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Arbitrariness and Accountability in Plea Bargaining

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ARBITRARINESS AND ACCOUNTABILITY IN PLEA BARGAINING

by
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ABSTRACT
EMMA BREWER: Arbitrariness and Accountability in Plea Bargaining

Justice is supposed to be a consistent, fair ideal of our society. If an individual is going to face punishment, there should be reasons why they receive the punishment they do, and two people who commit similar offenses should be punished similarly. These societal ideals are also embraced by the legal profession. Unfortunately, the current practice of plea bargains creates potential problems for our ability to satisfy that ideal of justice. Prosecutors have significant discretion in offering plea bargains. This discretion opens the door for potential arbitrariness. One way for prosecutors to combat that arbitrariness is by having a structured process they follow when deciding whether to offer pleas and what to offer. But prosecutors would also need to be held accountable to that process to ensure justice is done. In this thesis, I interviewed six prosecutors, primarily from the Southeastern United States, to determine whether they have a structured process they follow in determining plea bargains and how they could be kept accountable to that process. I find that while none of the prosecutors had a detailed, structured process they followed, most of them had considerations they utilized to evaluate each case on an individual basis. I also found that prosecutors are in favor of internal accountability measures and less in favor of external measures. Based on my research, I recommend a variety of solutions that address the possible need for a process, consistency, and internal and external accountability measures.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ABA	American Bar Association
ADA	Assistant District Attorney
AUSA	Assistant United States Attorney
DA	District Attorney
DUI	Driving Under the Influence
FBI	Federal Bureau of Investigation

CHAPTER 1: INTRODUCTION

Justice is supposed to be a consistent, fair ideal of our society. If an individual is going to face punishment, there should be reasons for why they receive the punishment they do, and two people who commit similar offenses should be punished similarly. These societal ideals are embraced by the legal profession. Some of the objectives of the American Bar Association (ABA) mission and goals statements are: "eliminate bias in the legal profession and the justice system; increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world; work for just laws and a fair legal process; and assure meaningful justice for all persons" (ABA Mission and Goals).

Unfortunately, the current practice of plea bargains creates potential problems for our ability to satisfy that ideal of justice. A plea bargain is an agreement between the defendant and the prosecutor in which the defendant agrees to plead guilty to some or all of the charges against them in exchange for concessions from the prosecutor (Legal Information Institute, Cornell). The prosecutor is the lawyer who conducts the case against a defendant in a criminal court, and the defendant is whomever is being sued or accused. Prosecutors have discretion regarding whether to charge someone and what to charge them with, as well as whether to offer a bargain and what that bargain entails. The United States criminal justice system allows, and protects, prosecutorial discretion in criminal cases to the point that prosecutors can charge to the highest extent and offer plea deals however they see fit in that case. Though this discretion can be valuable, it can

also be abused. Otto Obermaier, a former prosecutor in the U.S. Attorney's Office of the Southern District of New York once said,

> If you push and pull a whole lot you can reach almost any conclusion you want about what you actually charge a person with… And that's the whole ballgame. You can call the same act by several names, and each one brings about a different result in prison time. (Davis, 2005).

The prosecutor might have good reason for their actions and choices, but they do not necessarily have to. To interpret the U.S. Attorney Obermaier, the United States criminal justice system allows, and protects, prosecutorial discretion in criminal cases, to the point that prosecutors can charge to the highest extent and offer plea deals however they see fit in that case. There seem to be no formal standards prosecutors must abide by when making the bargains they do. Therefore, how "aggressive" criminal charges are is dependent on the prosecutor, and whatever is offered as a plea deal (if it is offered at all) is completely dependent on prosecutorial discretion. The arbitrariness that can enter the plea bargain process is counter to the law's ideal of justice.

I have chosen to focus on the plea bargain process at the state level, as the state level has fewer regulations than the federal level and is more often targeted as problematic in the literature. Prosecutors at the state level do not have any formal set of guidelines, regulations, expectations, or anything of this nature that guides them in their plea bargain development and offering. There are no explanations of what factors to consider, whether these be age, sex, criminal history, etc. This lack of guidance alone allows for potential arbitrariness as there are no expectations in place and readily available for these prosecutors to refer to, adhere to, and abide by. Since prosecutors are not told what matters for plea bargains, it is up to them or their employer to determine which factors are important.

Aside from not having restrictions in the way they approach plea bargains; the whole process is an extremely private one:

> Little to no documentation exists of the bargaining process that takes place between initial charge and a person's formal admission of guilt in open court, and final plea deals that close out cases are themselves rarely written down or otherwise recorded. As such, plea deals, and the process that produces them, are largely unreviewable and subject to little public scrutiny.
>
> (Subramanian et al., 2020, p. 4)

Individuals may have a way of approaching plea bargains, and offices or firms may have policies, but if so, the public is unaware of these policies. Thus, from the outside perspective the prosecutor's actions might seem arbitrary due to the public being left in the dark on what their approach or procedure is.

To illustrate the possibility of arbitrariness and even abuse of power, consider the case of Allegheny County District Attorney Stephen A. Zappala, Jr. DA Zappala's office was involved in a case with a Black defense lawyer named Milton Raiford. In the midst of proceedings Raiford told a judge that he believed that Zappala's office and the criminal justice system in general were both "systematically racist" (Griffith, 2021). Five days after Milton Raiford made his statement in regards to the district attorney's office, DA Zappala sent a memo to all of his deputy prosecutors forbidding them from offering plea deals to Raiford (Ward, 2021). The memo, originally acquired by The Pittsburgh Tribune-Review, stated,

> On May 13 [2021], we experienced another issue of unprofessional conduct in the courtroom of Judge Mariani, this one involving Attorney Milt Raiford…The transcript will evidence what is presently considered a convoluted critical diatribe.

> You are being advised of what actions will be taken… [effective immediately] no plea offers are to be made…The cases may proceed on the information as filed, whether by general plea, nonjury or jury trial. Withdrawal of any charges must be approved by the front office. (Ward, 2021)

This is a blatant example of an abuse of prosecutorial power and discretion. The problem is that this prosecutor is ordering different treatment and offerings towards Raiford's clients, and thus violating the ideal of justice we allegedly have in society. A prosecutor's opinion of a defense attorney, or what the defense says about the prosecution or justice system, should not bear on how the defendant is treated in the plea bargain process. Prosecutors need to have some kind of consistency and reasoning for offering the pleas they do. And maybe they do, but because it is kept private, we wouldn't know it if they did.

Arbitrariness, as mentioned previously, refers to choices that the prosecutor is able to make in a case, even if they lack consistent and fair reasoning. This act of determining whether and when to offer a plea deal, as well as what to offer if a deal is given, is all determined by the prosecutor. There are two varieties of potential arbitrariness here. First is *whether* the defendant receives a plea deal. In this case the prosecutor has full authority to offer or not offer a deal of any sort, for whatever reason they see fit. Second is *what* deal is offered. Two extremely similar cases can receive two completely different deals, depending on the prosecutor. For example, two defendants might be extremely similar aside from something arbitrary, like class or race, but the white person gets a better deal than the similarly situated person of color. This discrepancy could be for a legitimate reason, but it could also be completely arbitrary, based on class or race reasons, which are not relevant to the case.

If prosecutorial discretion allows for arbitrariness, it's tempting to think we should get rid of it. But it is important to acknowledge the general need for prosecutorial discretion. Prosecutors are a part of a large, oftentimes overwhelmed and overworked, machine. The American criminal justice system deals with incredible numbers of cases and people. In order for the system to function, almost everyone involved in it is given a level of personal discretion and responsibility. Due to the volume of cases in the criminal justice system alone, it is crucial for prosecutors to utilize their discretion in cases. If every case required a trial, people would sit in jail awaiting trial their entire lives. It is also important to note that each case is different. While some may be extremely similar, no case is exactly the same. Because of this there is a need for prosecutorial discretion so that all elements can be considered, and the best attempt possible at achieving justice and fair and equitable treatment can be made.

Since prosecutorial discretion allows for arbitrariness, but we need prosecutorial discretion, the issue is finding the balance of discretion for prosecutors to do their jobs well and ensure justice is achieved. Prosecutors having a specific *process* or procedure when offering plea bargains might be a way to strike this balance. As I will understand it, a process refers to a series of actions or steps consistently taken by prosecutors from case to case, proving that decisions are as uniform as possible and not made arbitrarily. In general, the process can be thought of as an established way of approaching the plea bargain process for each case. To illustrate, professors have discretion in their grading, which could allow for arbitrariness and unfairness. To balance that discretion, many professors use a rubric, which allows them to follow a consistent process for determining a grade.

When prosecutors have a process by which they determine whether to bargain and what to offer, it removes some of the possibility of arbitrariness and abuse. Although each case is

different, with a process in place it is more likely that each case will be approached and considered in the same way. Overall, having a process is valuable to ensure that the individual, in this case the prosecutor, is making non-arbitrary decisions by having independent justifications for their choices.

Although some prosecutors may have a process to ensure fairness and proper justice in their cases, there is no current evidence that there are processes in place. Even if each prosecutor does have a process, however, there is no *accountability* to ensure compliance with that process. This creates an additional layer to the problem in that even if every prosecutor in the United States had a set process or criteria for decision-making in order to ensure a non-arbitrary decision, there is nothing to ensure it is actually utilized. A lack of accountability might explain the abuse of power that occurred in District Attorney Zappala's office. DA Zappala might have procedures and methods for approaching all cases in his office. However, due to a lack of accountability, there was nothing preventing Zappala from ignoring that process when he chose to.

These issues of potential arbitrariness and abuses of prosecutorial discretion are pertinent because the United States criminal justice system is held afloat by plea bargains. Scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through the plea bargain process (Devers, 2011; Bureau of Justice Assistance U.S. DOJ). The United States Sentencing Commission releases an annual Sourcebook of Federal Sentencing Statistics. According to the 2021 Sourcebook, there were a total of 57,287 federal cases that resulted in sentences across all districts and circuits in fiscal year (FY) 2021. Out of those 57,287 cases, 56,324 resulted in guilty pleas and 963 of them ended in a trial. Out of the total guilty pleas and trials in each circuit and district in FY 2021, 98.3 percent resulted in a guilty plea and 1.7 percent

resulted in a trial (Table 11, 2021 Sourcebook of Federal Sentencing Statistics). With plea deals making up almost all of the criminal convictions in the criminal justice system, it is crucial that they be just.

To summarize, prosecutors have significant discretion in offering plea bargains. This discretion opens the door for potential arbitrariness. If prosecutors had a process for deciding whether to offer pleas and what to offer, this might combat the arbitrariness. But prosecutors would also need to be held accountable to that process to ensure justice is done. This leads me to the question this thesis attempts to answer: What process, if any, do prosecutors have for determining whether to offer a plea deal and what kind of plea deal to offer? What kind of accountability process could be implemented to ensure any such process is followed?

CHAPTER 2: LITERATURE REVIEW

Overview

There has been a multitude of academic discussion and research revolving around the problem of plea bargains. Throughout the literature on plea bargains, prosecutors, and sometimes the criminal justice system as a whole, are criticized for many of the problems and abuses that stem from unchecked powers of prosecutorial discretion. The literature generally identifies three key issues: coercion, arbitrariness, and accountability. Each of these issues raises questions regarding the fairness and overall achievement of justice in the criminal justice system (Vorenberg, 1981; Alschuler, 1968; Sklanksy, 2016; Crespo, 2018).

In this chapter I aim to survey the literature on coercion, arbitrariness, and accountability in connection with plea bargains. While my focus is on arbitrariness and accountability, given the significance of coercion as an issue in the literature, I also briefly survey that literature. This survey helps to paint the picture of unjust scenarios that can and do occur due to the root problem of arbitrariness.

Accountability comes into play in order to combat both of these issues. Even if every prosecutor is not using coercive tactics and not arbitrarily making decisions, without an accountability measure, any prosecutor could stray from this at any time. After the survey of the literature on coercion and arbitrariness, I discuss the literature on accountability and its role in limiting coercion and arbitrariness.

Coercion

Some of the unequal tactics discussed in papers by Angela Davis, Brady Heiner, Andrew Crespo, and others, are issues of coercion. Coercion can be defined as "the practice of persuading someone to do something by using force or threats" (Oxford Languages, 2023).

In the bargaining process coercion can manifest itself in many different ways. One of these ways is the trial tax. The trial tax is discussed by Angela Davis in her article titled, "The Power and Discretion of the American Prosecutor." Davis is an activist, scholar, and writer; she is currently a professor at the University of California, Santa Cruz, and has made her life's work writing and advocating for oppressed peoples. More specifically, she is an advocate for prison reform, and was formerly a professor of law. The trial tax refers to when the risks associated with exercising one's constitutional right to trial have become too high. The risks being so high then places a serious "tax," so to speak, on the option of going to trial (Davis, 2009). Because the risks associated with going to trial are so high, defendants feel goaded into accepting a plea deal that seems like the only viable option.

Dr. Brady Heiner, a philosophy professor at California State University, Fullerton, has written extensively on public humanities, political theory, and critical social and legal theory. In one paper, Heiner specifically discusses what he calls the trial penalty, which is similar to what Davis refers to as the "trial tax." The strategy of the trial penalty, according to Heiner, is to compel defendants to "convict themselves" by pleading guilty to the lesser charge or set of charges that prosecutors then offer as a more seemingly lenient alternative to the excessive and redundant stack of charges that was originally leveled by the prosecution (Heiner, 2015). Heiner describes how Justice Kennedy affirmed this phenomenon:

> Justice Kennedy affirmed this design in a recent Supreme Court ruling, claiming that defendants who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. (Heiner, 2015, p. 600)

The trial penalty is simply another name for the trial tax, and Heiner's description shows how important overcharging in the bargaining process is for compelling a defendant to accept a deal.

Overcharging is used in order to goad the defendant into pleading guilty to a lesser offense, an offense that may not even be able to be proven at trial (Davis, 2005). Davis provides a useful example of overcharging:

> If an individual is arrested because he was in possession of a quantity of cocaine, the prosecutor has many options… the prosecutor's arsenal of possible charges may include possession of cocaine, possession with intent to distribute cocaine, and distribution of cocaine, depending on the facts of the case…In most states, possession of cocaine is a misdemeanor with a maximum penalty of one year in jail while possession with intent to distribute cocaine and distribution of cocaine are felonies with mandatory minimum terms of imprisonment…even if the amount seems relatively small, a prosecutor may charge the person with possession with intent to distribute if she believes she has evidence that would prove that the defendant intended to sell that amount. (Davis, 2005).

Overcharging is a method of manipulating charges that applies pressure and fear to the defendant. This is yet another illustration of coercion in the bargaining process, utilizing fear of an overly harsh sentence to sway the decision-making process of a defendant.

In *The Hidden Law of Plea Bargaining,* written by the Morris Wasserstein Public Interest Professor of Law at Harvard Law School, Andrew Manuel Crespo, this use of power is described as charge bargaining, where an agreement occurs to replace a higher charge with a lower one in exchange for a defendant's promise [to plead guilty] (Crespo, 2018). Similar situations to these are count bargaining, where many charges are reduced to only one or a few, and sentence bargaining, when less severe sentences are imposed (Champion, 2021).

All of these are examples of charge manipulation at the hands of the prosecutor, which often results in coercion. In many of these cases defendants are pinned against a wall. They can accept a plea deal that is much better off than what they were charged with, or they can risk going to trial and being charged with everything, whether those charges are exaggerated or not. Heiner argues that when defendants are pressured into admittance, they are stripped of their constitutional rights in terms of criminal procedure to the point where they become trapped. Heiner refers to situations like these as instances of "procedural entrapment" (Heiner, 2015). Procedural entrapment directly illustrates the definition of coercion which was previously mentioned. The pressures and "taxes" that can come with manipulated charges force defendants in certain directions in terms of their decision making. Defendants that fall under Heiner's explanation of procedural entrapment are simply victims of prosecutorial coercion.

Along with the trial tax, overcharging, and procedural entrapment, coercion can appear in the plea-bargaining process when defendants are ignorant of evidence. For example, EJ Hashimoto, a Professor of Law at Georgetown University Law Center, where she serves as the Director of the Appellate Litigation program, discusses pre-plea exculpatory evidence. Hashimoto discusses how defendants currently have limited constitutional rights in regards to pre-plea discovery, and with this situation prosecutors have every incentive to conceal

information, pre-plea, that might be helpful to defendants (Hashimoto, 2008). Hashimoto argues for an expansion of requirements in regards to pre-plea disclosure of exculpatory and impeachment information. She reasons for this proposed expansion by utilizing the argument that this power, and possible abuse of this power, can seriously undermine and hijack the accuracy and just operation of the plea bargain process (Hashimoto, 2008).

While it is obvious from this brief survey that coercion is a potential issue within plea bargaining that deserves our attention, it is not my focus in this thesis. Instead, I will focus on the way prosecutors are able to arbitrarily charge people with severe or undeserving penalties at their own discretion. This unchecked power that the prosecutor holds is where I believe many of the elements of coercion might stem from—though I admit that ending arbitrary decision making might not mean the end of all coercive practices in plea bargaining.

Arbitrariness

I will focus on the potential arbitrariness that can enter the plea bargain process through prosecutorial discretion. Arbitrariness can occur throughout the plea bargain process in a multitude of ways, whether this be what sort of charges there are, whether the prosecution decides to offer a plea, what is offered, etc. This arbitrariness can, and often does, fall along racial lines and class lines. While some differential treatment due to race or class may be intentional, this arbitrariness could be entirely due to implicit bias. Regardless of the cause, arbitrariness in this process is something that needs to be addressed, which is why there is a need for a process and accountability.

Although this is my focus, I am certainly not the first to research arbitrariness in the plea bargain process. The simplest observation of arbitrariness occurring in this process is noticing

the disparities of people being charged and sentenced. Tinsley Griffin Hill studied the existence of sentencing disparities in Class A, B, and C felony plea bargains across the state of Alabama. She studied these disparities by examining different areas of prosecutorial discretion, charge and sentence bargaining, trial discretion, and sentencing recommendations (Griffin Hill, 2021). She finds evidence that "gender and race influence sentencing and support the position that bias is a factor in criminal sentencing" (Griffin Hill, 2021, p. ii). She explains that the purpose of this research was to fill gaps in the literature by assessing if racial and gender biases affect prosecutorial discretion and decision-making in the plea-bargaining process (Griffin Hill, 2021). Griffin Hill states in the conclusion section of the study,

> The data concludes that bias is an issue in the Alabama Criminal Justice System – perhaps not all in hypothesized ways, but racial and gender bias certainly are quantitatively significant factors in sentencing…The data indicates prosecutors are not unbiased, and that there is extensive potential for accidental and intentional bias within the plea system. If anything, the results of this project serve as a motivation to further study [and] collaborate with prosecutors across the state. (Griffin Hill, 2021, p. 159)

Griffin Hill's study begins to shine light on the possibility of arbitrariness or bias in prosecutorial discretion. Her study aims to gather data on arbitrariness in order to illustrate that it exists. While the data proving the existence of arbitrariness is important, it does not yet explain why arbitrariness exists, and it also does not suggest ways to mitigate it. Therefore, it is apparent that there are disparities in how groups of people are charged and sentenced in the process, but it is not apparent yet as to why. One reason might be the presence of implicit bias. According to the National Institutes of Health, "Bias consists of attitudes, behaviors, and actions that are

prejudiced in favor of or against one or group compared to another." The National Institutes of Health also defines implicit bias as, "a form of bias that occurs automatically and unintentionally, that nevertheless affects judgements, decisions, and behaviors" (NIH, 2022).

Several researchers have written about the systematic racial bias that can occur at the hands of a criminal prosecutor (Heiner, 2016; Davis, 2009; Knight, 2018; ABA, 2019; Godsil & Jiang, 2018; Sah et al., 2015; Bennett, n.d.). A New York City study found that Black and Hispanic defendants are more likely to be held in pre-trial detention and more likely to be offered a plea bargain that includes a prison sentence in comparison to White and Asian defendants who are charged with the same crime or crimes (Balko, 2014). This idea is illustrated in the following quote from Elayne E. Greenberg, the Assistant Dean of Dispute Resolution Programs and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law:

> The racial profiling by the police, the presumption of guilt rather than innocence for African American men, the prosecutor's discretion when charging the defendant, and the justice negotiation's speed all contribute to the harsher negotiated sentences that African American male defendants receive compared to white male defendants accused of similar crimes. (Greenberg, 2021, p. 93)

The prosecutor's discretion is an important element of the problem of disproportionate treatment of Black defendants, according to Greenberg.

In a study conducted at the SJ Quinney College of Law at the University of Utah, the authors state,

> A recent review of empirical studies examining prosecutorial decision making and race found that most of the studies suggested that the defendants' 'directly or

> indirectly influenced case outcomes, even when a host of other legal or extralegal factors are taken into account.' Minorities, particularly Black males, "receive disproportionately harsher treatment at each stage of the prosecutorial decision-making process." Indeed, prosecutors in predominantly Black communities have been shown to make racially biased decisions, such as overcharging Black youth, which, in turn, perpetuates racial stereotypes. Further, Black children in the United States are much more likely than White children to be sentenced as adults, probably because Black juveniles are perceived to be older and less childlike than White juveniles. (Sah, et al., 2015, p. 70)

The literature suggests that there are disparities in plea bargains that run along racial lines. Whether these disparities are purposeful, or merely the result of systemic implicit bias, is not always clear.

Anastasia Fern Knight, a former staff writer for the New York University Applied Psychology OPUS (Online Publication of Undergraduate Studies), wrote a literature review titled, "Racial Implicit Bias in the Plea Bargain Process." Among many statistics and data, Knight begins by explaining that Black adults' incarceration rates are five to seven times higher than white adults (Knight, 2018). Knight suggests that this might not just be due to arrest rate discrepancies, but also could be the effects of the plea bargain process (Knight, 2018). In explaining how prosecutors' perspectives of defendants can translate to discrepancies in plea bargains Knight states,

> Research indicates that race is a significant predictor for receiving a more severe and/or extended sentence when using the plea bargain process, and yet this differential treatment is less prominent if a defendant goes to court, suggesting

> that defense attorneys' and prosecutors' implicit bias shape plea bargain outcomes. (Knight, 2018)

Given the private nature of plea bargains, however, research investigating how implicit bias might impact the plea bargain process is limited.

Rachel D. Godsil, Law Professor and Chancellor's Scholar at Rutgers Law School, along with HaoYang (Carl) Jiang, Yale Law School graduate and current judicial law clerk of the United States Court of Appeals for the Ninth Circuit, authored the paper, "Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat." Godsil and Jiang state that the importance of this research is that

> It shows that people can genuinely want to be fair, but their decisions, reactions, and behaviors can be determined by their unconscious processes. These cognitive functions are shaped by the racial stereotypes that continue to be prevalent in popular media and culture. To begin to achieve racially equitable outcomes within the criminal justice system, prosecutors need to understand the risks of these unconscious, stereotypical associations and related phenomena linked to racial and ethnic differences. (Godsil & Jiang, 2018, p. 142)

This quote nicely illustrates the reason why it is so important to research arbitrariness in the plea bargain process. With implicit bias being able to influence people's decisions, reactions, and behaviors unintentionally, arbitrariness in decision making is that much more threatening. Godsil and Jiang go on to explain the presence of bias in prosecutor's offices:

> In a recent study of the Manhattan District Attorney's Office, the Vera Institute found that in the exercise of discretion at every level from case screening, bail recommendations, charging, and sentences in pleas, Black defendants were

> subject to more severe outcomes compared to similarly situated whites. Prosecutors recommended denying bail to Black defendants more often, a significant factor, and eventual plea deals included longer incarceration times. (Godsil & Jiang, 2018, 146)

Lawyers are humans and they are not immune to implicit biases. Regardless of intent or desire, sometimes it is impossible to approach situations without implicit bias creeping in. For some, the intention may be there, and it may just be a conscious abuse of prosecutorial power and discretion. However, for some, the intention may be to be as fair and just as possible, but they might still fall short due to implicit bias.

If this arbitrariness in the plea bargain process is due to implicit bias, there needs to be a solution. One solution may be a more explicit process in order to combat some of those biases. Dean J. Champion, who finished his career as a professor of Criminal Justice at Texas A&M University, conducted a survey to uncover prosecutors' considerations throughout the plea bargain process.

Champion surveyed 166 random city and county prosecutors from Kentucky, Tennessee, and Virginia in order to determine the kinds of priorities they assigned in plea bargaining factors such as prior record, seriousness of the offense, or the strength of government evidence (Champion, 1989). The study also had the purpose of investigating the influence of socioeconomic background of defendants as well as the effects of representation by a public defender versus a private attorney (Champion, 1989). This study utilized questionnaires sent to all 166 prosecutors, and then performed follow-up interviews with 30 out of the 166 prosecutors (Champion, 1989).

Champion found that there were differences in the plea bargains offered to defendants with private attorneys, in comparison to those being represented by public defenders (Champion, 1989). Mainly, this research uncovers possible disparities in achieving justice caused by the socioeconomic status of defendants, and it touches on the priorities of specific elements of cases that prosecutors value. While this is important and useful research, the interviews conducted by Champion only focused on the considerations of prosecutors. I aim to dig deeper by assessing and determining prosecutors' process for approaching each plea bargain, not just determining what elements of a case they often take into consideration. Also, this study was conducted nearly 35 years ago, so the data may now be out of date.

Peter Barone has conducted more recent research in the same vein. Barone conducted a qualitative research study to attempt to understand and interpret the lived experiences of Florida female felony prosecutors and how they learned to use their prosecutorial discretion. More specifically, Barone studied how these female prosecutors use their discretion in order to identify factors they assess for decision-making purposes in the plea bargain process (Barone, 2013).

Barone claims that the results of the study would be the only available information directly from female prosecutors (Barone, 2013). Although this study is a welcome addition, it is important to hear from lawyers of multiple genders. The study findings also more specifically discuss the challenges and experiences of female prosecutors, not just their decision-making process (Barone, 2013). While that is important research, it is not my focus here. Additionally, although the study is more recent than Champion's study, it is still 10 years old, so there is a need for more recent information. Finally, Barone did not research accountability measures or possible solutions to the problems he found, yet that seems an important area for research.

Nevertheless, Barone's study appears to be one of the few of its kind, and there should be more research in this area in order to produce a more broad and holistic understanding of the topic.

Accountability

It is not enough to simply identify a problem with arbitrariness in the plea bargain process; we must have some kind of solution to ensure just and equal treatment of all persons in the criminal justice system. The clearest solution involves accountability. The following quote provides a perfect illustration of the need for accountability: "Even if all prosecutors are endowed with tremendous discernment and virtue, so that they will never abuse their power, that they could do so without facing serious consequences still constitutes a severe and widespread injustice" (Crummett, 2020, p. 967). As I previously stated, even if all of the prosecutors in the United States had a process or set of criteria to weigh and consider in each case to make decisions less arbitrary, there is nothing to hold any of these prosecutors accountable to following that process. In order for the decisions of prosecutors to not be made arbitrarily there must be something to guide them consistently, and there must also be accountability to guarantee prosecutors stick to their process.

One example of an accountability measure or practice is a small-scale practice in Arizona. In Yavapai, Arizona there is a meeting referred to as Sharkfest (Miller & Caplinger, 2012). At Sharkfest, all of the prosecutors and defense attorneys with open criminal cases in Yavapai meet together in order to reach as many plea deals as possible in one sitting (Miller & Caplinger, 2012). The key accountability aspect of Sharkfest is that all of the prosecutors and defense attorneys meet in the same room. Meeting in front of one's colleagues and peers creates

a level of accountability, since one would assume no one would offer ludicrous deals or utilize coercive measures in a room full of their peers (Miller & Caplinger, 2012).

Many of the papers that I previously discussed in reference to coercion also have a variety of accountability reforms that they suggest. For example, prosecutors being required to provide all relevant information, reveal the weaknesses in their case, and corroborate the testimony of snitches are all discussed by Davis (Davis, 2009). Davis' discussion of providing all relevant information is similar to Hashimoto's argument for the disclosure of exculpatory information pre-plea (Hashimoto, 2008). Heiner, who discusses procedural entrapment and charge bargaining, suggests that defendants should, "go to trial, and crash the justice system" (Heiner, 2015). Crummett suggests that the system of plea bargains and criminal prosecution might be "pro-rated," meaning if a prosecutor charges a defendant with twenty offenses, but only convicts the defendant of one, the prosecutor must bear 95% of the defendant's legal fees (Crummett, 2020). Malcolm M. Feeley, Claire Sanders Clements Dean's Professor of Law Emeritus at the University of California Berkeley School of Law, encapsulates the opinions of many plea bargain reformists by simply stating, "bring plea bargaining out into the open" (Feeley, 1979, p. 203). Feeley suggests reform in the way of bringing the process out from behind closed doors and into the presence of a judge, or in open court (Feeley, 1979). Other proposed solutions are things like review boards and reporting of statistics, and some people even suggest that plea bargains should be completely abolished (Taylor, 2004).

Stephanos Bibas suggests the most comprehensive reform approaches. Bibas serves as a judge on the U.S. Court of Appeals for the Third Circuit, and before being appointed as a judge, he was a professor of law and criminology as well as the director of the Supreme Court clinic at the University of Pennsylvania Carey Law School. Bibas' solutions incorporate most other

reform ideas, just in a broader context. He separates reform ideas into two different categories of internal and external regulations (Bibas, 2009).

External regulations, which are said to be favored by most commentators, are regulations by legislatures, judges, or bar authorities. These external regulations could be across the board legislation, ex post review of individual cases, or a number of other regulations that were suggested in other papers (Bibas, 2009). Internal regulations refer to changing the internal structure and management of prosecutors' offices. These internal regulations might be developing office cultures and ideals that value more than conviction statistics; integrating office structures and procedures that promote deliberation, give fair notice, and increase consistency; or incorporating pay structures and feedback from judges, defense attorneys and victims (Bibas, 2009).

Bibas is a relatively harsh critic of external regulation. In presenting his opinions on the matter, he first mentions a number of well-regarded authors that support external regulations, including Albert Alschuler, Stephen Schulhofer, James Vorenberg, Daniel Richman, and William Stuntz (Bibas, 2009, p. 965-966). Bibas explains the views of his "challengers" by saying,

> Albert Aschuler and Stephen Schulhofer, for example, recommend legislation to abolish plea bargaining or specify fixed plea discounts. Several jurisdictions have heeded this call, enacting laws that ban plea bargaining or limit its scope or discounts. James Vorenberg, and more recently Daniel Richman and William Stuntz, call for legislatures to revise criminal codes to narrow offense definitions. Richman and Stuntz emphasize that code reform would foster oversight by voters and legislators, while Vorenberg stresses that better definitions of crimes and

> punishments would reduce prosecutorial power over sentencing. Vorenberg also advocates that prosecutors report annually on their discretionary decisions to legislative committees in order to foster oversight. (Bibas, 2009, p. 965-966)

Clearly, external regulation can come in a variety of forms.

Bibas says the following about the effectiveness of external regulations:

> While many scholars discuss prosecutorial discretion as a problem, most favor external regulation of prosecutors by other institutions. One strand of this scholarship, exemplified by James Vorenberg's work, favors legislation to restrict prosecutorial discretion ex ante. Another strand endorses ex post review by judges and bar authorities of individual cases of prosecutorial misconduct. Unfortunately, these external, institutional controls have proven to be ineffective. Legislation is too crude, and ex post review of individual cases is too narrow, to attack the deeper, systemic problems with patterns of prosecutorial discretion. (Bibas, 2009, p. 962)

As was said previously, Bibas is a critic of external regulations of prosecutors. The general theme of his paper is to pinpoint different ways in which he believes external regulations will not be successful, as he is attempting to show what he believes to be the superiority of internal regulations (Bibas, 2009).

Bibas leads into his discussion of internal regulations by mentioning the principal-agent problem. He explains his principal-agent problem assumption by stating,

> This agency-cost problem resembles corporate employees' temptation to shirk or serve their self-interests at the expense of shareholders, customers, competitors, and other stakeholders. This lens suggests alternatives to external, institutional

> solutions. Some involve giving voters, victims, and defendants more direct influence and providing them with the information that they need to monitor prosecutors' decisions. Another group of solutions draws on management literature to suggest ways to transform an office's structure, incentives, and culture from the inside. In short, institutional design is more promising than rigid legal regulation. Simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency. (Bibas, 2009, p. 963)

Though Bibas seems to be in the minority, he thinks external regulations are an insufficient response. Accountability must instead come from internal change.

These internal versus external regulations are the most comprehensive groupings of the different reform and regulation ideas that are presented throughout the literature. While the consensus seems to be on external regulations, detractors like Bibas leave us wondering what the most effective accountability measures might be. Further research may help us answer that question.

CHAPTER 3: METHODOLOGY

Given the problem of arbitrariness that seems to threaten prosecutorial discretion in plea bargaining, I wanted to determine if prosecutors have a process they follow in making these decisions. If they do, perhaps the arbitrariness we have seen above is merely apparent. While some research has been done on this issue, there is benefit in further research. Many researchers have asked prosecutors what criteria they consider and value in each case, but none of them have asked about a process or more structured method of approach, and although many researchers have examined arbitrariness in prosecutorial discretion, there is a lack of research that couples the arbitrariness with accountability. For these reasons I decided to attempt to fill the gap by interviewing prosecutors, as well as the defense attorneys that are on the receiving end of their discretion. Qualitative research was the preferred choice over a survey method because the interview process allowed for follow-up questions and more of a conversation, rather than a survey where one might not be able to elaborate as much as they could in an interview. Survey questions have the potential to be misunderstood and inaccurately answered, but a qualitative interview allows for clarification at any points of confusion.

My research was conducted by performing semi-structured interviews with criminal prosecutors and defense attorneys practicing law primarily in the Southeastern United States. I chose to interview defense attorneys from this same area in order to gain an outside perspective on whether they see a process in their dealings with prosecutors. It just so happened that two of

the people I planned to interview as prosecutors were now actively practicing as criminal defense attorneys. They were able to provide me with their experiences and perspectives not only as prosecutors, but also as defense attorneys. Defense attorneys are the individuals most likely to witness arbitrary decision making, coercion, and abuse of power first hand, as they are the ones accepting, discussing, and facilitating these plea bargains on behalf of their clients.

To find my interviewees, I started with a small list and utilized the snowball method in order to expand my contact list and create a larger data set by interviewing more individuals. The "snowball method" is, "a recruitment technique in which research participants are asked to assist researchers in identifying other potential subjects" (OSU, 2010). This process of collecting information and finding more interviewees through the snowball method was utilized partially due to limited resources. As an undergraduate student with limited legal contacts and experience, I was limited in my pool of contacts for finding interviewees.

After determining my contact list of prosecutors and criminal defense attorneys, there was a set of steps that were taken in order to secure the interviews. Subjects were sent a recruitment email or reached by phone, and then asked to meet for an interview regarding their career as a prosecutor or defense attorney as it relates to plea bargains. If they agreed to be interviewed, we determined a time and place, with Zoom or a phone call being the preferred methods. All interviews ended up taking place over Zoom. We then met for the interview where I presented them with consent and release forms that they read over and agreed to if they felt comfortable. If they agreed I then began recording and asked them my prepared set of questions approved by the Institutional Review Board, which ask about their job as well as plea deals and their experiences with them in their job. Then they were asked for any recommendations on lawyers to talk to next, and I concluded the interview.

For each interviewee the first five questions asked were the same. These questions asked about basic personal and career information such as gender, race/ethnicity, their role within the criminal justice system, how long they had been in the role, their current workload if applicable, and a question asking for an estimation of how many of their cases had gone to trial instead of being resolved by plea deal. The importance of these questions was to give context to their answers. In order to understand someone's opinion it is beneficial to have context as to where their opinions are stemming from. For example, it was important for each interviewee to explain what roles they served in the criminal justice system in order for me to categorize their experiences as things that occurred in a District Attorney's, federal prosecutor's, municipal prosecutor's, or criminal defense attorney's office.

From here the question set changed depending on the interviewee. Prosecutors were all asked if they had an explicit process that they employed for determining when to offer a plea bargain and what sort of bargain to offer, and this was to be answered by a yes or no in some form. Depending on the answer to the previous question, the interview can differ.

If the prosecutor answered yes, stating that they did in fact have an explicit process, they were then asked to explain their process. Prosecutors who answered yes were also asked if this process was unique to them or shared by their office, and if this process was available to the public or to other attorneys.

The importance of asking questions in regards to the process was in order for me to be able to answer my research question. My aim was to understand if prosecutors' decision making and approach to plea bargaining is arbitrary, or if they have some sort of process to limit arbitrariness.

Prosecutors who answered that they did not have an explicit process were not asked those questions previously mentioned, as they did not have a process and so would have nothing to explain for their answers. The prosecutors who answered no, along with the ones who answered yes, were then asked questions in regards to accountability measures found in the literature.

All prosecutors were asked their thoughts on increased transparency in the plea bargain process as well as two broad approaches in the literature for improving transparency: internal and external. As discussed in Chapter 2, external approaches are regulations by judges, legislatures, and bar authorities, and internal approaches are regulations adjusting the internal structure and management in a prosecutor's office. Prosecutors were asked specifically which approach(es) they believed would be most effective in creating transparency. They were also asked which approach would be the easiest to implement, and which they thought prosecutors would be most willing to consider.

Asking about broad categories of solutions allowed respondents to answer more generally and address the issues with each approach category rather than focus on a specific solution. This is important because while a specific external solution may fail, perhaps external solutions in general are more promising to pursue. Discussing accountability solutions with interviewees is necessary, because in order to combat this possible arbitrariness one must have something to combat it with. If solutions are not discussed in tandem with problems, then there can be no expectation that anything will occur aside from bringing the problem to light.

For the criminal defense attorneys I interviewed, most of the questions asked were mirrored from those presented to the prosecutors. Aside from the general questions asked of everyone, defense attorneys were asked if prosecutors explain their reasoning for the deals offered to their clients. I also asked the defense attorneys if they had ever had similar cases or

clients treated completely differently by the same prosecutor. The other questions asked of the defense attorneys were in regards to transparency, and internal and external approaches and solutions, similar to the questions asked of prosecutors. To read these questions in full please refer to the Appendix.

These questions were chosen and asked in order to fill gaps in the literature and answer my research question. The only way to determine if prosecutors have a process utilized in their plea bargain approach, and to understand how they use their discretion, is to ask criminal prosecutors, as they are the only ones who truly know the answers.

Once I finished the interviews, I utilized the transcription service OtterAI in order to efficiently transcribe each interview I conducted. I then analyzed each interview looking for themes or ideas in common with multiple interviewees. Once I completed my analysis, I explained my findings by discussing what patterns I found throughout my interviews.

Once I have fully explained the findings of my qualitative research in the coming chapters, I will then make recommendations based on these findings. As was discussed previously, many papers and discussions revolve around the issues at hand or the risk of the constant possibility for abuse of power and discretion. These papers and discussions provide some solutions, but no researchers consult with prosecutors on the feasibility and necessity of these solutions. Therefore, I will provide recommendations, based on my findings, so that the arbitrariness of plea bargains can be mitigated.

CHAPTER 4: FINDINGS REGARDING PROCESS

In light of my lengthy interviews, I will divide my findings into two chapters. In this chapter, I explain my findings regarding whether prosecutors have a process by which they make plea bargain decisions. In the next, I will turn to accountability. I found that most interviewees said they had some sort of process. However, in many cases the process was not clearly defined or worked out, or it seemed more like a simple set of considerations without any indication of how those considerations fit together. In these cases, instead of saying "yes," outright, many prosecutors would begin to explain certain considerations or approaches. To better understand these answers, I will first discuss the demographics of the interviewees, then explain and discuss my findings regarding the way in which plea bargain decisions are made.

Demographics

I interviewed six individuals who have all served as a criminal prosecutor or defense attorney at some point in their legal career. Of those six, two were females and four were males. Three of the interviewees identified themselves as white and three identified themselves as Black or African American. These research subjects practiced in a variety of different jurisdictions: Nashville and Chattanooga, Tennessee; Jackson and rural Mississippi; Las Vegas, Nevada; and Gwinnett, Georgia. The length of practice in the criminal justice system varied; some individuals

were in criminal practice for less than a year, while others have spent their entire careers, between 20 and 25 years, in the field in some capacity.

Almost all of the interviewees were involved in the system in a different capacity or position. Some of the subjects worked as Assistant District Attorneys at a point in their career. One interviewee from a more rural jurisdiction described this position as, "prosecuting crimes stemming from felonies to misdemeanors." This subject went on to say, "...we were a small sort of rural jurisdiction. So everybody had to do everything, it was a good experience for somebody coming out of law school, because you could start right away [and] have a jury trial within a month basically." Another subject described their position as "a prosecutor prosecuting felony cases."

Five of my interview subjects, at one time or another, worked as a federal prosecutor or assistant United States attorney (AUSA). These positions will be explained in more detail by the answers to questions below, but in the simplest terms these individuals prosecute crimes at the federal level and represent the United States of America as a prosecutor in their cases. All of these individuals that worked at the federal level also have worked or are working at the state level, so they still fall within the scope of my research.

The remaining prosecutorial position was an interviewee working as a municipal prosecutor. The interviewee described this role as being the prosecution in city/municipal court, meaning that the prosecutor represents the municipality rather than a district, or some larger jurisdiction. The interviewee went on to describe different "components" of the role. One of the components of this position is prosecuting the types of cases that are not going to be indicted–for example, speeding tickets, DUIs, disorderly conduct, etc. The second component of the municipal prosecutor as explained by the interviewee is prosecuting Federal Bureau of

Investigation (FBI) cases. The subject described these cases as, "cases where citizens can go to the police department and file charges… against… some other person who committed a misdemeanor violation that the cops did not witness or arrest them for." The third component, which goes along with the felony cases for which city police arrest people, is serving as the prosecution for the initial appearances: "If they want a preliminary hearing prior to the cases getting indicted and going into Circuit Court, I'll do those initial appearances in prelims as a prosecutor."

Two of my interviewees worked as criminal defense attorneys. Not much specific description was given for these roles by the interviewees. Regardless, the defense's role in a case is to represent the defendant, their client, against the prosecution. These two individuals serving as defense attorneys were also prosecutors at one point in time, so they were able to answer questions about a prosecutor's approach, as well as being on the other side as a defense attorney. These individuals having experience on both sides of the equation was a helpful addition to my data, as they were able to add opinions and answers that varied significantly from one position to another.

Finally, the caseloads of interviewees varied considerably. Some had 1000 cases in the span of 10 months, others had 50 cases at any given time, or 100 cases at any given time. Needless to say, the caseload differed greatly depending on the office and/or position. In contrast, the number of cases resolved with plea deals were more similar. Some answers were, "80-90% did not go to trial," "the vast majority of cases settle," and "somewhere between 70 to 80% resolved by plea, and somewhere between 20 and 30% resulted or resolved via a trial."

Process

Following discussing basic information about their background, careers, and roles, interviewees were then asked a series of questions about their process of offering plea bargains. As explained in Chapter 1, my understanding of a process is actions or steps consistently taken from case to case. A process is something beyond merely identifying relevant criteria, as in the Champion study in chapter 2. Rather, a process will provide guidance on how those criteria fit together in a way to achieve more consistent results from case to case.

Only one prosecutor directly answered that they do have an explicit process. This answer comes from a former federal prosecutor who has served as a defense attorney as well as criminal prosecutor, and they currently serve as a criminal defense attorney. They state,

> I was a defense attorney first, and I learned how to be a defense attorney from a former prosecutor. So my very first job, I was with someone who was a former DA. So I learned to be a prosecutor and defense attorney at the same time, which I thought, I still think is an incredible opportunity. So when I look at cases, as a prosecutor, I naturally think about mitigation.

According to the West Virginia Public Defender Services online resources,

> Mitigation is a complex, multi-pronged approach to preparing for sentencing for a defendant's crime with the goal of reducing or lessening the effects of aggravating factors. Mitigation is the story-telling part of representing the criminal defendant. Where the prosecution talks about the crime and the victim, mitigation talks about the story of the defendant as a person before the crime, after the crime, and in the future. (PDS WV, n.d.)

This specific prosecutor would approach cases thinking about what the defense was considering.

The former federal prosecutor continues:

> I think about whether or not I can prove my case. I look at my weaknesses. …Prosecutors have a greater responsibility to ensure justice. So I think that it's my responsibility to get ahead of the defense attorney at times because if the defense attorney for some reason doesn't know the information, or if the defense attorney is ineffective, as the prosecutor it is our responsibility to ensure justice, so if I find mitigation, I lead with that. Certainly, if it's dispositive, we have discretion to not pursue the charge, we can pursue a lesser charge, or if I see a reason there's some mitigating factor in terms of what the recommendation would be, I take that as my duty… We don't wait on the defense attorney to say you know, "this person is a student or this person was at least culpable." That's our role in my opinion.

While it is important to consider mitigating factors in any case, this seems to fall short of a strict process as I understand it. Instead, mitigation simply identifies certain features of a case, but does not offer guidance as to how those features bear on the case or what actions should be taken as a result.

A different prosecutor mentioned a very specific decision making "process." This former Assistant District Attorney (ADA) from Chattanooga's surrounding areas stated,

> For me individually, the discretion that I used, or at least how I took it was people who hurt other people or who took other people's stuff… my expectation was if I had a case [like] that they were going to have to go to jail. Other offenses such as drugs, drinking, you know, that type of stuff, I was a little bit more negotiable… I looked to hammer people who took advantage of others. If I saw a big dude kill,

> you know really hurt some smaller person or a female, like I wanted to hammer those people and put them in jail.

How this prosecutor approached the "other offenses such as drugs, drinking" was not fully explained to the same extent. While this could serve as a component of a process, that process is incomplete without more details on *how* the prosecutor would "hammer" the defendants—in other words, how they determined how much jail time to offer.

Most prosecutors, aside from those just mentioned, said that cases vary, so the details of a plea must be determined on a "case by case" basis. One explanation for this from a former federal prosecutor and Assistant District Attorney was, "Every case that I ever worked, I worked as a case-by-case situation, because it's just not possible to treat it like widgets or a factory system. These are people and their lives, and everyone is very different." This quote was the general consensus for many in terms of having a process. Another former federal prosecutor and Assistant District Attorney answered by saying,

> Yeah, it was very dependent on the case. In neither office that I worked at, I don't recall there being some kind of policy that said, you know, if it's this kind of case, or, you know, if these are the charges, you can offer a plea deal, or you have to take it to trial. It was really kind of subject to the prosecutor's own discretion within reason.

While many of these supporters of individualized cases might not have provided a formal or recurring approach, most of them provided elements they always consider in their decision-making process. The general point made was that there is no process that can be applied to each case that is also fair and treats defendants as individuals. This creates a complex question of how defendants can be respected and recognized as individuals, each with different attributes to be

considered, while also being treated fairly and equally in comparison to those in similar situations.

Even if a process is impossible or undesirable, that does not mean the pleas offered are completely arbitrary, as interviewees would be quick to point out. There are various criteria that they provided to guide their decisions, even if these criteria fall short of a robust process.

Criteria

A current federal prosecutor and former ADA discussed the federal sentencing guidelines. According to the Cornell Law School Legal Information Institute, "The Federal Sentencing Guidelines are a set of non-binding rules established by the United States federal court system in 1987 to provide a uniform sentencing policy for criminal defendants convicted in the federal court system" (LII, n.d.). Although they are no longer mandatory, the prosecutor explained that most federal prosecutors do not stray too far from those in terms of their sentencing recommendations. At the state level there are no such guidelines,

> but even without the guidelines… the things we look at are the same, and are also what I looked at when I was in state court, and I assume most state prosecutors still look at them now. Number one, what is the crime that has been committed and the past history of the defendant? Typically, when a defendant goes to trial, because of the rules of evidence, we don't get to tell the jury about all the other crimes he's committed in the past. But when you're determining what a proper sentence is, all people who commit crimes are not treated the same. If you've got somebody who's young and never been in trouble before and has no history of repeat offending, then you're going to be looking at a different recommended

> sentence than somebody who appears to be a career criminal who's never stopped breaking the law, who's done the same thing over and over and over again. I think you look at a combination of the two things: How egregious is the crime? And how egregious is his record?

Three other prosecutors echoed these ideas of considering how egregious the crime is and how good or bad the defendant's record is. All three prosecutors stated that they consider the severity of the crime committed as well as the record of the defendant, generally for every case—and it is usually one of the first things that they consider. Two of these three prosecutors also mentioned that they always consider the strength of the evidence. A former federal prosecutor and Assistant District Attorney explained their approach, "I always consider the strength of the evidence. First and foremost, in the case, I consider the severity of the crime. And I consider the person's record, their criminal record." Another former federal prosecutor answered in saying, "I mean, you know, as trite as this is gonna sound, it was, you know, it was basically like, how "bad" was the defendant's criminal history, combined with how bad was, you know, was the crime that the defendant was accused of." These three considerations—severity of the crime, criminal record, and strength of evidence—were mentioned by a majority of the interviewees as relevant criteria for determining a plea deal. Notably, all four of the prosecutors who discussed the severity of the crime coupled with the record of the defendant have served as a federal prosecutor at some point in their career.

Defense Attorney Perspective

Even if prosecutors have this set of criteria, it is not clear to defense attorneys how those criteria weigh collectively. One of the questions I posed to the defense attorneys was, do you

know everything that goes into a prosecutor's decision and treatment of your clients? One of them responded, "Absolutely not." In their experience as a public defender, prosecutors often do not consider what will best enable defendants to reenter society as a productive member. They said,

> The process seemed very much hit or miss. It depended on the personality and the relationships you had with the prosecutors. There was no consistency… I did not like, I did not enjoy, and I did not support people saying, "Oh, I'm gonna start at 15 but I'm willing to go down to 10." This is not money. And that's not fair to play that type of game… So I do not think the process is transparent whatsoever from the defense side, but I think that's on the prosecutor to make it that way.

From this interview it was evident that some defense attorneys do not experience consistency with prosecutors, or they do not feel that there is an open dialogue and discussion as to what should occur. The other criminal defense attorney also had much to say on this topic, but their remarks bear more on transparency and accountability, which will be discussed in the next chapter.

Office Cultures and Expectations

In probing how common these criteria are among other prosecutors and the office; I discovered some potentially problematic criteria that could be implicit in a process. For instance, one interviewee described a DA who had an unwritten rule that each of his ADAs should take a minimum number of five cases to trial every year. The former prosecutor who worked under this DA explained that this could have been so that ADA's trial skills don't atrophy, or to enhance statistics for the office. Regardless, possible problems can arise from a policy like this, whether

the policy is official and explicit or merely unofficial. The former ADA explains the unwritten expectation and its effects: “What that ultimately did was it incentivized people, I personally never had a problem with it, because I was able to give five trials just organically given the nature [of cases].” They continued:

> But what that requirement of tracking these statistics did was it incentivized people to try a case that they probably wouldn’t otherwise have tried, because they needed to get five trials. So imagine it’s December 15 and Prosecutor A only has four trials that year. And it’s a bubble case, where he could make an offer to make it go away but reasonably not giving away the farm as they say, maybe it’s not as much as he probably could get, it’s just enough. He could also push a hard line to kind of make an offer that he knows the defendant is probably going to refuse, just so he can say he made a plea offer, guess it’s going to trial. Because in the back of his mind, this is going to be his fifth trial… So there can be an abuse of power discretion with certain policies.

Although prosecutors typically listed three relevant criteria, other considerations like this might creep in to their decision-making process as well and make their decision somewhat arbitrary.

The reason why this particular former ADA was not impacted by the unwritten rule was that they dealt with domestic violence cases, and there was a pattern of individuals who were charged with domestic violence being less likely to accept pleas. This was credited by the prosecutor as being due to the fact that

> a lot of times defendants didn’t want to plead guilty to domestic violence or related crimes, because they, in my opinion, assumed that the prosecution wasn’t going to be able to convict them at trial, because they assumed the victim wasn’t

going to show up, or the victim was going to recant, which happens often in domestic violence type of cases.

Therefore, this prosecutor specifically did not have an issue meeting this five trial minimum, but others in the office may well have.

There may be some consistency within offices due to the office culture. One former ADA who is now a federal prosecutor explained how the "norm" in the office was to not stray far from the normal charges and sentences of the other prosecutors in the office. They said that it is important to strive to be consistent with what the others in your office are doing. "We knew for example, in the district, if somebody sold drugs, we were gonna be recommending they go to prison every time." In their district of Mississippi, selling cocaine was a major problem, which might explain the seemingly harsh approach here.

A commonality between answers with most prosecutors I interviewed was that they had a great deal of autonomy in their roles. Many of them mentioned that their superiors had great trust in the prosecutors in their office or in the individual I was interviewing.

Discussion

Overall, I learned from speaking with prosecutors that none of them have anything that would qualify as a robust process for determining whether to offer a plea bargain or what to offer as discussed in chapter 1. Nevertheless, interviewees reported that they do have certain criteria they explicitly consider in some way. Are these considerations enough to ensure that prosecutors are not arbitrarily making decisions in regards to plea bargains?

The prosecutors I spoke with were skeptical about having more than a loose set of criteria, since cases must be approached individually, on their own merits. In fact, some had explained that there could not be one specific method or process that also allowed for prosecutors to treat all defendants, and their unique cases, fairly. Generally, it seemed as if prosecutors believed these considerations were effective in ensuring justice on a case-by-case basis.

Regardless of prosecutors' faith in these considerations, I am hesitant to think that these considerations are enough to ensure that there is no arbitrary decision-making taking place. The general considerations the prosecutors mentioned were the severity of the crime, the defendant's criminal record, and the strength of the evidence. While these all appear to be relevant and important things to consider, some of them might smuggle in hidden biases. One interviewee seemed adamant that the main thing to address for the seriousness of the crime was that hurting someone or stealing from them warrants going to prison. They also wanted to punish the strong taking advantage of the weak with prison. In considering the severity of the crime, it is easy to become overwhelmed with retributivist urges to see certain people harmed, even disproportionately. The emotional or personal connection one has with certain crimes or victims could lead a prosecutor to be less merciful in some cases. Similarly, while criminal history seems a relevant consideration, it is not without potential bias. Some groups of defendants, such as those with a lower socioeconomic status or people of color, might have a longer criminal history not because they are guilty of more crimes, but because they are overpoliced in a criminal justice system that suffers from biases (Fridell, 2001). So, while these criteria might seem viable and fair, racial and class biases might already be present, impacting the fairness of prosecutors' decisions.

While these considerations are better than having no guidelines for making a decision, as we saw in chapter 2, prosecutors are just humans who suffer from implicit biases like the rest of us. Implicit biases can slip into decision-making whether someone is aware of it or not. While prosecutors may have good intentions in utilizing their considerations, there might be other factors influencing them that they may not even realize. These biases regarding race or class could lead to different deals for similarly situated individuals, which would violate the ideal of justice.

Even in my interviews, I saw the effects of these other considerations that can creep in. Office pressures, such as the unspoken trial minimum, could influence prosecutors in their decisions. Depending on the office, there could be pressures to meet a certain goal, or go to trial a certain number of times, as was mentioned by an interviewee.

While each interviewee seemed to have no ill intent in their method of approach, I do not believe these considerations are sufficient in the plea bargain process. These considerations themselves could be influenced by arbitrariness, and additional implicit considerations could also influence a prosecutor without their knowledge. While prosecutors say they have certain considerations, the issue is that how important each of these considerations are in a given case can be downplayed or made more serious by arbitrary factors.

There is no degree of certainty when it comes to the criteria and considerations mentioned by prosecutors, because like the rest of us, they are influenced by office cultures and pressures, implicit biases, and other outside forces. I see a need for more consistency. The possibility that a prosecutor can choose to only "consider" a defendant's criminal history in one case and then in another case consider strength of the evidence and severity of the crime is problematic.

Either prosecutors need a better process, or there needs to be more accountability ensuring the consistency and way these considerations are utilized for each case, as accountability can occur with or without a process. If prosecutors are correct that there can be no process for offering plea bargains, then we will have to rely on accountability instead. Whether prosecutors are correct is beyond my knowledge as a current outsider to the legal profession. Regardless of whether there can be a more explicit process or not, it seems as if prosecutors are unaware of the way arbitrariness can creep into decision making, and accountability can help with this.

CHAPTER 5: ACCOUNTABILITY AND TRANSPARENCY

As we have seen from the literature, as well as the information gathered in my interviews, accountability for how prosecutors use their discretion is needed given the outside influences and biases that can impact prosecutors' decisions. As discussed in chapter 2, researchers have offered both internal and external accountability measures. This accountability is typically understood in terms of transparency, whether within an organization (internal) or for the public or external agencies (external). Because transparency should create accountability, I will often focus on transparency as the relevant form of accountability in this chapter. When conducting my interviews, I used examples of internal and external accountability from Bibas and other commentators in the literature.

Overall, many of the prosecutors interviewed were more supportive of internal transparency solutions and ideas, rather than external, as many of them believed there are already sufficient checks on the prosecutor in the form of open court and the free press. Consequently, the interviewees saw no need for further external transparency.

External Transparency

Most interviewees believed that additional external transparency is unnecessary, because there is already some level of external transparency in place. Several interviewees noted that in order for any sort of deal to be finalized, the prosecution has to present their offer or sentencing

recommendation in open court in front of a judge. Many interviewees had the same general opinion that the proceedings having to occur in open court are transparent, and that provides accountability. One former ADA stated, "the thought process or what's behind it, at least it was my experience, that you explained that [the thought process] to the judge. So that all gets told to a judge and then the judge decides on this. So, a judge doesn't necessarily say all right; they have a job as well." The prosecutor, at least in their jurisdiction, is tasked with explaining their thought process used to reach their plea deal to the judge, and then the judge is tasked with evaluating that process and determining if it is appropriate for the case at hand. In other words, the judge is not just a rubber stamp for whatever the prosecution provides or wants; judges evaluate and weigh in as well.

Another former ADA, and now federal prosecutor, has similar views about the role of judges and open court. They stated, "I've always said there's a huge check on what you're describing [coercion and abuse of prosecutorial power], and that check is the judicial branch of government…I mean I don't know how to make it more transparent." The interviewee remarked that even if individuals do not want to sit through court proceedings all day, there is a free press that often reports on these proceedings as well. This prosecutor, specifically, strongly believes in the role of the judge. They explained to me that they have never liked determining someone's sentence, or trying to decide what to offer someone, as it is their belief that that responsibility belongs to the judge.

This strong belief from two prosecutors on the open court and judge's check on prosecutorial discretion, however, was directly challenged by another interviewee. A former federal prosecutor and now defense attorney criticizes these measures as insufficient at the state level by comparing them to the federal model:

> With the federal model, when we present, when we go before the court for a guilty plea, the federal prosecutor has to present facts in a very different way from what the standard is in Mississippi in state court… If the prosecutor is held to the standard to stand before the court and read off, like how each element will be met, was what I was used to and what most state prosecutors here are used to is just reading the indictment… The way the model is in state court is just "we will be prepared to show that on or about January 31, 2023, [example date] the defendant did [whatever the defendant is being charged for]," and then literally read the indictment. That's not showing what the evidence was to support. And I think that's too base level and it doesn't force the prosecutor to check him or herself when you have to.

If this interviewee's experience is any indication, it seems that the effectiveness of the judicial branch as an accountability check on the prosecution can be brought into question. Open court proceedings cannot truly be considered an element of transparency in the process if the prosecution is not being challenged to present how they came to their conclusions and offerings. If the prosecution is not required to provide evidence to support their claims, then even if it is in open court, there's not much understanding as to how any decision was made.

For example, a former federal prosecutor who is now a defense attorney in Mississippi explained how misuse of power can happen right in front of you, even in an open court. They said,

> I'm more concerned with what time it is than how the watch works. I don't really care what your reasoning is. Matter of fact, I'd like it to be more objective. Right? If Sally killed somebody, and you gave her manslaughter, I'm more concerned

> with consistency than seeing what your reasoning is… I've watched white boys with drugs get treated like they have a problem [with addiction] and then they're put in the trustee program to where they're doing time but not really doing time. You know, I mean, walking around the jail freely or whatever. Then a bunch of Black guys come in, their first offense, with weed instead of some heavy drug, and he wasn't going through a "phase," he doesn't have an addiction problem. He's a criminal. So he gets 30 years or something. And I sit in these courtrooms and I'm like, am I the only person there who's seeing it? Like they're doing this as if nobody's watching?

This is, unfortunately, a perfect example of the general problem discussed in chapter 1. The fear expressed in the literature is that prosecutors hold so much unchecked power that they can treat individuals unequally, whether intentional or not. If one out of the six individuals I interviewed has experienced and witnessed this unchecked abuse of power, it may be that several others have as well. This quote provides evidence to support the idea that judges and the open court room are not a sufficient accountability measure for the prosecutor.

Should the system be made more transparent to avoid these racially biased sentences? One interviewee responded to the question, saying,

> It's loaded in the sense that it presupposes that transparency is the problem. So I'm answering how you've given it to me, but I can't necessarily say that transparency is the problem. Because they're doing it in open court. How much more transparent can you be? …I mean ADAs for the exact same case, one will give you 30 years, the other will give you three months probation. There's no consistency. I'm concerned with consistency. I don't care about your reasons.

> You want to give everybody 100 years? Okay, cool. I know that when I go over here everybody's getting 100 years. I don't care what you read. It can be the stupidest reason you could come up with, at least it's across the board. Even I can deal with that.

This desire for consistency is reasonable, but it's an open question how to achieve that consistency. Perhaps it can be done through transparency of reasoning rather than just result, or perhaps other accountability measures will need to be put into place. However, in order to achieve the overarching societal concept of justice, we plausibly need consistency both in what is offered as well as the justificatory reasoning for that offer. Perhaps the former is transparent in open court, but it appears from my interviews that the latter is not.

A different reason offered for why external transparency is not needed is that all of the people who need to know the specific details of the case—namely, the prosecution and defense—already do. One former ADA, who follows the school of thought that all proceedings being open to the public is an element of transparency for the process, stated,

> A lot of that information [from a case] is going to be attorney-client privilege between the defendant and their attorney. So that wouldn't be public information anyway. And that attorney is going to communicate with the prosecutor, you know, that's going to be privileged confidential communication as well. And that is on purpose.

The interviewee explained that the defendant, and what they have to say, needs to be protected in many situations. The victim of the crime also needs to be protected, which puts a serious limit on what can be made public.

Lastly, there was one suggestion in the literature that every interviewee rejected except for one: published statistics. Unfortunately, interviewees did not specify exactly what kinds of statistics they were against. I offered published statistics as an example of an external transparency measure in my interview question, but interviewees were quick to dismiss statistics without specifying what kinds of statistics they found problematic. Instead, they focused on why they were against statistics as a solution.

Every interviewee, except one, stated in one way or another that published or openly available statistics would do more harm in the field than good. It would encourage prosecutors to do things differently, or possibly to compete in some sense, and it would completely unroot people's natural instincts and approaches. One former federal prosecutor and Assistant District Attorney said, "I think keeping statistics, stuff like that is inherently bad, because it incentivizes behavior that may not necessarily be in the best interest of justice." They went on to say, "...I just think it incentivizes bad, bad, bad decision making, or decision making that isn't motivated by what's right. It's motivated by trying to achieve certain statistics." A former federal prosecutor that now serves as a criminal defense attorney also shared this same sentiment. They said,

> I do think that people that get caught up on statistics like to show the number of convictions. I think we should just get away from their model. That is what makes people think they have to do things. They just have to get the conviction like the wins matter more than justice.

If prosecutors are focused on simply attaining certain statics, there may still be arbitrariness in the plea bargain process.

Overall, none of the individuals interviewed supported the publishing of statistics in reference to the plea bargain process. One interviewee supported the publishing of bias audit

statistics; however, this was in regards to the general bias and culture of a prosecutor's office, not necessarily the plea bargain process. The majority believed that the open court or free press is sufficient in providing external transparency and accountability. The disagreement came from current district attorneys who did not believe in the transparency of the open court room due to differences they experienced between federal and state prosecutors in open court. Federal courts require more information, which can promote greater transparency and accountability.

Internal Transparency

Every person I interviewed was relatively supportive of the idea of increased or improved internal transparency. Many of them touched on the importance of consistency throughout prosecutors' cases in an office. A few of them even provided examples of internal transparency they had experienced, or elements they would implement in a DA's office if given the opportunity.

For example, a former ADA and federal prosecutor from Nevada said that they believe internal transparency exists in many offices already. They explained that whatever they were thinking about offering on a case had to be run by a supervisor and the supervisor had to sign off on it. This person eventually gained the trust of their supervisors and did not have to clear all agreements. However, there was still an element of internal transparency in place: "What I did have to do was write the justification for a plea agreement on what we called a dump sheet. It was a sheet where you listed the original charges, what you're planning, where you're pleading the case to, just kind of a general notation as to why." These dump sheets provided an internal check and held prosecutors accountable. Whether an attorney was receiving supervision or not, they still had to justify their decision for their case. The only time dump sheets were ever

mentioned was in this interview, in which the interviewee was formerly a prosecutor in Nevada. Whether these dump sheets are a common practice in other jurisdictions such as the Southeast is not something I was able to determine in my research.

A former federal prosecutor and ADA who had run for DA explained policies they would have implemented had they won.

> I think all policies in the criminal justice system in the DA's office, you know, where the majority of the power lies, in terms of policy should be focused on public safety and fairness. It has to be those two factors working together. And you have to make sure that you're treating all people that are similarly situated, charged with the same crimes the same. And so you have to make sure, you know, conducting a bias audit in the office and determining, you know, are people of a certain race, gender, nationality, sexual orientation, religion, being treated differently? Are they getting higher sentences? Are people from a certain part of town being arrested at a higher rate than they are in another part of town? These are issues that do need to be looked at by district attorney's offices. And there should be an internal review process for that.

Not only did this interviewee support bias audits and internal review of a DA's office, but they also believe that following those internal reviews the results should be published. This suggestion blends elements of internal and external transparency. This prosecutor was the one interviewee who was not against statistics and recommended the publication of certain reports.

Feasibility

While most interviewees were open to internal transparency, some even providing ideas and examples, they disagreed about the feasibility of implementing such measures. Some prosecutors stated that they think there is always room for improvement, and of course offices and jurisdictions would be willing to improve. Others did not share this same sentiment.

There is reason to be skeptical about the feasibility of a bias audit. According to one prosecutor, "many district attorneys who are elected are afraid to do such types of bias research in their own offices, because I think honestly, they may be afraid of what they find." When asked if state courts could be altered to have more the rigorous standards of federal courts, the former federal prosecutor who explained the differences in presentation between the state and federal courts said, "Personally, I don't think that people will be open to changing." They went on to explain that the change would have to come from the top down, something like the Attorney General's office implementing policies. There are lots of different personalities and people all leading different offices, so it is difficult to expect everyone to do the same thing.

Discussion

Because of the lack of a rigorous process and the possibility of arbitrary considerations influencing prosecutorial discretion, I sought to find what kind of accountability process could be implemented to mitigate arbitrariness. I aimed to answer this question more generally by determining whether interviewees thought internal or external accountability measures would be more effective. After analyzing their answers, it was apparent that internal transparency measures were the clear favorite. However, although there was support for internal changes and improvements, when asked about feasibility and actual implementation prosecutors were not all

as positive. Internal accountability measures require attorneys and offices to regulate themselves, but humans are notoriously bad at this self-regulation, which explains the concern. This suggests that external accountability measures could be necessary to achieve consistency and mitigate arbitrariness.

The general argument against external transparency and accountability was that the process is already as transparent as it can be, taking place in open court before a judge. But it is unlikely that the current process is that transparent, or that it cannot be made more transparent. As we saw above, the current open court does not always deter arbitrariness. The perspective of the defense attorneys is especially useful in understanding how the open court is currently not transparent enough. The two individuals who are currently working as criminal defense attorneys were critical of prosecutors' belief in the transparency and accountability of open court. None of the prosecutors who put their faith in the current accountability measures of the open court and free press had ever practiced on the defense side.

The process likely can be more transparent than it currently is. The federal model illustrates this. At the state level, prosecutors are required to provide much less reasoning and evidence in court and in front of a judge. While it does take place in open court, oftentimes the "reasoning" provided might just be the reading of the indictment, or the recommendation of the prosecutor. The process could be more transparent if the same level of reasoning and explanation that was expected in federal court was also expected and provided in courts at the state level.

Even if we have good reason to think the process could be more transparent than it currently is, answering the argument many prosecutors offered, we would still want further reasons to implement external accountability measures. Would these stronger measures be effective enough? That remains to be seen.

Finally, we might question the backlash to publishing statistics that was shared among most interviewees. While certain statistics might encourage competition among prosecutors with respect to convictions, as suggested by interviewees, others might encourage helpful changes in behavior. For instance, knowing how many individuals of a certain class or race were offered one type of bargain compared to individuals of a different class or race could help identify whether there is any arbitrariness or bias in the plea bargains offered. The prosecutor who supported bias audits pointed out that prosecutors might be wary to find out what a bias audit might reveal, so it is understandable that most prosecutors initially rejected the idea. Even so, it is not clear that statistics should be taken off the table so quickly. In the next chapter, I will make recommendations that hopefully can limit the fears of interviewees while still incorporating the positive effects of bias audits and the information they might provide.

CHAPTER 6: RECOMMENDATIONS

From my research and conversations, I have pinpointed a variety of issues that could cause prosecutorial discretion to be used arbitrarily. After most interviewees rejected a rigorous process for offering plea deals in favor of broad considerations, I became less certain whether a process could be used. Perhaps justice can be maintained with the broad considerations interviewees mentioned, provided that they are held accountable for the way they weigh those considerations in order to promote consistency. Although interviewees largely rejected external accountability measures in favor of internal ones, the reasons for rejecting external measures were undermotivated. Drawing on research from the literature as well as my interviews, I will now make recommendations for how to limit the arbitrariness that can impact plea bargains.

Process Recommendations

The first question I aimed to address was: what process, if any, do prosecutors have for determining whether to offer a plea deal and what kind of plea deal to offer? From asking my interviewees about this topic their answers seemed to be all across the board. Specifically, none of their "processes" were detailed enough to count as a process in the sense I was looking for. But the interviewees had specific considerations they came back to each case, even if they did not have a process by which they could weigh those considerations against each other.

Initially, I was confident that prosecutors should have a robust process for making plea deals. After my interviews, however, I am uncertain if having such a process is the best way to address arbitrariness in plea bargains. However, regardless of what is appropriate, there still remains a problem to be solved. Implicit bias has the ability to affect anyone, regardless of intent. Additional pressures of office cultures compound the problem. These biases and pressures are a threat to justice, and we need to make some kind of change to address them.

To address these issues and concerns, I see a need for two things. First, to consider and utilize the opinions of my interviewees, I recommend the development of a specific set of criteria, or considerations, to be considered by prosecutors in each case. While there may not be a set way to weigh such criteria, all prosecutors should be operating with the same explicit criteria in making decisions about what deals to offer. This recommendation begins to address consistency and may be the first step of many. The first issue to address in terms of considerations is making sure each prosecutor is considering the same things for each person, attempting to ensure equal treatment in considerations. I maintain that a specific process may be a possible solution, but I defer to the expert of the prosecutors working in this system who reject the notion of a rigorous process.

What explicit criteria should be used? This is a question I cannot answer alone. Thus, I recommend that lawyers, prosecutors and defense attorneys alike, should work together in order to collectively decide which criteria prosecutors should consider. I include defense attorneys in this decision because they may have unique insight that can combat the bias of some prosecutors. It is clear that every attorney cannot be involved in this process, but the ABA could organize a task force of people with diverse opinions and perspectives in order to develop these explicit considerations for prosecutors.

These explicit considerations will not prevent other implicit biases or pressures from impacting a decision, however. To combat these other biases, we will need accountability measures, which I will now recommend.

Accountability Recommendations

The second question I sought to answer through my research was: what kind of accountability process could be implemented to ensure any such process is followed? The conclusions I drew from the answers to the accountability questions were relatively straightforward, in that most prosecutors were supportive of internal transparency examples and ideas. Most prosecutors, also, were either not in favor of external transparency examples and ideas, or simply did not see a need for them due to their belief in the power of transparency that rests in an open courtroom.

There can be accountability regardless of whether there is a process. These two are not a package deal, but they can be mutually supportive. There should be accountability measures put in place to ensure that prosecutors abide by the explicit considerations decided on by the profession, and to combat any implicit biases or external pressures that may influence the decision. The prosecutors I interviewed are in support of internal measures, and defense attorneys were arguing that external measures were not sufficient. In order to address the beliefs of the prosecution, as well as the frustrations and experiences of the defense, I have a few recommendations for accountability in prosecutorial discretion.

First, to ensure individuals reason utilizing the explicit considerations provided by the ABA taskforce, I recommend that prosecutors must fill out “dump sheets” in which they justify their decisions using those considerations. This recommendation can help prosecutors focus on

the same considerations, and to hopefully recognize implicit biases or external pressures as they try to justify their decision.

One way to approach this recommendation would be to assign the task force the responsibility of creating a uniform dump sheet that can be accessible by prosecutors nationwide. As was explained by many interviewees, it is extremely difficult to create uniformity among one office, let alone nationwide. To be effective, we need to ensure that prosecutors are utilizing them and filling them out for every case that needs one. Thus, my next step in this recommendation is to assign an external agency or entity to have access and review power over the dump sheets. One way to accomplish this might be for an external agency to conduct reviews of certain statistics in offices, specifically the bias audit statistics that were previously mentioned by an interviewee. This agency could review the basic elements of cases from prosecutors' offices—race, socioeconomic status, criminal history, and whatever else might be up for judgment implicitly in terms of a defendant—and check those against what the result of the case were. If any of these begin to look concerning, or the agency sees some discrepancies between how certain people are treated, then the agency could have the power to request the office's dump sheets. If there is obvious discrimination occurring or reason to believe there might be, the external agency should be granted the authority to report things like this to the ABA. This agency should also be able to report to the ABA on if there is a request for dump sheets that is not fulfilled or the office does not have dump sheets on file. The ABA then could have the authority to hold these individuals or offices accountable, perhaps with fines or even disbarment if the offense is serious enough. With this looming possibility of dump sheets being requested and the agency's power to report to the ABA, it might provide accountability for dump sheets to be filled out consistently by prosecutors.

While most prosecutors and defense attorneys were heavily against statistics, and provided a few examples as to why they can be detrimental to prosecutorial discretion, in this specific instance I believe they might be necessary. The only examples I was provided against statistics was the unspoken office case minimum example. The interviewees' answers were not clear regarding statistics from a bias audit. Perhaps they would be willing to accept the collection of some statistics rather than others.

Because an external agency reviews the statistics, there is no need for any prosecutors to see them. The main concerns that arose from anti-statistic interviewees were the ideas of competition and the need to fulfill certain expectations that might arise from the comparison of statistics between prosecutors. If prosecutors do not review or compare these statistics, then these fears of comparison and competition might not be necessary. More specifically, these statistics would not be conviction rates, or other possibly competitive statistics; they would mainly be defendant demographics and how their case was resolved. Hopefully this approach to statistics can provide accountability and ensure prosecutors will utilize dump sheets, while also limiting some of the fears and discontent interviewees had with statistics.

Many prosecutors I interviewed recognized that there are differences in how one is charged for the same crime from state to state, and even differences from city to city in the same state. They largely dismissed these inconsistencies. They spoke of these inconsistencies as nothing alarming, but just simply what was happening due to the lack of a method to unify different jurisdictions, especially different states with different laws. For example, one former ADA in Georgia stated,

> In rural northeast Georgia, or northwest Georgia, people get more time for committing the same crime than they do in one of the metro Atlantic counties.

> That's just a fact that prosecutors will tell you. Is that fair? I mean, I don't know. But you know, the response is when you commit a crime, you've essentially put your freedom, and what's going to happen even, in somebody else's hands. And so far, as is what the result is, is constitutionally permissible.

Of course, what's constitutionally permissible isn't necessarily what's morally permissible or just. If we aim to uphold the ideals of justice, these kinds of inconsistencies are problematic.

I understand that states have different laws, and some things are legal in some states and illegal in others. However, we can work toward more consistency, beginning within states. To that end, I recommend that all states should create their own sentencing guidelines specifically for their state. These would allow the defense to have a better idea of what to expect from prosecutors and to hold those prosecutors accountable. Also, this would hopefully create a culture shift in that prosecutors could see if there were major discrepancies between sentences from one prosecutor among different defendants, or among multiple prosecutors for similar crimes or situations. While this may only be able to address major discrepancies from continuing to occur and not all discrepancies, it is a good starting point regardless.

This last recommendation attempts to address the experiences of defense attorneys regarding the effectiveness of open court in providing transparency. There is a disconnect between federal and state prosecutors in general, whether this be in training, case load, presentations in open court, etc. If the federal prosecutor's offices are considered the "gold standard," it only makes sense that state level offices follow their lead. I recommend utilizing the DOJ's structure and training for prosecutors at the state level. One former federal prosecutor explained that the Department of Justice has resources for training and procedures, but that many people probably do not know about them. I believe that implementing the federal model into

state level offices would begin to address some of the problems state level offices and jurisdictions often succumb to. Specifically, all state courts should enact the same standards for presentation of evidence and explanations in open court that the federal courts do. Open court is not the highest level of transparency if prosecutors in Mississippi are just reading off the indictment rather than presenting their entire decision-making process to the judge. This accountability measure fits nicely with establishing explicit criteria and using dump sheets.

Research Limitations

This research has some limitations. There was a limited pool of interviewees due to a lack of legal contacts and the time frame for acquiring interviews. The limited pool of interviewees provides a smaller number of perspectives for data usage, and the sample may not be sufficiently representative. Another limitation is the geographical locations of the interviewees. Five out of the six interviewees practiced law in the Southeastern United States. There is a limited perspective created here due to the specific area that most of the interviewees practiced in. The last apparent limitation was in regards to the statistics discussion and questions. While I was provided answers and explanations of interviewees' thoughts on statistics, I did not adequately clarify what kind of statistics interviewees were against. Determining what types of statistics prosecutors believe to be harmful is something to consider investigating in future research endeavors. Despite these limitations, my research remains a useful starting point for others to expand the portfolio of perspectives concerning the arbitrariness of plea bargaining.

Conclusion

Through my research I have gained a great deal of insight into the proceedings, practices, and problems that occur in the plea bargain process. In attempting to answer my research

questions I have found that the prosecutors I interviewed did not have a rigorous process they used in determining whether to offer plea deals and what to offer. Instead, they had some criteria they consider, but no method for weighing those criteria against each other. While none of the people I interviewed seemed to be arbitrarily making decisions or intentionally abusing their power, the defense attorneys I interviewed still experience unexplained and seemingly unjustified decisions that negatively impact their clients. Without a process or more formal method, however, arbitrariness is still a threat to the plea bargain process. Stronger accountability measures can help keep the arbitrariness of prosecutorial discretion in check to ensure justice is achieved.

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APPENDIX

Interview Questions:

1. Can you please state your name, the gender you identify with, and your race/ethnicity, if you are comfortable with doing so?

2. Can you explain what your role is within the criminal justice system and what all it entails?

3. How long have you been working in this position, along with any other positions in the criminal justice system?

4. What is your current workload/how many cases are you working on right now?

5. In your best estimation, what percentage of your cases have gone to trial and what percentage was resolved with a plea deal?
    Follow up – In any of the cases that went to trial was there a plea deal offered? And if there was, at what point was it offered?

Questions for prosecutors proceed to question #6, questions for defense attorneys proceed to question #16

6. Do you have an explicit process that you employ for determining when to offer a plea bargain and what sort of bargain to offer? (Yes/No)

If answer is no proceed to question #11. If answered yes continue on to question #7

7. Could you explain the process you use to determine whether to offer someone a plea deal? For instance, what key features of a case or individual do you look for, and why are those important?

8. Could you explain the process you use to determine what type of plea deal you offer? What key features of a case or individual do you look for, and why are those important?

9. Is this process your unique personal process, or is it one used by everyone in your office?

10. Is this process available to the public or to other attorneys? Why?
    a. Possible follow up- How do you think making the process publicly available would impact you and how you do your job?

11. Some scholars have suggested that the plea-bargaining process should be made more transparent to ensure consistency. What are your thoughts on transparency?

There are two broad approaches in the literature to improving transparency: external and internal. External approaches include review boards or standardized procedures of disclosure. Internal approaches include clarifying procedures and policies within an organization's office. (*Context for questions 12-14)*

12. Regardless of your views on the necessity of increased transparency, do you think internal, external, or a combination of approaches would be most effective at creating transparency? Why?
    Are there any you think wouldn't be effective? Why

13. Regardless of your views on the necessity of increased transparency, do you think internal, external, or a combination of approaches would be the easiest to implement? Why?

14. Which of these approaches (internal, external, or a combination) do you think prosecutors would be most willing to consider? Why? Are there any you think prosecutors would not be willing to accept? Why?

Questions for prosecutors stop here --

15. Do prosecutors explain their reasoning for the deals they offer your clients?
    a. Do they explain to you, your client, or both of you?
    b. If applicable – What do you think of the justifications that are offered? Why?

16. Have you ever had very similar cases that were treated significantly differently by prosecutors? For instance, was one client offered a deal when the other was not, or were the terms of the deal offered to one client much better than the terms of another, despite the similarity of cases? If so, could you share any details about those cases?

17. Do you think plea bargains would be more consistent across cases if prosecutors had to be more transparent regarding their process for determining whether to offer a bargain and what terms to offer? Why?

There are two broad approaches in the literature to improving transparency: external and internal. External approaches include review boards or standardized procedures of disclosure. Internal

approaches include clarifying procedures and policies within an organization's office. (*Context for questions 18-20)*

18. Regardless of your views on the necessity of increased transparency, do you think internal, external, or a combination of approaches would be most effective at creating transparency? Why?
    Are there any you think wouldn't be effective? Why

19. Regardless of your views on the necessity of increased transparency, do you think internal, external, or a combination of approaches would be the easiest to implement? Why?

20. Which of these approaches (internal, external, or a combination) do you think prosecutors would be most willing to consider? Why? Are there any you think prosecutors would not be willing to accept? Why?