# Perspectives on Contemporary Plea Bargaining: A Washington, DC Case Study

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## Dedication

I dedicate this research to Kalief Browder. May he Rest In Peace. His story changed my life and inspired this research.

## Acknowledgments

First and foremost, I would like to acknowledge and thank my parents for their continuous and unfailing support throughout my educational journey. They have always pushed me to put my best foot forward in everything I do and not quit. This thesis is a true testament of what is delayed, is not denied. Next, I would like to extend my utmost gratitude to Fran Buntman, my thesis director. Without her expertise, guidance, and patience, there would not be a thesis. Also, thank you to Professor Chiquisha Robinson for your mentorship along this process. Additional thanks and gratitude to Professor Terri Gale, who prioritized reading an early version of this research within tough time constrictions. Finally, thank you to the participants of this study that took the time to help me complete this research.

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# Chapter One: Introduction

Plea agreements are the predominant mechanism used to adjudicate criminal cases within the United States. Plea agreements are contracts, approved by judges, between the prosecutor, on behalf of the government, and the defendant, represented by defense counsel, in which the defendant agrees to plead guilty, usually in exchange for the prosecutor recommending a negotiated sentence. While judges ultimately decide the sentence, agreements usually formally involve one or more of the following: dismissal or reduction of one or more charges (charge bargaining); reduction of sentence (sentence bargaining); or negotiation of the facts that are the basis of the charge(s) (fact bargaining) (Subramanian & Digard, 2020; Plea Bargain Task Force Report, 2023). In practice, prosecutors usually have considerable discretion to decide on the initial charges, proposed sentences, and included facts, so the negotiations tend to be premised on terms set by the state (Davis, 2008; Alkon 2017). Pleas, developed through private negotiations, take considerably less time than trials and expedite criminal proceedings. Although most incarcerated people were convicted via a guilty plea (Beenstock et al., 2021), pleas can also lead to alternatives to imprisonment, such as a defendant receiving probation, being mandated to attend a community program, or entering a rehabilitation center. Even where incarceration is avoided, a guilty plea still means a person has a criminal conviction on their record. Plea agreements are also known and commonly referred to as plea offers, plea bargains, or plea deals in scholarly works, professional settings, and everyday life. In this thesis, these terms will be used interchangeably.

Contemporary research on plea agreements revolves around their evolution (Ortman, 2020), the factors that lead to a criminal defendant pleading guilty (Subramanian & Digard, 2020), how racial disparities bleed into the plea system (Testa & Johnson, 2020), and the roles of prosecutors, judges, and public defenders (Chretien, 2014). This thesis addresses a gap in the literature by opening an examination of public defenders' and prosecutors' perspectives of the plea bargaining system and its impact on criminal defendants, starting with the District of Columbia (DC). For reasons explained below, more is learned about the understanding of public defenders than prosecutors. After inviting numerous potential respondents to participate in the study anonymously, under the human subjects protections of the George Washington University's Institutional Review Board, this study found that public defenders were more accessible and willing to discuss this subject than prosecutors. Their perspectives contributed new ideas while confirming the existing literature, such as the determinants of a defendant pleading guilty, the advantages and disadvantages of pleading guilty for defendants, and the impact of opposing counsel on plea outcomes. Based on the extensive existing research about pleas, trials, and the roles of prosecutors and defense counsel, this study found that, among the small number of respondents interviewed, public defenders' views of their relative professional strengths and weaknesses largely aligned with previous research findings than those of prosecuting lawyers. For example, the defense attorneys interviewed tended to recognize their own resource limitations and, even more, the resource limitations of their colleagues in other jurisdictions, such as how high caseloads tend to decrease the time counsel have to review each case and advise their clients, and the subsequent impact on their clients' choices to plead rather than go to trial. In contrast, compared to the

prevailing research, prosecutors understated their power and how their resources and the rules of criminal courts impact the plea process.

This thesis draws on national research but focuses on Washington, DC. It is, therefore, critical to understand the necessary terminology and how DC's criminal system, especially regarding courts and pleas, compares to other jurisdictions' dominant structures. This overview of Washington DC's specificity is followed by a literature review. The reviewed research considers the evolution of plea bargaining; events that led to the rise of plea agreements; legal and non-legal factors guiding plea outcomes; and the role of the courtroom workgroup. After the literature review, the methodology for this thesis' research is explained. Next, the findings and discussion chapters summarize and analyze the participants' perspectives on contemporary plea bargaining. Finally, the ideas discussed in this thesis will be synthesized in the conclusion, and the implications of this study will be considered, including future research needs.

**The Criminal System and Plea Agreements**

The institutions and practices widely referred to as the criminal justice system are directly responsible for arresting, prosecuting, and punishing those suspected and convicted of criminal behavior (*Oxford Languages*, n.d.). The nomenclature of the criminal justice system is increasingly debated and challenged by many activists, academics, and lawyers who argue that the word *justice* is a misnomer because "justice" is not at the forefront of, or often absent from, this system's practices. While the dominant term remains the criminal justice system, other names include the criminal legal system, the criminal punishment system, and the criminal system (Mayeux, 2018). This thesis used the term the criminal system.

There is also debate about the usage of the term plea bargain; using the word 'bargain' has at times been questioned by the defense, the public, and prosecutors (Wilford et al., 2019). In declining this researcher's request to interview prosecutors in the U.S. Attorney's Office, a public affairs employee noted that some prosecutors "take exception to the term 'bargain'" because "some lawyers bristle at the idea that a defendant got a 'bargain'" (personal communication, February 27, 2023). Public defenders interviewed for this thesis tend to argue that, more often than not, prosecutors get the 'bargain' and not their clients.

**DC Criminal System**

This thesis focuses on the adult criminal system within DC. Under U.S. federalism, the federal, state, and local governments have their own criminal systems, however, DC is neither a distinctly federal or state criminal legal system. It also has several unique attributes worth highlighting when examining how pleas function/operate in its unique jurisdiction. First, since DC is not a state, the Superior Court of the District of Columbia (DCSC) is DC's trial court. It was established by Congress as the city's trial court of general jurisdiction (*Superior Court*, n.d.). The Criminal Division of the Superior Court has jurisdiction over all local DC criminal matters, including "felony, misdemeanor, District of Columbia code violations, and criminal traffic cases" (*Criminal Division*, n.d.).

Second, DC was a national pioneer in pretrial reform, prohibiting cash bail in 1992 (Lockwood & Griffin, 2020). States such as California, Alaska, Georgia, New Jersey, New York, and Vermont have passed or are working to pass and implement bail

reform, including eliminating monetary bail; however, cash bail is still widely used throughout the U.S (Lockwood & Griffin, 2020). Therefore, unlike most jurisdictions, cash bail is not the leading cause for pretrial detention in DC. This fact is significant because pretrial detention is a leading reason to induce defendants to plead guilty. Most defendants in states that employ a cash bail system are subject to long pretrial detention durations due to their inability to afford bail, which increases their likelihood of pleading guilty (Digard & Swavola, 2019; Sawyer & Wagner, 2023).

Third, DC's adult criminal defendants, charged with federal and local serious crimes, are prosecuted by federal prosecutors within the United States Attorney's Office (USAO) (United States Department of Justice, 2019). In contrast, most states (45 out of 50) have locally elected prosecutors who try local misdemeanors and felonies (Hessick, 2020). The Superior Court Division of the USAO prosecutes most local (non-federal) adult crimes (United States Department of Justice, 2023).

Fourth, DC has a perhaps uniquely and certainly unusually strong and resourceful public defense system for court-appointed cases of indigent defendants. The main source of public criminal defense is the nationally recognized Public Defender Service for the District of Columbia (PDSDC), which serves as a model public defender office and employs career public defenders. This broader public defense system also includes a private panel of attorneys, known as Criminal Justice Act (CJA) attorneys; moreover, many DC law schools have criminal defense clinics that receive select cases, often misdemeanors (personal communication, August 12, 2023). (Means of public defense and public defense offices differ by jurisdiction elsewhere in the country.) Public defenders interviewed for this thesis were all PDSDC lawyers as indigent criminal

defendants in DC are predominantly defended by public defenders from their Trial Division. Importantly, however, lawyers were interviewed in their personal capacity based on their individual observations and experiences. Their views are their own and do not represent the views of the Public Defender Service or the federal or state offices where the retired prosecutors were formerly employed. A significant difference between PDSDC and other states' public defender offices is that PDSDC was intentionally designed to be a model public defender office (personal communication, August 12, 2023; *Mission & Purpose*, n.d.). In doing so, PDSDC has and continues to receive appropriations directly from Congress. Being a federally funded entity allows it to be consistently well-funded, well-staffed, and well-trained (PDS Historical Timeline, n.d.), whereas, in the rest of the US, most defendants are represented by public defender offices that are funded by various means, usually inadequately (Defender Services, n.d.; Joe, 2021). Across the country, public defender offices are typically underfunded, understaffed, under-resourced, and overworked (Atlanta News First, 2023; Jackson-Gleich & Bertram, 2021). The funding differential affects resources like staffing and investigators as well as the caseloads of the public defenders. Since PDSDC receives regular funding and can retain more staff, its clients are at an advantage relative to indigent clients in many, and probably most, other jurisdictions.

Fifth, as of 2022, DC's racial demographic consists of 46.2% of white people, 45% of Black people, and 8.8% of other races and ethnicities (*U.S. Census Bureau QuickFacts,* n.d.). Although Black and Brown people are not the majority population group, they are the overwhelming number of defendants and detainees (88%) in DC (*DC's Justice Systems Overview 2021*, 2022). This is in part due to the disproportionate

policing of people of color compared to white communities. The racial disparities in DC and nationwide are discussed further in the literature review; these disparities at times reflect and at times differ from other patterns in the nation.

Despite the unusual or distinct features of the DC criminal system, the city does not differ much from the national pattern in its enormous dependence upon plea agreements. One means to understand both similarities and differences in DC's use of pleas compared to the country more broadly is through the perspectives of public defenders and prosecutors since they are responsible for spearheading plea negotiations.

# Chapter Two: Literature Review

## The Rise of Plea Agreements

Pleas involve four key players with uneven power throughout the proceedings: the prosecutor, the criminal defendant, the defense lawyer (public defender or private defense counsel), and the judge. In practice, pleas can be offered, requested, negotiated, rejected, withdrawn, or accepted at many points between the defendant's initial charging and conviction. The prosecutor typically presents the defendant and the defense attorney, or just the attorney, with a plea offer the defense will negotiate, accept, or reject (Wilford et al., 2019). Defense counsel can request an offer, or prosecutors can initiate them independently. In contrast to the public nature of trials and most other court proceedings, plea offers and negotiations are private conversations that can take place in many different settings, like the courtroom or courthouse steps (personal communication, August 12, 2023). The judge typically plays a minimal but crucial role in this process by approving and signing plea agreements between the defendant and the prosecution while simultaneously confirming that a defendant is entering into the agreement knowingly and voluntarily; otherwise, the agreement is not legally binding (*Boykin v. Alabama*, 1969). (Although judges play a role in plea deals, this research focuses on the parties negotiating plea agreements.) By accepting a plea offer, the defendant avoids a trial. However, in actuality, defendants often and perhaps usually are caught between a rock and a hard place when faced with the decisions of going to trial or pleading guilty as, the majority of defendants, have minimal power in these scenarios to negotiate, which will be discussed further in this chapter.

William Ortman's (2020) article, "When Plea Bargaining Became Normal," describes the origin of plea bargaining from the 1920s and how this once uncommon practice slowly became a more expeditious and dominant method of disposing of cases. Several crime commissions, formed by legal scholars and reformers, including the New York Crime Commission, explained that the plea process incentivizes criminal defendants to forego a trial and thereby an extensive and lengthy process for the government, in exchange for prosecutorial concessions such as pleading to a lesser charge (Alschuler, 1979; "The Trial Penalty," 2018; Ortman, 2020). In addition, guilty pleas were secured if defendants were assured the prosecutor would seek leniency in sentencing compared to what they likely would have received if they denied the plea offer, went to trial, and were found guilty. From the 1920s to the 1960s, the criminal system would see a boost in plea agreements.

Pleas were initially not well regarded by the crime commissions because many of their members believed they let defendants avoid punishment (Ortman, 2020). In this view, prosecutors should seek the maximum punishment the law allows, rather than compromise with defendants and offer lenient penalties. As the plea process was normalized, two arguments were especially persuasive, the efficiency of pleas and their ability to focus on the culpable individual, or the criminal, more than the crime. As Ortman notes, "[b]y the 1960s, . . . the legal profession had learned to love it" (2020, p. 1435).

Ortman notes while scholars were worried about the impact of plea bargaining on the criminal system in their earlier critiques, they seldom considered the implications for defendants who were at times coerced into plea agreements. He argues that this failure

reflected reformers' greater concerns with controlling crime than protecting due process and added their emphasis on "crime control, moreover, may have been inflected by racial, nativist, and class prejudices" (p. 1469). By way of example, he cites a president of the Institute of Criminal Law and Criminology who "blamed Chicago's crime woes in part on Black people" (Ortman, 2020, p. 1469). In addition to racism, other changes brought by a changing world, from immigration to urbanization led to reformers being far more concerned with prosecutorial convictions than defendants' rights, a concern which continues into the present day.

### *The Trial Penalty*

Both coercion and the expanded use of pleas in the late twentieth century and continuing into the present are connected to the trial penalty (Reimer & Sabelli, 2019; "The Trial Penalty," 2018). The trial penalty refers to the difference, often significant, between the sentence a defendant would receive from pleading guilty (pre-trial) and the sentence they would likely receive if convicted in a trial ("The Trial Penalty," 2018). For example, for the same act, a prosecutor may offer to charge a crime as a misdemeanor if the defendant pleads guilty, but if the defendant pursues their right to a trial, that conduct would be charged as a felony. In part, the trial penalty reflects a risk associated with all trials, but Reimer and Sabelli (2019) argue that prosecutors employ the trial penalty as a punitive measure when defendants exercise their right to trial. Prosecutor's purposeful choice to charge people with crimes that have associated mandatory minimums and practices known as "stacking charges" - combining multiple and similar charges of a crime on a defendant - increases the risks defendants must consider, making a prosecutor's plea offer more enticing because these policies "often

make the risks of taking a case to trial intolerable" ("Stacked," 2023;Plea Bargain Task Force Report, 2023, p. 6). In addition, prosecutors may extend an "exploding offer" in which the offer has an expiration date, and the defense only has a short window to consider and accept; if they do not, the prosecutor may retract the offer and not extend another, or they will retract and present a less lenient one than before (Alkon, 2017). While a defendant's decision about whether to go to trial is almost inevitably difficult, the trial penalty adds significant psychological and practical pressure. Defendants must battle through the enticement of the offer, the fear and anxiety of potentially spending years incarcerated, and the weight of having to make this decision quickly (Dervan, 2019). Their fear can lead them to take a plea regardless of their guilt or whether they believe they have a strong case to present at trial that could diminish the seriousness of the charges, identify mitigating factors, or even prove their innocence (Beenstock et al., 2021; Dervan & Edkins, 2013). The trial penalty is an important explanation for why guilty people accept overcharging or over punishment and even innocent people plead guilty (Dervan & Edkins, 2013). Since its inception, the trial penalty has been criticized for coercing defendants into plea agreements. The Supreme Court upheld the constitutionality of plea agreements in the 1970 *Brady v United States* unanimous decision, which held that significant sentencing differentials and even threats of seeking the death penalty "does not require every guilty plea to be overturned" as the pleas are made by defendants voluntarily and with advice from competent counsel.

### *Plea Agreements Emerge as Dominant Among Political and Social Changes*

The continued rise in plea bargaining occurred at the same time as other important political and social changes in the US, including changes in how legislators

defined and penalized crime to changes in crime patterns. The United States experienced a significant uptick in violent crimes from the 1960s to the 1990s ("Rising Incarceration Rates," 2014). From 1964-1974, homicide rates doubled in the US, and before the decline in crime in the 1990s, the rates among Black young men were about ten times that of their white counterparts ("The Underlying Causes of Rising Incarceration: Crime, Politics, and Social Change," 2014). This trend in violent crime is in part due to socioeconomic changes such as the tail end of the Great Migration, white flight, hypersegregation, and changes in economic opportunities, including deindustrialization especially hurt less educated Black men in urban areas (Morenoff & Sampson, 1997). Homicide rates were especially high in poor urban neighborhoods compared to more affluent ones ("The Underlying Causes of Rising Incarceration: Crime, Politics, and Social Change," 2014). In addition, widespread civil rights protests in the cities, as Black people demanded equal rights, were often perceived by white people, and framed by white politicians and the media, as reflections of criminal disorder rather than struggles for equality, dignity, and opportunity ("The Underlying Causes of Rising Incarceration: Crime, Politics, and Social Change," 2014). In response to the rising crime rates and the Civil Rights Movement, Republicans and Democrats called for increased law enforcement policies leading President Johnson to enact the "war on crime" ("The Underlying Causes of Rising Incarceration: Crime, Politics, and Social Change," 2014). While the war on crime did increase federal government involvement with crime policy, President Johnson intended his war on poverty to focus on root causes of crime, like inequality and structural disadvantage. However, during the implementation of the crime policies, the root causes were

usually forgotten. Moreover, while the Johnson administration sought to address and redress crime with comprehensive approaches that included policing reform and investments in the poorest communities, the approach increasingly displaced and replaced social welfare efforts with expanding powers of the criminal system ("The Underlying Causes of Rising Incarceration: Crime, Politics, and Social Change," 2014; Hinton, 2017). Even more, future administrations almost exclusively focused on repressive rather than "root causes" approaches to crime and capitalized on the public's fear of crime by offering expanded criminalization and more punitive policies and practices.

The 1970s saw an expanded growth in categories of conduct defined as criminal, which critics labeled as overcriminalization, exacerbating the growth and normalization of plea bargaining as the primary mechanism to process criminal cases (Alexander, 2010); and increased opportunities for the trial penalty, especially with the expanded use of mandatory minimum sentences in the last three decades of the twentieth century. In 1971, President Nixon, with approval from Congress, declared a "war on drugs" in which he extended the criminalization of drug use, increasing federal involvement and funding for drug control agencies like the Drug Enforcement Agency (Wilford et al., 2019). As Wilford, Shestak, and Wells (2019) explain, Nixon implemented zero-tolerance policies like mandatory sentencing guidelines, which outlined the mandatory punishments courts must impose on defendants for certain offenses without consideration of any mitigating circumstances. These policies were attached to many drug offenses. President Ronald Regan continued where Nixon left off, and the number of people incarcerated for non-violent drug offenses increased

from 40,000 in 1980 to 500,000 by 1997, becoming the driving force for prison population growth (Hodge & Dholakia, 2018; Alexander, 2010). These policies caused decades of mass incarceration and mass case processing which overloaded the court system (Alexander, 2010).

For nearly 30 years, the war on drugs criminalized and led to the incarceration of hundreds of thousands of people; importantly, it disproportionately targeted Black and Brown drug users, creating an inordinate racial disparity within the criminal system by explicit targeting (Boyd, 2001) people of color. Although the drug war was framed by various presidential administrations as criminalizing all drug usage, the original goal was to disrupt and discredit the Black community and antiwar activism (Cummings & Ramirez, 2022). Nixon's top advisor during this campaign, John Ehlricman, admitted as much (Cummings & Ramirez, 2022):

> You want to know what this [war on drugs] was really all about? The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people…We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did. (Ehlricman cited in Baum, 2016)

The war on drugs performed precisely as Ehlricman and Nixon set out for it too. The Black incarceration rate rose 47.9 percent from 1973 to 1979 (Christianson & Dehais, 1980). An expanded but altered version of this tactic, or at least consequence, continued with the 1986 creation and execution of the crack cocaine sentencing policy, also known as the 100:1 quantity ratio, where a person arrested with 100 grams of powdered cocaine receives the same severity of punishment as a person with 1 gram of crack cocaine (The Sentencing Project, n.d.; *Racial Disparities in Sentencing in the United States*, 2022). This sentencing policy criminalized Black drug usage more than those of whites, as crack cocaine was associated incorrectly as primarily a drug used by Black people (*Racial Disparities in Sentencing in the United States*, 2022). In 2019, 81% of crack cocaine convictions were of Black people, while historically, over 66% of crack users were white and Hispanic (*Racial Disparities in Sentencing in the United States*, 2022). More broadly, Black and white people tend to use drugs at comparable rates but are policed, sentenced, and punished at far higher rates: “Black people are nearly four times as likely as whites to be arrested for drug offenses and 2.5 times as likely to be arrested for drug possession” (Nellis, 2021, p. 14). Pleas rather than trials made the war on drugs far more efficient.

Trials are an inherently lengthy, time-consuming process that can overwhelm the court dockets and require more financial and legal resources than plea agreements (Ortman, 2020). Typically, trials can span months to years, and legal services can be costly. According to the Urban Institute, "In 2020, state and local governments spent $129 billion on police (4 percent of state and local direct general expenditures), $86 billion on corrections (2.5 percent), and $51 billion on courts (1.5 percent)" (*Criminal*

*Justice Expenditures*, n.d.). Plea agreements provide a swift and relatively inexpensive means of deciding criminal cases, often at the cost of how millions of people would normatively understand and experience true justice.

## Plea Bargaining Today

On a national level, existing research has examined and identified why the criminal system depends on plea agreements and several factors influencing plea outcomes. The most relevant factors impacting plea outcomes are the trial penalty discussed previously, bail and pretrial detention, and systemic inequalities. It is difficult to discern if one of these factors has more of an effect than the others, but each factor can guide plea outcomes (Subramanian & Digard, 2020).

### *Bail and Pretrial Detention*

When defendants are arraigned for their charges, the judge typically grants or denies them bail, a monetary conditional release of a defendant with the requirement that they appear for trial (Sawyer & Wagner, 2022). Defendants are jailed until their trial if they are denied bail or cannot afford it. They are only released from detention if one of these actions occurs: they raise sufficient funds for bail or a bail bond, accept a plea deal that does not involve further incarceration, the bail is reduced and paid, or the case is dismissed (personal communication, August 12, 2023; Sawyer & Wagner, 2022). Heard and Fair (2019) interviewed lawyers in New York, and they regarded bail, usually unaffordably high, as a method of persuading defendants to plead guilty quickly. Instead of bail, judges do have other ways to release defendants pending trial, including releasing defendants on their own recognizance (ROR) or on supervised conditions or regulating them to a treatment facility (Dobbie et al., 2018). Judges may deny a defendant's release,

including the option of release on bail, for several reasons. First, defendants can be detained due to the crime's severity and to "protect the community" (Detention Prior to Trial., n.d.). Second, if a defendant has a criminal history, including prior arrests, warrants, and convictions, they can be detained. Relatedly, in states that participate in cash bail, a defendant's release can be denied due to previous bail violations (*Legal Information Institute - Jump Bail,* 2020). Third, if the judge believes a defendant will violate their conditional release and will not return for their future hearing, they can be detained (Detention Prior to Trial., n.d.). Both the unaffordability of bail and the denial of bail lead to pretrial detention.

Nick Petersen (2019), author of "Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas", examined whether pretrial detention affected plea outcomes. He found that "detainees plead guilty 2.86 times faster than those released pretrial" (2019, p. 1026) for reasons unrelated to actual guilt or innocence. First, detainees may plead guilty due to the uncertainty of the duration of their detention to avoid extended stays in jail or to accept a plea deal for time served. Second, defendants may plead to end the strain on themselves and their families. Many defendants were supporting their families in whole or in part prior to being jailed, leading to increased poverty and precarity (DeFina & Hannon, 2013). Once jailed, most detainees' families are further heavily impacted financially when trying to raise money for legal fees and bail money, "The median bail amount for felonies is $10,000, which represents eight months' income for a typical person detained because they can't make bail" (Sawyer & Wagner, 2022). In addition to financial costs, there are emotional costs as part of a family's support system has been removed. Essentially, whatever role the

detainee was filling, whether parent, breadwinner, caretaker, or more, that position is now unfulfilled, and their family must adjust while they are detained.

Lastly, Petersen (2019) references the physical reality of jails as accelerating the likelihood of detainees pleading guilty. Isolation, lack of recreation, a violent environment, and insanitary living conditions are among the many negative realities that tend to be the norm in many jails. These can mentally break down defendants and incentivize plea offers. The DC Jail, formally known as the DC Department of Corrections Central Detention Facility (CDF) and the Correctional Treatment Facility (CTF), has long been criticized as having unsafe and inhumane conditions (Carlisle, 2022; *Correctional Facilities*, n.d.). For example, in 2015, the Washington Lawyers Committee for Civil Rights and Urban Affairs released a report, "D.C. Prisoners: Conditions of Confinement in the District of Columbia," describing the DC Jail as having failed physical infrastructure like leaking ceilings, infestations of pests, black mold on the walls, sewer odor, and brown drinking water (Beaujon, 2022). Despite multiple reports about the unsafe and unhealthy living conditions in the jail, until the complaints came from white far right-wing detainees jailed while awaiting charges for insurrectionist activities on January 6, 2021, little attention was given to the concerns from the predominantly local Black and Brown detainees (Carlisle, 2022). Ongoing complaints ultimately led the U.S. Marshals Service to perform an unannounced inspection in October 2021, resulting in the removal of 400 detainees from the jail after observing several egregious conditions, like water and food being withheld from detainees as punishment, lack of medical attention for defendants with evident injuries, and sewage piled high in toilets due to water being shut off for several days (United States Marshals

Service, 2021). Whether in DC or elsewhere, confinement coupled with unsanitary, inhumane conditions puts detainees in untenable situations where plea offers look more enticing every day they spend detained.

Although DC does not have a cash bail system, the DC Jail is still filled with people awaiting trial. The Pretrial Services Agency for DC reported that most detainees (85%) are released pretrial or on supervised conditions, but 15% are ultimately detained. Compared to nationally, this percentage is low; however, 85% is misleading as this percentage includes subsequent releases (*Release Rates for Pretrial Defendants in the Superior Court, Washington, DC: FY 2022*, 2023). Compared to initial releases, subsequent releases refer to a defendant being detained longer in the pretrial period and then being released before the disposition of their case. While the defendant is ultimately released, the time in which they were detained is unknown, and any length of detention can have adverse effects on defendants and inform whether they plead guilty due to the short glimpse in which they saw their future.

DC detainees experience lengthy stays in jail. According to the DC Department of Corrections (DOC) Facts and Figures report, as of January 2020, the percentage of women held pretrial for a felony offense was 21.9%, with an average of 110.3 days spent in jail and 16.4% for misdemeanor offenses for an average of 23 days in jail. Almost 25% of men were held pretrial for felony offenses and 5.3% for misdemeanors. Men were jailed for about 229 days for felonies and 30 days for misdemeanors.

While poor conditions of detention can incentivize a person to accept a plea offer, not being detained pretrial can improve a defendant's position in plea negotiations. Dobbie, Goldin, and Yang, in "The Effects of Pretrial Detention on Conviction, Future

Crime, and Employment: Evidence from Randomly Assigned Judges" (2018), show that detainees released pretrial tend to have strengthened bargaining power during plea negotiations than those subjected to pretrial detention. Dobbie et al. (2018) analyzed court data from two Philadelphia and Miami-Dade courts for all defendants arrested and charged from 2006 to 2014. They found that pretrial release notably decreased the use of guilty pleas and that released defendants were "14.0 percentage points less likely to be found guilty, a 24.2 percent decrease from the mean, and 10.8 percentage points less likely to plead guilty, a 24.5 percent decrease from & mean" (p. 225). Excessive bail and lengthy pretrial detention can increase the likelihood of defendants pleading guilty.

***Systemic Inequalities***

The realities and steps that lead up to the plea process are shaped by pervasive and systemic inequalities that enable and exacerbate the mass incarceration of Black, Brown, and poor people. Racial disparities in the criminal system, from police stops to sentencing outcomes, may lead to more Black and Brown people having to consider plea offers. First, Black, Brown, and/or indigent defendants are more likely to be arrested and charged, including due to heightened police presence in their neighborhoods, compared to the much lower policing of white people and wealthier neighborhoods (Rehavi & Starr, 2014; Nellis, 2021). Racial profiling of people of color in white neighborhoods also highlights racially unequal policing (Fagan et al., 2016). Data gathered from MPD's officers' reports reflected that Black people made up 86.1% of stops (9,514 of 11,045) and 91.1% (3,933 of 4,315) of searches that resulted in no ticket, warning, or arrest (*Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, 2020). Stops and searches were not isolated to predominantly Black

neighborhoods, but Black people were also stopped and searched at higher rates in primarily white districts of DC. In the First District of DC, Black people made up 30% of the population, but 74% of the people stopped by police. In the Second District, seven percent of Black people were residents but they were 41% of the people stopped (*Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, 2020). In 2022, MPD recorded approximately 14,991 arrests; of those arrests, 12,900 were arrests of Black people compared to 1,418 white people (*Arrests by Year: 2022*, 2022). The racially disparate stops largely influence whom MPD arrests in DC, contributing to public defenders' client pool of Black defendants, thereby affecting the likeliness of Black people pleading guilty.

Disparate policing, generally and specific to DC, is part of a broader context in which various kinds of inequality lead Black, Brown, and poor people into the criminal system. Residential segregation, a byproduct of many policies including redlining, is associated with economic disinvestment and declining social and economic resources in predominantly Black neighborhoods (Rothstein, 2017). Light and Thomas (2019) state that the absence of resources almost guarantees a concentration of poverty leading to unsustainable education quality, loss of employment, food deserts, and more. Structural disadvantages such as these contribute to increased rates of violence and crimes (Love et al., 2022). Love et al. (2022) note that gun violence is especially prevalent and concentrated in neighborhoods that experienced "systemic disinvestment, segregation, and economic inequality" (Rowlands & Love, 2022). The Brookings Institute found that low-income individuals are more likely to experience victimization compared to high-income individuals (Kearney et al., 2014). The divestment from these neighborhoods

primarily impacts Black and Brown people making them more susceptible to criminal activity, suspicions of criminality, and arrests (Love et al., 2022; U.S. Department of Housing and Urban Development, 2016). Illustrative of some of these trends, the DC DOC reported that the majority of its detainees were unemployed at the time of their incarceration and had only a GED or high school diploma as their highest education (*DC Department of Corrections Facts and Figures January 2023*, 2023). The absence of social and economic resources is replaced with investments in policing (Love et al., 2022). These inequalities and disparities provide a shaping backdrop to the plea system that defendants will experience as they traverse the court system.

### *Critical Roles of the Courtroom Workgroup*

Existing literature has explored the power dynamic between prosecutors and public defenders including in the courtroom workgroup. This term refers to the people like prosecutors, criminal defense lawyers, and judges who often or routinely work together because their jobs demand it, including making case management decisions (Chretien, 2014; Field et al., 2023; Rude & Portillo, 2012). Plea agreements cannot only be understood as technical, based on law and fact, but also as interpersonal, involving people with relationships, egos, and career decisions that factor into these interactions. Defendants and jurors come and go, but judges, prosecutors, and public defenders interface routinely, allowing them to build a rapport. Despite their different professional roles and possibly their different outlooks on life, prosecutors, defense counsel, and judges may have similar backgrounds, both educationally and professionally, and some shared perspectives on court operations. They may even have common goals, like disposing of their caseloads and achieving justice. Although the court process has

adversarial dynamics, in practice, the courtroom workgroup underscores a higher degree of collaboration, compromise, and negotiation, especially during plea negotiations.

Judges have a more subtle and sometimes passive role in the plea process. Judicial involvement in plea negotiations varies from state to state depending on the local law as well as common practices (Henderson et al., 2021). However, in DC, judicial involvement in plea negotiations is strictly prohibited (Henderson et al., 2021). Nevertheless, even in DC, judges implicitly suggest to the two parties that they consider all forms of resolution, i.e. a plea agreement (personal communication, August 12, 2023). Plea negotiations do not require judicial supervision, only approval, so judges only participate once the defense and prosecution have agreed to a deal. Their role is crucial during the plea colloquy, the process in which the judge advises defendants of their rights, asks them questions to confirm that they are voluntarily and knowingly entering into this agreement, and assesses the evidence for validity (*Boykin v Alabama*, 1969; Henderson et al., 2021).

Public defenders are not immune to power dynamics between themselves and the other members of the courtroom workgroup, including those that could compromise their defense. They need to carefully and strategically manage their relationships with judges and prosecutors for their clients and themselves, balancing advocating for their clients with good working relationships with their colleagues. An uncollaborative public defender may have difficulty getting a favorable plea offer for their clients. Being an unrelenting and uncompromising attorney could hurt them professionally and impact the trajectory of their career, including at the expense of the defendants they represent (Field et al., 2023). Public defenders may, at times, be incentivized to overuse plea agreements

as a means to decrease what are commonly crushing caseloads as they have to pick which cases to give their full efforts to; in practice, they cannot reasonably provide a sound defense to each client (Field et al., 2023). Plea agreements give strained public defenders a reprieve to focus on "better" cases they can take to trial (Joe, 2021; Andersson, 2022). Where PDSDC may be better placed to resist the pressures of incentives to get their clients to plead due to better resources, public defenders nationally have to walk a tightrope.

Prosecutors' roles in the criminal system are ever-shifting between "adversarial and inquisitorial forms of justice, between courts and the police, between vengeance and mercy, between law and discretion, and—particularly in the United States—between politics and law" (Sklansky, 2017, p. 25). Where public defenders advocate for their clients, prosecutors balance advocating for the victims - who are not their clients - and justly prosecuting defendants. During plea negotiations, they must consider the victim and their families' rights as well as the victim's vision of justice. The 2004 federal Crime Victims Rights Act, passed in 2004 required that, at minimum, victims must "be informed in a timely manner of any plea bargain or deferred prosecution agreement" (Rights of Victims, 2020). While extending a plea offer to a defendant is up to the prosecutor, this Act gave victims unprecedented involvement in criminal proceedings as they can at least inform the prosecutor's decision (Jones, 2014; *Victim Input Into Plea Agreements*, 2002). In the end, prosecutors typically revert to a more punitive ideology to prosecute defendants (Sklansky, 2017).

In addition, prosecutors also have career aspirations and perhaps disproportionate political goals. Jed Shugerman, a Fordham University historian, collected data and

produced a database exploring the emergence of US "prosecutor politicians" (Sawyer & Clark, 2017). Shugerman's project came from an observation that prosecutors with "political aspirations appear to have prioritized public opinion and personal gain over justice" (Sawyer & Clark, 2017). The Prison Policy Initiative extrapolated data from Shugerman's database to examine public officials' backgrounds and found that in 38 states between 2007 and 2017, state attorney generals (38%), governors (19%), and US senators (10%) all possessed prosecutorial backgrounds (Sawyer & Clark, 2017). Getting convictions and appearing "tough on crime" leads to prosecutors aiding their political aspirations but hindering the criminal system's fairness (Sklansky, 2017).

While the courtroom workgroup is intended to be collaborative, most case-making decisions are more unilateral as prosecutors have more power (Frederick & Stemen, 2012). David Sklansky (2017), in "The Problems With Prosecutors," outlines several problems with the American prosecutorial practice. First, Sklansky (2017) offers several explanations as to how policies over the years have empowered prosecutors leading to the expansion of their role. The "tough on crime" policy, mandatory minimums, and other sentencing guidelines have given prosecutors more leverage to be punitive and have increased influence over sentencing that was previously reserved for judges. In addition, Sklansky questions if the expansion of prosecutorial power can be attributed to the increase in criminal offenses and cases and then, in turn, the rise of plea agreements. While this question is debated among scholars, it is clear that a prosecutor's ability to offer a significantly more lenient sentence pretrial than what they would recommend post-trial would be an ineffective incentive without plea agreements.

Ample prosecutorial resources and lax discovery laws have also led to the empowerment of prosecutors and the disempowerment of defense lawyers and their clients (Sklansky, 2017). Prosecutors generally have more knowledge of the evidence and information that affects cases due to more efficient investigative resources like police officers and technology software (Chretien, 2014; Hill, 2019). On behalf of prosecutors, law enforcement gathers evidence via warrants and court orders, whereas public defenders cannot and have to wait to obtain discovery (Hill, 2019; Klinkosum, 2013). While PDSDC has investigators to help gather evidence for their cases, many public defender offices elsewhere are so short-staffed that the public defenders themselves are the investigators on top of their untenable caseload, which makes it almost impossible to investigate every case (Andersson, 2021; Atlanta News First, 2023). Moreover, prosecutors have limited pretrial discovery obligations requiring them to turn over exculpatory evidence (Sklansky, 2017). Mike Klinkosum (2013), in "Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files," discussed the prevalence of *Brady* violations, prosecutors illegally withholding exculpatory evidence, leading the defense to advise their clients based on partial information. During negotiations, this knowledge gives prosecutors more leverage over the defense attorney and defendant when presenting a plea deal since they have a bigger picture of the case.

Prosecutorial power is profoundly influenced by their expansive legal and institutional discretion. Angela Davis (2005), in "The Power and Discretion of the American Prosecutor," notes that charging discretion allows prosecutors to choose whom to charge, what offenses to charge, and the sentences to recommend. Prosecutors can handpick defendants and cases they want to pursue, recommending the minimum or

maximum sentences for each offense (Sklansky, 2017). While prosecutors have to have a factual basis, backed up by evidence, for their charging decisions, they often have a wide range of statutes to choose from which allows them extensive options to charge defendants: "Many criminal statutes overlap, and the same conduct is often punishable by a range of different statutes carrying different maximum—and sometimes minimum—penalties" (Sklansky, 2017, p. 26). Prosecutors typically have considerable range to create the conditions to fact bargain, charge bargain, and sentence bargain during plea negotiations through their discretionary powers. At times, prosecutorial discretion is vital as every criminal case is different, as are the circumstances leading a defendant to be prosecuted. Their discretion can allow them to consider the mitigating factors of a case to help determine if they want to pursue charges as well as other choices, from diversion programs to community-based punishment to incarceration (Davis, 2008). Davis argues that prosecutors exercise discretion inconsistently and haphazardly without enforceable laws and guiding policies.

Inherently, plea negotiations lack transparency, but even more so when there are no mechanisms or policies to account for prosecutors' discretion. A frequent criticism of prosecutors is the lack of checks and balances on their power and discretion (*Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson*, 2016). There is very little oversight over prosecutors' charging decisions and plea negotiations, and it is crucial to underscore this point as the range of prosecutorial power and the consequences of their power are in part due to the lack of oversight (Sklansky, 2017). In addition to the lack of oversight, there is limited information and no systematic data collection to capture the full breadth of prosecutors' decision-making (*Prosecutorial*

*Oversight: A National Dialogue in the Wake of Connick v. Thompson*, 2016). Data collection among prosecutors' offices is inconsistent from office to office, limiting the data available for the public to review (Olsen et al., 2018).

This thesis considers these issues with respect to Washington, DC, through the professional perspectives and experiences of public defenders and prosecutors. The methodology section discusses how participants for the study were recruited, the procedural steps the researcher took to ensure anonymity and human subjects' protection, and how the findings were analyzed.

# Chapter Three: Methodology

This study's initial goal was to interview ten practicing D.C. attorneys: five prosecutors and five public defenders. However, due to the difficulty in getting responses from the attorneys, the researcher interviewed four public defenders from DC's Public Defender Service, a DC retired Assistant United States Attorney, and a retired federal prosecutor from Philadelphia.

Each respondent was asked about their demographic characteristics during the interviews, and it was used as the basis to identify the demographic profile of the respondents. A summary of their demographics is outlined in the findings, and their significance will be considered in the discussion. Understanding the results requires assessing what the respondents said and the implications. However, there are significant implications in addressing the research goal that could not be adequately confronted, as it sheds light on the broader research context. Indeed, missing information can be a key to understanding key elements of broader questions, theories, or answers being researched (Singh & Richards, 2003).

Interviews were used to determine the respondents' perspectives of contemporary plea bargaining, specifically in Washington, DC, and address how they believe the plea bargaining processes impact defendants. Interviews were the best mechanism for this study because they allowed for further probing questions that could not be done within another setting.

The participants were selected through purposive and snowball sampling, which are non-random ways of selecting individuals for the study (McCombes, 2019).

Purposive sampling is the intentional selection of subjects based on the researcher's expertise to identify the most valuable subjects for their research (Robinson, 2014). In snowball sampling, each respondent is asked to give "the name of at least one more potential interviewee (Kirchherr & Charles, 2018).

Purposive sampling was used to identify subjects since the researcher had specific criteria that the participants needed to meet to participate (McCombes, 2019). For this study, there were explicit inclusion and exclusion criteria. To be eligible, participants had to be practicing prosecutors or public defenders in criminal law in Washington, D.C. This included public defenders in the Public Defender Service for the District of Columbia's (PDSDC) Trial Division and prosecutors in the United States Attorney's Office's (USAO) Superior Court Division. All other offices and departments were initially excluded. Other than those exclusions, these attorneys did not have to meet age, race, or gender requirements. Through purposive sampling, the researcher selected participants for the study from LinkedIn. Next, the researcher searched LinkedIn profiles for employees connected to PDSDC or USAO. The researcher selected profiles that fit the criteria by which the subjects identified themselves as working in the Trial Division of PDSDC or the Superior Court Division of USAO. Based on their profiles, all the people approached to be respondents handle criminal misdemeanor and felony cases in Washington, D.C. Once the researcher identified subjects who met the requirements, the researcher emailed them to inquire about participating in the study.

Second, snowball sampling was used because the researcher needed help getting subjects to participate. This method is typically used when the population the researcher is looking to study is hard to reach and needs the help of subjects to identify more willing

participants (Kirchherr & Charles, 2018). At the end of each interview, the participants were asked if they would recommend other potential subjects for the researcher to contact via email. The researcher informed each interviewee of the criteria needed in participants to ensure that the interviewee recommends the appropriate individuals and to limit any sampling bias that may arise. If participants suggested individuals to contact, the researcher emailed them. Lastly, the researcher gained participants through educational and professional help from mentors, professors, and colleagues.

It is important to note that all methods used for recruitment were unsuccessful in recruiting practicing DC prosecutors from the USAO who were unwilling to reply and/or to participate. The researcher, therefore, expanded her sample by loosening the criteria needed to participate in order to get prosecutorial perspectives. With that option, the researcher interviewed two retired federal prosecutors: one practiced in DC and the other in Philadelphia. Since one of the prosecutors had practiced in Philadelphia and not DC, only this person's responses to general questions regarding the plea bargaining system were recorded.

Before starting the research process, the researcher submitted an application to George Washington University's Institutional Review Board (IRB) to ensure all ethics requirements were met and all protocols followed for this study. The application described the study's research procedures, methodology, schedule, and steps to protect subjects and their welfare. The IRB approved this study for legal and ethical compliance with protecting interviewees' privacy and confidentiality. The research team obtained verbal consent and requested a waiver of documentation of consent from each research subject at the start of each interview. In addition to verbal consent, participants were

provided a copy of the consent form via email before the interview to be reviewed beforehand. There was no option for respondents to disclose identifying information on a consent form because of the use of verbal consent. Participants acknowledged they understood and agreed to the procedures, including audio and video recordings, risks and benefits associated with the study, and the measures taken to maintain confidentiality. Since the research subjects are practicing and retired lawyers, they have intense legal knowledge through their education and professional experiences, making them more qualified than many other research subjects to understand and review the information on the consent form and verbal consent to ensure their rights are protected.

**Procedures**

The researcher conducted virtual, one-on-one, semi-structured interviews. The interviews were semi-structured so the researcher could prepare specific questions informed by contemporary plea bargaining research while allowing participants to express their perspectives and new ideas. Semi-structured interviews further enabled the researcher to prepare additional prompts that may or may not have been asked based on the interviewees' answers to the outlined questions. The interviews were held via Zoom, a virtual meeting platform. As noted in the informed consent form shared with each respondent, the goal was that each interview would last no more than one hour, but if a respondent requested to end the interview early, we would do so (see Appendix A).

The informed consent form outlined the need for audio and video recordings for each interview. Recordings allow the researcher to review the interviews afterward at her own pace to gather themes for analysis. There were two stages to transcribing the audio recording. First, a transcription from the interview was automatically generated since

Zoom has transcription capabilities integrated into its platform. Second, the researcher reviewed the Zoom transcript directly after each interview to correct any portions of the interview that were captured incorrectly. Recordings were deleted once the transcripts had been corrected, de-identified, and coded.

All respondents were promised confidentiality, and the researcher took steps to protect their privacy. Every interview was number coded to ensure personal identifiers were not revealed during the analysis and write-up of findings; however, the researcher retained a code link, a link between the study code and direct identifiers, to be able to refer back to during the analysis. Each participant was given a letter and a number (e.g., 1P, 2D); public defenders were coded with the letter D, and prosecutors were coded with the letter P. The interview instruments, including the interview questionnaires, audio and video recordings, and data files, were stored in a secure Google drive that could only be accessed via a secure link. After securing verbal consent from each participant, the interviewer asked the questions, and their answers were recorded. The code link and identifiers were deleted after the completion of the study.

Participants were asked the same questions regarding their criminal law experience, the procedures they follow during plea negotiations, and their perceptions of the plea bargaining system. Participants were sometimes prompted to expound and clarify their answers in ways that may have differed for different respondents. During the analysis phase of this study, the researcher grouped the respondents' answers to the questions which were organized to capture their empirical and interpretive understandings. Similar replies to a question were organized and summarized in the findings. Derived from Virginia Braun and Victoria Clarke's (2006) article *Using*

*Thematic Analysis in Psychology*, the researcher performed some coding of themes beyond what was summarized, most of which is more relevant to the discussion than the findings. These findings are addressed next.

# Chapter Four: Findings

The interviews identified perceptions and ideas from the participants that not only underscored the literature but also challenged it. The data was organized into four categories summarizing the participants' understandings and opinions about contemporary plea bargaining: what factors impact plea outcomes; differences between prosecutors' and public defenders' roles and resources; advantages and disadvantages of plea agreements; and perceptions of achieving "justice."

The table below represents the demographic characteristics and career experience of each respondent. Three public defenders identified as Black women and one as a white man, while both retired prosecutors identified as white men. Three out of the four public defenders had more than two years but less than five years of career experience and had respectively defended approximately 40, 50, and 100 clients. The fourth public defender had more than five years of experience and had defended over 300 clients. The retired prosecutors had more than 30 years of career experience and had prosecuted over a hundred cases each. Five of the six respondents stated that 90% or more of their cases ended in plea agreements, while the sixth one said that their cases ended in plea agreements more than 75% of the time.

| Table 1 | N = 6 |
|---|---|
| Demographics | Number |
| *Race* | |
| African American/Black | 3 |
| White | 3 |
| *Gender* | |
| Female/Woman | 3 |
| Male/Man | 3 |
| Public Defenders' Years of Experience | |
| > 2 years | 3 |
| > 5 years | 1 |
| Number of Clients Defended | |
| 40 – 50 clients | 2 |
| > 300 clients | 2 |
| Prosecutor's Years of Experience | |
| > 30 years | 2 |
| Number of Prosecutions | |
| > 100 cases | 2 |
| Estimate of Cases Ending in Plea Agreements | |
| 75% – 85% | 1 |
| 90% or more | 5 |

**Factors Impacting Plea Outcomes**

All respondents shared perspectives on how these three non-legal factors shaped plea outcomes: race, socioeconomic status, and opposing counsel. Consistent with the literature and national research, questions asked whether or how respondents believed race and economic status impacted plea outcomes (Subramanian & Digard, 2020). The defense attorneys explained that their answers were partly shaped by the demographic profile of their client pool, which reflected broader social and criminal justice inequalities. They explained that all of their clients were Black or Brown; by definition, public defenders are required to work on behalf of poor clients. Notwithstanding the demographic facts, the defense counselors understood their client base to reflect social

and criminal system inequalities. One respondent noted, “I think systemic racism and over-policing of black neighborhoods is why everybody that comes to the courthouse is young, Black, and from a poor area in the city” (1D). The retired DC prosecutor identified wealthier, white, and usually male defendants as more likely to receive leniency in the criminal system, while the other retired prosecutor regarded race as an irrelevant factor.

Most respondents identified the tenacity or lack thereof of the defense attorney as a critical factor in shaping plea outcomes. Both the DC prosecutors and public defenders pointed to the strength of the counsel, and the DC prosecutor noted that the public defenders at PDSDC are the “best of the best lawyers we have in Washington, DC” (1P). Moreover, the defense lawyers noted that defendants who trust their counsel are more agreeable to their advice. One interviewee noted that although defendants may be “scared, they’re gonna do what you say because they trust you. And then also, they’re gonna listen to your advice. So they’re gonna say, . . . ‘I’m scared, but you know, this attorney is fighting for me’” (2D). The same respondent also noted that defendants do not want to risk going to trial if they do not have confidence in their counsel. From this point of view, a defendant would be more likely to plead when they had lower confidence in their attorney.

Three factors that had both legal and non-legal dimensions were identified by interviewees as potentially influencing pleas; these were structural inequalities that could be understood as mitigating circumstances, the fact and conditions of pretrial detention, and the defendant’s criminal history. One public defender reflected that “progressive or left-leaning” prosecutors who understand the systemic pressures that cause people to be

involved in the criminal justice system may see those as mitigating circumstances and may therefore offer a more favorable plea offer (1D). Another defense lawyer highlighted the role pretrial detention played in their client's decision to accept a plea against their lawyer's advice: The detained client "wanted to get out, so he wanted to wrap everything up as quickly as possible. No matter how many times I told him not to take the offer, he wanted to anyway" (2D). Similarly, a different respondent said their client would be more likely to accept a plea agreement if they were offered a "reasonable amount of [jail or prison] time, or . . . serve no jail time at all" (1D).

Public defenders affirmed the dominant findings in the existing literature by noting that a defendant more familiar with criminal proceedings would be more equipped to make an informed decision and discern the trade-offs of a trial versus pleading guilty as they have some (Devers, 2011) "knowledge of the process and…where things could end up" (1D). In addition, the same respondent noted that in adult court, many clients have "backup time" in which they pled guilty to a previous charge and may have to forfeit the punishment they avoided previously if they are found guilty, whether via a plea or trial, stacking that sentence onto the new charges. They noted that cases like these tend to go to trial because there is no benefit of pleading guilty when the client will more than likely have to serve time for the older offense.

Although the literature highlights the trial penalty as a legal factor, only one respondent referred to this phenomenon, labeling it a "trial tax" (4D). This person suggested that prosecutors are more likely to offer pleas when they have weak evidence:

> The system is designed where you [defendant] get a better plea deal simply because the prosecutor . . . is worried about the evidence [and] . . . that they

> would have a hard time proving their case . . . They are going to give you an excellent deal if they don't dismiss the case entirely. . . . if the evidence is worse [i.e. stronger from the government's perspective] against a person, then the prosecutor is not going to give you as good of a plea. (4D)

In contrast, both the defense and prosecution attorneys emphasized the value of a good plea offer from the client's perspective as being the way prosecutors could get the plea they sought. One of the prosecutors noted that long sentences offered in a plea increase the chance of a person going to trial "If the penalty is small, in my experience, you're more likely to have a plea" (2P). One public defender compared the decision to gambling and said, "If someone's facing 20 years [by going to trial], then gambling sounds almost like a dumb idea. So you're gonna go ahead and take that offer" (2D). Two defense respondents also agreed that if a client's plea offer exposes them to similar punishments as a trial then that case would more likely end in a trial.

**Perceptions of Differences Between Public Defenders' and Prosecutorial Resources**

Respondents were asked how their resources, both material and legal, may impact plea outcomes. Public defenders repeatedly expressed that prosecutorial resources are far greater than those of public defenders, but the prosecutors were less likely to address this point. The retired DC prosecutor described prosecutors' power as "unfettered" and having "enormous discretion in what kinds of pleas to offer" (1P), which is perhaps the most powerful resource. In contrast, the other prosecutor rejected the idea that prosecutors have a great deal of discretionary power during plea negotiations. He argued that

> I don't have any power during any of this process that was not given to me by the defendant. It is the defendant who decided to provide me [with] the evidence that is going to lead to their being charged with a crime. (2P)

PDSDC attorneys recognize they are better resourced financially than the vast majority of other public defenders. Nevertheless, they believe they and their clients could benefit from increased resources. One defense respondent shared the opinion that high caseloads can hinder the effectiveness of defense counsel. The pressure of "trial dates . . . could cause some clients or cases to fall by the wayside . . . or you have not conducted as much investigation as you wanted to … because you're so pressed for time" (1D). The extent to which this lawyer was identifying resource limitations regarding their own work versus the profession more generally is not entirely clear. Further, whether "by the wayside" meant a plea was taken when a trial would have been more appropriate, or the best plea was not necessarily sought, or that they have professional self-critique under normal work pressures was not clear.

**Perceptions of Advantages and Disadvantages of Plea Agreements**

Both the prosecutors and public defenders were asked about what they perceived as the advantages and disadvantages of the plea bargaining system for each party that participated in it. There was broad consensus that plea offers can provide defendants with a relative advantage; respondents disagreed on the prosecutorial advantages. This category is organized by defendants, prosecutors, and public defenders.

***Advantages for Defendants***

Both public defenders and prosecutors noted two primary reasons plea agreements could benefit defendants, both of which are consistent with the literature. First, plea

agreements "allow people to avoid jail time. They allow people to remain in the community, or they reduce your exposure to a potential prison sentence" (1D). Second, plea agreements avoid the trial penalty by "increasing the chances of being free from the system earlier than they would be if they went to trial and lost" (3D).

### *Disadvantages for Defendants*

The former prosecutors and current defense lawyers had differing perspectives on how plea agreements disadvantage defendants. One former prosecutor only recognized a disadvantage for defendants when innocent people plead guilty, noting that "People shouldn't plead guilty if they're not actually guilty of the crime to which they're pleading" (1P). The second retired prosecutor argued the only disadvantage associated with pleading guilty was the guilty conviction.

In contrast, the public defenders identified both generalized critiques of plea agreements and more concrete disadvantages pleas could have for defendants. Notwithstanding the potential advantages of plea agreements that they also identified as potentially favoring defendants, all the public defenders identified pleas as a coercive tool that relies on defendants' fear. One defense attorney stated:

> There are a lot of people who will just take a plea because they don't want to have to go through the system. They've been traumatized before…they're just afraid of the possibility of having to go to prison for a long time. (2D)

They described fear as a motivating factor for why defendants plead guilty and emphasized that prosecutors have considerably more bargaining power than defendants, rejecting the idea that a plea is a "contract [where] . . . both parties have equal bargaining power," given prosecutorial discretion and resources to collect evidence (2D). The

defense counselors all agreed that a disadvantage of pleas is that defendants cannot challenge the evidence against them.

> You aren't able to argue the case. You aren't able to go back and forth about the facts because you're admitting to a set of facts. At trial, you actually get to present your own evidence. You get to challenge all of the evidence that's presented against you. (1D)

***Disadvantages for Public Defenders***

Continuing with generalized critiques of plea agreements, the public defenders suggested that there is a reputational and legitimacy cost to overusing plea agreements: "You never want to be . . . known as a plea attorney," which would contribute to the flaws of the criminal system. If you "practice that way. You're just making this system worse" (3D). This theme of becoming part of the problem was identified as a social harm to the client base and to general practices concerning the legitimacy of the legal system: "It puts a sour taste in the community's mouth about the criminal justice system. I think that it [also] allows the government to shield bad evidence. It allows it to get wrongful convictions. It allows a lot of [police] misconduct . . . to be swept under the rug" (1D).

***Advantages for Public Defenders***

Public defenders are widely known to have high caseloads due to typically highly constrained resources to represent indigent defendants, the majority of the cases that come through the court system. In DC, one could anticipate at least a somewhat different perspective or experience based on the more reasonable resources allocated to PDSDC. Two out of four public defenders believed that plea agreements are helpful towards case management. However, one of the public defenders disagreed with the premise of a more

reasonable workload with appropriate resources, noting that as soon as one case is resolved, whether, by plea or trial, there will be new cases and additional work. This lawyer pointed out that "you're consistently picking up other cases. People are getting arrested every day" (1D). They added that "I don't see how pleaing one or two people, or even pleaing everybody, is necessarily beneficial for your caseload because you're continuing to pick up new cases."

### *Advantages for Prosecutors*

One prosecutor identified resolving a case that respects the victim and the victim's family as an advantage, a perspective which is consistent with the literature as "justice" for the victim is a consideration of prosecutors (Jones, 2014). In contrast, the second prosecutor rejected the very premise that plea offers were a prosecutorial tool, or at least rejected the idea that he had ever used or invited a plea. He emphasized that he had never used a plea and he did not "accept the use of the word 'use.' . . . A plea is something that happens if the defendant is interested. That's not a tool that I use or a conversation that I initiate" (2P). Instead, he characterized what many would consider plea negotiations differently, saying he had "sat in a room with people and said, 'Here's the proof against you. I'm showing you to your face. I'm going to indict you. If you want to plead guilty to this, tell me now'" (2P). This researcher interprets that statement to be that the prosecutor had initiated or at least opened the door for plea negotiations. The prosecutor characterized such a conversation as a pre-indictment plea and noted he had had this conversation with defendants many times. In comparison, public defenders listed more prosecutorial advantages consistent with the literature, such as foregoing a trial avoids a process that is "expensive, time-consuming, and resource intensive" on the

government, allowing for cases to be resolved more quickly (4D; Ortman, 2020). Additionally, the defense attorneys agreed plea offers help prosecutors and their offices gain convictions which in turn helps their careers.

### *Disadvantages for Prosecutors*

The participants had difficulty identifying the disadvantages of utilizing pleas for prosecutors. Ultimately, one defense lawyer and prosecutor agreed that utilizing pleas could disadvantage prosecutors if the victim's family or the complaining witnesses were not happy with a plea offer being extended to the defendant.

## Perceptions of Achieving "Justice"

The participants held varying views on whether the plea bargaining system achieved justice and its impact on criminal defendants. The prosecutors described plea bargaining as a means to achieve justice. One argued that "it's a real positive for criminal defendants. If nothing else, it gives them some agency over how the case is going to proceed" (2P). The other argued that the system of pleas is "important" and "necessary" because it "has saved so many people decades and decades in prison" (1P).

In contrast, two public defenders believed the modern plea bargaining system does not achieve justice, at least in part because of fundamental systemic flaws: "I don't think justice exists in this [criminal] system" (2D). One public defender saw that plea bargaining both achieved justice at points due to some of the advantages for defendants, such as quicker returns to the community, early release from detention or incarceration, and/or relatively quick resolution of their case (Subramanian & Digard, 2020), but could also be harmful to clients, and that assessments needed to be on a "case by case [basis],

because in some situations it could be very beneficial to a client, and in some situations, . . . it will just harm the client on the back end" (1D).

***Soundness or Lack Thereof of Plea Agreements***

Both prosecutors suggested that plea bargaining in the hands of morally conscious prosecutors is more just but described the need for a political and internal checks to ensure these prosecutors are the majority, not the minority. They also considered the judicial check on pleas to add protection or oversight.

> [W]hen somebody decides to plead guilty, there is a very rigorous process that goes on in court where the judge places that person under oath, and that person has to swear that they committed the acts that satisfy the element of the crime. A judge is required to reject the guilty plea if it's not supported by the evidence as articulated by the prosecutor, and if it is not sworn to by the defendant, who is charged with the crime and wants to plead guilty to the crime. The judge painstakingly goes through all of a defendant's rights that are being waived in the event the defendant wants to plead guilty, including making sure that that defendant is satisfied that he or she has had adequate representation by counsel (1P).

On the other hand, public defenders believe that plea agreements should be reformed to reduce their coercive nature. One respondent noted "exploding offers" as an example of a pressure tactic as prosecutors make it seem like the defendant is "never going to get the plea again" if they do not take the pre-indictment plea (4D). This lawyer highlighted plea offers before the indictment as especially coercive because defendants typically neither have a lawyer nor an evidence discovery when

pressured to make this choice under a deadline and the threat to lose the offer if it was not taken.

> It forces people to make bad decisions, especially when they don't even give us [the defense] the full extensive discovery before the indictment. The whole system is made and designed to get . . . [defendants] to confess, or admit guilt, without having the benefit of a lawyer being able to walk them through the case and discuss with them at least pre-indictment pleas. And then, after the indictment, the pleas supposedly get worse, and will only get worse. (4D)

Relatedly, while the respondents differed on plea agreements achieving justice, they all emphatically agreed that there is no alternative to the plea system and the criminal system would be unable to operate in its current capacity if not for plea bargaining, ultimately collapsing without it. Each respondent's perspectives were insightful and gave a better understanding of how plea agreements work in practice, mostly in DC. An analysis of these findings is presented in the discussion section.

# Chapter Five: Discussion

The findings presented in this thesis document DC public defenders' and prosecutors' shared and differing perspectives on the contemporary plea bargaining system, primarily in this city. First, this study is missing perspectives from practicing DC prosecutors, which would have undoubtedly brought more perspectives and more depth to this research. Discussing the missing prosecutorial perspective is imperative; their absence reinforces criticisms of prosecutors as untransparent and insufficiently accountable, criticisms that are similar to the concerns many have with plea bargaining itself.

The individual and institutional refusal of prosecutors to participate in a scholarly research project, especially given Institutional Review Board oversight and assured anonymity, underscores prosecutors' aversion to being held accountable and their unwillingness to be transparent. Not only were all respondents guaranteed anonymity, but they also had the right to any disclaimer of their choice, including to emphasize their opinions were their own, and that they were not speaking in an official or representative capacity. Moreover, given the growing critique of prosecutors (e.g., Sklansky, 2017), this research project offered prosecutors an excellent opportunity to highlight their points of view and challenge criticisms that their profession is insufficiently accountable and transparent. Paradoxically, the very absence and self-exclusion of practicing prosecutors from this study illuminates and underscores the problem of these very powerful and influential public officials to support fundamental democratic principles of accountability, openness, and public engagement.

Second, respondents' assessment of the ways race both is and is not a factor that affected plea outcomes offers a complex response to the literature. The homogeneity of the public defenders' client base meant one cannot compare how people of different races accept pleas or go to trial. The defense attorneys argued that the lack of racial diversity among their clients reflects, however, how the criminal system disadvantages poor, Black people, including affecting their plea outcomes. Whereas the defense attorneys identified racial disadvantage for Black defendants, one of the former prosecutors identified racial advantage for white defendants who were also wealthy but did not address any disadvantages Black defendants might have faced on the basis of their race (1P). Although this respondent disregarded concerns with racially disparate policing practices in DC, the public defenders consider these sorts of practices as among the factors that contribute to their largely homogeneous client pool.

Third, there was a large gap between how the two former prosecutors and the four public defenders viewed the power dynamics involved in plea agreements; the perspectives of the defense attorneys were largely consistent with contemporary research findings, but the prosecutors had a far more idealized view of how pleas work in practice, from the perspective of the different parties. In comparison to the public defenders and related to Ortman's (2020) assertion that early legal scholars were committed to the ideology of crime control than due process, both prosecutors' comments reflect their understanding of plea agreements in the context of the criminal system in general rather than its explicit or direct impact on criminal defendants. One prosecutor suggested that defendants have a level of bargaining power in plea negotiations (2P). That may certainly be the case with some defendants but based on the literature and the perspectives of the

public defenders, such defendants would be outliers. One respondent did note the enormous discretion prosecutors wielded in pleas (1P). Nevertheless, that ability to use discretion was not acknowledged as a source of enormous power and both prosecutors largely avoided discussing their leverage in plea negotiations. In fact, both the experience of actors affected by the plea system as well as research evidence underscores that the prosecution typically asserts more control over plea negotiations than the defense, including due to charging and plea discretion.

In addition, a surprising departure from almost all evidence and literature was one of the former prosecutor's belief that most prosecutors do not, and certainly the respondent over his career did not, use plea offers, and that pleas originate with defendants and their lawyers (2P). (He did amend this position to note that pre-indictment pleas could be offered, although a standard practice is that plea negotiations can occur at many points in a case.) In contrast to this prosecutor's perspectives that offering pleas were largely aberrational and reflected more conventional experience and evidence, one of the public defenders noted:

> A plea offer is literally probably one of the first things that you [the defense] would get in the case, right after you get what is considered the initial evidence or discovery in a case. So a plea offer is almost automatically extended in every case. (1D)

and the DC prosecutor stated, "It depends on the case. In a misdemeanor [case] we're extending a plea offer at the moment they are presented" (1P).

**Public Defenders' Perspectives**

There was a high degree of overlap among the public defenders' understanding of the plea system. They highlighted the negative effects plea agreements often had for criminal defendants. Public defenders argued that prosecutors and the government are getting the "bargain" in "plea bargain" as plea offers "actually benefit" prosecutors more than defendants and defense counsel who "are doing them a favor by taking whatever offer they give us" (2D). As the literature and the defense respondents stated, foregoing trials provides the government the most benefits as it saves them time, resources, and money. Importantly, it saves prosecutors the effort of developing a very strong case (Abrams & Fackler, 2017). Moreover, pleas guarantee prosecutors convictions and success. Public defenders summed up plea agreements as career boosters for prosecutors since "they don't have to risk a loss at trial" guaranteeing convictions through guilty pleas which aids their reputations and climb up internal and political ladders (1D; 3D).

More or less consistent with national data, the public defenders identified that about 90% of their cases were adjudicated through guilty pleas. While the public defenders were adamant that plea agreements disadvantage defendants and that they do not lead their clients to plead guilty, still many of their cases ended in guilty pleas. There may be several explanations for this. Public defenders are obligated to inform defendants of all plea offers that the prosecution extends (Lee & Ropp, 2020). In addition, after reviewing their clients' cases, they must help them make a well-informed decision by advising them of what they believe is the best route to pursue, whether a trial or a plea agreement (Lee & Ropp, 2020). So, based on the evidence, public defenders may advise that a plea agreement is in the client's best interest, especially if the plea offer is viable.

In addition, public defenders ultimately must do what their clients decide, which two defense attorneys noted in their interviews. If their clients are risk averse, they may be more likely to accept a plea offer regardless of their counsel's advice. Alternatively, a client with a criminal history, presumably more comfortable with the criminal system, may ask their counsel to initiate plea negotiations. Most public defenders do their best to investigate cases and advise their clients thoroughly. One of the public defenders hinted at ethical qualms as some choices needed to be made but did not raise concerns of ethical violations or overuse of plea agreements as sometimes the national literature suggests is inevitable and a result of unrealistic workloads (1D; Wood et al., 2016).

Although one prosecutor believes that defendants are "very well represented" nationally (2P), this opinion is not sustained by the data. Prosecutors' abundant resources greatly surpass that of public defenders, even at PDSDC, directly impacting the defense quality that a defendant can receive. Although public defenders at PDSDC have designated investigators to help gather evidence and witness statements (personal communication with 1D), making them better equipped to support their clients, they argue that their investigative resources pale in comparison to prosecutors' access to entire police departments (2D). While recognizing their advantages as a model public defense office, the defense respondents described the struggle for all public defenders, including themselves, to provide an effective defense when they have high caseloads and limited means of obtaining discovery, "The lawyer doesn't have enough time, and probably doesn't have the full extent of discovery to even advise them of it" (4D). Without an effective defense, defendants are more susceptible to plea offers.

**Trial Penalty as a Driving Factor**

In contrast to the emphasis of the enormous influence of the trial penalty in influencing decisions in the literature, only two defense respondents highlighted the trial penalty either using the term/related terms such as trial tax or by describing that phenomenon. Relatedly, a significant criticism of plea bargaining is what scholars call the innocence problem. The innocence problem refers to the prevalence of factually innocent individuals pleading guilty for fear of not being believed at trial and losing (Dervan & Edkins, 2013). From the DC prosecutor's perspective, innocent individuals should not plead guilty; however, this is easier said than done, as the National Registry of Exonerations found that in 2022, 25% of all the exonerations (233) were convictions via a guilty plea (*The National Registry of Exonerations - 2022 Annual Report*, 2023). Interestingly, none of the public defenders addressed the innocence problem. The stronger resources of PDS attorneys and their reputation for high-quality defense (1P) may explain their not raising this concern.

The key takeaway from the analytical discussion of the research findings is that DC's plea system is somewhat of an outlier compared to the national literature. Fundamental aspects of plea agreements outlined by the respondents were consistent with the national picture, but the respondents' experiences are likely largely specific to DCs criminal system. Final thoughts, considerations, and implications are discussed in the conclusion.

# Chapter Six: Conclusion

This small qualitative research study explored the perspectives of four practicing DC public defenders and two retired prosecutors, one from DC and the other from Philadelphia. A literature review outlined the evolution of plea agreements, including the political and social changes enabling them, the importance of the trial penalty in a national context, and the legal and non-legal factors that play a role in plea outcomes. The review of the literature showed a lack of research regarding the perceptions of plea bargaining from two institutional actors that make the plea system possible, defense counsel and prosecutors.

The findings both coincide with and challenge the existing literature. The District of Columbia has both advantages and disadvantages as a site to understand and examine plea bargaining, and perspectives on plea agreements. First, PDSDC represents a model public defender office for other public defender offices to replicate. Hence, they are able to attract and retain very highly skilled attorneys and have far greater, more reliable, and predictable resources than most public defense offices or systems. That this study did not reveal as harsh a critique of plea agreements as the overwhelming national literature suggests that strong, reliably funded, and decently resourced criminal defense attorneys can make a significant difference in mitigating the widely recognized power imbalances of the more typical systems of plea agreements.

Second, there are significant limitations to exploring the effect race may play on the plea agreement system and process in DC, especially with a focus on indigent defendants, as they are largely a racially homogeneous group. That homogeneity speaks,

therefore, less to an overt "story" of racial disparities in the plea system and more to the deep and profound ways policy and political choices have enabled or furthered racism poverty, and other inequalities, which in turn create and shape problems of crime, violence, policing, prosecution, and punishment in this city. The formal due process protections of good lawyers are no match for the structural conditions of the systematic inequalities that fuel crime and the criminal system.

Just as it is vital to highlight the often invisible ways inequality shapes the criminal system, it is also essential to spotlight missing "stories" and testimony that needs to be told and shared, in this case the absent voices, by choice, of practicing DC prosecutors. Their individual or organizational refusal to participate in a research study is confirming that the criticisms of their lack of accountability and transparency are justified. Research is about learning from the data, good and bad, expected or unexpected, and while prosecutors may have declined to be interviewed due to scholarly and professional criticism, they forfeited the opportunity for the researcher to better understand their perspectives, portray them objectively, and potentially find good, professional practices and highlight those. This researcher began this inquiry trying in part to understand how non-legal factors may shape plea agreements, but the research process and evidence instead highlighted the immense importance of good indigent defense and the protections that due process can provide. The research process also revealed a government prosecutor's office's closedness to research intended to enhance the court system.

The two retired prosecutors who commendably were willing to be interviewed, especially the prosecutor from Philadelphia, still at times avoided the kind of healthy

critique all professions need. In contrast, public defenders were open and willing to be self-critical about the difficult but normal professional choices they face in their role working with criminal defendants. Public defenders' eagerness and prosecutors' refusal to participate in scholarly research essential for a democracy shines a light on the need for prosecutorial reflection and accountability. Much like the medical profession holds morbidity and mortality (M&M) conferences as both a learning opportunity and preventative measure to discuss medical and judgment errors with the ultimate goal of bettering patient care (Kravet et al., 2006), researchers can help provide reflections for future professional and societal benefits, which is invaluable in improving all systems. Unfortunately, prosecutors did not only lose the opportunity to discuss their viewpoints and how they understand pleas to work for the criminal system, but undermined their accountability as civil servants.

Like all research, there are limitations to this study. Since the sample of this research was only six people, the results are not generalizable, even for DC. More useful inferences can be drawn from the interviews with the defense counsel than the prosecutors, in part because there were four defense lawyers and two prosecutors, but also because the defense lawyers came from more similar professional backgrounds and were in current practice rather than retired. In contrast, both prosecutors were retired, and only one prosecutor could address the DC perspective, while the other had practiced in Philadelphia.

The high level of agreement among the public defenders suggests that a large sample of at least this category of lawyers might not be necessary to achieve saturation (Saunders et al., 2018). But even if there is a relative consensus among public defenders

from PDSDC, for future research, it would be important to interview other criminal defense lawyers, including from the CJA panel, university law clinics, and private criminal defense attorneys, to expand an understanding of defense counsels' perspectives. Furthermore, it would be ideal if prosecutors would break their fourth wall and add their perspectives to the conversation of plea bargaining. Lastly, criminal defendants' perspectives need to be collected to truly compare perceptions versus the impact of plea agreements, and to go deeper, Black and Brown, indigent defendants, specifically, should be interviewed to examine their lived experiences with the plea system.

This thesis highlighted the necessity and possibility of providing robust defense for indigent defendants facing pleas, noted that due process protections cannot undo larger structural inequalities, and identified the problem with prosecutorial secrecy. Increased accountability measures and supervision of prosecutors' decision-making needs to include internal and external checks to track prosecutorial discretion (Sklansky, 2017). Broader structural inequality also needs to be addressed as part of improving the criminal system. As the retired DC prosecutor remarked, there is a profound need to "address the chronic problem of people committing minor offenses because of drugs and poverty, mental health, homelessness, and joblessness" to end the cycle of binary decisions: charge or not charge (1P). The public defenders addressed problems within the criminal system and the associated need for better policing practices to curb racial discrimination in stops, arrests, and incarceration. This researcher would add the need to expand alternatives to prosecution and interventions to prevent crime and violence in the first place. Plea bargaining is necessary within the contemporary criminal system; however,

its current iteration must consider the realities of power and the implications on criminal defendants.

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# Appendix A

Script

Thanks for taking the time to meet with me. This interview is part of my research for my Master's in Criminology at George Washington University. The research questions aim to understand how prosecutors and public defenders view and understand the plea bargaining system in Washington DC. In order to accomplish this, you are one of an anticipated 10 attorneys who will be interviewed. As a reminder, this interview is being both video and audio-recorded, and will only be accessed by me and the supervising professor, Fran Buntman, PhD. All interviews will be de-identified. In other words, neither your name nor other identifying information will be attached to any perspectives that you share. Information from these interviews may be used in publications and presentations.

Do you have any questions about the informed consent form that I sent you?

If not, then we can start…

Public Defender -

1. Name, Title, Race, Gender
    1. I have your name and title as ……. and …….. Is that correct? How do you identify in terms of your race, ethnicity, and/or gender?
2. How long have you worked as a public defender?
    1. How long have you been practicing in D.C.?
3. Besides DC, have you worked anywhere as a public defender?
    1. Do you have previous experience in another professional capacity within the criminal legal system, e.g. as a prosecutor, clerk, etc.?
4. Approximately how many defendants have you defended in Washington DC?
5. Of the criminal cases you've defended in the District, approximately what is the distribution of those cases in terms of types of crimes?
    1. Misdemeanors?
    2. Felonies?
    3. Juveniles?
    4. Adults?
6. In DC, approximately how many of the cases for which you provided defense counsel were adjudicated through plea bargains?
    1. If you don't have an approximate number, what percentage would you give anecdotally?
    2. Are you aware of any entity that collects these types of statistics that the public can access?

7. Based on your experience, what are the major reasons or situations that result in criminal cases being tried rather than plead?
8. In your experience, what are the factors that **increase** the likelihood that cases will conclude with pleas rather than trials in D.C.?
9. In your experience, what are the factors that **decrease** the likelihood that cases will conclude with pleas rather than trials in D.C.?
10. How do defendant's demographics, such as age, race, income status, and/or sex play a role in plea outcomes (in D.C.)?
    1. Prompts:
        1. Rank; Could you rank those factors? Let's start with the factors that have seemed to be most important.
        2. Context in why defendant pleads;
        3. Weighting
    2. If you would not consider those factors to be significant during plea bargains, then what would you identify as significant?
        1. Prompts:
            1. Public defender vs private counsel
            2. Pretrial detention
            3. Type and severity of crime
11. How does the quality of the opposing counsel affect the outcome of trial versus a plea?
12. How do you believe public defenders benefit from utilizing pleas, and why?
    1. Prosecutors?
13. How do you believe public defenders are disadvantaged from utilizing pleas, and why?
    1. Prosecutors?
14. In your opinion, are plea bargains under-utilized or over-utilized within the criminal legal system?
    1. Please explain.
15. Do you consider there to be any advantages of pleas for defendants? If so, what are those advantages?
    1. If not, please explain why not.
16. Do you consider there to be any disadvantages of pleas for defendants? If so, what are those disadvantages?
        1. If not, please explain why not.
17. In your opinion, does the plea bargaining system positively impact criminal defendants? If so, how?
    1. If not, please explain why not
18. In your opinion, does the plea bargaining system negatively impact criminal defendants? If so, how?
    1. If not, please explain why not.
19. At what point(s) do you seek a plea deal from the prosecutor if they haven't offered one?
    1. Why?

20. At what point(s) do you encourage your client to accept a plea deal from the prosecutor?
    1. Why?
21. Some scholars have argued that public defenders' caseloads can be a hindrance to providing quality assistance of counsel to criminal defendants and can have a negative impact on plea outcomes. What is your response to this argument?
22. Do you believe that contemporary plea bargaining achieves justice?
    1. What does that mean to you?
23. Do you believe that the contemporary plea bargaining system needs to be reformed in any way?
    1. If so, what are your suggestions for reform?
    2. If not, please explain why not.

<u>Prosecutor</u> -

1. Name, Title, Race, Gender
    1. I have your name and title as ……. and …….. Is that correct? How do you identify in terms of your race, ethnicity, and/or gender?
2. How long have you worked as a prosecutor?
    1. How long have you been practicing in D.C.?
3. Besides DC, where have you worked as a prosecutor?
    1. Do you have previous professional experience in another professional capacity within the criminal legal system, e.g. as a public defender, judge, clerk, etc.
4. Approximately how many criminal cases have you prosecuted in Washington DC?
5. Of the criminal cases you've prosecuted in the District, approximately what is the distribution of those cases in terms of types of crimes?
    1. Misdemeanors?
    2. Felonies?
    3. Juveniles?
    4. Adults?
6. In DC, approximately how many criminal cases that you've prosecuted were adjudicated through plea bargains?
    1. If you don't have an approximate number, what percentage would you give anecdotally?
        1.
7. Based on your experience, what are the major reasons or situations that result in criminal cases being tried rather than plead?
8. In your experience, what are the factors that **increase** the likelihood that cases will conclude with pleas rather than trials in D.C.?
9. In your experience, what are the factors that **decrease** the likelihood that cases will conclude with pleas rather than trials in D.C.?

10. How do defendant's demographics, such as age, race, income status, and/or sex play a role in plea outcomes (in D.C.)?
    1. Prompts:
        1. Rank; Could you rank those factors? Let's start with the factors that have seemed to be most important.
        2. Context in why defendant pleads;
        3. Weighting
    2. If you would not consider those factors to be significant during plea bargains, then what would you identify as significant?
        1. Prompts:
            1. Public defender vs private counsel
            2. Pretrial detention
            3. Type and severity of crime
11. How does the quality of the opposing counsel affect the outcome of a trial versus a plea?
12. From the perspective of a prosecutor, i.e. your goals and the goals of your office, what do you consider as the advantages of utilizing pleas, and why?
    1. Public defender's advantages?
13. As a prosecutor, i.e. your goals and the goals of your office, what do you consider as the disadvantages of utilizing pleas, and why?
    1. Public defender's disadvantages?
14. In your opinion, would you describe plea bargains as under-utilized or over-utilized within the criminal legal system? Please explain.
15. Do you consider there to be any **advantages** of pleas for defendants? If so, what are those advantages?
    1. If not, please explain why not.
16. Do you consider there to be any **disadvantages** of pleas for defendants? If so, what are those disadvantages?
    1. If not, please explain why not.
17. In your opinion, does the plea bargaining system **positively** impact criminal defendants? If so, how?
    1. If not, please explain why not.
18. In your opinion, does the plea bargaining system **negatively** impact criminal defendants? If so, how?
    1. If not, please explain why not.
19. At what point(s) do you tend to provide an initial plea offer to a defendant and their counsel?
20. How would you describe your approach when offering plea deals to defendants?
21. Do you use any methods to make a plea deal more enticing to a defendant?
22. Some scholars, activists, and even other prosecutors, have argued that prosecutors' discretionary power during plea negotiations are exorbitant and need to be checked. What is your response to this argument?
23. Do you believe that contemporary plea bargaining achieves justice?
    1. What does that mean to you?

24. Do you believe that our current plea bargaining system needs to be reformed in any way?
    1. If so, what are your suggestions for reform?
    2. If not, please explain why not.

Appendix B

## Informed Consent for Participation in a Research Study

**Title of Research Study:** Plea Bargaining: The Truth – A Key Look into Attorneys' Perceptions of the Plea Bargaining System

**IRB#:** NCR224538

**Student Researcher:** Brianna Anderson, Department of Sociology
**Principal Investigator:** Fran Buntman, PhD, Department of Sociology

Key Information:

You are being asked to take part in a research study about the utilization of plea bargains in the criminal legal system. This page will give you key information to help you decide whether or not you want to participate in this study. More detailed information can be found on the next pages. Ask the research team questions during the consent process, and use the contact information on this form to ask questions later.

**WHAT IS THE PURPOSE, PROCEDURES, AND DURATION OF THIS STUDY?** By doing this study, we hope to learn more about the perceptions of the plea bargaining system from the perspective of prosecutors and public defenders. Your participation in this research will last about an hour.

**WHAT ARE THE REASONS YOU MIGHT CHOOSE TO VOLUNTEER FOR THIS STUDY?**

You may choose to participate in this study to contribute to the discussions surrounding plea negotiations as well as help guide future policies and reforms. For a complete description of benefits please refer to the Detailed Consent.

**WHAT ARE THE REASONS YOU MIGHT NOT CHOOSE TO VOLUNTEER FOR THIS STUDY?**

You may choose to not participate in this study because you do not want to be audio or video recorded in order to minimize any risks of identifying information from being released. For a complete description of risks please refer to the Detailed Consent.

**DO YOU HAVE TO TAKE PART IN THIS STUDY?**

You do not have to take part in this research. It is your choice whether or not you want to take part. You can agree to take part and later change your mind. If you choose not to take part or choose to stop taking part at any time, there will be no penalty to you or loss of benefits to which you are otherwise entitled.

**WHAT IF YOU HAVE QUESTIONS OR CONCERNS?**

The person in charge of this study is Brianna Anderson, and her supervisor is Fran Buntman. If you have questions, suggestions, or concerns regarding this study or you want to withdraw from the study their contact information is: briannaanderson@gwmail.gwu.edu and fbuntman@gwu.edu. You can also reach Brianna via phone at (757) 372-8486.

This research is being overseen by an Institutional Review Board ("IRB"). You may talk to them at 202-994-2715 or via email at ohrirb@gwu.edu if:

> • You have questions, concerns, or complaints that are not being answered by the research team or if you wish to talk to someone independent of the research team. • You have questions about your rights as a research subject.

**Detailed Consent Form:**

**Description of Research Study:**

This study is centered on the increased adjudication of criminal cases through plea bargaining. The purpose of this study is to examine the perceptions of the plea bargaining system from the perspective of prosecutors and public defenders.

**Participant Criteria**: To be eligible for the present study, you must be a practicing prosecutor or public defender in Washington D.C. Otherwise, all genders, races, religions, and socioeconomic statuses are welcome in this study.

**Time Commitment:**

Each interview session is expected to last approximately an hour. You may withdraw from the study at any time without penalty.

**Risks and Benefits:**

**Risks:** There are minimal risks to this study. A small potential risk associated with all research involves breaches of confidentiality. The researcher will try to reduce the risk of breaches of confidentiality by only recording sessions through a secure server on Zoom, and only allowing the research team to access said recordings. Each recording will be transcribed, and each transcription will be deidentified by removing all identifiers, such as names and official titles. The personally identifiable information collected will be coded using a unique ID #. The coded lists are only accessible to the research team. The information that has your personally identifiable information will be kept separately from the rest of your data. The recordings will be deleted once the transcriptions have been finalized.

**Benefits:** Through the thesis of this research, it is possible that evidence can be discovered and used to guide policy work for the future. Additionally, this research can help scholars and individuals better understand prosecutors and public defenders

perceptions of the plea bargaining system, its impact on criminal defendants, and identify areas of potential reform.
**Costs and Payments:** There is no cost to participate in this research.

**New Information**: If there are any changes to the study protocol, the researcher will inform the participants via email.

**Confidentiality:** This individual interview is being conducted over Zoom and will be video and audio-recorded for the student researcher's data. Resulting data from these interviews will be both summarized in potential publications and presentations, and individual results, in the form of de-identified quotes, will be communicated. By verbally consenting, you are allowing these recordings to take place as well as de-identified quotes to be communicated in potential publications and presentations. All information obtained about you in this study is strictly confidential, and recordings will be discarded 6 months after the completion of MA thesis. Recordings will be secure and only accessible to the research team, myself and Fran Buntman, PhD, until the end of the 6 month time period. The results of this study may be used in reports, presentations, and publications, but all data will be de-identified. The recordings and information in it are produced in confidence solely for research purposes and will not be disclosed to any third party for any other purpose without the express written permission of the disclosing party.

**Withdrawal privilege:** You may withdraw from this research study at any time with no penalty. If you withdraw, any responses will be excised from the data pool. Additionally, the student research reserves the right to withdraw your participation in this study at any time.

**Voluntary consent:** By verbally consenting, it is implied that you have acknowledged reading this form and/or having it read to you with an understanding of the research and risks/benefits outlined here. If you have any questions, please contact the student researcher, Brianna Anderson.

To ensure anonymity your signature is not required, unless you prefer to sign it. *Please keep a copy of this document in case you want to read it again.

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