ABSTRACT

Title of Thesis: ADDRESSING THE IMPACT OF UNCHECKED PROSECUTORIAL DISCRETION ON COERCIVE PLEA BARGAINING

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Plea bargaining in the United States has become the dominant form of case adjudication since the later decades of the 20th century (Kutateladze and Lawson 2018; Neily 2021; Viano 2012). An overburdened justice system has led to an overreliance on plea bargaining and given the prosecutor the power to pursue cases how they see fit (Bibas 2009; Brown 2016; Gold 2011; Graham 2013). Prosecutors have amassed considerable power and now control the entire plea bargaining process, leaving the defendant at the will of their tactics and threats (Alkon 2017). Unchecked prosecutorial discretion in plea bargaining has threatened the integrity of the plea bargaining process by creating a coercive atmosphere for defendants (Brunk 1979; Caldwell 2011; Johnson 2023; Kipnis 1976; Neily 2021). This paper begins with a background on the origins of plea bargaining before diving into an explanation of the problematic nature of

prosecutorial tactics and incentives, the lack of judicial oversight in plea bargaining, plea bargaining disparities, and the coercive nature of the process. A qualitative study utilizing semi-structured interviews with incarcerated offenders is proposed to understand the lived experiences of former defendants who recently accepted a plea offer and investigate the coercive nature of the process. The importance of capturing the defendant's voice is highlighted and the potential findings are discussed to construct a more accurate narrative of how plea bargaining impacts defendants.

Keywords: plea bargaining, prosecutors, prosecutorial discretion, plea negotiation, guilty pleas, defendant rights, coercion

ADDRESSING THE IMPACT OF UNCHECKED PROSECUTORIAL DISCRETION ON COERCIVE PLEA BARGAINING

by

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TABLE OF CONTENTS

Chapter 1: Introduction

With an estimated 95% of cases moving through the U.S criminal justice system being settled through plea bargaining, it is troubling how little is known about the process itself (Kutateladze and Lawson 2018; Neily 2021; Viano 2012). A plea bargain is a deal offered by the prosecutor to the defendant that entails the defendant submitting a guilty plea in exchange for an agreed-upon sentence or alternative form of punishment. This process is used to lessen the burden of trials on government resources and give the defendant an opportunity at, what is typically, a lesser sentence than what might be received at trial (Alschuler 1981). The act of 'plea bargaining' or 'negotiating a guilty plea' was generally unknown to the public and not widely practiced until the turn of the 20th century (Viano 2012). In the following decades of the turn of the 20th century and until 1970, its reception was mixed both from actors within the judicial system and the general public. It was not until the landmark 1970 Supreme Court case *Brady v. United States* asserted that plea bargaining was an "inherent" aspect of the U.S. criminal justice system that its full acceptance came to fruition (Alschuler 1979; Brady v. United States 1970; Viano 2012).

The crime surge in the 1980s and 1990s, followed by the "tough-on-crime era" cemented plea bargaining's role as a permanent and central feature of the system (McDonald 1985). As such, the prosecutor's role, which was previously essential but not necessarily central, grew substantially. The creation of mandatory minimums and sentencing guidelines shifted the sentencing discretion from the judge to the prosecutor, further expanding the prosecutor's role (Bibas 2009; Viano 2012). The prosecutor was tasked with ensuring the minimal government resources were allocated correctly, which created additional incentives to resolve cases through

pleas rather than trials (Alschuler 1968). The tough-on-crime policies led to a spike in cases being shuffled through a system with not enough resources to handle them (McDonald 1985).

What devolved from this sudden influx of cases and new prosecutorial power is a plea bargaining process largely unchecked and entirely in the hands of the prosecutor (Bibas 2009). Prosecutors have full decision-making capabilities with no supervision and the freedom to negotiate and offer pleas how they see fit (Langer 2006; McDonald 1985). Literature on this subject is limited since the negotiation process, where most of the potential misconduct can and does occur, is hidden behind closed doors. What goes into a prosecutor's decision-making is a matter of speculation and leaves the system with a dark black hole that cannot be tapped into (Wright, Baughman, and Robertson 2022). This has been coined the "Prosecutorial Black Box," referring to an area of the justice system hidden from public view (Fortier 2019; Wright et al. 2022).

Since plea bargaining occurs behind closed doors, existing literature fails to capture an essential aspect of the process — the defendant's acceptance of the plea (Subramanian, Digard, Washington II, and Sorage 2020). Capturing defendants' experiences in the plea bargaining process is largely missing from existing research, but it remains a potentially untapped source for important information regarding the potentially coercive nature of the process (Johnson 2023). Prosecutors often use a variety of tactics throughout their negotiation process with the aim of pressuring defendants into accepting a plea, but because this process is hidden, the problematic nature of these tactics can rarely be seen (Alkon 2015; Alkon 2017; Alschuler 1968; Ehrhard 2008; Gazal-Ayal 2006; Gifford 1983; National Association of Criminal Defense Lawyers 2018). These offers are not placed on the record throughout the process, nor are they systematically reviewed by a judge, which leaves the defendant at the hands of the prosecutor's

discretion during negotiations (Turner 2021). No standardized process or check currently exists to adequately examine whether a defendant is accepting their plea knowingly, voluntarily, and intelligently as the process requires (Jones 1978).

This research will explore if unchecked prosecutorial discretion in plea bargaining can lead to coerced pleas and a coercive negotiation process. With no oversight or check on this discretion, the implications have been shown to result in coercive plea bargaining, wrongful convictions, and sentencing disparities based on characteristics such as race and gender (Berdejó 2018; Berdejó 2019; Fortier 2019; Johnson 2023; Johnston, Kennedy, and Shuman 1987; Joy 2006; Kutateladze, Andiloro, and Johnson 2016; Rousseau and Pezzullo Jr. 2014; Subramanian et al. 2020). As coercion in plea bargaining has yet to be fully explored, its definition is subject to debate, but it involves a level of acknowledgment of the defendant's position in plea bargaining and their inability to reject an offer (Brunk 1979; Luna 2022). The nature of the process is coercive in that it often renders the defendant uninformed of their rights and the offers being made and forces them to make a decision between a certain smaller punishment and an uncertain harsher punishment (Brunk 1979; Kipnis 1976; Scott and Stuntz 1992). The lack of transparency and checks throughout the process, coupled with the prosecutor's various tactics and personal incentives, can make defendants feel as if they have no choice but to accept the plea. Coercion can present itself in a variety of ways, all of which may affect the defendant's acceptance of the plea and cause them to feel forced into taking their plea (Alkon 2017). As a process that overwhelmingly consumes the system, it is a threat to a defendant's rights if their plea acceptance is coerced, or if the court cannot assess whether their plea was accepted appropriately.

The proposed study will attempt to capture defendants' experiences in the plea bargaining process through semi-structured qualitative interviews with incarcerated offenders in Maryland correctional facilities to shed light on their hidden experiences. Using a diverse sample from a minimum-security jail housing individuals convicted of misdemeanors and a maximum-security prison housing individuals convicted of felonies, the study seeks to investigate these former defendants' experiences accepting a plea offer. The results of this study will aid in providing a platform for voices that have been missing from the existing research narrative to inform future plea bargaining research and reform.

The following sections will attempt to delineate what current literature has to offer about unchecked prosecutorial discretion, including how prosecutorial tactics, personal incentives, and structural considerations affect the plea bargaining process, before reviewing how this literature largely ignores the defendant's experience. I will then examine how prosecutorial discretion is problematic for defendants, how it creates a coercive atmosphere, how my proposed qualitative study will seek to capture this missing piece of the process, and the potential policy and research implications for the results of my study.

Chapter 2: Literature Review

Section I: Actors and Moving Parts of the Plea Bargaining System

To understand the prosecutorial power afforded by the plea bargaining process, it is imperative to understand the moving parts of the process. After initial charging by the arresting officer, the case moves to the prosecutor's office. When a case comes to a prosecutor's desk, it is within their complete discretion how to handle it (Langer 2006; McDonald 1985). Cases are handled in one of two ways – either the prosecutor throws the case out or the prosecutor moves forward with charging. One estimate by Pew Research Center examining almost 80,000 federal cases found that 8% of cases get thrown out, 90% pled guilty through a plea bargain, and only 2% went to trial (Gramlich 2019). Other estimates put the percentage of plea bargained cases anywhere from 93% to 97% (Neily 2021; Subramanian et al. 2020; Viano 2012). Throwing out a case is usually undertaken when the evidence against the defendant is weak and unlikely to prove beyond a reasonable doubt that the defendant is guilty, although I will later discuss how prosecutors may use plea bargaining to their advantage in this scenario by leveraging sentence departures (Alschuler 1968; Gazal-Ayal 2006; Gifford 1983). When prosecutors choose to pursue a case and decide to move forward with charging, they can choose any number of directions with charging (Graham 2013). A rise in caseloads and an increase in prosecutorial discretion has resulted in a tendency for prosecutors to charge defendants and resolve the case through plea bargaining.

Plea bargaining has grown since the Brady v. United States decision established plea bargaining as standard, but various policies caused an uptick in its use to relieve burdens on the system. Since the tough-on-crime policies of the 1990s, caseloads have more than doubled and the COVID-19 pandemic caused a massive case backlog with an estimated 49,000 pending cases

in New York City alone and thousands more across the United States (Chan 2021; McDonald 1985). This has resulted in a substantial incentive for prosecutors to resort to plea bargaining to lessen the burden on themselves, government resources, and the system as a whole. It should be noted that these burdens do not fall squarely on the prosecutors as public defenders are similarly burdened by case backlog and a lack of resources. Studies indicate that public defenders' cases result in guilty pleas for their defendants more often than not, and potentially even more than private defense attorneys (Alschuler 1975).

However, the prosecutor's power in plea bargaining is immense (Bibas 2009). The prosecutor singlehandedly decides what charges to file, which involves both potential charge reductions or enhancements (Brown 2016; Gold 2011; Graham 2013). These charges and potential enhancements or reductions are then used as bargaining chips for the prosecutor to negotiate a plea offer (Oliver and Batra 2015). Mandatory minimum laws have further extended this power by reassigning the judge's role of sentencing to the prosecutor. The prosecutor may choose to charge the defendant with an offense that carries a mandatory minimum and should the defendant plead guilty, the judge's hands are tied in sentencing. Even in the absence of mandatory minimums, sentencing guidelines severely constrict the judge's discretion and place more power in the hands of the prosecutor (Bibas 2004). Additionally, public defenders and private defense attorneys vary in their negotiating abilities and may be at the will of an experienced prosecutor's discretion. This too creates a power imbalance that awards the prosecutor the upper hand.

Furthermore, the prosecutor has no imposition to reveal information obtained in their investigation to the defendant or their defense counsel during plea bargaining. This leaves the defendant in the dark about the likelihood that the prosecutor will be able to prove the charges

beyond a reasonable doubt in court and may lead them to hastily accept a plea offer (Bell 2019; National Association of Criminal Defense Lawyers 2018). When defendants hastily accept a plea offer, are unaware of the true nature of their case, and subsequently rely on a plea offer out of fear, plea bargaining opens itself up to a coercive atmosphere.

The prosecutor's power can be traced back to the legislative level. Legislators have expanded criminal codes to be so broad as to give prosecutors the greatest amount of elbow room in charging (Alkon 2015; Langer 2006). Once again, prosecutors are given the power to use charge enhancements and additional charges, that hold stronger penalties of incarceration, how they see fit. As elected officials, prosecutors are subject to little to no judicial oversight (Brown 2016; McConkie 2015). Judges by practice give credence to the prosecutor's decision to charge and while they can encourage a lesser or different charge, the judge cannot ultimately change the charge (Butler 2021).

When taking into consideration all of these factors, the prosecutor is the actor with the most power in the plea bargaining process. Both before and after plea bargaining became a common practice, as a powerful government official with unchecked power, legal scholars have labeled the prosecutor as "dangerous" (Gershman 1992:407; Jackson 1940:5; Sklansky 2016). Most of this process, however, takes place behind closed doors. Negotiations and plea offers are not well documented nor are they commonly placed on the record with the court. Most, if not all, negotiations take place off the record which can ultimately harm the defendant from gauging the fairness of the offer (Turner 2021). The prosecutor's discretion fails to garner the adequate attention it deserves. There are few requirements for plea bargaining and the ones that do exist focus on the defendant's acknowledgment that their plea is knowing, voluntary and intelligent (Alkon 2017; Bibas 2012; Boykin v. Alabama 1969; McConkie 2015). Accepting a plea

knowingly and intelligently entails having the necessary information to make a decision and understanding the information being conveyed to you (Redlich et al. 2017). Voluntariness is assessed to ensure the plea is accepted by their own volition and not by the use of force or threats. The assessment of these requirements occurs during the plea colloquy, which is when a judge assesses the defendant's acceptance of the plea. Unfortunately, research indicates that the validity of the plea colloquy varies from judge to judge and has become largely procedural rather than an adequate measure of the defendant's acceptance of the plea (Boruchowitz, Brink, and Dimino 2009; Redlich et al. 2017; Sanborn Jr. 1992).

Furthermore, the central issue that the courts have focused on when ruling on the plea bargaining process has been the ineffective assistance of counsel in advising them of their plea, adequately informing them of their options, or coercing them into taking the offer (Alkon 2017). However, there is limited research and few rulings or policy reform regarding prosecutorial misconduct behind closed doors.

Section II: Issues with Prosecutorial Discretion

There are critical consequences related to the enormous power afforded to prosecutors in the plea bargaining process, the most central one being prosecutors creating a coercive atmosphere for defendants deciding whether to accept a plea deal. This section will break down five main issues that result from unchecked prosecutorial discretion in plea bargaining — the use of hard bargaining tactics, the impact of prosecutorial ambitions and self-interests, money and resources, the lack of judicial oversight, and plea bargaining disparities — and how they impact defendants.

Section IIa: Hard Bargaining Tactics

Most cases examining the plea bargaining process have focused on the issue of ineffective assistance of counsel, but few have focused on the issue of hard bargaining tactics (Bibas 2012; McConkie 2015). These tactics are prosecutor "tricks" that render the negotiation process pointless by backing defendants into a corner and forcing them to make an often quick and potentially coerced decision to take the plea or go to trial (Alkon 2017). The use of these tactics can vary from prosecutor to prosecutor, but the use of them is very routine and can create a heavily distorted power imbalance (Alkon 2015). Some examples of tactics are exploding offers, threatening enhancements, additional charges, the death penalty, "rights" bargaining, and all-or-nothing agreements (Alkon 2017; National Association of Criminal Defense Lawyers 2018).

Exploding offers, which are a commonly used tactic, entail attaching a short time frame to an offer to pressure the defendant into taking it. This tactic is often used early on in the process when defendants have only just met their counsel on the first day of arraignment (Alkon 2017). A tactic like this serves no real purpose other than to pressure the defendant into taking a quick deal, lessening the burden on the prosecutor. Threats to add charge enhancements and/or additional charges, commonly referred to as "overcharging," are threats to increase the potential time of incarceration if convicted, and are designed to induce defendants into accepting a plea offer (Caldwell 2011; Gershman 1992; Gold 2011; Graham 2013). Threats to add enhancements or additional charges can give the defendant the illusion that the prosecutor has a strong case because they feel comfortable enough proving these additional charges in a trial (McDonald 1985). However, a prosecutor may also use this tactic when their case is weak which is problematic since the burden of proof falls on the prosecutor. If the prosecutor does not have the

evidence to prove in a trial that the defendant is guilty beyond a reasonable doubt, the law holds that they should be released rather than coerced into a plea deal. Similarly, while not as common, a threat to proceed with the death penalty can pressure a defendant into taking a long sentence rather than risk the possibility of the death penalty should they go to trial. This holds a strong potential for coercion because defendants must decide between a lengthy sentence or a life-or-death scenario (Alkon 2017; Ehrhard 2008; North Carolina v. Alford 1970).

'All or nothing' offers, or 'take it or leave it' offers, give defendants one possible offer with no room for negotiation and the alternative being trial. Defendants are only given one choice with this offer and since trial outcomes favor longer sentences than plea bargaining outcomes, defendants feel pressured into taking this offer if they know they will not be offered another one (Alkon 2017; Fellner 2014). The final mentioned tactic is "rights" bargaining where prosecutors can tag on additional terms to the plea agreement that require defendants to waive certain rights should they accept the offer. This can include "waiv[ing] the right to appeal their sentence or important legal rulings including…the legality of the criminal statutes or police conduct,…the legality of a stop, search, or seizure, or the acquisition of other forms of evidence" (National Association of Criminal Defense Lawyers 2018:28). This leaves the defendant and their defense attorney without access to tools such as discovery which can allow them to assess the merits of the prosecutor's case.

Additionally, departure provisions allow the defendant to receive a reduction or departure in their sentence through acceptance of responsibility and/or substantial assistance (Gershman 1992; National Association of Criminal Defense Lawyers 2018). For a defendant to receive a reduction or departure, they must show that they accept responsibility for their offense or give the government, i.e. the prosecutor's office, substantial assistance in prosecuting another

offender/offense. The perceived issue with acceptance of responsibility is that it is a superficial acceptance used to secure a guilty plea in exchange for a sentence reduction, not an actual indication of repentance or regret. Substantial assistance is problematic for comparable reasons previously noted in that it may pressure and/or incentivize defendants to plead guilty and plead quickly to receive huge departures or reductions (Gershman 1992; National Association of Criminal Defense Lawyers 2018). Prosecutors may even use these tactics when they feel their case is not strong enough to hold at trial. When a prosecutor's case is weak against the defendant, they may offer a substantial sentence reduction to induce the defendant to accept the plea rather than go to trial. However, this can and has been shown to coerce innocent defendants into accepting a plea because of the fear of going to trial and the certainty of a minor punishment (Alschuler 1968; Gazal-Ayal 2006; Gifford 1983).

All of these tactics, while not inherently illegal in and of themselves, induce the very real possibility of coercion. Most defendants lack the knowledge necessary to identify the use of these tactics as smoke screens and must rely on their defense counsel to advise them correctly (Subramanian et al. 2020). However, inexperienced and/or financially incentivized private defense attorneys and overworked public defenders are similarly incentivized to encourage defendants to take plea offers, rendering these tactics even more dangerous for defendants (Alschuler 1975; Bibas 2004).

Section IIb: Prosecutorial Ambitions/Ego/Self-interest

Another central issue that arises from the great discretion afforded to prosecutors in this process is how their self-serving biases, egos, self-interests, and ambitions may distort the process. Win-loss records, or scores, are important to prosecutors, especially as officials with political ambitions (Alschuler 1968; Ferguson-Gilbert 2001; Hessick III and Saujani 2002).

Being able to bolster a strong winning reputation with few losses and numerous convictions appeals to voters and the general public, but it leaves defendants at the will of a prosecutor determined to secure a guilty plea (Bibas 2004). Securing guilty pleas affords prosecutors greater prospects for future career advancement and it can serve their egos to have many wins under their belt. Prosecutors strive to be able to consistently secure guilty pleas in a high-stakes environment. Going to trial in a system lacking resources, with the burden of proof placed on the prosecutor's office is onerous for a prosecutor while pleas are seen as more clean-cut and run less of a risk of public disapproval (Bibas 2004; Hessick III and Saujani 2002; Standen 1993). However, it may also be simple human desires such as a smaller and less burdensome caseload that incentivize prosecutors to negotiate plea deals (Standen 1993).

Section IIc: Money and Resources

Money and resources are extreme structural distortions in the criminal justice system that affect transparency in the plea bargaining process in many ways. For one, prosecutors are paid standard salaries that are unaffected by their case outcomes. Without a direct stake in their case outcomes, what happens to the defendants in each case is irrelevant to their salaries (Bibas 2004). This only serves to strengthen personal incentives such as their egos and political ambitions and can lead prosecutors to carelessly allow too severe or too lenient pleas to come to fruition.

This issue is further complicated because while prosecutors do not have a personal financial stake in the outcomes whether they be severe or lenient, they may feel pressured to alleviate the government's financial burden to use plea bargains. As the prime decision-makers of the criminal justice system, prosecutors are responsible for guarding the government's money and resources (Hessick III and Saujani 2002; National Association of Criminal Defense Lawyers

2018). In an overworked, underfunded, and understaffed system, prosecutors are deeply incentivized to conserve resources and avoid going to trial. Especially as caseloads grow, the court system and the prosecutor's office are simply unable to afford to have most cases go to trial (Alschuler 1968; Chan 2021; Langer 2006). Plea bargaining drastically reduces the number of resources, time, and money needed to close a case, and while this is beneficial in relieving some of the burdens in an already overworked system, it can also lead to an overreliance on pleas. As outlined above, almost all of the power in the negotiation belongs to the prosecutor, who is financially burdened and incentivized to plea, but who does not have a direct stake in the outcome. The acceptance of responsibility provision tactic that prosecutors use carries an additional sentence reduction if the defendant notifies the prosecutor of their intent to accept responsibility in a "timely manner" (National Association of Criminal Defense Lawyers 2018). This is because a quickly closed plea allows the prosecutor and the government to conserve resources, without any consideration that the defendant might have felt pressured to plead guilty. Coupled with overworked public defenders, money, or lack thereof, is a problematic feature of the system that distorts transparency in the process and puts defendants in a coercive atmosphere (Alkon 2017; Bibas 2004).

Section IId: Judicial Oversight

Judges' primary role in this process is to approve offers and sentence defendants. As previously noted, their sentencing power has largely been given to prosecutors with the establishment of mandatory minimums and sentencing guidelines that tie judges' hands (Gershman 1992; McDonald 1985). This is because judges rarely sentence below the recommended sentencing guidelines, and they must follow mandatory minimum laws (National Association of Criminal Defense Lawyers 2018). Although limited research exists on the plea

bargaining process since it occurs off the record, studies indicate that defendants often plead simply out of fear of receiving a worse penalty at trial, leaving defendants at the will of a prosecutor's offer (McConkie 2015). As public figures, prosecutors feel a sense of duty to promote uniformity in sentencing to advertise a strong cohesive system to the general public (Bibas 2004). Judges, on the other hand, tend to take a more personalized approach as they consider external factors such as families and communities, and the direct impact a sentence will have on an individual (McConkie 2015). This process takes this crucial discretion out of the judge's hands and places it into the prosecutor's.

Similarly to prosecutors, judges must also guard the government's resources because they lack the resources to preside over a large number of trials. This leads to a tendency to blindly approve plea offers because they are standard and so common. They also do not have much knowledge of the case and negotiations and as such, defer to the prosecutor (Alschuler 1976; McConkie 2015; Medlin v. State 1981). The central criterion in approving plea offers is determining a factual basis for the offer, but this can be completed if the defendant pleads guilty to the offenses, leaving judges an inconsequential role in the process (Brown 2016; McConkie 2015). As Jones (1978) puts it, plea agreements require "judicial ratification rather than acceptance or rejection" (Jones 1978:600). Defendants are guided to waive their rights in accepting a plea offer without guidance or oversight from a judge on how exactly the plea offer came to be. Plea bargaining is kept off the record, so judges have no insight into the potential misconduct that occurred during the negotiations (Turner 2021).

Section IIe: Plea Bargaining Disparities

As the primary decision-makers in plea bargaining, prosecutors have an unchecked power that can, also, be clouded by bias based on race, class, and/or gender. Racial, gender, and class

disparities in the criminal justice system are well established from the entry points of arrest to penalties of incarceration (Hetey and Eberhardt 2018; Kovera 2019). Incarceration continues to soar despite crime declining (Robertson 2019; Santa Cruz 2022). The solution to reducing the potential of bias would appear to be more oversight at all points of processing, but the plea bargaining process remains an unchecked and powerful thorn in this attempt. With no oversight, prosecutors can worsen these disparities. Although limited research exists documenting disparities in the plea bargaining process, some studies have shown the existence of disparities in charge reductions and sentence length (Fortier 2019; Rousseau and Pezzullo Jr. 2014; Subramanian et al. 2020). A study by Berdejó (2018) examined disparities in the plea bargaining process and found that White defendants were 25% more likely than Black defendants to get their charges reduced and almost 75% more likely to get their charges dropped in misdemeanor cases. Furthermore, Berdejó found that prosecutors may even use "race as a proxy for a defendant's latent criminality," a concerning outcome given the power and discretion prosecutors hold (Berdejó 2018:1191). A similar study examining misdemeanor marijuana cases in New York City found that Black defendants were less likely to receive charge reductions and more likely to receive custodial sentence offers (Kutateladze, Andiloro, and Johnson 2016). Other studies have indicated that female defendants are more likely to get lenient pleas or charge reductions from prosecutors when compared to men (Berdejó 2019; Johnston, Kennedy, and Shuman 1987). These issues all intersect since class, race, and gender are tied and rooted within one another. With unchecked prosecutorial power, these disparities can go unseen and personal biases can easily creep in. As no formal process exists to monitor a prosecutor's offers or review their record, these offers may remain skewed and continue to exacerbate sentencing disparities.

Section III: The Defendant's Experience

Within the limited literature on plea bargaining, the defendant's experience is hidden from public view and largely ignored. With all the discussion of how problematic unchecked prosecutorial discretion is, researchers have only sparsely used former defendants as a source of information and attempted to understand how their decisions have been impacted by prosecutors (Subramanian et al. 2020). Defendants are the primary individuals being affected by the prosecutor's decisions since it is their lives on the line. Plea offers entail serious consequences that will affect an individual's life trajectory whether it be the years lost spent in incarceration, the loss of housing benefits, voting rights, and other public benefits, being labeled a felon on job applications, or even the potential of the death penalty (Bushway and Sweeten 2007). Accepting a plea has been made to seem so standard and conventional that we tend to forget the individuals accepting them are making decisions that will alter the course of their life. As such, understanding how the defendant came to accept their plea, and if by any measure, the prosecutor and the prosecutor's actions made the defendant feel pressured or coerced, is necessary to restore integrity to this process.

Prosecutors' decision-making and negotiations occur behind closed doors, which allows them to use these various tactics and considerations without the approval or supervision of others. As such, a prosecutor's use of these factors may quickly turn into misuse and pressure defendants into plea acceptance and because their use of these factors occurs off the record, detecting coercion is difficult (Alkon 2017; Langer 2006). Various threats made by the prosecutor such as threats of additional charges, being held in pretrial detention without bail, or going after friends or family who may be involved in the offense can coerce the defendant into accepting a plea they cannot objectively assess (Neily 2021). While coercion in plea bargaining

may present itself in the traditional sense of prosecutors threatening defendants to force plea acceptance, it may also present itself in the atmosphere the prosecutor and the plea bargaining atmosphere create. The plea bargaining atmosphere can be inherently coercive when defendants are repeatedly told that accepting a plea offer is their best option or that plea offers are the standard or the norm.

When a system such as plea bargaining has become so pervasive, as evidenced by the 2% of cases going to trial, the importance of treating each case and each defendant individually may be swept under the rug. The lack of information flowing to the defendant coupled with the feeling that they are another case being shuffled through the system can induce a defendant to accept a plea to move along in the process (Bell 2019; National Association of Criminal Defense Lawyers 2018; Subramanian et al. 2020). One study assessing individuals who had recently accepted a plea indicated that one in five of them were only informed on the day of the plea hearing that their plea acceptance had to be voluntary, 6% were never told it had to be voluntary, and one-third of them "erroneously believed that someone other than themselves (e.g., the judge or their attorney) made the final plea decision," further underscoring how uninformed defendants are and how easily they may be coerced into a plea (Redlich and Summers 2012:638).

Coercion in plea bargaining, whether it occurs consciously or unconsciously, sets a dangerous precedent for our criminal justice system. Given that this process overwhelmingly consumes the time and energy of the system, a coercive atmosphere threatens the integrity of the process (Hessick III and Saujani 2002). It calls into question whether any plea has ever been accepted voluntarily, intelligently, and knowingly, or if by some measure defendants felt coerced into their decision through threats of penalties or a short time frame. Wrongful convictions through guilty pleas are one example of how damaging the plea bargaining system can be and

how it fails to adequately weed out the innocent from the guilty (Findley and Scott 2006; Joy 2006). Caldwell argued that, "negotiations are fundamentally skewed in ways that may lead to innocent defendants pleading guilty and to guilty defendants serving sentences disproportionate to their crimes" (Caldwell 2011:73). The National Registry of Exonerations has thus far identified 798 exonerations since 1989 where innocent defendants submitted a guilty plea, resulting in a total of 2,186 years lost spent in incarceration (Cabral 2023). There are trickle-down effects to the years lost in incarceration that go beyond the individual who served time. That individual's family will be affected whether it be the potential income lost, the mental health issues and PTSD that result from having a family member incarcerated, or the continued cycle of violence that occurs with children who have incarcerated parents (Kjellstarnd and Eddy 2011; Martin 2017). It will also place additional burdens on the correctional system and taxpayers to continue funding mass incarceration. The fact that nearly 25% of exonerations are the result of guilty pleas indicates that there is no fail-safe in place to ensure plea bargaining is being used correctly and ethically (Cabral 2023). This highlights the significance of giving a voice to incarcerated individuals because their stories did not conclude with their acceptance of a guilty plea. How their plea came to fruition, how they were treated throughout the process, how knowledgeable they were about the process, and how they came to eventually plead guilty are details only someone who directly experienced it, i.e. the defendant, can provide. As such, incarcerated offenders who have pled guilty are a voice worth capturing, not only to uncover potential innocence but to understand the coercive nature of the process. As evidenced, there are grave consequences to this process that affects the lives of hundreds of thousands of people, but because this process has become the standard, it continues to persist largely unchecked.

Unfortunately, the Supreme Court has yet to revisit the coercive nature of the process since the Bordenkircher v. Hayes decision in 1978. Paul Hayes was charged with forgery, a low-level offense that carried a two to ten-year sentence at the time. However, the prosecutor threatened to charge Hayes under the Kentucky Habitual Criminal Act, which carried a life sentence because of his prior convictions, if he did not accept the five-year plea deal. Hayes did not take the deal and he was subsequently sentenced to life in prison under the Habitual Criminal Act during trial. He appealed to the Supreme Court, arguing that the prosecutor's threats violated his due process rights under the Fourteenth Amendment. The Supreme Court disagreed and maintained that prosecutors have the right to threaten a harsher sentence, but not once in the decision was there any mention of coercion or prosecutorial threats coercing defendants (Bordenkircher v. Hayes 1978). Brunk (1979) argues that the use of charging under the Kentucky Habitual Criminal Act was unwarranted given the nature of Hayes' previous offenses and he was being penalized for not accepting the prosecutor's offer. Since the Hayes decision, the subject has remained largely untouched, the prosecutor's power has only continued to grow, and defendant rights have continued to be ignored.

Prior to the 1978 decision, a similar coercive plea bargaining issue was brought to the Supreme Court, in North Carolina v. Alford (1970), when a defendant pled guilty to second-degree murder after the prosecutor threatened the defendant with the death sentence. Despite a similar outcome, where the Supreme Court ruled against the defendant, in the dissenting opinion, Justice William J. Brennan Jr. wrote that "the facts set out in the majority opinion demonstrate that Alford was 'so gripped by fear of the death penalty' that his decision to plead guilty was not voluntary but was the product of duress as much so as choice reflecting physical constraint" (Brunk 1979; North Carolina v. Alford 1970). Another instance of the courts' acknowledgment

of the dangerous nature of plea bargaining came in a 2002 decision examining whether the acceptance of a guilty plea and the use of downward departures were appropriate. In that case, the U.S. District Court wrote, "the stick and carrot – largely controlled by prosecutors – produces a danger of excessive coercion of a defendant and undue pressures on defense counsel to avoid trial" (United States v. Speed Joyeros 2002). Plea bargaining has been recognized by legal scholars for its coercive nature, but its coercive nature has yet to be revisited by the courts in recent years (Alkon 2017; Brunk 1979; North Carolina v. Alford 1970; Scott and Stuntz 1992; United States v. Speed Joyeros 2002).

What constitutes coercion in plea bargaining is subject to debate and unclear given the lack of attention it has thus far received (Luna 2022). The "voluntary" requirement associated with plea acceptance has been widely criticized for its vagueness (Brunk 1979; Langer 2006; Luna 2022; United States v. Speed Joyeros 2002). Existing literature argues that coercion is multifaceted and can present itself in a diverse set of ways. Authority is one integral aspect of coercion because of the control individuals in an authority position, prosecutors, in this case, can hold over others. The nature of authority and how coercive it can be has been well demonstrated in social science research (Burger 2009; Milgram 1963). Similarly, power is another aspect of coercion because prosecutors hold virtually all of the power in the process. The ability to dangle charges or reductions over a defendant is a tool for prosecutors and gives them control over the defendant and their future. Power is also heavily based in perception which is why a plea bargaining atmosphere dominated by the prosecutor and made to seem like the only standard and viable option for the defendant can be coercive (French and Raven 1959).

In defining coercion, Brunk (1979) suggested that there are four different levels of coercion ranging from "hard coercion" where the defendant is put in a position where the offer is

"irresistible or cannot be reasonably rejected" to "soft coercion" where the defendant is manipulated into accepting the offer (Brunk 1979:533). Luna (2022) offered as a definition of coercion, "the use of power to constrain an individual's situation, to impose one's will on that individual via the use of force or conditional proposals (to include both threats and offers) (Luna 2022:246). It is evident that coercion has yet to be clearly defined in plea bargaining context, but these definitions incorporate aspects of coercion that go beyond using direct force. Coercion, according to these researchers, involves acknowledging the defendant's situation and the circumstances that led to their plea acceptance.

Some have argued that the very existence of plea bargaining and unchecked prosecutorial discretion coerces defendants (Brunk 1979; Ferguson and Roberts 1974; Kipnis 1976). Plea bargaining differs little from someone threatening you at gunpoint unless you give them your money because as a defendant you are "forced to choose between a very certain smaller punishment and a substantially greater punishment with a difficult-to-assess probability" so plea bargaining favors the risk-averse defendant without regard for their innocence or guilt (Brunk 1979:99; Bar-Gill and Ayal 2006; Hessick III and Saujani 2002). Kipnis (1976) says that pleas cannot be accepted voluntarily under a state of duress which is caused by the very nature of the process. Defendants do not have a real choice when two vastly different deals are placed on the table and threats are made. Offers that carry threats and conditions do not meet the plea bargaining requirements of voluntariness because they are set up so that these offers are not truly options (Kipnis 1976; Scott and Stuntz 1992). Defendants also lack the knowledge of the system that prosecutors have (Bell 2019; National Association of Criminal Defense Lawyers 2018; Subramanian et al. 2020). The possibility of a trial has become so obsolete, and the prosecutor's decision-making has become so concealed that defendants are rarely, if ever, able to accept these

offers knowingly, voluntarily, and intelligently. Coercion is not clear cut, and it can present itself in a diverse set of ways, further emphasizing the seriousness of recognizing and addressing the issues with prosecutorial discretion (Alkon 2017).

These issues beg the inevitable question of how we can shed light on what occurs behind closed doors during the plea bargaining process to prevent coercion.

Chapter 3: Proposed Research

This study is designed to assess defendants' experiences with prosecutorial tactics and discretion during the plea bargaining process. The study will use qualitative interviews to understand how defendants have been informed throughout the bargaining process and to investigate the potential of coercion. Due to the noted plea bargaining disparities based on race and offense type, this study will collect interviews from offenders of different backgrounds (Berdejó 2018; Kutateladze, Andiloro, and Johnson 2016; Rousseau and Pezzullo Jr. 2014). To get a variety of viewpoints on various offenses, this study will pull from two correctional facilities — one housing offenders convicted of misdemeanor offenses and one housing offenders convicted of felony offenses. Although defendants are not commonly exposed to the negotiations that occur between the prosecutor and their defense attorney, interviewing defendants will allow me to capture how information in the plea bargaining process is communicated to them and how that information affected their acceptance of the plea. This study will allow me to construct a picture of the plea bargaining environment from the defendant's point of view to understand if the nature of the process is coercive.

Chapter 4: Methods

Sample Selection and Study Criteria

To conduct this study, I will select two correctional facilities located within the same district in Maryland. The first facility I will select from will be the Howard County, MD Detention Center. This facility is located in Jessup, Maryland, and is used to house pre-trial detainees and offenders sentenced to up to eighteen months. The facility is reportedly housing approximately 283 inmates currently (CountyOffice). The second facility will be the Jessup Correctional Institution (which will be referred to as JCI). The JCI is located in Jessup, Maryland, and is classified as a maximum security state prison (Maryland Department of Public Safety and Correctional Services). The JCI houses approximately 1,400 offenders serving sentences of an average of 9.5+ years (PrisonPro). Research on sentencing disparities in plea bargaining indicates that racial disparities are exacerbated by charge severity and criminal history (Berdejó 2018; Rousseau and Pezzullo Jr. 2014). By choosing these facilities, I can learn from the experiences of individuals convicted of less serious misdemeanor offenses and those convicted of more serious felony offenses, who are also more likely to have prior offenses on their record. This is done to compare and contrast potential differences and similarities in the prosecutorial styles these offenders experienced during their plea bargaining process. While selecting participants from a correctional facility limits my pool to convicted offenders currently in the system, this is the most easily accessible, feasible, and standardized pool to collect from. Additionally, this sample will give me insight into a portion of the population within the justice system that has been ignored and excluded from the narrative.

The sampling strategy is defined by a few inclusion criteria. First, participants must be at least eighteen years of age, and no older than sixty-five years of age, to collect a diverse age

sample, but limit to offenders who have been sentenced more recently. Participants must have been convicted within the last twelve months because any longer risks the potential of participants forgetting crucial details. The chosen participants will be males because of the high proportion of convicted male offenders and the unlikelihood of being able to accurately capture a female narrative at these facilities. There is no restriction on race or ethnicity, however, I will use a stratified sampling approach based on race and ethnicity, namely categories for White, Black, Hispanic Latino, Asian, American Indian or Alaska Native, and Native Hawaiian or Other Pacific Islander (Jensen et. al 2021). The racial breakdown in prisons and jails is uneven, so a random sample would not result in a diverse sample of offenders. By dividing the sample by strata, I can force an equal number of participants from each racial category (Thomas 2020). This approach will be used to ensure the sample is diverse and balanced so that I can assess a wide array of experiences (Hayes 2022). The final criterion is that participants must have accepted a plea offer and were not convicted through trial.

Success with this study will depend on cooperation and maintaining a positive relationship with prison and jail personnel to facilitate the interviews (Apa et al. 2012; Newman 1958). Once these initial criteria are screened through, I will speak with the warden of the prison or administrator of the jail to discuss their thoughts on my initial list of participants and to get permission to interview the inmates. I will identify the purpose of my study and address any concerns they may have. Based on their thoughts, along with my commitment to create an inclusive and diverse sample, I will choose a sample of approximately 15-20 inmates at each facility to interview, inform the population about the purpose of the study, and collect consent from the inmates themselves. These interviews will be conducted in a private one-on-one setting using a semi-structured interview style. I will record the interview, with the permission of the

participant, or if they do not feel comfortable I will utilize handwritten notes. Incarcerated offenders may feel inclined to hide certain aspects of themselves and their experiences which will further inform the handling of the interview as a delicate matter with a vulnerable population (Schlosser 2008). As stigmatized and cautious individuals, emphasizing my separation from the system and the actors involved in plea bargaining and articulating my intention to hear their experiences will help to develop a rapport for the interview (Apa et al. 2012). My goal will be to create a comfortable conversational environment to allow for the greatest flow of information on something that may remain a delicate topic for the participants. Additionally, I will guarantee anonymity for all participants, to ease any hesitations about speaking about their experiences for fear of retaliation or personal information being shared (Apa et al. 2012).

The use of a semi-structured interview will allow me to touch on certain integral points such as more complex prosecutorial tactics that they may be unaware were in use while also allowing for a free-flow conversation. Qualitative research is unique in that it is held in the belief that one singular reality does not necessarily exist, and by using qualitative methods in this study, I can capture the multiple realities that exist for these incarcerated offenders beyond the traditional narrative their guilty plea may convey (Teherani et al. 2015). The interview will track the offenders' entire experience from their initial charging until their eventual acceptance of the plea. I will formulate a list of questions to guide the nature of the discussion, but the semi-structured nature will allow room for me to probe and elicit responses from participants that may go beyond the themes and experiences originally expected for the study (Kallio et al. 2016). This less structured aspect will be used to identify experiences that occurred during the process that do not necessarily fit into the researched criteria for coercion but may have nonetheless caused the participants to feel coerced into their plea. The ultimate goal of the interview will be to

identify the participant's perceptions of the plea bargaining atmosphere, and if they felt any sense of coercion through the use of prosecutorial tactics, threats, or by the nature of the plea bargaining atmosphere.

I will first attempt to gain background information on the participants such as their upbringing and how they came to be charged before moving on to structured and unstructured questions. The use of these background questions will be formative to understanding how prior criminal history and personal characteristics played a role in their eventual plea since research indicates prosecutors use defendants' background and characteristics, sometimes unconsciously, in crafting their plea offers (Berdejó 2018).

I will then move on to the more structured aspect of the interview to give the participant an initial sense of the direction of the interview. These structured questions will be used to get a baseline understanding of the timeline of events during the process and how their eventual plea came to be accepted (See Appendix A). I will allow for a gradual shift toward unstructured questions, based on the direction of the interview, to gauge their understanding of the process and if they felt that any aspects or parts of the process contributed to a coercive plea bargaining atmosphere. Operationalizing coercion will be the most difficult aspect of these interviews as one clear-cut definition does not yet exist. Informed by prior literature, I operationalize coercion using the concepts of direct coercion, threats, tactics, and manipulation, and indirect coercion, through the atmosphere, their knowledge of their plea acceptance, their reasonable ability to reject the offer, and the use of the prosecutor's power and authority. Understanding the defendant's experiences is the most crucial element of the plea bargaining process since it is their livelihoods being affected by the prosecutor and the outcome of the process. Participants will be treated with respect, empathy, and fairness as it is common for participants in the system to feel

angry and resentful toward actors in the system (Schlosser 2008). By creating an understanding environment for the participants to speak freely, they are likely to be more honest and forthcoming about their experiences and if and how they feel they have been harmed by the process.

Analytical Strategy

Following the conclusion of the interviews, the recordings will be transcribed verbatim. I will plug the transcribed interviews into a coding software, MAXQDA, which will allow me to organize and analyze the interviews for further coding. I will use a combination approach of both deductive and inductive coding. I will begin with a deductive approach to look for my expected themes, but because of limited prior research and understanding of coercion in the plea bargaining process, shifting into an inductive approach will give space for themes I may not anticipate (Saldaña 2015). For the first round of coding, the transcribed interviews will be coded using structural coding methods which will allow me to code the interviews using themes. It is particularly suited for semi-structured interview styles because its purpose is to break down a large chunk of data into smaller pieces (Saldaña 2015). Using my questions as a starting point, my initial codes will include an understanding of coercion, experiences with coercion, knowledge of rights, feelings of pressure, and experiences with threats, but since I am using inductive methods as well, I will leave room for additional codes I may come up with after conducting the interview. After inputting these codes into my coding software, I will read through the transcripts and assign the codes. I will assign these codes when the interviewee has said something directly linked to the code, but because coercion is not clear-cut, I will assign the codes to anything I deem relevant to the theme.

Following this initial round of coding, and after analyzing the themes that I've pulled out, I will engage in a second round of coding using emotion coding. Emotion coding will aid in

identifying and labeling the emotions felt and recalled during the interviews (Saldaña 2015). As the purpose of this study is to investigate if my sample felt coerced into their plea, understanding their emotions throughout their decision-making is an important piece of the puzzle. A commonly used tactic for emotion coding is to trace the emotional arc of the interviewee, which I believe to be particularly suited for this study as it is likely these individuals' emotions were heightened with each stage of the process and if multiple offers were given to them (Saldaña 2015). Likely codes, while keeping in mind that I am seeking to use an inductive approach for this subsequent round of coding, may include feelings of pressure, fear, and confusion. Any subsequent rounds of coding that may arise will be done utilizing inductive coding, pulling out any new and unanticipated themes that emerge.

Chapter 6: Discussion and Conclusion

This proposed research seeks to fill a gap in plea bargaining literature by examining former defendants' experiences with plea bargaining and investigating the coercive nature of the process. Plea bargaining is no longer just a part of the system, it *is* the system. With an estimated 95% of cases moving through the U.S criminal justice system being settled through plea bargaining, it is imperative that the system in place is credible and just (Kutateladze and Lawson 2018; Neily 2021; Viano 2012). Our dependence on plea bargaining to conserve system resources has allowed prosecutors to amass far too much power and has stripped the plea bargaining process of its due checks and balances. The Supreme Court has long upheld the rights of defendants to a fair and just process, but they have failed to revisit the problematic aspects of this process that strips defendants of those very rights (Alkon 2017; Brunk 1979). Protections for defendants are a fundamental value ingrained in the Constitution, and protections to prevent defendants from being coerced into life-altering guilty pleas do not fall far from that purview. Research has focused on the prosecutor and the defense attorney with a lack of consideration for the person accepting the plea (Subramanian et al. 2020). The demonstrated dangerous nature of an untrustworthy and coercive plea bargaining process proves the need for giving defendants a platform to share their experiences. This research would provide the missing perspective that is needed to initiate reform and create a trustworthy process. The information collected in these interviews will be used to illustrate the real-world implications of unchecked prosecutorial discretion beyond the detached narrative that numbers and statistics provide.

Implications

It is important to note that plea bargaining is deeply ingrained as a norm and common practice of our justice system. However, as discussed, our system was not initially designed with

plea bargaining in mind nor was it practiced widely until the late 20th century. Most of the prosecutorial power that exists today is a result of policymakers and public officials seeking to give prosecutors freedom to pursue cases how they see fit, which indicates that just as this extensive power was given, it can be reduced. While there would likely be pushback to change from prosecutors, the necessary steps can be taken to ensure a more accountable and checked process exists.

If this research demonstrates that these individuals felt directly coerced into their acceptance through the use of threats and tactics or directly by the prosecutor, that would warrant additional research into and policy changes regarding the use and abuse of these threats and tactics. This study is intended to be introductory and baseline, but additional interviews or surveys should be conducted with a larger sample to understand how prevalent the use of these tactics is and how they impact other defendants. The results of that research will aid in deciding which tactics and threats will be permitted and which will be prohibited, or subject to further debate, because of their threatening and coercive nature. Forcing defendants to decide on the day of their arraignment whether to accept a plea is one example of a tactic that could be prohibited from use because of its inherently coercive nature (Alkon 2017). Decisions regarding these tactics would ultimately be best decided by the courts to examine how they violate constitutional rights but could also be decided by state or federal legislatures.

One possible outcome of this research is that these individuals indicate they did not feel directly coerced but fall under the indirect veil of coercion where they felt backed into a corner, uninformed of their options, intimidated by the prosecutor's power or authority, or that they had no other choice but to accept the deal. These indirect forms of coercion where individuals feel pressured by the general structure and atmosphere of the plea bargaining process, while not as

well documented and researched, hold just as much credibility as direct coercion (Brunk 1979; Kipnis 1976; Luna 2022). As legal scholars have argued, by giving defendants the choice between a certain smaller punishment and an uncertain larger punishment, the choice they make is not truly their own, rather a product of duress (Brunk 1979; Bar-Gill and Ayal 2006; Fellner 2014; Hessick III and Saujani 2002). These results would further demonstrate the need for implementing additional checks and balances in the plea bargaining process and creating more transparency through court inquiries and plea offers being put on the record.

If this research proves that defendants are under any veil of coercion, whether directly or indirectly, when accepting their plea offers, there should be policy changes to reduce prosecutorial power and create a check to ensure defendants' acceptance of their plea is entirely their own. Implementing additional checks and balances on the plea bargaining process is a requisite to restoring fairness and trust in the system. One of the most problematic aspects of the current plea bargaining system is the lack of transparency which renders us unable to detect coercion (Turner 2006). Judicial involvement in plea bargaining negotiations is one of the most feasible and highly suggested solutions (Gifford 1983).

Over the years, judges have been stripped of their oversight and role in plea bargaining and various laws have given prosecutors the judge's power. By requiring judicial involvement in plea negotiations, not only will there be greater oversight to detect coercion, but the judge will also get a better sense of the strength of the case which can inform their decision to accept or reject the plea offers (Turner 2006). The current practice whereby judges give credence to prosecutors only serves to be harmful to defendants and prevents judges from accurately assessing the offers, the negotiations, and the defendant's acceptance of the plea. Whether my research indicates that this coercion is clear-cut or that the current system creates a coercive

atmosphere by indirectly backing defendants into accepting pleas, having judges monitor the negotiations and regularly speak with the defendant can help reduce coercion and ensure the defendant's rights are being protected. Furthermore, the plea colloquy should be reformed to be a standardized and formal check on the defendant's knowledge of their plea acceptance and whether any misconduct or coercion occurred behind closed doors, rather than a box for the judge to check off.

The lack of transparency and information flowing to the defendant throughout the process is another element of plea bargaining that should be examined and reformed. Justice Michael P. Donnelly (2021) suggested that to prevent keeping defendants in the dark about threats such as charge enhancements, "trial courts should not accept a plea agreement until they have made an inquiry on the record as to what position the state intends to advocate at a future sentencing hearing" (Donnelly 2021:22). Similar changes could be implemented to encourage prosecutorial transparency and aid in informing the defendant of all their options. Additionally, there should be a requirement to place all plea offers on record with the court. This will hold both the prosecutor and the defense attorney accountable by ensuring the defendant is aware of every deal that is offered, and nothing gets swept under the rug to the detriment of the defendant (Mallord 2014).

If my research indicates the offenders in my study did not feel coerced into their pleas either directly or indirectly, further research should be conducted to understand if the results are specific to my measurements and sample, or if the results hold across different samples. As previously noted, a study interviewing incarcerated offenders about their experiences with plea bargaining to understand the potentially coercive nature of the process has generally never been conducted before. While some studies and interviews exist with former defendants to discuss their plea bargaining experiences, testing for coercion and understanding coercion is a fairly

unexplored aspect of plea bargaining research. Additional studies with released offenders, for example, or more unstructured interviews may yield different results.

Limitations

The proposed study is a crucial first step to investigating defendants' experiences with the plea bargaining process. However, because this topic has been largely untouched by researchers, this research should be extended beyond this sample. Incarcerated offenders are a limited pool who may be affected by their experiences in the correctional system, how recent their acceptance of their plea was, and heightened emotions due to their environment and the result of their plea experience. All of these factors can impact how they respond during interviews and cloud their knowledge with their emotions (Schlosser 2008). These emotions are important to note because they may be coming from a place of real frustration with their plea bargaining experience, but research should always be extended to different samples. Incarcerated offenders are helpful for addressing the direct impact of plea bargaining through incapacitation, but extending this research to samples outside of jails and prisons to places such as community housing, halfway homes, or substance abuse facilities can provide other perspectives on the direct impact of plea bargaining. This sample also does not capture experiences with unsuccessful coercion where defendants experienced coercion during their plea bargaining process but were ultimately able to prevail and avoid punishment.

As noted, sentencing disparities based on race/ethnicity, socioeconomic class, and gender exist and may be particularly prevalent in the plea bargaining process (Berdejó 2018; Rousseau and Pezzullo Jr. 2014). While this sample makes an effort to collect a diverse sample, it is limited to the pool of offenders in these correctional facilities. This study does not capture the experiences of women, who tend to get more lenient offers, which can further the narrative that

the prosecutor's discretion is far too unbalanced (Berdejó 2019). This study does not use any criteria for socioeconomic status, nor dive into deep background questions, both of which can be formative in developing a full narrative of plea bargaining disparities. Despite these limitations, the current study still provides important insights into some aspects of defendant's perspective in plea bargaining and the potentially coercive nature of the process.

Conclusion

Understanding the experiences of defendants in the plea bargaining process is an important voice that has been missing from research. The proposed study attempts to create a clearer picture of the problematic nature of plea bargaining and unchecked prosecutorial discretion. Prosecutors have amassed far too much power over the years and have been tasked with controlling a process that dominates our system. Plea bargaining has strayed from its intended nature of conserving resources to becoming the backbone of the criminal justice system and being overused and abused (Alkon 2015; Fellner 2014; Langer 2006). Existing checks on the system such as plea colloquies and the requirements of accepting the plea knowingly, voluntarily, and intelligently have been swept under the rug, leaving defendants at the will of the prosecutor's decisions and their defense attorney's negotiation skills (Alschuler 1975; Boruchowitz, Brink, and Dimino 2009; Brunk 1979; Luna 2022; Redlich et al. 2017; Sanborn Jr. 1992; United States v. Speed Joyeros 2002).

It is imperative that this gap in research is addressed and that the rights of defendants are secured. With the understanding that we are simply unable to take every case to trial and intend to continue to rely on plea bargaining, the existing system is unfit to fulfill the requirements for fairness and justness set out in the constitution. If a system that controls 95% of cases does not give defendants their right to due process because it coerces them into taking pleas for the sake

of time, personal incentives, money, or resources, it is a real and serious threat to the integrity citizens should have in the system (Alkon 2017; Alschuler 1968; Bibas 2004; Ferguson-Gilbert 2001; Hessick III and Saujani 2002; National Association of Criminal Defense Lawyers 2018; Standen 1993). The findings from this study could initiate meaningful prosecutorial and plea bargaining reform and ensure the process in place has appropriate checks and balances.

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APPENDIX A. Structured Questions for All Participants

a. Before entering the system, what were your thoughts and prior knowledge of the plea bargaining process?

b. Thinking back in time to the initial incident you are currently incarcerated for, when was the first time you were informed of a plea offer?

c. Were you ever told by anyone (judge, defense attorney, prosecutor) that plea bargains are "standard" or anything along the lines of "conventional," "typical," etc.?

    i. If the answer is yes, how did it inform your eventual decision to accept the plea?

    ii. If the answer is no, how was plea bargaining explained to you?

d. How many plea offers were you offered?

    - If multiple, what is the timeline of when each plea offer was given?

e. Were you informed of what accepting a plea offer entails?

    i. If so, what were you informed?

f. Were you told that your plea had to be accepted knowingly, intelligently, and voluntarily?

g. What did your defense attorney(s) relay to you about the prosecutor? (i.e. their personality, their style, their history)

h. What was your perception of the prosecutor based on your experience from start to finish?

i. Did you ever interact with the prosecutor directly regarding your plea?

j. I'm going to ask you a series of questions. Please answer: Yes, No, or I don't know

    - Were you given a timeframe to accept the plea?

- Were you threatened with charge enhancements or additional charges that would have increased your sentence?
- Were you threatened with the death penalty or a life sentence without parole?
- Were you given a take it or leave it offer where the prosecutor threatened to go to trial if you didn't accept their offer?
- Did the prosecutor tag on any additional terms to your plea deal?
- Were you required to waive any current or future rights as a condition of accepting the plea?
- Did you receive or were you offered any charge reductions in exchange for submitting an acceptance of responsibility?
- Did you receive or were you offered any charge reductions in exchange for giving the prosecutor's office substantial assistance on a case?

k. Can you reflect back on any of these questions you answered yes to?

l. As a final question, was there any point in the process that you felt *coerced?

*(If the interviewee requires a definition of coercion, I will define coercion as: Did you feel pressured or forced into your decision, uninformed or have a lack of understanding of your options and the process, or feel backed into a plea deal by the process?)