truth and Avenger of Falsehood?*, 27 U. FLA. J.L. & PUB. POL'Y 443, 473 (2016) (emphasis omitted); *see* FED. R. EVID. 603.

a true verdict that is supported by the evidence.[263] Oaths and solemn affirmations are justified by several considerations. They encourage individuals to tell the truth by exposing them to perjury accusations and other offenses if they lie under oath.[264] Given that oaths are sworn on a religious text, individuals may tell the truth due to deeply held moral convictions or because they fear a higher power.[265]

Yet oaths and solemn affirmations also constitute a form of decision assistance that combines self-commitment and public-commitment strategies.[266] Individuals do not swear oaths or affirmations in private and to themselves. Instead, oaths and solemn affirmations are sworn in front of others and are made in open court or in front of a judge or magistrate.[267] Individuals commit to themselves—and to others—that they are truthful and will act with integrity, a pledge that nudges individuals to behave honestly.[268] Indeed, some empirical research suggests that oaths are a cheap and effective way to promote truthfulness.[269]

Prison reward systems offer a third example of decision assistance, a choice architecture device that is used in other criminal justice contexts.[270] As a form of commitment strategy, correctional services have devised different reward systems to encourage prosocial behavior, such as nonviolence, improved hygiene, or participation in educational or rehabilitative programs.[271] Prison reward systems take various forms, including tokens that can be used to purchase goods, increased privileges (such as additional recreation time and higher pay rates), sentence reductions, and nonmonetary praise (such as

263. Kathleen M. Knudsen, *The Juror's Sacred Oath: Is There a Constitutional Right to a Properly Sworn Jury?*, 32 TOURO L. REV. 489, 494–97 (2016).

264. *See* linda f. harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under Federal Perjury Statutes*, 35 U. TOL. L. REV. 397, 399 (2003).

265. Farid, *supra* note 260, at 556–57; Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1, 60 (2009).

266. *See* Tobias Beck, *How the Honesty Oath Works: Quick, Intuitive Truth Telling Under Oath*, 94 J. BEHAV. & EXPERIMENTAL ECON. 1, 2 (2021); Boudewijn de Bruin, *Pledging Integrity: Oaths as Forms of Business Ethics Management*, 136 J. BUS. ETHICS 23, 24–25 (2016); Nicolas Jacquemet et al., *Preference Elicitation Under Oath*, 65 J. ENV'T ECON. & MGMT. 110, 111–12 (2013).

267. *See* de Bruin, *supra* note 266, at 24–25.

268. *Id.*; Mark R. Rutgers, *Will the Phoenix Fly Again? Reflections on the Efficacy of Oaths as a Means to Secure Honesty*, 71 REV. SOC. ECON. 249, 265 (2013).

269. Beck, *supra* note 266, at 2; Brent J. Davis & Tarek Jaber-Lopez, *Do Voluntary Commitment Mechanisms Improve Welfare? The Effect of Mandatory and Voluntary Oaths in a Social Dilemma*, 75 BULL. ECON. RSCH. 525, 526 (2022) (citing Nicolas Jacquemet et al., *Truth Telling Under Oath,* 65 MGMT. SCI. 426, 437 (2019); Jérôme Hergueux et al., *Leveraging the Honor Code: Public Goods Contributions Under Oath*, 81 ENV'T & RES. ECON. 591, 606–07 (2022)).

270. *See* Jan Maarten Elbers et al., *The Effects of Reward Systems in Prison: A Systematic Review*, 71 INT'L J.L. CRIME & JUST. 1, 8–9 (2022); Brian Galle, *The Economic Case for Rewards over Imprisonment*, 96 IND. L.J. 471, 474 (2021).

271. Elbers et al., *supra* note 270, at 2, 7.

graduation ceremonies, celebration dinners, and certificates).[272] In some contexts, inmates who engage in such prosocial behavior or participate in programs receive rewards immediately.[273] In other contexts, inmates receive rewards as they progress through different stages of a particular program, which delays reward-based gratification.[274] Rather than punish or penalize inmates, this commitment strategy aims to provide positive reinforcement to encourage prosocial behavior.[275] Certain studies suggest that reward-based commitment strategies can positively influence inmates' conduct.[276]

Some statutes exemplify a commitment to prison reward systems as a form of decision assistance. For instance, the First Step Act—which sought to reform federal prisons, reduce incarceration, and promote rehabilitation—leverages feedback rewards as a form of decision assistance.[277] The First Step Act was a major bipartisan criminal justice reform bill that was enacted in 2018.[278] It relied heavily on reward structures to facilitate re-entry and decrease incarceration.[279] The act provides that inmates can earn time credits when they participate in "Evidence-Based Recidivism Reduction . . . programs" and "Productive Activities."[280] Examples of such programs and activities include "cognitive-behavioral therapy, financial education, wellness groups, and mental health and substance abuse therapy."[281] Furthermore, inmates who participated in such programs could receive other privileges, such as increased access to phones and

272. *Id.*; Susan Dewey et al., *Higher Education in Prison: A Pilot Study of Approaches and Modes of Delivery in Eight Prison Administrations*, 71 J. CORR. EDUC. 57, 62–74 (2020); Zarek Khan, *A Typology of Prisoner Compliance with the Incentives and Earned Privileges Scheme: Theorising the Neoliberal Self and Staff–Prisoner Relationships*, 22 CRIMINOLOGY & CRIM. JUST. 97, 98–99 (2022).

273. Elbers et al., *supra* note 270, at 2.

274. *Id.* at 2–4; Michelle Butler, Catherine B. McNamee & Dominic Kelly, *Exploring the Factors Influencing Prison Incentive Scheme Status Among Adult Males: A Prospective Longitudinal Study*, EUR. J. CRIMINOLOGY 887, 888–89 (2024).

275. Elbers et al., *supra* note 270, at 2.

276. *Id.* at 8 (noting, however, that "the internal validity of these studies is questionable"); *see also* Paul Gendreau et al., *Making Prisoners Accountable: Are Contingency Management Programs the Answer?*, 41 CRIM. JUST. & BEHAV. 1079, 1079–80 (discussing the effectiveness of such rehabilitation efforts as rewards systems in context).

277. 18 U.S.C. § 3632; Andrew Edwards, *For One or For All: Who Gets the Benefits of the First Step Act?*, 112 KY. L.J. 395, 395–96 (2023); Emily M. Smachetti & Alix I. Cohen, *Introduction to the First Step Act*, 69 DEP'T JUST. J. FED. L. & PRAC. 39, 39–40, 42 (2021).

278. Anthony Passela, *Stacking the Deck: How the Eighth Circuit's Decision in* United States v. Crandall *Threatens the First Step Act's Bipartisan Criminal Justice Reforms*, 68 VILL. L. REV. 97, 100–01 (2023).

279. Julie Zibulsky & Christine Kitchens, *The First Step Act of 2018: One Year of Implementation*, 33 FED. SENTENCING REP. 144, 144 (2020).

280. U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, FIRST STEP ACT PROGRAM INCENTIVES 1 (July 14, 2021), https://www.bop.gov/policy/progstat/5220.01.pdf [https://perma.cc/GVD8-4BPD]; Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 LOY. U. CHI. L.J. 67, 86–87 (2020).

281. Emily Muenster, *The First Step Act Took One Step Forward and Two Steps Back*, 60 HOU. L. REV. 135, 152 (2022).

email, more visitations, greater purchasing opportunities, and more.[282] Together, these three examples—court reminders, oaths and affirmations, and prison reward systems—highlight the use of decision assistance in the criminal justice system.

III. THE BENEFITS AND RISKS OF CHOICE ARCHITECTURE

A. The Benefits of Choice Architecture

Choice architecture has several features that highlight its value as a law-reform tool. First, some choice architecture mechanisms are more effective than other types of interventions.[283] Compared to other mechanisms, some forms of choice architecture—such as default rules—can reliably encourage certain options or achieve specific outcomes.[284] Some forms of choice architecture are valuable because they prevent individuals from making mistakes that are inconsistent with their preferences.[285] Default rules can be especially valuable in contexts where active choosing would produce mistakes, given the complexity of information, the mental load associated with a task, and the power of preexisting cognitive bias (such as status quo bias and hyperbolic discounting).[286] Reminders are a cheap and effective way to ensure that individuals remember to select options that they prefer.[287] Choice architecture is valuable because it can foster individual welfare and promote collective prosocial outcomes.[288]

Second, choice architecture can be a cost-effective way to effectuate change.[289] The costs to implement a particular form of choice architecture—such as those that leverage nudges—can be cheap.[290] For instance, cafeteria or grocery-store items can be rearranged to promote healthier choices at a minimal

282. Amy B. Cyphert, *Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk*, 51 SETON HALL L. REV. 331, 343 (2020).

283. *See* Colette Einfeld & Emma Blomkamp, *Nudge and Co-Design: Complementary or Contradictory Approaches to Policy Innovation?*, 43 POL'Y STUD. 901, 905–06 (2021); *see also* Dennis Hummel & Alexander Maedche, *How Effective is Nudging? A Quantitative Review on the Effect Sizes and Limits of Empirical Nudging Studies*, 80 J. BEHAV. & EXPERIMENTAL ECON. 47, 48 (2019) (reviewing the similarities and differences of a nudge and a codesign).

284. Cass R. Sunstein, *Default Rules Are Better than Active Choosing (Often)*, 21 TRENDS COGNITIVE SCI. 600, 603 (2017).

285. *Id.* at 603–04.

286. *Id.* at 601–02.

287. Mette T. Damgaard & Christina Gravert, *The Hidden Costs of Nudging: Experimental Evidence from Reminders in Fundraising*, 157 J. PUB. ECON. 15, 15 (2018).

288. Herwig Pilaj, *The Choice Architecture of Sustainable and Responsible Investment: Nudging Investors Toward Ethical Decision-Making*, 140 J. BUS. ETHICS 743, 751 (2017).

289. Luca Congiu & Ivan Moscati, *A Review of Nudges: Definitions, Justifications, Effectiveness*, 36 J. ECON. SURVS. 188, 206 (2022) (citing Benartzi et al., *supra* note 76, at 1041–42).

290. Avishalom Tor, *The Private Costs of Behavioral Interventions*, 72 DUKE L.J. 1673, 1676 (2023).

cost.[291] Additionally, choice-architecture-based initiatives may result in substantial financial savings compared to traditional mechanisms that aim to shape behavior, such as penalties and enforcement, subsidies, financial rewards, or tax collection.[292] This is true for both individual and governmental financial savings. For instance, individuals are much more likely to enroll in pensions or savings plans—and save more money—when they are default enrolled into such programs and are not required to opt in to them.[293] Similarly, compared to traditional interventions, governments and other organizations can save money through carefully chosen nudge-based initiatives.[294]

Third, some choice architecture mechanisms are advantageous because they can avoid classic forms of coercion—such as threats, fines, and imprisonment—and their collateral consequences—such as criminal records, criminal justice debt, and decreased housing and employment prospects.[295] Nudges are an example.[296] Recall how some forms of choice architecture are more likely to increase tax-filing rates compared to threats.[297] Individuals who are informed that most citizens file their taxes on time are more likely to file than those who are informed of the potential penalty.[298] Similarly, telephone and text-message reminders can facilitate court appearances without subjecting individuals to threats, warrants, arrests, or incarceration.[299] To be clear, certain types of choice architecture—especially invisible, manipulative, and exploitative ones—can be coercive because they limit freedom (more on this below). However, other forms of choice architecture are less objectionable and avoid the classic forms of coercion described above that are typically associated with the criminal law.

Fourth, certain forms of choice architecture promote efficiency because they remove sludge and administrative burdens that prevent individuals from

291. *See, e.g.*, Mariel Marcano-Olivier et al., *A Low-Cost Behavioural Nudge and Choice Architecture Intervention Targeting School Lunches Increases Children's Consumption of Fruit: A Cluster Randomised Trial*, 16 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 1, 6–8 (2019).

292. *See* Benartzi et al., *supra* note 76, at 1046, 1048–49; *see also* Cass R. Sunstein, *Misconceptions About Nudges*, 2 J. BEHAV. ECON. FOR POL'Y. 61, 65 (2018) (describing the consequences of nudges and how they influence human behavior).

293. *See, e.g.*, Jonathan Cribb & Carl Emmerson, *What Happens to Workplace Pension Saving when Employers Are Obliged to Enrol Employees Automatically?*, 27 INT'L TAX & PUB. FIN. 664, 665–66 (2019); Robert L. Clark & Denis Pelletier, *Impact of Defaults on Participation in State Supplemental Retirement Savings Plans*, 21 J. PENSION ECON. & FIN. 22, 23, 26–27 (2022).

294. *See* Benartzi et al., *supra* note 76, at 1042, 1046–50.

295. Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1836 (2013); Terry Skolnik, *Rethinking Homeless People's Punishments*, 22 NEW CRIM. L. REV. 73, 81 (2019); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1198–99, 1207 (2016); SUNSTEIN, *supra* note 3, at 21.

296. Sunstein, *supra* note 66, at 7.

297. Thomas, *supra* note 77, at 581–82.

298. *Id.*

299. Fishbane, Ouss & Shah, *supra* note 92, at 7; Zottola et al., *supra* note 90, at 100.

achieving their goals.[300] Default options and auto-enrollment schemes can avoid time-consuming paperwork, mailing requirements, and more.[301] Simplification measures can help reduce—or eliminate—much of the friction that stems from a scheme's learning and compliance costs.[302] Some studies suggest that benefits or social programs have higher uptake rates when they use shorter and easier application forms.[303]

Fifth, certain types of choice architecture are advantageous because they are broadly popular and are preferred to other types of interventions.[304] Studies show that a significant portion of individuals—over 70%—appreciate certain forms of choice architecture, such as calorie labels (or traffic-light categorization) for food items, graphic warnings on cigarettes, and more.[305] Other research shows that the majority of individuals also approve of certain forms of choice architecture, such as automatically enrolling eligible individuals as voters and listing incumbent politicians as the first option on ballots.[306] Moreover, individuals may prefer nudges to other traditional interventions, such as regulation.[307]

B. The Risks of Choice Architecture

Choice architecture also carries certain risks and can result in negative consequences.[308] First, choice architecture can be used to exploit, manipulate, or deceive individuals.[309] Choice architecture can be objectionable because it can weaponize individuals' cognitive biases against them and infringe their autonomy.[310] Some usages of choice architecture can undermine individuals' rational and deliberative processes to achieve outcomes that are inconsistent

300. Cristiana Cerqueira Leal & Benilde Oliveira, *Choice Architecture: Nudging for Sustainable Behavior*, *in* SUSTAINABLE MANAGEMENT FOR MANAGERS AND ENGINEERS 14 (Carolina Machado & J. Paulo Davim eds., 2020); Shahab & Lades, *supra* note 99, at 344.

301. Stuart Mills, *Nudge/Sludge Symmetry: On the Relationship Between Nudge and Sludge and the Resulting Ontological, Normative and Transparency Implications*, 7 BEHAV. PUB. POL'Y 309, 315–16, 320 (2023).

302. *See* Sunstein, *supra* note 99, at 1852.

303. *Id.* at 1851–52.

304. Cass R. Sunstein, Lucia A. Reisch & Micha Kaiser, *Trusting Nudges? Lessons from an International Survey*, 26 J. EURO. PUB. POL'Y 1417, 1420–21 (2019) (noting that "strong majorities of citizens in diverse countries approve of most of the nudges presented to them"); Sunstein, *supra* note 67, at 286–89; Cass R. Sunstein, *Nudges, Agency, and Abstraction: A Reply to Critics*, 6 REV. PHIL. PSYCH. 511, 514–15 (2015).

305. CASS SUNSTEIN, HUMAN AGENCY AND BEHAVIORAL ECONOMICS: NUDGING FAST AND SLOW 20–23 (2017).

306. *Id.* at 22.

307. Peter John, Aaron Martin & Gosia Mikolajczak, *Support for Behavioral Nudges Versus Alternative Policy Instruments and Their Perceived Fairness and Efficacy*, 17 REG. & GOVERNANCE 363, 368 (2022).

308. *See* Sunstein, *supra* note 68, at 433–50 (exploring the objections related to welfare, autonomy, manipulation, and dignity); Ayala Arad & Ariel Rubinstein, *The People's Perspective on Libertarian-Paternalistic Policies*, 61 J.L. & ECON. 311, 312–14 (2018).

309. MARK D. WHITE, THE MANIPULATION OF CHOICE: ETHICS AND LIBERTARIAN PATERNALISM 106, 123–25, 140 (2013).

310. T. Martin Wilkinson, *Nudging and Manipulation*, 61 POL. STUD. 341, 344–45 (2013).

with their preferences.[311] The background conditions for choice can attempt to hijack individuals' emotions, exploit their weaknesses, or deceive them.[312]

Various examples highlight the manipulative and exploitative potential of choice architecture. Magazines and streaming services can offer easy one-click auto-enrollment memberships, but require a time-consuming and complex cancellation process, a form of choice architecture that exploits individuals' status quo bias.[313] As a result, corporations leverage default rules to increase profits, while consumers remain subscribed to services that they do not want.[314] In other contexts, agencies or institutions may overload individuals with options or information that complicate decision making (examples include highly complex application processes to limit access to benefits, or excessively long terms of service agreements).[315] Or choice architects may use dark patterns to confuse individuals or steer them towards options that set back their interests.[316] The term "dark pattern" connotes "practices that materially distort or impair, either on purpose or in effect, the ability of recipients of the service to make autonomous and informed choices or decisions."[317] Classic examples of dark patterns include websites with trick questions, disguised ads, nagging prompts, and complicated unsubscribe schemes.[318]

Second and interrelatedly, some argue that certain types of choice architecture are objectionable because they are paternalistic and ignore individuals' true preferences.[319] Paternalism is generally critiqued on the grounds that the individual—rather than government—is best suited to know and understand their own authentic inclinations.[320] According to this view, paternalistic forms of choice architecture demean individuals' intelligence or capacity to make decisions for themselves.[321] Interrelatedly, others note that individuals may profoundly disagree with a governmental objective that choice architecture promotes, such that the state should not steer individuals towards that goal.[322] Additionally, some forms of choice architecture are error-prone; they can fail to consider the population's diversity and mistake individuals'

311. McCrudden & King, *supra* note 6, at 104–05.

312. *Id.* at 105 (citing Marcia Baron, *Manipulativeness*, 77 PROCS. & ADDRESSES AM. PHIL. ASS'N 37, 44 (2003)). Note that McCrudden, King, and Baron reference these three types of manipulation. *Id.*

313. Willis, *supra* note 66, at 1165, 1170–71.

314. *Id.* at 1170-71.

315. Petra Persson, *Attention Manipulation and Information Overload*, 2 BEHAV. PUB. POL'Y 78, 79, 82, 97–98 (2018).

316. Luguri & Strahilevitz, *supra* note 8, at 74–75.

317. Martin Brenncke, *Regulating Dark Patterns*, 14 NOTRE DAME J. INT'L & COMP. L. 39, 45 (2024).

318. *Id.* at 41; Luguri & Strahilevitz, *supra* note 8, at 53.

319. Arad & Rubinstein, *supra* note 308, at 312–13.

320. Clareta Treger, *When Do People Accept Government Paternalism? Theory and Experimental Evidence*, 17 REG. & GOVERNANCE 195, 197 (2023) (describing this objection).

321. Chris Mills, *The Heteronomy of Choice Architecture*, 6 REV. PHIL. & PSYCH. 495, 497–98 (2015).

322. Arad & Rubinstein, *supra* note 308, at 312–13.

actual preferences.[323] Individuals' dislike towards certain forms of choice architecture—especially dark patterns—may produce backlash and undermine trust.[324] As a result, individuals may rebel against certain forms of choice architecture that they perceive as distasteful, overbearing, or manipulative.[325] These concerns also explain why some usages of choice architecture may produce short-term rather than long-term benefits.[326]

Several examples illustrate these concerns associated with choice architecture. Individuals may prefer to spend money today rather than save for tomorrow.[327] Yet governments or employers may auto-enroll individuals into retirement savings plans that go against their preference.[328] Similarly, choice architects may steer individuals towards healthier food options that they dislike.[329] Although many individuals still select the healthier option, they may ultimately reject the choice architect's nudge and throw out the food.[330] The upshot: individuals lose money, reject the healthier option, and waste food that could be given to others.[331]

Third, some usages of choice architecture are problematic because they violate human dignity.[332] There are various conceptions of human dignity.[333] For one, dignity can connote individuals' inherent worth and right to be treated as ends in and of themselves, rather than as means to an end.[334] The notion of dignity as inherent worth is premised on individuals' rationality and capacity for deliberation.[335] Certain interests—such as privacy and equality—are also associated with dignity as inherent worth.[336] Substantive conceptions of dignity, in contrast, aim to safeguard self-respect and maintain public morality.[337]

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323. Cass Sunstein, *Forcing People to Choose Is Paternalistic*, 82 MO. L. REV. 643, 645–46 (2017); Johannes Kniess, *Libertarian Paternalism and the Problem of Preference Architecture*, 52 BRIT. J. POLI. SCI. 921, 923 (2022).

324. Luguri & Strahilevitz, *supra* note 8, at 67.

325. CASS SUNSTEIN, HOW CHANGE HAPPENS 113 (2019).

326. *Id.*

327. Arad & Rubinstein, *supra* note 308, at 312.

328. *Id.*

329. *Id.* at 12–13.

330. Evan Polman & Sam J. Maglio, *The Problem with Behavioral Nudges*, WALL ST. J. (May 26, 2024, at 08:30 ET), https://www.wsj.com/economy/consumers/decision-making-research-behavior-2e5060c1 [https://perma.cc/2LD9-DKK6].

331. *Id.*

332. Sunstein, *supra* note 68, at 439–42.

333. Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, *in* UNDERSTANDING HUMAN DIGNITY 1, 8–10 (Christopher McCrudden ed., 2013).

334. Denise G. Reaume, *Discrimination and Dignity,* 63 LA. L. REV. 645, 674–75 (2003); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 76 (2011).

335. *See* Kristi Giselsson, *Rethinking Dignity*, 19 HUM. RTS. REV. 331, 332 (2018) (describing the Kantian model of inherent dignity).

336. *See, e.g.*, Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092–93 (2001); Evadné Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 300 (2007).

337. *See* Jacob Weinrib, *Human Dignity and Its Critics*, *in* COMPARATIVE CONSTITUTIONAL THEORY 167, 173–74 (Gary Jacobsohn & Miguel Schor eds., 2018); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 221–26 (2011).

Substantive conceptions of dignity have been used to justify prohibitions against conduct that is considered self-harming, such as participating in dwarf-tossing or engaging in sex work.[338] Others construe dignity as nonhumiliation.[339] According to this view, indignities express a form of rank-ordering that violates substantive equality and treats individuals as inferior or lesser than.[340] Humiliation violates human dignity because it involves "diminishing and lowering a person physically, psychologically, symbolically, publicly, individually, or collectively."[341]

Malevolent forms of choice architecture can violate each of these conceptions of dignity. Default enrollment schemes that financially exploit individuals can treat them as means to an end rather than as ends in and of themselves.[342] Similarly, emotionally manipulative forms of choice architecture—such as countdown timers and other scarcity cues—may limit autonomy because they undercut individuals' decision making capacities and encourage impulsive behavior.[343] Some dark patterns—such as forced online registrations that trick users into needlessly providing personal information—push individuals to sacrifice their privacy interests associated with human dignity.[344] Other forms of choice architecture are objectionable because they encourage individuals to engage in self-destructive behavior that demeans their sense of self-respect. Although individuals may wish to cease gambling, casinos and online betting apps may use dark patterns that exploit individuals' vulnerabilities and facilitate wagers.[345] Such dark nudges can overwhelm individuals' self-control or encourage self-destructive behavior.[346] Other forms of choice architecture can debase individuals or treat them with less respect.

338. *Id.* at 226–29; Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 220–22 (2011).

339. Avishai Margalit, *Human Dignity Between Kitsch and Deification*, *in* PHILOSOPHY, ETHICS AND A COMMON HUMANITY: ESSAYS IN HONOUR OF RAIMOND GAITA 106, 112 (Christopher Cordner ed., 2011); Duane Rudolph, *Dignity. Reverence. Desecration.*, 53 SETON HALL L. REV. 1173, 1209 (2023).

340. Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCH. PUB. POL'Y & L. 105, 111 (2012).

341. *Id.*

342. Brenncke, *supra* note 317, at 69–70.

343. Ray Sin et al., *Dark Patterns in Online Shopping: Do They Work and Can Nudges Help Mitigate Impulse Buying?*, 9 BEHAV. PUB. POL'Y 61, 61–62 (2025). *But see* Thomas Nys & Bart Engelen, *Commercial Online Choice Architecture: When Roads Are Paved with Bad Intentions*, *in* THE PHILOSOPHY OF ONLINE MANIPULATION 135, 139–40 (Fleur Jongepier & Michael Klenk eds., 2022).

344. Christoph Bösch et al., *Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns*, 4 PROCS. ON PRIV. ENHANCING TECHS. 237, 249 (2016).

345. *See* Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 40 (2019) (discussing manipulation and vulnerabilities); Philip W. S. Newall, *Dark Nudges in Gambling*, 27 ADDICTION RSCH. & THEORY 65, 65–66 (2019).

346. Sally M. Gainsbury et al., *Reducing Internet Gambling Harms Using Behavioral Science: A Stakeholder Framework*, 11 FRONTIERS PSYCHIATRY 1, 2 (2020).

Public-health campaigns may humiliate smokers or overweight individuals to discourage smoking, encourage exercise, or promote certain eating habits.[347]

These three objections—that nudges can be manipulative, paternalistic, or undermine dignity—highlight the importance of ethical uses of choice architecture. Certain requirements aim to ensure that nudges respect autonomy and treat individuals with respect and concern. For one, choice architecture should aim to be transparent and publicized, such that individuals can recognize and understand that they are subject to it.[348] Indeed, research demonstrates that individuals tend to support and accept such choice architecture interventions.[349] Furthermore, choice architecture schemes should be unselfish and aim to maximize individual welfare.[350] Choice architecture should aim to maintain political and ideological neutrality, such that it does not offend individuals and produce backlash.[351] Lastly, nudges should not be weaponized against individuals to exploit their cognitive biases and push them to make choices that reduce their welfare.[352]

IV. THE CHOICE ARCHITECTURE OF CRIMINAL JUSTICE REFORM

Choice architecture constitutes a novel method of criminal justice reform that is typically overlooked. More specifically, laws and policies can leverage choice architecture to counteract discrimination, promote fairness, and protect individuals against arbitrary or capricious governmental action. This section offers five examples of criminal law-reform initiatives that leverage choice architecture to instantiate positive change. Surprisingly, scholars, lawmakers, policy experts, and criminal justice system actors may not even realize that choice architecture underpins these five law-reform initiatives. Yet once we recognize choice architecture's potential as a law-reform tool, we can deploy it to improve decision making and outcomes throughout the criminal justice system.

347. Nir Eyal, *Nudging by Shaming, Shaming by Nudging*, 3 INT'L J. HEALTH POL'Y. MGMT. 53, 53–54 (2014); Rafi M.M.I. Chowdhury, *The Ethics of Nudging: Using Moral Foundations Theory to Understand Consumers' Approval of Nudges*, 56 J. CONSUMER AFFS. 703, 708–09 (2022).

348. Barton & Grüne-Yanoff, *supra* note 71, at 347.

349. H. Min Bang et al., *The Role of Perceived Effectiveness on the Acceptability of Choice Architecture*, 4 BEHAV. PUB. POL'Y 50, 66 (2020).

350. Despoina Alempaki, Andrea Isoni & Daniel Read, *Tainted Nudge*, 176 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES. 1, 2, 6 (2023).

351. *See* SUNSTEIN & REISCH, *supra* note 69, at 15–18.

352. Sunstein, *supra* note 68, at 427–28.

A. Pre-Arrest Screening

Pre-arrest screening offers a first example of choice-architecture-based criminal justice reform.[353] The term "pre-arrest screening" implies that prosecutors screen the lawfulness of arrests before police officers take a defendant into custody.[354] Adam Gershowitz explains that some jurisdictions—such as Harris County, Texas—impose a three-step pre-arrest screening process that he summarizes as follows.[355] At the first step, police officers contact prosecutors through a hotline and explain the circumstances and justification for the arrest.[356] The officer must release the individual if the prosecutor declines the criminal charge.[357] Once the prosecutor preliminarily accepts the arrest's lawfulness, the pre-arrest screening process proceeds to the next step.[358] During the second stage, the police officer inputs a variety of information into a police database, including the charges and probable cause for the arrest.[359] An intake prosecutor then reviews this information and decides whether to charge or release the individual.[360] Gershowitz observes that this two-stage process typically occurs within two hours of the arrest.[361] As part of the third step that occurs in the initial hours following the arrest, a different felony prosecutor reviews the charge and assesses probable cause before the case proceeds to a magistrate.[362] Here, too, the prosecutor can reject the charges and decline to prosecute the individual.[363]

Pre-arrest screening aims to prevent an array of negative consequences that flow from needless or unlawful arrests.[364] For one, arrests can result in permanent records that generate employment and housing barriers, denial of public benefits, loss of child custody, immigration repercussions, and more.[365] Furthermore, individuals who are arrested may be jailed, searched, and photographed for a mugshot, which can result in significant stigma and humiliation.[366] Needless arrests subject individuals to these negative

353. *See* Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 835–36.

354. *Id.*

355. *Id.* at 859–60.

356. *Id.* at 859.

357. *Id.*

358. *See id.* at 859–60.

359. *Id.*

360. *Id.* at 860.

361. *Id.*

362. *Id.*

363. *Id.*

364. *See* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016) (explaining the consequences of an arrest).

365. *Id.*; Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–98 (2019); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810, 826–44 (2015).

366. *See* Roberts, *supra* note 365, at 999.

consequences. But they also impose heavy financial costs on police departments, prosecutor offices, and local governments.[367] These costs include the financial burdens of "jail, court appearances, and public defense," as well as potential overtime pay for criminal justice system actors.[368] Research conducted in 2006 estimates that the cost of superfluous arrests in El Paso, Texas, was roughly $1,900 per case that should have been declined, for a total of approximately $1.5 million.[369]

Compared to typical prosecutorial screening, pre-arrest screening occurs earlier in the criminal justice process.[370] Typically, prosecutors screen the lawfulness and appropriateness of charges days or weeks after an arrest.[371] In some cases, an individual's case may be declined weeks or months later, and they may languish in pretrial detention and lose access to housing or employment during that period.[372] When screening occurs later in the criminal justice process, defendants—including factually innocent ones—are encouraged to plead guilty to be released from pretrial custody or to end the uncertainty surrounding their criminal charges.[373] To be clear, some prosecutors' offices employ prompter and more rigorous screening practices.[374] Yet delayed prosecutorial screening practices fail to prevent many of the collateral consequences associated with unlawful or unnecessary arrests.

As a choice-architecture-based criminal justice reform, pre-arrest screening leverages decision information and decision structure to improve outcomes. Begin with decision information. The pre-arrest screening process uses mutually reinforcing decision feedback to improve police and prosecutors' conduct.[375] More specifically, prosecutors provide police officers with feedback regarding the lawfulness of an arrest, alignment between the probable cause requirement and a particular criminal charge, and the quality of the officer's justifications.[376] This form of decision feedback constitutes a teachable moment that can improve police officers' legal knowledge and encourage lawful

367. *See* Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 978 (2024).

368. *Id.*; *see also* Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1532–33 (2018) (describing the link between needless arrests and overtime pay).

369. Natapoff, *supra* note 367; DOTTIE CARMICHAEL ET AL., EVALUATING THE IMPACT OF DIRECT ELECTRONIC FILING IN CRIMINAL CASES: CLOSING THE PAPER TRAP, 10, 73 (2006), *cited in* Gershowitz, *supra* note 353, at 861 n.276 *and in* Natapoff, *supra* note 367, at 946 n.34.

370. *See* Gershowitz, *supra* note 353, at 835.

371. *See id.*

372. *See* Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)Appearance*, 88 GEO. WASH. L. REV. 392, 394, 396, 409, 417 (2020).

373. *Id.* at 410–11.

374. *See, e.g.*, Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 60–66 (2002).

375. *See, e.g.*, Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 493, 542 (2020).

376. *See* Gershowitz, *supra* note 353, at 842, 865.

action.[377] Pre-arrest screening also provides prosecutors with necessary information.[378] Prosecutors can directly ask officers for information that can result in an immediate dismissal in some contexts and strengthen the quality of the case in others.[379]

Pre-arrest screening also alters the decision structure of arrest and charging decisions because it increases the level of physical effort for police officers and prosecutors during the pretrial process.[380] This form of screening augments the level of sludge that police officers and prosecutors face.[381] Police officers must exert greater effort to justify an arrest's lawfulness so that the case is not dismissed.[382] Prosecutors, for their part, must carefully scrutinize the police officer's justifications so that the case is not dismissed down the line by a colleague in the second and third stages of the pre-arrest screening process.[383] Recall how governmental agencies can impose administrative burdens—such as learning and compliance costs—to ensure the integrity of public-benefit schemes and to evaluate individual eligibility.[384] Similarly, jurisdictions can impose pre-arrest screening to ensure that police officers satisfy the compliance costs of lawful arrests and that prosecutors respect the compliance costs that underpin legitimate criminal charges.[385]

B. Transparent Plea Bargaining

Consider next how transparent plea bargains use decision information and decision structure to promote fairness and accuracy in the criminal justice process.[386] The concept of "transparent plea bargaining" has been advanced by scholars such as Jenia Turner and refers to reforms that reduce opacity and increase oversight in plea bargaining.[387] She argues that plea bargains are more transparent when they are in writing, filed with the court, and incorporated within searchable databases.[388] Additionally, plea bargains are more transparent

377. *See id.*; *see also* Gershowitz, *supra* note 368, at 1535–40 (describing the practices of various prosecutors' offices in informing police about dismissals).

378. Gershowitz, *supra* note 353, at 865.

379. *Id.*

380. *See id.* at 848, 859–60 (explaining burdens on prosecutors and officers in a pre-arrest screening system).

381. *See id.*

382. *See* Gershowitz, *supra* note 368, at 1528.

383. *See* Gershowitz, *supra* note 353, at 860.

384. *See* CASS SUNSTEIN, BEHAVIORAL SCIENCE AND PUBLIC POLICY 18–22 (2020).

385. *See* Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 829–30 (2020); Gershowitz, *supra* note 353, at 862–63.

386. *See* Turner, *supra* note 227, at 1000–22; Skolnik, *supra* note 63, at 659–60; Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434, 492–93 (2019).

387. *See* Turner, *supra* note 227, at 1000–22.

388. *Id.* at 1002–16.

when the prosecutor must disclose exculpatory evidence before guilty pleas and when the law imposes ceilings on plea discount rates.[389]

Transparent plea bargaining attempts to instantiate various improvements. Currently, plea bargains are opaque, secretive, and shielded from judicial review.[390] Whereas trials occur in public and are subject to meaningful checks and balances, plea negotiations occur behind closed doors and tend to involve informal discussions between the parties.[391] During plea negotiations, prosecutors enjoy significant discretion to engage in coercive plea bargaining practices, such as overcharging, charge bargains, and exploding offers.[392] Such tactics distort factual accuracy in the criminal justice process because defendants who wish to avoid harsh sentences may plead guilty to less serious crimes that are not supported by the evidence.[393] Moreover, coercive plea bargaining practices are subject to minimal checks and balances.[394] Plea colloquies may last several minutes.[395] Judges may minimally assess whether the defendant pleaded guilty voluntarily and understood the consequences of doing so.[396] Many jurisdictions do not require prosecutors to take notes during plea negotiations, file plea offers with the court, or draft a written plea agreement—all of which limits the reviewability of guilty pleas.[397] The conventional critique of plea bargaining is that it lacks transparency and adequate oversight mechanisms.[398] And this critique is largely correct.

But plea bargaining also suffers from distinctly poor choice architecture, an equally serious problem that receives minimal attention.[399] In theory, *Brady* disclosure looks a lot like a default rule that imposes mandatory disclosure: the prosecution must divulge material exculpatory evidence to the defense.[400] In practice, disclosure can operate more like an exception than a rule. Many states

389. Turner, *supra* note 229, at 96–99.

390. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 916, 921, 923 (2006); Turner, *supra* note 229, at 86.

391. *See* Bibas, *supra* note 229, at 1077.

392. Skolnik, *supra* note 153, at 2480 (discussing the broad discretion granted to prosecutors in their negotiations); *see also* F. Andrew Hessick III, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 203–06 (2002) (explaining other coercive issues in plea bargaining that an innocent defendant may face).

393. *See* Nancy Amoury Combs, *Rehabilitating Charge Bargaining*, 96 IND. L.J. 803, 805–06 (2021).

394. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); *see also id.* at 876–79 (2009) (explaining how plea bargaining gives prosecutors more executive power with fewer checks).

395. Allison Redlich et al., *Guilty Plea Hearings in Juvenile and Criminal Court*, 46 L. & HUM. BEHAV. 337, 347 (2022); Amy Dezember et al., *Plea Validity in Circuit Court: Judicial Colloquies in Misdemeanor vs. Felony Charges*, 28 PSYCH. CRIME & L. 268, 281–82 (2022).

396. *See id.* at 281–84 (discussing the statistical variation in judicial assessment of pleas between felony and misdemeanor charges).

397. Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1556 (2022); Brandon L. Garrett et al., *Open Prosecution*, 75 STAN. L. REV. 1365, 1379 (2023).

398. *See* Turner, *supra* note 227, at 975; Bibas, *supra* note 229, at 1077.

399. *See* Skolnik, *supra* note 8, at 11–14, 23–25.

400. Ryan, *supra* note 397, at 1557.

only require evidentiary disclosure before *trials* but not before plea bargains.[401] Yet over 95% of cases are resolved by guilty pleas.[402] As a result, many defendants do not benefit from *Brady* disclosure and plead guilty with limited information about their case.[403] Prosecutors can also issue verbal offers—or conclude verbal agreements—that present decision information in a less salient and visible manner compared to written plea offers and agreements.[404] The upshot: judges cannot adequately scrutinize plea agreements and determine whether the factual allegations support the relevant criminal charge.[405] Defendants, for their part, may plead guilty even though they do not understand the terms of a verbal agreement.[406] Constitutional criminal procedure allows prosecutors to use scarcity cues—such as exploding offers—as a form of decision structure that pressures defendants to plead guilty.[407] And prosecutors can issue very lucrative offers that defendants—including innocent ones—cannot refuse.[408]

Transparent plea bargaining uses choice architecture to address these shortcomings. First, transparent plea bargaining modifies existing decision information to increase defendants' knowledge during the negotiation process. Some advocates of transparent plea bargains argue that the prosecution should be required to disclose material exculpatory evidence to the defense prior to guilty pleas—a requirement that exists in many jurisdictions.[409] This evidentiary disclosure aims to ensure that a defendant's guilty plea is voluntary because they can better assess the strength of the prosecution's case.[410]

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401. Jenia I. Turner, *Plea Bargaining and Disclosure in Germany and the United States: Comparative Lessons*, 57 WM. & MARY L. REV. 1549, 1551 (2016); *see also* Kelly S. Smith, *Assessing the National Landscape of Constitutional and Ethical Disclosure Requirements During Plea Bargaining: Louisiana Comes Up Short*, 98 TUL. L. REV. 537, 539 (2024) (discussing the circuit split on extending mandatory disclosures to the plea context); Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RSRV. L. REV. 651, 653–54 (2007) (explaining the circuit split and the Supreme Court's subsequent refusal to fully extend mandatory disclosures to the plea stage).

402. Ben Stearns, *Expanding* Brady *to Plea Deals: Efficiency as a Roadblock to Justice*, 57 U. ILL. CHI. L. REV. 149, 151 (2023); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1343 (2012) (estimating that between 90% and 95% of all defendants plead guilty).

403. *See, e.g.*, Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3650 (2013) (concluding that the Supreme Court should require the disclosure of exculpatory *Brady* evidence during plea negotiations); *see also* Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The* Brady *Database*, 114 J. CRIM. L. & CRIMINOLOGY 185, 213 (2024) (providing a table and further statistical discussion regarding the small number of *Brady* claims).

404. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1154 (2011).

405. Turner, *supra* note 229, at 86.

406. *See* Turner, *supra* note 227, at 976–77.

407. *See supra* Part II.B and accompanying text.

408. *See* Bibas, *supra* note 62, at 2546.

409. *See, e.g.*, Gabriella Castellano, *The "Critical Stage" of Plea-Bargaining and Disclosure of Exculpatory Evidence*, 65 N.Y.L. SCH. L. REV. 105, 116, 118 (2020).

410. Petegorsky, *supra* note 403, at 3619.

Transparent plea bargains modify decision information in other ways. Consider the requirements that plea offers and agreements must be in writing and must be filed with the court, which states such as Arizona, New Mexico, and Indiana already impose.[411] As part of this process, prosecutors must also provide the factual allegations that support the specific criminal charge.[412] This shift in decision information aims to increase the visibility and salience of information for defendants and judges and facilitates judicial review.[413] In doing so, written plea offers and agreements can simplify information for defendants and judges.[414] Plea-bargaining databases also modify decision information. Defendants and attorneys can use plea-bargaining databases to compare a plea offer's benefits to analogous cases in the same jurisdiction.[415] This information allows defendants to gauge whether the plea offer is reasonable in the circumstances.[416]

The choice architecture of transparent plea bargains also modifies existing decision structure. Transparent plea bargaining converts the prosecution's disclosure obligations from an opt-in scheme that operates exceptionally to a default rule that applies to plea negotiations and criminal trials.[417] Additionally, the requirement that plea offers and agreements must be in writing increases the level of physical effort for prosecutors who must show that the factual allegations support the criminal charge.[418] This additional sludge can also shape prosecutorial behavior. Prosecutors may screen out weaker cases that are unsupported by the evidence or that may not survive judicial scrutiny.[419] And statutory limits on discount rates modify decision structure because they counteract exploding offers.[420] Statutory ceilings restrict prosecutors' ability to offer steep sentencing discounts that are typical for exploding offers and encourage false guilty pleas in weak cases.[421]

411. Turner, *supra* note 227, at 1003; *see also* Marie Manikis & Peter Grbac, *Bargaining for Justice: The Road Towards Prosecutorial Accountability in the Plea Bargaining Process*, 40 MAN. L.J. 85, 106 (2017) (advocating for plea bargains to be put in writing); Russell D. Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 OR. L. REV. 257, 283 (2023) (arguing for plea bargains to be put in writing and filed with the court).

412. *See* Covey, *supra* note 228, at 1274.

413. *See* Bibas, *supra* note 404, at 1154.

414. *See id.*; Bibas, *supra* note 229, at 1079–80.

415. Turner, *supra* note 227, at 1010, 1012.

416. *Id.*

417. *See* Kaitlin Morgan, *Betting Against the House: Why Prosecutors Have an Ethical Disclosure Obligation Prior to Plea Negotiations*, 31 GEO. MASON U. C.R.L.J. 31, 56 (2020) (arguing for *Brady* disclosure during plea bargaining).

418. *See* Turner, *supra* note 227, at 989–92 (explaining how secrecy allows prosecutors to stretch the law or the facts in making plea deals).

419. *See* Turner, *supra* note 229, at 93.

420. *See id.* at 98–99.

421. *See id.*

C. Presumptive Inadmissibility of Criminal Records

Third, the presumptive inadmissibility of criminal records offers an example of choice-architecture-based reforms that apply during criminal trials.[422] Compared to first-time offenders, defendants with a criminal record face two interrelated risks that increase their conviction prospects: the prior-offender penalty and the trial penalty.[423]

The prior-offender penalty refers to how judges and juries are more likely to convict defendants who are impeached on their criminal record at trial.[424] A defendant's criminal history can trigger jurors' cognitive biases, such as the representativeness and availability heuristics.[425] Jurors may believe that a defendant is likely guilty given their prior convictions, a prohibited form of propensity reasoning that exemplifies the representativeness heuristic.[426] Furthermore, the defendant's prior convictions are salient information that jurors can recall easily.[427] For this reason, jurors may draw on the defendant's criminal record to assess the likelihood that they are guilty.[428] Research demonstrates that defendants face higher conviction rates when they are cross-examined on their criminal history.[429] The law employs a largely unsuccessful debiasing technique to attempt to counteract this risk. Judges must issue a warning that jurors cannot use the defendant's criminal history to infer their guilt.[430] Instead, prior conviction evidence can only be used to evaluate the defendant's credibility.[431] Yet studies show that such judicial admonishments are largely ineffective.[432] Furthermore, some research suggests that judges may still consider inadmissible prior conviction evidence.[433]

The silence penalty, for its part, refers to how defendants with a criminal record may refuse to testify because they do not wish to be cross-examined on

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422. Skolnik, *Two Systems*, *supra* note 1, at 331–36.

423. Bellin, *supra* note 50, at 401–10; Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J. CRIM. L. & CRIMINOLOGY 493, 494–95 (2011).

424. Bellin, *supra* note 50, at 402–03; Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 38 (1985); Skolnik, *Two Systems*, *supra* note 1, at 318–19.

425. *Id.* at 320, 332.

426. *Id.* at 319–20; Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 577–78 (2014); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 840–41 (2016).

427. Skolnik, *Two Systems*, *supra* note 1, at 319.

428. *Id.* at 319–20.

429. *Id.* at 321.

430. *See* Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1998 (2016); FED. R. EVID. 609.

431. Sopen B. Shah, *Marked: Do Prior Convictions Cause New Ones?*, 51 GONZ. L. REV. 1, 12 (2015).

432. Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501, 2512 (2020); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 70 (1995).

433. Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1304–08 (2005).

their prior convictions.[434] Various legal rules protect defendants' silence.[435] Defendants enjoy the right to remain silent when arrested and interrogated by the police.[436] They also have the right to refuse to testify at trial.[437] Prosecutors cannot comment on a defendant's silence so that jurors infer guilt.[438] Furthermore, judges must warn jurors that defendants enjoy the right to silence and that jurors cannot infer guilt from the defendant's decision to remain silent.[439] Yet here, too, the representativeness heuristic may explain why jurors disproportionately convict defendants who remain silent at trial. They may reason that defendants who refuse to testify are representative of guilty individuals who have something to hide, a belief that is shared by roughly half of U.S. survey participants in various studies.[440]

The prior-offender penalty and the silence penalty are especially pernicious because they can contribute to wrongful convictions. A study conducted by John Blume determined that 91% of wrongfully convicted defendants who chose not to testify at trial had a previous conviction.[441] Blume notes that the admissibility of prior convictions is one of the main factors—if not *the* main factor—that dictates whether a defendant testifies.[442]

Some jurisdictions—such as Hawaii, Kansas, and Montana—use choice architecture to protect defendants against the prior-offender and silence penalties.[443] These jurisdictions impose rigorous default rules that aim to neutralize judges' and jurors' improper use of the representativeness heuristic.[444] In these jurisdictions, a defendant's prior convictions are presumptively inadmissible, subject to several narrow exceptions that are more restrictive than rule 609 of the *Federal Rules of Evidence*.[445] For instance, in Hawaii and Kansas, a defendant's prior convictions are admissible only to rebut the defendant's good character evidence.[446] No good character evidence, no prior convictions. Additionally, only the defendant's prior convictions related to dishonesty—such as theft, fraud, or perjury—are admissible to rebut their good

434. Bellin, *supra* note 50, at 407.

435. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1450, 1477 (2005); Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1327 (2009).

436. *See* GARY L. STUART, *MIRANDA*: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 81 (2004).

437. Sampsell-Jones, *supra* note 435, at 1327; U.S. CONST. amend. V.

438. Kelsey Craig, *The Price of Silence: How the* Griffin *Roadblock and Protection Against Adverse Inference Condemn the Criminal Defendant*, 69 VAND. L. REV. 249, 250 (2016).

439. Vida B. Johnson, *Silenced by Instruction*, 70 EMORY L.J. 309, 343 (2020).

440. Bellin, *supra* note 50, at 407.

441. John H. Blum, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 490 (2008).

442. *Id.*

443. Skolnik, *Two Systems*, *supra* note 1, at 336; *see* Roberts, *supra* note 430, at 2019–30.

444. Skolnik, *Two Systems*, *supra* note 1, at 332–36.

445. Anna Roberts, *Models and Limits of Federal Rule of Evidence 609 Reform*, 76 VAND. L. REV. 1879, 1881–83 (2023).

446. *Id.* at 1882; Roberts, *supra* note 430, at 2019–20, 2026–27.

character evidence.[447] In Montana, prior conviction evidence is admissible only when the defendant lied about their criminal record.[448]

The strong presumption of inadmissibility triggers judges' anchoring effect to counteract jurors' representativeness heuristic.[449] The presumption of inadmissibility constitutes an anchor that pulls judges towards a default outcome: the defendant's prior convictions are inadmissible at trial.[450] The robust presumption of inadmissibility—and the narrow exceptions to it—aim to limit the prospect that jurors convict defendants because they appear to be part of a broader class of criminals.[451] These evidentiary rules offer another example of how choice architecture can be used to promote principled asymmetries that counteract cognitive biases.[452]

Interestingly, the evidence rules of Kansas, Hawaii, and Montana also leverage the framing effect to better protect defendants who have prior convictions.[453] Like everyone else, judges are susceptible to the framing effect, a cognitive bias discussed at the onset of Part III of this article.[454] In some contexts, individuals are more inclined to select options that are framed positively, while in other contexts, they prefer options that are framed negatively.[455] Consider the example of framing effects in cancer treatment. Research suggests that individuals are more open to cancer-related surgery when outcomes are framed positively and are more open to radiotherapy when its outcomes are framed negatively.[456] Similar frames can influence judicial decision making.[457] The evidentiary rules of Kansas, Hawaii, and Montana all leverage negative frames to protect defendants with prior convictions. More specifically, these states' statutes employ negative terms that reinforce the anchoring effect (e.g., "A defendant's prior convictions are inadmissible except when . . .") rather than in positive terms (e.g., "A defendant's prior convictions are admissible in contexts where . . .").[458]

As a form of decision structure, this robust presumption of inadmissibility offers crucial insights into choice architecture's role in criminal justice reform.

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447. Roberts, *supra* note 430, at 2019–20, 2026–27.

448. *Id.* at 2027–28.

449. Skolnik, *Two Systems*, *supra* note 1, at 331–36.

450. *Id.* at 332.

451. *Id.* at 311.

452. *Id.* at 336.

453. *See supra* Part IV, notes 441–46.

454. Guthrie, Rachlinski & Wistrich, *supra* note 55, at 796–99; Alexander I. Platt, *Debiasing Statutory Interpretation*, 39 OHIO N.U. L. REV. 275, 291 (2012); Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1126–27 (2002).

455. Yi-Ting Tang & Weng-Tink Chooi, *A Systematic Review of the Effects of Positive Versus Negative Framing on Cancer Treatment Decision Making*, 38 PSYCH. & HEALTH 1148, 1163 (2023).

456. *Id.*

457. Platt, *supra* note 454, at 291.

458. HAW. REV. STAT. § 626; KAN. STAT. ANN. § 60-421; MONT. R. EVID. 609, *cited in* Roberts, *supra* note 430, at 2019–30.

It demonstrates how lawmakers and judges can leverage the anchoring effect to counteract jurors' representativeness and availability heuristics. It illustrates how statutory language can incorporate framing effects that steer judges towards default outcomes. And it demonstrates how these reforms can aim to neutralize the prior-offender penalty and the silence penalty that adversely impact defendants and contribute to wrongful convictions.

D. Graduating Economic Sanctions

Graduating economic sanctions are a fourth example of choice-architecture-based reforms.[459] A graduating economic sanction (or day fine) is a financial penalty whose quantum is determined according to the gravity of the offense and the defendant's financial capacities.[460] Day fines are calculated according to a two-step process.[461] At the first step, the offense is assigned a number of "days" that reflect its gravity and does not vary between individuals.[462] At the second step, the number of days is multiplied by a number of units that reflects a portion of the defendant's daily adjusted income, meaning the defendant's income minus their daily living expenses.[463] Various jurisdictions use graduating economic sanctions, such as Finland, Sweden, Argentina, Columbia, and Germany.[464] Some U.S. jurisdictions have also experimented with day fines, such as Milwaukee, Staten Island, and Maricopa County.[465]

Graduating economic sanctions are typically contrasted with tariff fines (or fixed financial penalties) that apply in most U.S. jurisdictions.[466] Tariff fines impose a fixed financial penalty on defendants irrespective of their financial capabilities.[467] Furthermore, the quantum of mandatory surcharges and fees associated with fixed financial penalties does not generally vary according to the

459. Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 55 (2017); *see also* Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 51 (1990) (discussing the structure and rationale of day fines).

460. Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333, 338 (2018).

461. Elena Kantorowicz-Reznichenko, *Day-Fines: Should the Rich Pay More?*, 11 REV. L. & ECON. 481, 482 (2015).

462. *Id.*

463. *Id.*

464. Tapio Lappi-Seppala, *Criminology, Crime and Criminal Justice in Finland*, 9 EUR. J. CRIMINOLOGY 206, 218 (2012); Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1874 (2018) (expressly referring to these countries).

465. Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, 1 ANN. REV. CRIMINOLOGY 471, 489 (2018).

466. Elena Kantorowicz-Reznichenko & Maximilian Kerk, *Day Fines: Asymmetric Information and the Secondary Enforcement System*, 49 EUR. J.L. & ECON. 339, 340 (2020).

467. TERRY SKOLNIK, HOMELESSNESS, LIBERTY, AND PROPERTY 186 (2024).

defendant's income.[468] According to some estimates, individuals owe a total of roughly $145 billion worth of unpaid fines in the United States.[469]

Graduating economic sanctions aim to avoid the injustices and collateral consequences associated with tariff fines.[470] First, tariff fines disparately impact indigent individuals and persons of color.[471] Individuals who cannot afford to pay their fines can be subject to additional fees and penalties that affluent persons can avoid, which are referred to as "poverty penalties."[472] Yet additional fees and penalties can balloon beyond the initial amount of the fine.[473] Indigent individuals may also forgo food or medication to pay their fines.[474] These disparities explain why tariff fines are critiqued as a form of regressive taxation against indigent persons.[475]

Second, fixed financial penalties are objectionable because they violate proportionality constraints that are fundamental to punishment theory.[476] Indigent persons owe greater financial amounts—and are thus punished more harshly—because they cannot afford to pay the initial fine rather than because they committed a more serious offense or acted more culpably.[477] Furthermore, the inflated quantum of the fine expresses that the defendant was more blameworthy than they are, and that the offense was graver than it was.[478]

Third, tariff fines are problematic because they can result in significant collateral consequences that entrench individuals in poverty and homelessness.[479] Individuals who fail to pay their fines can be sought by bench warrant, arrested, or jailed.[480] Unpaid fines can adversely impact one's credit

468. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 285 (2014); *see also* Jack Furness, *Willful Blindness: Challenging Inadequate Ability to Pay Hearings Through Strategic Litigation and Legislative Reforms*, 52 COLUM. HUM. RTS. L. REV. 957, 971 (2021) (providing examples of how various states apply "routine" court fees and the level of discretion judges are given over setting such fees).

469. Furness, *supra* note 468, at 973; *see also* Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407, 439 (2021) (analyzing the financial burdens imposed on defendants through restitution awards).

470. Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y. 22, 31 (2017).

471. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 518 (2016); Alexes Harris, Mary Pattillo & Bryan L. Sykes, *Studying the System of Monetary Sanctions*, 8 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 1, 4 (2022).

472. Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 6–9 (2018).

473. SKOLNIK, *supra* note 467, at 111; Colgan, *supra* note 468, at 286.

474. Colgan, *supra* note 472, at 8.

475. *See, e.g.*, Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 987–88 (2021); Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 8 (2020).

476. *See* Skolnik, *supra* note 295, at 84–88; *see also* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish" to "How Much"*, 25 ISR. L. REV. 549, 551–54 (1991) (describing consequentialist theories of punishment).

477. Skolnik, *supra* note 295, at 88.

478. *Id.*; von Hirsch, *supra* note 476, at 552–53.

479. SKOLNIK, *supra* note 467, at 107–17.

480. *Id.* at 112.

rating, trigger private collection efforts or default civil judgments, result in a driver's license suspension, or lead to the loss of an occupational license.[481]

To be clear, some mechanisms aim to reduce the likelihood that fixed financial penalties disproportionately impact indigent persons. Prior to incarcerating an individual for an unpaid fine, courts must hold an ability to pay hearing (or *Bearden* hearing) that assesses the defendant's capacity to acquit their fine.[482] During these hearings, courts must examine whether the defendant intentionally refused to pay their criminal justice debts or failed to make bona fide efforts to do so by seeking employment, a loan, or other method to obtain money.[483] The court must then explore alternatives to incarceration for defendants who cannot afford to pay their fines.[484] For instance, courts can waive the fine, reduce its severity, or extend the payment period.[485] A judge can also impose community service as an alternative to incarceration.[486]

However, these mechanisms may fail to adequately protect indigent defendants against imprisonment for debt for several reasons. Courts can still imprison defendants when the State demonstrates that it cannot achieve its penological objectives without incarceration.[487] Some jurisdictions impose sludge on defendants and require them to swear an affidavit that documents information such as their "income, assets, debts, other [legal financial obligations], and any other information the court deems appropriate."[488] Research demonstrates that some courts fail to hold *Bearden* hearings and incarcerate individuals for unpaid fines, while other courts held rapid hearings without defense counsel.[489] These considerations illustrate how *Bearden* hearings exemplify an opt-in scheme that imposes heavy administrative burdens on judges and defendants and may fail to protect indigent persons against imprisonment for debt.[490]

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481. Skolnik, *supra* note 295, at 80, 96; Colgan, *supra* note 472, at 6–8.

482. Tia Lee Kerkhof, *Small Fines and Fees, Large Impacts: Ability-to-Pay Hearings*, 95 S. CAL. L. REV. 447, 459 (2021); Bearden v. Georgia, 461 U.S. 660, 674 (1983).

483. Jaclyn Kurin, *Indebted to Injustice: The Meaning of "Willfulness" in a* Georgia v. Bearden *Ability to Pay Hearing*, 27 GEO. MASON U. C.R.L.J. 265, 293–94 (2017).

484. Darryl K. Brown, *The Case for a Trial Fee: What Money Can Buy in Criminal Process*, 107 CAL. L. REV. 1415, 1433 (2019).

485. Kurin, *supra* note 483, at 296.

486. *Id.*

487. *Id.* at 277.

488. *Id.* at 290 (internal quotation marks omitted) (citing CITY OF BILOXI, BENCH CARD: BILOXI MUNICIPAL COURT PROCEDURES FOR LEGAL FINANCIAL OBLIGATIONS & COMMUNITY SERVICE (2016), https://finesandfeesjusticecenter.org/wp-content/uploads/2018/11/Biloxi-bench-card-LFOs-community-service.pdf [perma.cc/6Y4L-A4EK]); Furness, *supra* note 468, at 987, n. 199.

489. Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 215 (2016); Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 10 (2016).

490. Skolnik, *Revolution*, *supra* note 1, at 64.

Day fines combine the choice architecture of decision structure, decision information, and decision assistance to avoid these problems.[491] Begin with decision structure. Unlike tariff fines, graduating economic sanctions resemble a default enrollment scheme that automatically considers the defendants' financial circumstances.[492] Rather than require defendants to fill out complex forms or provide documentation, some jurisdictions leverage prompted choice and allow defendants to self-report their income.[493] In doing so, these sanctions remove the administrative burdens that defendants face when they must prove their inability to pay their fines, and that judges experience when they hold *Bearden* hearings.[494] For these same reasons, day fines decrease the requisite effort levels for criminal justice system actors.[495] Research demonstrates that defendants tend to self-report their income relatively accurately.[496] Some jurisdictions—such as Maricopa County—have also used different types of decision information and decision assistance to secure higher recoupment and payment rates for day fines.[497] Beth Colgan notes that courts offered "clear instructions regarding payment plans, payment reminders, and payment methods, such as pre-addressed envelopes that made payment straightforward."[498] She observes that "[p]robation officers also sent delinquency letters and reached out to defendants by phone or in person when payments were overdue."[499] Graduating economic sanctions offer a compelling example of how choice architecture plays a fundamental role in criminal justice reform.

Notice how graduating economic sanctions attempt to avoid many of the problems associated with fixed financial penalties.[500] By tethering the fine to the defendant's income, graduating economic sanctions aim to prevent major punishment disparities between defendants based on their income levels.[501] These sanctions also attempt to ensure that financial punishments are more proportionate because they consider individuals' personal circumstances that

491. *Id.* at 62–63.

492. *Id.*

493. *See* Colgan, *supra* note 459, at 61–65.

494. *See id.* at 72.

495. *See id.* at 64–65 (refuting the concern that graduation of economic sanctions will increase burdens on court staff).

496. *See id.* at 63–64.

497. *See id.* at 105–06.

498. *Id.* at 106.

499. *Id.*

500. Skolnik, *Revolution*, *supra* note 1, at 62–64.

501. Lindsay Bing, Becky Pettit & Ilya Slavinski, *Incomparable Punishments: How Economic Inequality Contributes to the Disparate Impact of Legal Fines and Fees*, 8 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 118, 119–20 (2022).

tariff fines ignore.[502] Graduating economic sanctions—especially when combined with initiatives that limit collateral consequences—help ensure that individuals do not become entrenched in poverty and homelessness.[503]

Graduating economic sanctions also produce a host of benefits for cities and local governments. Although the amount of day fines is generally less than tariff fines, day fines may result in higher complete payment rates and higher average payment amounts per fine compared to fixed financial penalties.[504] The costs to enforce and recuperate fixed financial penalties can be more expensive than the income that the economic sanction generates.[505] Cities must pay significant costs to recuperate unpaid fines, issue bench warrants, arrest and jail individuals, remunerate police and court personnel, and more—costs that day fines can help avoid because individuals are more likely to pay them in full.[506] Graduating economic sanctions also maintain the institutional role of various criminal justice system actors—such as judges, prosecutors, and police officers—rather than transform them into de facto debt collectors.[507]

E. Automatic Expungements

Automatic expungements offer a fifth example of how choice architecture can be used in criminal justice reform.[508] Previous Parts elucidated why many eligible individuals do not expunge their criminal records and how the uptake rate for criminal record expungements is below 5% in many states.[509] Frequently, sludge is the culprit.[510] Administrative burdens—such as having to fill out complex forms, participate in fingerprinting, conduct criminal record checks, travel to police stations, and more—discourage eligible persons from criminal record expungements.[511] Moreover, some jurisdictions impose a

502. Elena Kantorowicz-Rezenichenko, *Theoretical Perspectives on Day Fines*, *in* DAY FINES IN EUROPE: ASSESSING INCOME-BASED SANCTIONS IN CRIMINAL JUSTICE SYSTEMS 11–13 (Elena Kantorowicz-Reznichenko & Michael Faure eds., 2021).

503. *See* Atkinson, *supra* note 489, at 232–33.

504. Colgan, *supra* note 459, at 67; Martin et al., *supra* note 465, at 489.

505. R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1788 (2015); Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 519, 527–28 (2011).

506. MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES 5, 9–10 (2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf [https://perma.cc/QB9W-UPVM].

507. *See* Colgan, *supra* note 459, at 66–67.

508. Skolnik, *Two Systems*, *supra* note 1, at 326–31.

509. *See supra* Part I.C; Chien, *supra* note 133, at 556–57.

510. Prescott & Starr, *supra* note 135, at 2501–26; Skolnik, *Two Systems*, *supra* note 1, at 325–28. Financial costs can also discourage criminal record expungement applications. *See* Cassie Chambers Armstrong, *The Price of Fundamental Rights: Criminal Convictions, Expungement Fees, and Constitutional Concerns*, 74 RUTGERS U. L. REV. 1167, 1182 (2022).

511. Prescott & Starr, *supra* note 135, at 2501–26.

burden on applications to justify a criminal record expungement.[512] Many individuals continue to suffer the collateral consequences of criminal convictions that limit their access to housing, employment, educational opportunities, and public benefits.[513] The existing choice architecture that governs criminal record expungements is clunky, inefficient, and disadvantageous for defendants.[514] Current expungement models involve a complex opt-in scheme that triggers individuals' status quo bias and discourages them from applying to clear their criminal record.[515]

But there is more. Prosecutors may enjoy significant discretion in the expungement process.[516] Depending on the jurisdiction, prosecutors may have the power to contest—or reject—an individual's criminal record expungement application.[517] For instance, in some states, prosecutors must consent to an individual's expungement application for it to be filed.[518] In others, prosecutors screen whether an individual's expungement request should be sent to a judge and can reject the application.[519] On its face, this form of choice architecture resembles prompted choice: prosecutors are asked whether they approve an expungement application.[520] To be clear, many prosecutors are open to criminal record expungements and attempt to facilitate the process.[521] But in other contexts, the internal culture of prosecutors' offices—and perverse incentive structures—may lead to informal default rules where prosecutors delay or reject these applications.[522]

One of the most promising means to increase uptake rates for criminal record expungements is hiding in plain sight: automatic expungements.[523] Governments can increase criminal record expungement rates if they switch their choice architecture from opt-in to default enrollment—an effective way to reduce uptake gaps.[524] Automatic criminal record expungements (or spent-

512. Brian M. Murray, *Completing Expungement*, 56 U. RICH. L. REV. 1165, 1181–82 (2022).

513. Chien, *supra* note 133, at 554.

514. Katherine Ganick, *Increasing Access to Expungements: Expungement Statutes Are Intended for the Greater Good. But Are They Working?*, 98 U. DET. MERCY L. REV. 1, 13 (2020).

515. Burton et al., *supra* note 137, at 141.

516. Shima Baradaran Baughman & Jensen Lillquist, *Fixing Disparate Prosecution*, 108 MINN. L. REV. 1955, 1957 (2024); Bradan Litzinger, *Expedited Expungement and Its Limits: AB 2147 as a Peak of Progress*, 70 UCLA L. REV. 1274, 1300 (2023).

517. Brian M. Murray, *Insider Expungement*, 2023 UTAH L. REV. 337, 352.

518. *Id.*

519. *Id.*; Murray, *supra* note 512, at 1181–82.

520. Munscher, Vetter & Scheuerle, *supra* note 145, at 517 (describing prompted choice).

521. Prescott & Starr, *supra* note 135, at 2505; Jenny Roberts, *Prosecuting Misdemeanors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTIONS 529–30 (Ronald F. Wright et al. eds., 2021).

522. Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2852 (2018).

523. Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate*, 52 ARIZ. ST. L.J. 1059, 1066–68 (2020); Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 671–72 (2021).

524. Skolnik, *Two Systems*, *supra* note 1, at 326–31; Moka Ndenga, *Collateral Consequences: Why the Consequences of Criminal Convictions Affect Much More than the Individual, and a Case for Automatic Expungement*, 46

regime models) clear individuals' prior convictions after a particular period, provided the individual did not re-offend.[525]

As a default enrollment scheme, automatic criminal record expungements use choice architecture to improve outcomes in several respects. Automatic expungement models remove sludge for individuals—especially administrative burdens—that discourage expungement applications.[526] They also alter decision structure: automatic expungements reduce the level of physical effort and financial costs that individuals normally face if they wish to enjoy a clean slate.[527] Such automatic schemes largely remove prosecutorial and judicial discretion that is difficult to police, and that may result in biased decision making.[528] As formal legal rules, automatic expungement legislation also displaces informal institutional norms that may explain why prosecutors reject criminal expungement applications.

CONCLUSION

This Article argued that the criminal justice system incorporates different forms of choice architecture that shape decision making. Drawing on existing research in behavioral economics, it demonstrated how some of the justice system's rules and principles can activate decision makers' cognitive biases and produce adverse outcomes. It showed how justice system actors may resort to certain heuristics that misfire and negatively impact defendants. It elucidated how the criminal justice process utilizes nudges and allocates sludge on different justice system actors in a manner that influences their choices. And it illustrated how these behavioral economic forces pervade the criminal justice system—even if we do not notice them—and how these forces can be used for benevolent or malevolent purposes.

The core arguments of this Article established how the criminal justice system employs decision information, decision structure, and decision assistance at different points in the criminal justice process. More specifically, these choice architecture tools affect policing, court appearances, plea bargaining, trials, sentencing, and the post-conviction process. Some of the most enduring problems in the criminal justice system—such as coercive plea bargaining, evidentiary rules that contribute to wrongful convictions, and low uptake rates for criminal record expungements—are also choice architecture problems.

T. MARSHALL L. REV. 199, 212–24 (2022); MICHAEL HIESTAND, A CLEAN SLATE FOR NO ONE: THE NEED FOR AUTOMATIC EXPUNGEMENT POLICIES 20 (2022).

525. Murray, *supra* note 517, at 352.

526. Skolnik, *Two Systems*, *supra* note 1, at 326–31; Prescott & Starr, *supra* note 135, at 2503 (providing examples of sludge in the expungement process).

527. Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439, 466–68, 496 (2022).

528. Murray, *supra* note 517, at 352, 357.

This Article's concluding parts highlighted how choice architecture is a valuable—and under-utilized—criminal justice reform tool that is hiding in plain sight. It demonstrated how five criminal justice reforms leverage choice architecture to improve outcomes in a cost-effective, efficient, and predictable manner. These criminal justice reforms included pre-arrest screening, transparent plea bargaining, the presumptive inadmissibility of criminal records, graduating economic sanctions, and automatic criminal record expungements.

Ultimately, this Article laid the foundation for future research into the choice architecture of criminal justice more specifically, and the choice architecture of law more generally. Once we notice the presence and power of choice architecture, we begin to see it everywhere. And once we notice it, we can leverage its potential to instantiate concrete reform initiatives inside and outside of the criminal law.