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Defending David Cannon: Unpacking the Unfairness of Plea Bargains Through Bargaining Theory

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Abstract

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This thesis investigates the fairness of plea bargaining in the United States by applying bargaining theory from political science to analyze the legal structures and power dynamics that shape the process. Plea bargaining has become the dominant method of resolving criminal cases, accounting for over 95% of convictions, but it remains a highly contested practice. Certain legal scholars argue that it promotes efficiency and reduces trial burdens, but critics claim that plea bargaining enables coercion and undermines due process. This conflict led to my research question: is plea bargaining in the United States unfair, and if so, what legal mechanisms contribute to this imbalance? Using legal analysis, political science theory, and history, this thesis unpacks the concept of information asymmetry to explain how prosecutors exert disproportionate influence over defendants. The analysis focuses on two legal mechanisms: discovery rules and charge bargaining. It also examines how coercive tactics, including inflated charges and trial penalties, distort defendants' perception of their options, often leading even innocent individuals to plead guilty. The result suggests that plea bargaining functions more as a strategic tool used by the state and less as a tactic to induce fair negotiation. The conclusion reflects on the systemic consequences of this imbalance and poses critical questions about the viability of criminal prosecution.

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To Leo, my biggest supporter. You inspire me.

Table of Contents

The chains clinked loudly as the courtroom door opened. The audience watched silently as a white-bearded man shuffled slowly to the table, his hands bound tightly behind him. As he took his seat he let out a hacking cough. David Cannon had been transported from the Fulton County state prison to address his latest felony: drug trafficking. Today, he could accept the guilty plea hammered out by the district attorney and the public defender or go to trial. “David. E. Cannon” announced the judge, “case number 2598404.” The defendant nodded, never once taking his eyes off the table. “Well then,” said the judge, a portly white man with glasses, “let’s begin.”

Introduction

A plea bargain is a negotiated settlement between the prosecutor and the defense attorney that involves the defendant pleading guilty to lesser or altered charges in exchange for reduced punishment.[1] There are three types of plea bargains: charge bargaining, fact bargaining, and sentence bargaining.[2] Charge bargaining involves the defendant pleading guilty to a lesser charge than the original one, while fact bargaining involves omitting or changing certain case facts that could lead to a harsher sentence.[3] Sentence bargaining, the most common, involves pleading guilty to the charges specified in the plea deal in exchange for a lesser sentence.[4] Once a plea bargain is agreed upon, the defendant relinquishes their right to trial and confesses to the specified crime.[5] In the early 1900s, plea bargains were rarely used and often publicly denounced as “hardly, if at all, distinguishable in principle from the direct sale of justice.”[6] According to

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[1]Donald A. Dripps, “Guilt, Innocence, and Due Process of Plea Bargaining,” *William & Mary Law Review* 57 (2016 2015): 1343.

[2]Cynthia Alkon, “The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland” 38 (n.d.).

[3]Albert W. Alschuler, “Plea Bargaining and Its History,” *Law & Society Review* 13, no. 2 (January 1979): 212 https://doi.org/10.2307/3053250.

[4]Alschuler, “Plea Bargaining and Its History” 215.

[5] Ralph Adam Fine, “Plea Bargaining: An Unnecessary Evil,” *Marquette Law Review* 70, no. 4 (1987-1986): 621.

[6] Fine, Plea Bargaining,” 620.

Matt Baker, a former assistant public defender in Orlando, Florida, now over 95% of cases in the United States are settled with plea bargains. Many lawyers and academics regard this figure as a sign of the increased professionalization and complexity of the legal system.[7] They see plea bargains as a representation of the developing array of legal tools that help expedite and streamline the legal process.[8] Conversely, opponents of plea bargaining regard this expediency as a sign of coercion and manipulation on behalf of the prosecution.[9] A core critique of plea bargaining identified by Ralph Adam Fine, a former judge on the Wisconsin Court of Appeals, is that it provides prosecutors with an unchecked amount of power when it comes to proposing or altering the terms of a plea bargain.[10] He argues that to close deals so quickly, prosecutors often fudge the facts of the case or pressure the defendant to take a deal that is not in their best interest.[11] This can involve threatening the defendant with false charges, ramping up the charges to make a trial seem less attractive, or falsifying the facts of the case itself.[12]

Malcolm Feeley, author of several books on criminal justice and substantive procedure, believes that plea bargaining and prosecutorial power are justified and necessary tools to navigate recent changes and expansion in substantive law.[13] Trials in the mid and early 19th century were not the tense, white-knuckled affair that they are now.[14] They consisted of a hastily created jury, a complaining witness, and a brief thirty-minute discussion period. However, as the legal process professionalized and expanded, so did the need for well-educated adversaries. Plea

[7] Fine, "Plea Bargaining," 617.
[8] Jennifer L. Mnookin, "Uncertain Bargains: The Rise of Plea Bargaining in America Book Review," *Stanford Law Review* 57, no. 5 (2004): 1723.
[9] Dripps, "Guilt, Innocence, and Due Process of Plea Bargaining," 1344.
[10] Fine, "Plea Bargaining," 618.
[11] Lucian E. Dervan, "Bargained Justice: The History and Psychology of Plea Bargaining and the Trial Penalty," *Federal Sentencing Reporter* 31, no. 4–5 (2018): 239.
[12] Fine, "Plea Bargaining," 642.
[13] Malcolm M. Feeley, "Plea Bargaining and the Structure of the Criminal Process," *The Justice System Journal* 7, no. 3 (1982): 338.
[14] Feeley, "Plea Bargaining," 342.

bargaining, and the negotiations involved, reflect a shift toward the standardization of the legal process.[15] What Fine may view as unchecked power on behalf of the prosecutor is, according to Feeley, a necessary "assessment or reassessment of the facts as they fit under various definitions or categories of offenses."[16] Plea bargains thus result from increased adversariness combined with an "overdetermined system of law" that forces legal personnel to engage in fine-lined distinctions and critical decisions.[17]

This controversy serves as the context for my thesis, which aims to analyze the dynamics and bargaining stances of plea bargain negotiations. When I first began my research, I aimed to find a new lens through which to view the plea bargain debate. However, after finding this concept to be extensively researched and highly oversaturated, I shifted my focus to navigating plea bargains instead of contemplating their existence. I wanted to understand the legal tools and internal operations that allegedly make plea bargaining a one-sided system. By thoroughly investigating the procedures involved in plea bargain negotiations, I could better understand if and how the system is coercive. My research question became the following: is plea bargaining in the United States unfair, and if so, what legal system or individual actions contribute to this unfairness?

To understand how these bargains are created and the potential inequalities they perpetuate, I turn to the bargaining framework as used in political science. This framework outlines the different ways that parties will make decisions based on the outcome they want and the information they have. Decisions based on unequal information can radically change the bargaining stance of both parties and alter the trajectory of the negotiations. Although the bargaining framework is often used to explain international conflicts, my thesis will highlight the

[15] Feeley, "Plea Bargaining," 342.
[16] Feeley, "Plea Bargaining," 346.
[17] Feeley, "Plea Bargaining," 345.

applicability of the bargaining framework when it comes to understanding and navigating plea bargains. Furthermore, my thesis will explain plea bargains as a problem of information asymmetry and coercion as opposed to an issue of morality. Unpacking plea bargains in terms of a pre-existing framework that centers around tangible actions may help negate the informal and closed-door nature of the system.

The first section of my thesis provides a historical analysis of plea bargaining and its development in the United States. By referencing landmark cases and specific historical periods, I trace the rise of plea bargaining and prosecutorial power from the American colonies to the modern day. Framed by Malcolm Feeley, Ralph Adam Fine, and Albert Alschuler, I also provide a comprehensive literature review that establishes the deep roots of plea bargaining in the criminal justice system.

The next section aims to use a bargaining framework to unpack the dynamics of plea bargain negotiations. This involves a mix of political science, legal theory, and history. Using close reading and analysis, I will first define the concepts of the bargaining framework as defined by political scientists. My key thinkers include Robert Powell, Michael K. McKoy, and David A. Lake. Once I establish a working definition of these concepts, I will use the Iraq-US war as an example of these theories in action. Specifically, I will highlight how both the United States and Saddam Hussein misinterpreted information about the other's relative power leading them to underestimate the cost and length of the war. Once bargaining theory has been properly contextualized, I will use it to unpack the dynamics of plea bargain negotiations. Specifically, I will discuss the two legal mechanisms, discovery and charge bargaining, that perpetuate a system of information asymmetry between the prosecutor and the defendant. This section closes with a comprehensive analysis of the problems facing defense attorneys when combatting this

asymmetrical structure. The primary goal of the second chapter is to elucidate how information asymmetry creates an unfair system.

The third chapter tackles the second layer of unfairness: coercion. By showcasing how prosecutors can skew the defendant's perception of the negotiation process, I expose the disadvantaged and unjust position of the defendant. A case study of the West Memphis Three discloses the dangerous effects of such coercion, namely innocent defendants pleading guilty. This phenomenon is corroborated by my interviews with a former public defender in Georgia and Florida which informed my understanding of plea bargains by pointing to specific instances where defense attorneys experience an information deficit. My goal when conducting those interviews was to understand how people in the legal system negotiate, think about, and confirm plea bargains. I also want to find out how they discuss the situation with their clients. Do they ask them point blank if they are innocent? How do they handle clients that may not be telling the truth? What factors influence their starting point for plea bargain negotiations? Chapter three closes with a close look at the fundamental inconsistencies between the prosecutorial duty to convict the guilty and the plea bargain system which convicts based on efficiency.

The conclusion of this thesis is a two-pronged section: first, I illustrate the effects of this broken system through my interview with Stephen Walker, Director of Correctional Health for the state of California. As a youth correctional officer for 35 years, Walker has witnessed his fair share of impoverished and underprivileged individuals who landed in prison, and his experience provides a comprehensive assessment of the effects of our criminal justice system. In our interview, I asked about the process of admitting defendants into prison while they await trial and the process of setting up meetings between lawyers and inmates. The purpose of this section interview was to understand the procedural and logistical aspects behind plea bargains. I also

inquired into the emotional and psychological effects of working within the criminal justice system to gain insight into the impacts. Second, I provide an alternative way to consider plea bargains that flips the idea of asymmetry on its head. By posing the question, "What would be the consequences if plea bargaining ceased to exist tomorrow," I discovered that the alternative to trial may be no prosecution. Unfortunately, the current system prevents defendants from realizing the reality of this situation and the power of their collective action. However, should defendants collectively recognize and exploit the system, they could effectively dismantle prosecutorial capacity altogether.

My methods of literature review and close reading will allow me to articulate the complexities of legal and political science theories as stated by the authors. Ideally, my thesis could add a new perspective to legal journals that approach plea bargains solely from a legal standpoint. By analyzing the work of my academic neighbors, I not only stake out my own intellectual territory, but I increase the chances of contributing a unique, interdisciplinary perspective to the legal world. This methodology will also contribute to my fluency in political and legal jargon, helping me align more closely with the communication style of these existing academic communities. The interviews will allow me to inquire into the thought processes and decision-making of lawyers in real time. While literature gives me access to legal theories, interviews will explain these concepts' rationale.

Potential problems with these methods include unconscious biases and confidentiality issues. My interlocutors may come with biases against certain types of offenders, specific cases, or particular laws. They may also be unable to give me specifics when referencing cases or offenders. Furthermore, close reading and literature review depend upon my initial evaluation of the academic work in relevant disciplines. To have success with this methodology, I must

evaluate pieces in an unbiased and honest manner. The challenge lies in selecting pieces that contribute to my argument without excluding opposing opinions. I want to analyze and review cases that further my argument while still placing them in the context of their academic field.

Chapter One

Chapter One traces the rise of plea bargaining in the United States, starting with its development in the American colonies and ending with the establishment of mandatory minimums. Critical to the development of the plea bargain is the prosecutor's rise to power. Specifically, the change from an appointed official to an elected position allowed the prosecutor to increase jurisdiction over charging matters. Overwhelmed by the amount of crime in the post-Civil War era, prosecutors relied increasingly on plea bargains to handle the influx of cases. The end of the 20th century saw the first official challenges to the formalized plea bargain in the form of *Brady v. Maryland* and *Santobello v. United States.* These cases did little to establish federal guidelines, but their presence in the Supreme Court validated the existence and use of plea bargaining as a legitimate tool. *Brady*, however, propelled the plea bargain debate amongst legal scholars and members of the court by highlighting the potential for coercion in plea bargains. This debate has continued into the 21st century, where the ethics of plea bargains remain a hotly contested topic. Chapter one dives into these historical and legal developments to showcase the path of plea bargains in America and concludes by highlighting the existing controversy that accompanies it.

1.1 The Early Years; 1700-1829

Prior to the formation of a federal government and the establishment of the Constitution, trials were brief affairs where a judge and jury would review multiple cases in a single day. Although prosecutors existed, they were appointed officials with limited legal power.[18] Often, the victim of the crime served as their own prosecutor, aided by the few witnesses they called. The defendant was put on the stand and forced to testify against themselves, as the "constructed

[18] Michael J Ellis, "The Origins of the Elected Prosecutor," *The Yale Law Journal*, (2012): 1538.

privilege against self-incrimination" did not yet exist.[19] In theory, judges acted as counsel by protecting defendants against illegal procedures in cases of treason and felony, but they did not assist in the formulation of a defense, nor did they assist in cases of misdemeanors.[20] The inconsistent and inadequate support provided to the defendant reinforced a prominent idea in early American trials that the defendant was rarely, if ever, deserving of counsel.[21] This mindset was further reinforced by the lack of solid rules of evidence in state and federal courts, resulting in almost no guidelines for the judge or the prosecutor.[22] They were free to prosecute and charge the defendant as they saw fit. The lack of clarity also meant that there was no appeals process for the verdicts handed down by the judge.[23] Once the sentence was handed out, the defendant's fate was sealed. The expediency with which trials were handled meant that judges and juries could process between eighty-four and 100 felony cases a week.[24] This "lawyer-free contest of amateurs," which continued up until the early 19th century, was far from the lengthy and standardized processes that characterize the modern-day criminal justice system.[25] Instead, trials were dealt with hastily and with little negotiation. These minimalist legal proceedings characterized trials in the United States as simplistic routines largely devoid of aggressive domination or negotiation.

Increased prosecutorial power was a result of the developing political and social identity in the mid-19th century. With Jacksonian democracy sweeping the nation, Americans began to "redefine the political nature of officeholders nationwide," opting to elect officials rather than appoint them. Voters believed that electing people to office would make them more responsible

[19] Carlton F W Larson, "The Origins of Adversary Criminal Trial in America" 57 (n.d.).
[20] John H. Langbein, "Understanding the Short History of Plea Bargaining," *Law & Society Review* 13 (1978): 261.
[21] Langbein, "Understanding the Short History of Plea Bargaining," 260.
[22] Alschuler, "Plea Bargaining and Its History," 91.
[23] Langbein, "Understanding the Short History of Plea Bargaining," 263.
[24] Alschuler, "Plea Bargaining and Its History," 92.
[25] Alschuler, "Plea Bargaining and Its History," 91.

for the concerns of the masses and remove them from the influences of political patronage. Put simply, the goal was to make the prosecutor "emphatically the people's officer."[26] This was a start change "against the backdrop of popular discontent with the power of appointed judicial officials," but it reflected an awakening within the American consciousness.[27] In 1832, Mississippi became the first state to formally elect its prosecutors followed shortly by Ohio. By 1861, almost three-quarters of states in the Union elected prosecutors..[28] The effects of this were twofold: firstly, it granted prosecutors the political legitimacy to undertake increasingly relevant decisions in the field of criminal justice. Before the 1830s, prosecutorial appointments carried little weight. While they undoubtedly served an important function within the justice system, their duties included a variety of administrative tasks that diminished their status. The switch to elected positions implied that, like politicians, prosecutors carried a somewhat elite social and political status.[29] This was most evident in matters of charging. Increased prosecutorial discretion means that prosecutors now could pick and choose what each defendant was charged with.[30] No longer "judicial functionaries," elected prosecutors became increasingly relevant and respected individuals in the legal field.

Secondly, prosecutors developing relevance positioned them advantageously to form connections with executive branches of government, specifically police forces.[31] Throughout the colonial period, prosecutors were responsible for issuing arrest warrants, which allowed them direct control over their caseloads.[32] Now that their status as an elected official altered their

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[26] Ellis, "The Origins of the Elected Prosecutor," 1555.
[27] Ellis, "The Origins of the Elected Prosecutor," 1557.
[28] Ellis, "The Origins of the Elected Prosecutor,"1547.
[29] Ellis "The Origins of the Elected Prosecutor," 1556.
[30] Ellis "The Origins of the Elected Prosecutor," 1550.
[31] Alschuler, "Plea Bargaining and Its History," 89.
[32] Jed S. Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free and Other Paradoxes of our Broken Legal System* (New York; Picadoor Paper, 2022), 25.

responsibilities to focus more on charges, police departments took over the task of identifying and tracking down individuals.[33] This was the beginning of a close collaboration between prosecutors and law enforcement, as the existence of the police validated the need for a prosecutor and vice versa. The symbiotic relationship between the two institutions bolstered both the power of the police and the prosecutor, helping to reshape and expand the American criminal justice system.

The development of an expansive police department also changed the nature of sentencing. Without the need for the victim to help in the identification and arrest of the perpetrator, the sentences became less focused on restitution and instead aimed at "penalties to deter or rehabilitate the offender."[34] This is the key turning point for the use of plea bargains, as it positions the prosecutor to associate charging the defendant with the idea of punishment. No longer was the legal system interested in helping to rehabilitate an offender. Instead, the goal of sentencing was to place an individual behind bars until they were deemed deserving of societal privileges. This shift in prosecutorial jurisdiction combined with punishment-oriented sentencing goals set the stage for the current American legal system. By the Civil War, twenty-five of thirty-four states had elected prosecutors and four more would soon follow. Every state admitted to the union after the Civil War would also elect prosecutors. During this period, plea bargains were still relatively unknown and rarely used. A study of the Boston Police Court in 1824 revealed that only 11 percent of the 2208 defendants pleaded guilty. Similarly, only twenty-five percent of defendants in New York State plead guilty over a twenty-eight-year period. However, with the prosecutor becoming an increasingly formidable figure in the criminal legal system and the rise of penal sentencing, the stage was set for a major change.

[33] Rakoff, *Why the Innocent Plead Guilty*, 19.
[34] Haller, "Plea Bargaining," 86

1.2 The Early Emergence and Legitimization of Plea Bargains

Plea bargaining began to pick up at the end of the Civil War when economic and social stresses led to an increase in crime.[35] Plea bargains offered a sufficient way out as they mitigated the need for trial decreasing judicial caseloads.[36] Although individuals within the legal system continued to express apprehension, the majority of people viewed plea bargains as "an exercise in contractual negotiation between independent agents that helped make the system work."[37] It was around that time that one of the first plea bargains appeared in American appellate courts. In *Swang vs. Julius* Swang was arrested in Tennessee on several counts of gambling, a felony offense in 1865.[38] He agreed to plead guilty to two counts of gambling in exchange for a dismissal of the other eight charges.[39] The defendant was fined twenty-five dollars for the first charge and ten for the other. The remarkable nature of this unnamed case in the American judicial system was noted by the Tennessee Supreme Court:

> "[This] statement of fact [was] unprecedented in the judicial history of the State .... [The defendant was,] told by the Attorney General, that if he did not submit, he would have to go to jail, and that he could certainly prove his guilt. The plea of guilty was entered, while the prisoner was protesting against his guilt, but as best, under the circumstances, he could do."[40]

Upon issuing this statement, the Tennessee Supreme Court called for a new trial based on a plea of not guilty, citing each citizen's constitutional right to "a speedy public trial.[41] While they ultimately rejected the plea bargain, the very fact that the case made it to an appellate court

[35] Rakoff, *Why the Innocent Plead Guilty*, 19.
[36] Rakoff, *Why the Innocent Plead Guilty*, 21.
[37] Rakoff, *Why the Innocent Plead Guilty*, 23.
[38] Alschuler, "Plea Bargaining and Its History," 152
[39] Alschuler, "Plea Bargaining and Its History,"148
[40] Alschuler, "Plea Bargaining and Its History," 149.
[41] Alschuler, "Plea Bargaining and Its History," 150.

showcased plea bargains increasing legitimacy to the nation. It also represented a change in trial courts across the United States which were moving away from a literalist interpretation of the constitutional right to trial by jury in favor of speedy and decisive legal proceedings.[42] Although this change would not be evident in American society until the 20th century, this case serves as evidence that plea bargains were making progress in the criminal legal system.

Defense counsel, on the other hand, remained a highly marginalized and undeveloped profession throughout the themed-1800s. Although their presence was recognized in the courtroom, their power paled in comparison to prosecutors whose association with the state lent them unprecedented influence.[43] Although some legal scholars refer to the development of the defense counsel as an "evening up" of the legal process, the reality was that the prosecutorial power outweighed many other figures in the courtroom.[44] However, the establishment of opposing presences in the courtroom introduced the idea that justice could be given or taken away by an individual and the narrative they bring into the courtroom. Although this idea would not come to fruition until decades later, it is worth noting that, with a prosecutor and a defense attorney, the judicial stage was set for the adversarial system to come.

1.3 Prohibition, Corruption, and Legal Complexity

The beginning of the 20th century proved a time of formidable growth for plea bargains. Prohibition saw the rise of arrests and criminal cases throughout the United States, creating a period of "unprecedented overcriminalization."[45] Plea bargains became a useful tool with which to handle the influx of cases coming into the courthouse. However, prosecutors were not immune to the social discontent of the 1920s of this time and began to use plea bargains to their

[42] Alschuler, "Plea Bargaining and Its History," 148.
[43] Langbein, Understanding the Short History of Plea Bargaining," 9.
[44] Langbein,Understanding the Short History of Plea Bargaining," 8.
[45] Alkon, "The Right to Defense Discovery," 410.

advantage. Often, attorneys were offered cases of whiskey in exchange for reduced sentences or probation.[46] One attorney "commonly offered half his fee to a police inspector to arrange a plea agreement."[47] Prosecutors and judges were responsible for the majority of this wrongdoing, but police officers were also vulnerable to external pressure. Anxious to win the title of "plea getters," police officers would visit the jails each morning and negotiate with the defendants before bringing them to the prosecutor.[48] By 1920, in Chicago, 85% of all felony convictions were by guilty plea; in Detroit 78%; in Denver 76%; in Minneapolis 90%; in Los Angeles 81%; in Pittsburgh 74%; and in St. Louis 84%.[49] By 1934, 66% of guilty pleas nationwide involved the defendant switching their original plea and the prosecutor reducing the charges.[50]

Exacerbating this process was the development of the pretrial rules of evidence. Although these rules were designed to make the judicial system fairer, "they had the effect of giving greater authority to lawyers who could then exercise their expertise before trial."[51] Suddenly the legal system was full of lawyers, all with specialized experience and education, attempting to navigate the system on their client's behalf. Not only did this increase the adversarial nature of the system, but it also made it more elitist. Only those with the education and resources to navigate could partake. Those who did not have such experience were at the mercy of the prosecutor. When "expansion of adversariness" was combined with judicial corruption, the result was a highly private and complicated structure that was widely used but rarely understood.

1.4 Enter the Supreme Court

It wasn't until 1970 that plea bargaining came into the courtroom. In *Brady v. United States*, Robert M. Brady pleaded not guilty to kidnapping until he learned that his codefendant

[46] Alschuler, "Plea Bargaining and Its History," 20.
[47] Alschuler, "Plea Bargaining and Its History," 24.
[48] Alschuler, "Plea Bargaining and Its History," 24.
[49] Alschuler, "Plea Bargaining and Its History," 23.
[50] Feeley, "Plea Bargaining," 348.
[51] Feeley, "Plea Bargaining." 350.

had admitted to the crime and was preparing to testify against him in the trial. If found guilty the jury had the option to recommend the death penalty. Brady chose to plead guilty rather than risk his chances at trial and was sentenced to 50 years in prison, later reduced to 30.[52] Brady appealed his conviction because he was coerced into a guilty plea out of fear of the death penalty. He cited *United States v. Jackson,* which held that the death penalty imposed an "impermissible burden upon the exercise of a constitutional right."[53] By the time this case was appealed to the Supreme Court, it was recognized publicly as a potential turning point for plea bargains.[54] The question in front of the court was two-pronged: "Should *United States v. Jackson* be applied retroactively to guilty pleas entered before that decision?" and "Did the death penalty needlessly encourage Brady to plead guilty in violation of the Fifth Amendment?"[55] In a unanimous decision, the court denied the application of *Jackson* to this case and upheld the constitutionality of Brady's plea, ruling that fear of death penalty does not negate the voluntariness of his decision."[56] They wrote that the "petitioner's plea, made after advice by competent counsel, was intelligently made" regardless of the fear of execution.[57] This was the first instance of the Supreme Court officially upholding a plea bargain in the face of allegations regarding coercion. Although opponents argued that *Brady* eliminated "in substance, but not in name, the voluntariness requirement for in-court confessions," the Supreme Court sidestepped these objections by declaring plea bargains as "inherent in the criminal law and its administration."[58] By refusing to declare *Brady* an instance of coercion, even in the face of the death penalty, the Supreme Court established a noticeably high standard when examining the concept of voluntariness. This ruling would not

[52] "Brady v. United States, 397 U.S. 742 (1970)," Justia Law, accessed December 10, 2024, https://supreme.justia.com/cases/federal/us/397/742/.
[53] "Brady v. United States, 397 U.S. 742 (1970)."
[54] Feeley, "Plea Bargaining," 352.
[55] "Brady v. United States, 397 U.S. 742 (1970)."
[56] "Brady v. United States, 397 U.S. 742 (1970)."
[57] "Brady v. United States, 397 U.S. 742 (1970)."
[58] Alschuler, "Plea Bargaining and Its History," 6.

only serve as a precedent in future cases regarding the constitutionality of plea bargains, but it also signaled a transformative shift in the court towards plea bargains.[59]

The court's acceptance of a second plea shortly after *Brady* cemented the idea of plea bargaining in the American consciousness. In *Santobello v. New York*, Rudolph Santobello agreed to plead guilty to a lesser offense, possession of gambling records in the second degree, after the prosecutor assured him he would abstain from making a sentencing recommendation.[60] However, by the time the sentencing occurred, Santobello's prosecutor had been replaced with a new one who recommended the maximum sentence to the judge.[61] Santobello appealed, arguing that his new prosecutor refused to follow the deal between himself and the former prosecutor, but the appellate court rejected his claims.[62] The Supreme Court, ruling on whether or not a defendant could seek a new trial when a new prosecutor fails to abide by the terms of his predecessor's plea agreement, ruled four to three in Santobello's favor.[63] *Santobello* established that prosecutors could not renege on promises made to defendants. However, the court did not specify what remedies were constitutionally permissible to rectify the situation, nor did they provide any legislation to prevent misuse of the plea bargain system on behalf of the prosecutor. Although it was a win for Santobello himself, this case did little to prevent prosecutors from repeating the same strategies in the future. It did, however, cement the existence of plea bargaining in the court for the first time since *Brady*. The court's acceptance of such a method combined with their lack of regulation made plea bargaining a relatively uncontrolled system.

The court's newfound disposition toward plea bargains was aided by the establishment of federal mandatory minimums in the 1980s. Mandatory minimums are sentencing guidelines that

[59] "Santobello v. New York," Oyez, accessed December 10, 2024, https://www.oyez.org/cases/1971/70-98.
[60] "Santobello v. New York."
[61] "Santobello v. New York."
[62] "Santobello v. New York."
[63] "Santobello v. New York."

"require a specific minimum prison term for certain crimes, regardless of individual circumstances."[64] These function as blueprints for prosecutors and judges, as they control the minimum and maximum sentencing range for each defendant. This simplified the plea bargain process by providing a structure for each charge.[65] However, mandatory minimums also fueled plea bargain controversy, as legal scholars argued that these sentencing guidelines papered over important distinctions between cases and defendants. The Boggs Act, an amendment to the Narcotic Drugs Import and Export Act that established mandatory minimums, did not distinguish between drug users and drug traffickers and instead imposed a two to five-year minimum sentence for possession.[66] The National Association of Criminal Defense Lawyers sets forth the following example to illustrate the way that mandatory minimums work:

> "The prosecutor can agree with the defense counsel in a federal narcotics case that, if there is a plea bargain, the defendant will only have to plead guilty to the personal sale of a few ounces of heroin, which carries no mandatory minimum and a guidelines range of less than two years; but if the defendant does not plead guilty, he will be charged with the drug conspiracy of which his sale was a small part, a conspiracy involving many kilograms of heroin, which could mean a ten year mandatory minimum and a guidelines range of twenty years or more." [67]

The plea bargain would be the better option for the defendant given the mandatory minimum sentencing for personal sale versus drug conspiracy. Opponents cited these generalizations as

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[64] "How Mandatory Minimums Perpetuate Mass Incarceration and What to Do About It," The Sentencing Project, February 14, 2024, https://www.sentencingproject.org/fact-sheet/how-mandatory-minimums-perpetuate-mass-incarceration-and-what-to-do-about-it/.

[65] Molly M. Gill, "Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums," *Federal Sentencing Reporter* 21, no. 1 (2008): 57, https://doi.org/10.1525/fsr.2008.21.1.55.

[66] Gill, "Correcting Course," 55.

[67] "Watch Judge Jed Rakoff Explain America's Guilty Plea Problem," Let's Fix America's Guilty Plea Problem, accessed February 14, 2025, https://guiltypleaproblem.org/?id=jed_rakoff.

evidence that mandatory minimums functioned as a license for the prosecutor to charge regardless of the details of the crime. However, even those opposed to the burgeoning process had little power in the face of federal sentencing guidelines. Soon, prosecutors were charging a record number of cases across the country, cementing the use of plea bargains in the United States.

As state and federal facilities reached their maximum occupancy at alarming rates, courts were forced to decide which defendants would wind up in prison from among the many who were potentially eligible.[68] Ironically, the overcrowding of prisons increased the rate of plea bargains, as prosecutors attempted to move people through the system as quickly as possible. The result was a cycle of mass incarceration and bargaining Between 1980 and 2000, there was a 40% increase in arrests, and by 2004, state criminal court filings rose by 67%.[69] Incarceration rates also rose from 139 per 100,000 prisoners in 1980 to 478 in 2000.[70] In 2024, the United States solved 95% of its cases by plea bargains and had 1.9 million people incarcerated.[71]

1.5 Where Are We Now?

The increased usage of plea bargains in the past three decades has turned up the heat on the plea bargain debate. Due to the expediency with which the plea bargain system functions, many scholars have praised it as an innovative and efficient way to handle the increased rates of criminalization. The defendant receives a lesser sentence and the prosecutor moves quickly through their cases without expanding excessive resources. Ultimately this incentivized structure "fosters cooperation in a system that many feel should be conflictual."[72] Feeley argues that any issues with the plea bargain system stem from the fact that it is a professionalized system that is

[68] Haller, "Plea Bargaining," 88.
[69] Dripps, "Guilt, Innocence, and Due Process of Plea Bargaining." 76.
[70] Dripps. "Guilt, Innocence, and Due Process of Plea Bargaining," 78.
[71] Prison Policy Initiative and Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2024," accessed March 10, 2025, https://www.prisonpolicy.org/reports/pie2024.html.
[72] Feeley, "Plea Bargaining," 341.

inherently difficult to navigate.[73] Technical language, rapid communication, and client dependence can be found in most adversarial, high-stakes jobs, and, when it comes to plea bargaining, represent the "*increased* resources available to the accused rather than any decrease in standards, practices, or capacity."[74] In other words, the problems accompanying plea bargaining can be found in many professional careers and are not representative of faults in the system. Although individuals may express frustration with the structure, many legal scholars argue that the reality is the benefits of such plea bargains outweigh the drawbacks.

Opponents of the plea bargaining system argue that plea bargaining is an inherently coercive system driven by a prosecutor with unchecked power.[75] Although Candance McCoy, the former Director of Policy Analysis for the New York City Police Department, writes that "guilty pleas are cheap and efficient because they avoid the costs of trials while achieving the benefits of criminal punishment," opponents allege that plea bargains are ultimately unfair because the absence of a trial prevents the clarification of facts of the case.[76] They argue that this prosecutorial discretion allows the state to alter, fabricate, or falsify certain aspects of their case as they see fit.[77] Additionally, the lack of judicial review means that plea bargains are subject to "almost no review either eternally or by the courts."[78] Both parties have doubled down on their opinion, creating noticeable cleavages within the legal community. As the use of plea bargains continues to rise, the urgency to answer one question lingers: are plea bargains fair?

Chapter One illustrates how plea bargaining grew from a modest practice into a cornerstone of American justice. As prosecutors transitioned from appointed administrators to influential elected officials, plea bargaining emerged as an essential tool for managing caseloads.

[73] Feeley, "Plea Bargaining," 348.
[74] Feeley, "Plea Bargaining," 341.
[75] Fine, "Plea Bargaining," 619
[76] Dervan, "Bargained Justice," 240.
[77] Fine, "Plea Bargaining," 623
[78] Rakoff, *Why the Innocent Plead Guilty*, 24.

The mandatory minimums and rise in crime during the late 19th century made the use of plea bargains seem harmless and even efficient. When plea bargains entered the courtroom through *Brady* and *Santobello*, the court largely sidestepped the ethics behind the system and inaugurated it into the American court system as a legitimate option. However, the ongoing plea bargain debate illustrates the inherent tension between the use of plea bargaining and the moral imperative to uphold fairness and equality within the legal system. While the rest of my thesis tackles this complex issue, Chapter One illustrates how criminal justice got this far to begin with.

Chapter Two

To understand plea bargains, one must comprehend the relationship between rational choice and information. To make a rational choice, one must comprehend the potential courses of action and their payoffs. In other words, to make a rational choice one needs information. This ability to comprehend the risks and implications of a decision is what ensures a fair process. When one side lacks information, they are unable to make a rational choice and the process becomes unfair. The relationship between information and cost-benefit analysis is commonly referred to in the social sciences as bargaining theory. Bargaining theory states that productive negotiations are conditional on symmetric information, and conflicts arise when one party possesses more or different information than the other[79]. A tangible example of these phenomena in action is the US-Iraq war, where asymmetric information led to a breakdown in bargaining and ultimately international conflict. After establishing information asymmetry at work, I apply the concepts of bargaining theory to plea bargains to illustrate the inherent information disparities between the prosecutor and the defendant. These disparities stem from two sources: discovery and charge bargaining. Chapter two unpacks these legal mechanisms to provide a comprehensive overview of the asymmetric dynamics of plea bargains in the context of bargaining theory and ultimately illustrate the unfairness of the process.

2.1 Explaining Information Asymmetry

The core idea of bargaining theory holds that a negotiated outcome exists that is better for both sides than the consequence of not bargaining. In political science, rationalist bargaining theory has been applied to the explanation of why nations do or do not go to war.[80] This means

[79] Robert Powell, "Bargaining Theory and International Conflict,"*Annual Review of Political Science* 5, no. Volume 5, 2002 (June 1, 2002): 1–30, https://doi.org/10.1146/annurev.polisci.5.092601.141138.
[80] David A. Lake, "Two Cheers for Bargaining Theory: Assessing Rationalist Explanations of the Iraq War," *International Security* 35, no. 3 (2010): 17.

that either party is better off accepting a solution within its bargaining range rather than going to war.[81] The bargaining protocol, as defined by political scientist Robert Powell, has three possible forms: (1) player one makes an all-or-nothing offer that player two can accept or receive; (2) either bargainer makes an offer but can make as many as they want; (3) the offers alternate back and forth with no limit.[82] Plea bargaining ultimately falls in the last two forms, as the prosecutor makes an offer and the two parties negotiate until a deal is achieved. War, or failure to arrive at a negotiated outcome, occurs for two reasons: one side is perceived as less committed to the deal than the other, or one or both sides misrepresent information.[83] The issue of credible commitment often arises when there is a shift in the distribution of power between the bargaining parties, incentivizing one party to demand a more favorable bargain.[84] Not only does this change the bargaining range for both parties, but it motivates the weaker state to fight before the power difference becomes more drastic. Commitment problems can also arise when one state feels uncertain regarding the other state's interests, rendering them unable to commit to a bargain out of fear of defection from the other side.

This uncertainty is often related to the second issue, a problem involving negotiations, and misrepresentation. Lake argues that actors typically have incentives to reveal private information to further the negotiations.[85] However, if war occurs, this significantly disadvantages the state by allowing their opponent insight into the cost of fighting. Therefore, states often misrepresent the cost of fighting to safeguard their private information in the case of failed negotiations. [86]

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[81] Lake, " "Two Cheers for Bargaining Theory," 18.
[82] Powell, "Bargaining Theory," 27.
[83] Lake, "Two Cheers for Bargaining Theory, 19.
[84] Lake, "Two Cheers for Bargaining Theory," 12.
[85] Lake, "Two Cheers for Bargaining Theory," 13.
[86] Lake, "Two Cheers for Bargaining Theory, 12.

The misrepresentation of critical information, which impedes the proper navigation of the bargaining process, contributed to the initiation of the US-Iraq war. Credible commitment issues arose when Saddam refused to verify that Iraq had stopped its weapons of mass destruction program. These weapons greatly influenced the bargaining cost of war for the United States, as their existence signaled the ability of the Baath regime to potentially deter an attack from the United States.[87] More importantly, the United States viewed Saddam's lack of credible commitment as a foreshadowing of future war. A bargain is only credible if both parties agree to honor it at a later date, so without Saadam's assurance that Iraq would pause all WMD programs, any bargain made at the time would be effectively useless. The fear of military disadvantage, combined with the lack of Saddam's commitment, led the United States to war in 2003. Not only did they believe that further bargaining with Iraq was useless, but they wanted to strike when they deemed the odds still in their favor.[88] More importantly, the United States had incentives to misrepresent the cost of war after 9/11 necessitating a display of strong political and military power. This attack not only inspired the United States to display its power on the world stage, but it shifted the Bush administration's attitude away from opposing nation-building and towards a "total transformation of the Middle East."[89] Vice President Dick Cheney declared to the public that he was aware of the challenges that would come with governing Iraq, but that "September 11 required the United States to take on such costs."[90] The United States wanted to portray its military capabilities in a way that would not only intimidate Saddam but send a message to the rest of the Middle East.[91] Certain scholars argue that this desire to intimidate Saddam led the United States to purposefully downplay the financial cost of the war. Others argue that this was a

[87] Lake, "Two Cheers for Bargaining Theory," 7.
[88] Lake, "Two Cheers for Bargaining Theory," 9.
[89] Candace McCoy, "Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform," *Criminal Law Quarterly* 50, no. Issues 1 & 2 (2005): 68.
[90] McCoy, "Plea Bargaining as Coercion," 89.
[91] Lake, "Two Cheers for Bargaining Theory," 12.

move designed to gain illicit support from the public.[92] Either way, the original cost of the war between two and three trillion dollars - dwarfed the Bush Administration's estimate of fifty million.[93]

The root of these credible commitment issues and misrepresentations of power was asymmetrical information. With complete information, one state can make the best offer for themselves that still falls within the other state's bargaining range and vice versa. When information is asymmetrical, that is, when one state has information the other state lacks, it can no longer estimate the other state's demands, limiting the type of offer it can make that satisfies both parties and avoids war. The state with the information now faces a "risk-return trade-off between possibly obtaining better terms and a higher probability of not obtaining any settlement at all."[94]

In the case of the US-Iraq war, Saddam incorrectly assumed that the Bush administration was bluffing. Although the United States signaled its plans by establishing troops in the region, Saddam was "insulated in a cocoon" where "few subordinates dared challenge his preconceived beliefs."[95] Saadam's political bravado regarding weapons of mass destruction stemmed from misconceptions within the Iraqi government that the US military did not pose a substantial threat to his power. He based his assumptions on recent failures of the US military including their withdrawal from Baghdad as well as their withdrawals from Lebanon and Somalia in the late 20th century.[96] He also viewed the US refusal to send troops during Operation Desert Fox as an indicator of the lack of their true commitment to the war.[97] Although the United States was signaling its war plans quite clearly, Saddam's impression of them as "paper tigers" led him to

[92] McCoy, "Plea Bargaining as Coercion," 90.
[93] Lake, "Two Cheers for Bargaining Theory," 17.
[94] Lake, "Two Cheers for Bargaining Theory," 17.
[95] Lake, "Two Cheers for Bargaining Theory," 23.
[96] McCoy, "Plea Bargaining as Coercion," 68.
[97] Lake, "Two Cheers for Bargaining Theory," 24.

conclude that the greatest threats to his rule were domestic and internal.[98] He calculated that he should direct much of his attention toward Iran, whose pending influence prompted the Iraqi government to continue its weapons of mass destruction program even though it violated international regulations.[99] His miscalculation added to the breakdown in negotiations that ultimately led to war. This asymmetrical information structure allowed him to delude himself about the risks of engaging in war with the United States, continuing the bargaining process in hopes of achieving a higher payout. The United States fueled their misrepresentation of war by deploying minimal military planners so that the Iraqi military "would never be tipped off to US plans nor be able to adequately recover.[100] These minimal ground troops were preceded by simultaneous ground and aerial assaults, creating a "shock-and-awe" strategy.[101] The United States also viewed his inability to commit to a bargain as evidence that Saddam would not hold up his end of a potential compromise.[102] More importantly, the United States had critically underestimated the cost of the Iraq war by calculating. This decision, compounded with their incorrect estimates regarding the cost of the war, created "the administration's and the public's unwillingness to accept any bargain short of Iraq's complete capitulation."[103] Saddam's isolation led to strategic misjudgments, while the United States' flawed estimations narrowed its willingness to negotiate. Ultimately, these asymmetries created a volatile bargaining environment where both sides miscalculated the costs and risks of war.

Plea bargain negotiations have a similar bargaining theory structure perpetuated by asymmetric information. The defendant's choices are dependent on the actions of the prosecutor

[98] Lake, "Two Cheers for Bargaining Theory," 24.
[99] Lake, "Two Cheers for Bargaining Theory," 26.
[100] McCoy, "Plea Bargaining as Coercion," 20.
[101] Lake, "Two Cheers for Bargaining Theory," 26.
[102] McCoy, "Plea Bargaining as Coercion," 19.
[103] Lake, "Two Cheers for Bargaining Theory," 24.

and vice versa.[104] When deciding whether or not to file specific charges or reject a plea offer, the prosecutor and defendant consider how the other will react to these decisions.[105] Because each party's choices are "substantially dependent upon the anticipated actions of the other, their motivations are fundamentally related."[106] This creates a bargaining-like structure where the two parties enter a mutually dependent agreement to negotiate. A defendant will accept a plea offer "only if the utility of the known consequences of such an acceptance outweigh the risk associated with going to trial."[107] The prosecutor alters the plea to calibrate the defendant's bargaining range while balancing their interest in securing justice.[108] Complicating these interactions is the increased risk each party faces when they don't share the same information.[109] If one side has more information than the other, they may be able to misrepresent the cost of going to trial or skew the plea bargain in their favor. Without complete information, neither party can act in accordance with their best interests. It is this information asymmetry that "makes the game of plea bargaining a gamble for both sides."[110]

2.2 Discovery

Discovery rules in criminal proceedings originated to prevent the prosecutor from withholding executory evidence that could coerce the defendant into pleading guilty. Discovery is defined by the American Bar Association as the formal process of exchanging information. Designed to prevent "trial by ambush," discovery allegedly ensures that both sides have access to the evidence the other would present in court. The current rules of discovery were dictated by the 1963 case *Brady v. Maryland,* where John Brady and Charles Bobbit were found guilty of

[104] H. Mitchell Caldwell, "Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System," *Catholic University Law Review* 61, no. 1 (2012 2011): 63.
[105] Caldwell, "Coercive Plea Bargaining," 68.
[106] Caldwell, "Coercive Plea Bargaining," 78.
[107] Caldwell, "Coercive Plea Bargaining," 79.
[108] Caldwell, "Coercive Plea Bargaining," 78.
[109] Caldwell, "Coercive Plea Bargaining," 72.
[110] Caldwell, "Coercive Plea Bargaining," 71.

first-degree murder in separate trials and were sentenced to the death penalty.[111] In his trial, Brady claimed that he took part in the crime but that Bobbit was responsible for the actual killing.[112] After trial, Brady learned that Boblit had confessed to the entire murder, but the prosecutor had withheld that evidence to force Brady to plead guilty.[113] Brady appealed his conviction based on this information, but the Maryland Court of Appeals rejected his appeal, arguing that this evidence "would not have reduced the petitioner's offense below first-degree murder."[114] The Supreme Court reversed the ruling of the Court of Appeals on the basis that withholding information violated the due process clause of the 14th Amendment.[115] During the new trial, the court ruled for the defendant, writing that the prosecution had to disclose "evidence favorable to an accused…where the evidence is material either to guilt or to punishment."[116] They defined this evidence by asking "whether the evidence would have changed the outcome of the proceedings."[117] This ruling set the standard for criminal discovery across the United States, as prosecutors were now required to turn over exculpatory evidence, also called Brady material, to the defense. Specifically, the prosecutor has an "affirmative duty" to search their files and disclose any Brady material to the defense promptly.[118] These standards are meant to prevent the defendant and their counsel from being ambushed by undisclosed evidence during the plea bargain process.

[111] Caldwell, "Coercive Plea Bargaining," 71.
[112]"Brady v. Maryland," 373 U.S. 83 (1963)," Findlaw, accessed March 4, 2025, https://caselaw.findlaw.com/court/us-supreme-court/373/83.html.
[113] "Brady v. Maryland, 373 U.S. 83 (1963)."
[114] "Brady v. Maryland, 373 U.S. 83 (1963)."
[115] "Brady v. Maryland, 373 U.S. 83 (1963)."
[116] Jenny Roberts, "Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process," *Iowa Law Review* 95, no. 1 (2010 2009): 120.
[117] Brady v. Maryland, 373 U.S. 83 (1963)."
[118] "Impeachment of a Witness," LII / Legal Information Institute, accessed February 10, 2025, https://www.law.cornell.edu/wex/impeachment_of_a_witness.

Brady falls short of protecting defendants because the application of this case law to plea bargains remains relatively unspecified. *Brady* was decided in the context of a trial, and the court has not specifically required prosecutors to "disclose exculpatory evidence to the defendant before entering a guilty plea," nor has the court specifically addressed a failure to turn over exculpatory evidence during plea negotiations.[119] According to the Fordham Law Review, some courts currently apply Brady to plea bargain negotiations, while others only require the presentation of Brady material before trial. The lack of uniform application stems from arguments that applying Brady to plea bargains would "improperly force the Government to engage in substantial trial preparation before plea bargaining."[120] Although beneficial to the defendant, this would essentially double the work for prosecutors who rarely conduct extensive analysis of cases that result in plea bargains. Even if prosecutors did overhaul their evidence, Brady's material is decided within the context of all evidence that would have come into trial. Therefore, it is difficult to cherry-pick evidence that may be independently exculpatory rather than evidence that becomes exculpatory when viewed alongside other details.

Furthermore, despite some states extending Brady's obligations to plea bargains, prosecutors frequently breach these requirements. I interviewed Maxine Gerard, a former public defender for DeKalb County, who noted that Brady violations happen all the time.[121] These violations occur when prosecutors purposefully hold onto information for their benefit or they may simply forget to turn over information relevant to the case.[122] This latter is increasingly likely when information about the defendant's case is spread across multiple agencies. These violations are difficult to prove because the concept of exculpatory evidence is left entirely up to

[119] Alkon, "The Right to Defense Discovery," 421.
[120] Alkon, "The Right to Defense Discovery," 428.
[121] Maxime Gerard (former public defender) interview with the author, February 2017.
[122] Gerard, interview.

the prosecutor's discretion.[123] To prove that a violation of Brady occurred, the defense first has to establish that the evidence in question was exculpatory.[124] Even when the defense manages to do so, "empirical evidence shows that few Brady claims succeed and that most Brady material is ambiguous enough that prosecutors can easily overlook it."[125] The ambiguous nature of exculpatory evidence makes prosecutors immune to many claims of Brady violations, leaving the defendant unable to rectify the injustice.

The lack of legal precedent requiring *Brady* in plea bargains allows prosecutors to withhold valuable information. A plea bargain only occurs if the value of the plea "is worth more to the defendant than what he or she might gain at trial.[126] To accurately enter into a plea bargain, both sides must perform a cost-benefit analysis. However, if only the prosecutor knows the full weight of the evidence against the defendant, the defendant cannot rationally make an informed decision. The lack of knowledge prohibits them from deducing whether or not the offer(s) being made are advantageous are within their best interest. This information asymmetry privileges the prosecutor because they can propose harsh and unfair bargains without the defendant's knowledge. Ultimately, in the absence of explicit statutory guidelines governing discovery obligations between the parties, the prosecutor retains a distinct informational advantage.

Proponents of the plea bargain system cite official motions for discovery as a way to even the playing field. A motion for discovery is a formal written request asking for the state's evidence. This is a deceptive method, as prosecutors can link this request to a plea bargain, forcing the defendant to choose between a plea and access to evidence.[127]

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[123] Alkon, "The Right to Defense Discovery," 431.
[124] Gerard, interview.
[125] Stephanos Bibas, "Plea Bargaining Outside the Shadow of Trial," *Harvard Law Review* 117, no. 8 (2004): 2465, https://doi.org/10.2307/4093404.
[126] Caldwell, "Coercive Plea Bargaining," 70.
[127] Alkon, "The Right to Defense Discovery," 423.

> "Here's how it went. [A] client would hire me for a DWI or weed case. I'd go to court and ask for a copy of the police report. I'd be told that they could read it to me (no seriously, they would say this), or sometimes even let me read it. But if I wanted a copy, then I would have to file a discovery motion, and then they would withdraw all plea offers and force my client to trial. So basically they set up a closed file system to bully defendants into pleading guilty without looking at the evidence."[128]

By linking discovery with plea bargains, prosecutors back defendants into a corner. They are forced to choose between a plea that may or may not be based on facts, or gain access to discovery and risk going to trial.

Defendants can also claim that Brady was violated during or after the case. However, this requires the defendant to show "why he didn't raise the claim in his first petition and show actual prejudice from the Brady violation."[129] This involves a lengthy, complex appeals process that will undoubtedly cost the defendant significant time and money. More importantly, demonstrating that certain evidence would have affected the outcome of a case is a difficult task, as it requires the court to weigh the hypothetical value of evidence in a closed case.

Progress in the fight for fair plea bargaining has been made when it comes to discovery. *Lafler v. Cooper* held that defendants have the right to "effective assistance of counsel" in plea negotiations.[130] Anthony Cooper was found guilty through trial by jury of shooting a woman in the thighs after rejecting a plea bargain offer from the prosecutor. He appealed to the Court after his conviction, claiming that his lawyer poorly advised him to turn down the deal.[131] The Supreme Court ruled 5-4 in Cooper's favor, recognizing that "a fair trial after a failed plea

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[128] Alkon, " "The Right to Defense Discovery," 423.
[129] James W. Diehm, "Pleading Guilty While Claiming Innocence: Reconsidering the Mysterious Alford Plea," *University of Florida Journal of Law and Public Policy* 26, no. 1 (2015): 28.
[130] Alkon, "The Right to Defense Discovery," 419.
[131] Ross, "The Entrenched Position of Plea Bargaining," 720.

bargain is not a complete cure". Although they did not define "effective" legal assistance, their judgment indicates a shift regarding the plea bargain controversy by addressing the nature and quality of the defense attorney.[132] At the same time, it sidesteps the larger issue of defendants being misadvised during their plea bargain process. Although Cooper's verdict went all the way to the Supreme Court, dozens of verdicts resulting from ineffective assistance exist in the United States. *Lafler* flags to the American public that the court cares about the assistance provided to defendants, but it doesn't provide any guidelines to ensure that this doesn't happen again in a different case.[133] Ultimately, the lack of required discovery in plea bargains substantially privileges the prosecutor as it allows them an informational advantage over the defendant.

2.3 Charge Bargaining

The asymmetric divide of information continues into the charging section. The inherent motivation of the prosecutor is to convict as many individuals as possible most efficiently and cost-effectively. It is inefficient, for the prosecutor individually, and the justice system as a whole, to take a defendant to trial when the state is unsure of their guilt. It is more efficient to overcharge the defendant in the plea bargaining process to "ensure that justice is served." In other words, prosecutors choose to overload charges in the chance the defendant is guilty. Therefore, many prosecutors begin plea bargain negotiations with a "seriously inflated set of charges" that are "much higher than what a typical prosecutor" would want to see imposed.[134] Once the charges are leveled, the process that ensues between the prosecution and the defense is called charge bargaining. In its most basic form, charge bargaining represents an agreement "to replace a higher charge with a lower one in exchange for the defendant's promise to plead

[132] Alkon, "The Right to Defense Discovery," 418.
[133] Alkon, "The Right to Defense Discovery," 420.
[134] Andrew Manuel Crespo, "The Hidden Law of Plea Bargaining," *Columbia Law Review* 118, no. 5 (2018): 1303.

guilty."[135] Charge bargaining and plea bargaining are often used synonymously, but charge bargaining refers specifically to the negotiations regarding the charges against the defendant, while plea bargains refer to a general category of negotiations. For example, charge bargaining can look like a prosecutor agreeing to swap an aggravated assault charge for a simple assault charge to entice the defendant to plead guilty.[136] Charge bargaining can also involve "joining multiple charges together in a single case" to create "sticker shock" for the defendant.[137] For example, a prosecutor can take a charge of stealing a motor vehicle and add unauthorized use of a vehicle and possession of stolen property.[138] This is referred to as overreaching, and it involves inflating the individual charges beyond what the law can impose or beyond what the facts of the case can support.[139] In these instances, the prosecutor knows that it is unlikely a jury would accept these charges but the defendant does not. Prosecutors use this knowledge to their advantage, capitalizing on the "defendant's fear that a jury might go along with the inflated charges" to manipulate the bargaining range.[140] In reality, the prosecutor has no interest in obtaining the maximum sentence, so they are trading away "extra" years behind bars that they never really wanted.[141] This is referred to as sliding down, it gives the defendant the impression that they are making progress when it comes to negotiating their sentence.[142] This informational advantage controls "the defendant's incentive to plead guilty" and allows the prosecutors to dictate the terms of the negotiation. Ultimately, the prosecutor's knowledge of the charging landscape and their ability to inflate or exaggerate the charges provides them an informational advantage in negotiations.

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[135] Crespo, "The Hidden Law of Plea Bargaining," 1303.
[136] Crespo, "The Hidden Law of Plea Bargaining," 1310.
[137] Crespo, "The Hidden Law of Plea Bargaining," 1317.
[138] Crespo, "The Hidden Law of Plea Bargaining," 1328.
[139] Crespo, "The Hidden Law of Plea Bargaining." 1329.
[140] Crespo, "The Hidden Law of Plea Bargaining," 1328.
[141] Crespo, "The Hidden Law of Plea Bargaining," 1328.
[142] Crespo, "The Hidden Law of Plea Bargaining," 1330.

These prosecutorial powers are addressed under the laws of joinder and severance which dictate how many charges can be piled on top of each other and how much discretion the prosecutor has to handle each case.[143] Put differently, the law of joinder answers the question "How many charges can a prosecutor pile on in a single case?"[144] Federal Rule of Criminal Procedure 8 allows for the joinder of offenses if they "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan."[145] Severance refers to the the separation of these charges before or during trial "to promote a fair determination of the defendant's guilt or innocence of each offense"[146] Severance serves as a check on the prosecutor's power by allowing the judge or defendant some power when it comes to dividing up the charges.[147] Each jurisdiction tackles the question of joinder and severance differently, creating an extensive range of prosecutorial power across the country.[148] States with permissive joinder-severance regimes provide the prosecutor flexibility when it comes to applying multiple charges to the defendant, while states with narrower laws force prosecutors to choose which charges to forgo.[149] Twenty-six states permit joinder, even for factually unrelated offenses, allowing the prosecutor more control over their charging decisions.[150] A few states, such as Texas, have attempted to curb prosecutorial power by limiting the law of joinder, but the majority of states still allow prosecutors to divide and join charges as they see fit.[151] The trend towards lenient joinder and severance laws throughout the nation increases prosecutorial discretion in charging matters

[143] "Joinder & Severance," accessed February 17, 2025, https://www.americanbar.org/groups/criminal_justice/resources/standards/joinder-severance/.
[144] Crespo, "The Hidden Law of Plea Bargaining," 1303.
[145] "Joinder & Severance."
[146] "Joinder & Severance."
[147] "Joinder & Severance."
[148] "Joinder & Severance."
[149] "Joinder & Severance."
[150] "Joinder & Severance."
[151] "Joinder & Severance."

This chapter lays out the two legal mechanisms that preserve prosecutorial power: discovery and charge bargaining. Specifically, the lack of clear discovery procedures for plea bargains creates a loophole with which prosecutors can withhold information. Access to privileged information also means that the prosecutor can inflate or exaggerate the charges without the defendant knowing, controlling both the defendant's perception of the case and their incentive to plead guilty. In the context of bargaining theory, defendants cannot make informed choices because their lack of information gives them the"inability to predict the prosecutor's future conduct with any certainty."[152] The process is now ultimately unfair, as one party is deprived of knowledge and the other is not. By illustrating the effects of information asymmetry, one can conclude that the plea bargain process prevents the defendant from making well-reasoned choices and is ultimately unfair.

[152] Caldwell, "Coercive Plea Bargaining," 68.

Chapter Three

Information asymmetry addresses the systematic advantages afforded to the prosecutor, but the concept of coercion highlights another avenue of unfairness. Armed with an abundance of information, prosecutors can alter the defendant's perception of the negotiations and the risks of going to trial. Without access to information that allows for rational decision-making, the defendant is particularly vulnerable to such manipulation. The result is that prosecutors can coerce defendants into accepting deals that are not in their best interest. On certain occasions, prosecutors also force innocent people to plead guilty. This was the case in the West Memphis Three, the infamous trial where three men were wrongly convicted of a triple homicide. Beginning with an analysis of the prosecutor's bargaining standpoint and ending with a discussion of the duties of the defense attorney, chapter three unpacks the concept of coercion within the plea bargaining system.

3.1 Coercion

Prosecutors strategically manipulate plea negotiations by inflating initial charges to create an impression of leniency, placing defendants at an inherent disadvantage through calculated misrepresentation. The prosecutor knows that the defendant wants to obtain the minimum sentence, so they start bargaining for the maximum sentence to give the impression of drastically reducing the charges. By having a baseline understanding of the maximum and minimum acceptable charges, prosecutors can set their bargaining range. Prosecutors also conceal whether they "subjectively intend to plea bargain some or all of the charges away" or use them solely to threaten the defendant with trial (Graham). In bargaining theory, this amounts to a prosecutor misrepresenting their own cost of going to trial, as the inflated charges increase the legitimacy of the state's case while raising the risks for the defendant. In other words, inflated charges create

the impression that the state faces minimal risk by proceeding to trial, while significantly increasing the perceived risk borne by the defendant. It also obscures the defendant's ability to objectively analyze potential offers as the falsified or exaggerated charges prevented them from contextualizing the information. Most importantly, the inflated charges intimidate the defendant and raise the stakes of the situation. While the prosecutor is gambling with time and effort, the defendant is considering their next wedding anniversary, their son's birthday, or their best friend's funeral. These personal stakes often induce "risk-averse behavior" forcing the defendant to accept plea bargains that are not in their favor. Put simply, the prosecutor's informational advantage makes the defendant's cost of trial abhorrently high, forcing them to plead guilty.

The coercion of the system is furthered by the fact that prosecutors can also threaten to reindict the defendant with bad facts if they do not accept the bargain. This was the case in *Bordenkircher v. Hayes,* where Hayes was charged with forgery of $88.30 resulting in two to ten years in prison.[153] The prosecutor offered Haynes five years if he pleaded guilty and instructed him that if he refused this offer, the state would reindict Hayes under the Kentucky Habitual Crime Act.[154] This was a particularly poignant threat as Hayes had two prior felony convictions and would be imprisoned for life if found guilty as a habitual offender.[155] Hayes rejected the deal, went to trial, and was found guilty. The question was whether the Fourteenth Amendment prohibits acting upon a threat made during plea negotiations to re-indict the accused on more serious charges.[156] The court ruled that the 14th Amendment did not prevent this conduct, meaning that it is constitutionally permissible to threaten and intimidate the defendant to coerce them into accepting a plea.[157] Therefore, when prosecutors discuss plea bargains, they can

[153] "Bordenkircher v. Hayes, 434 U.S. 357 (1978)," Justia Law, accessed December 12, 2024, https://supreme.justia.com/cases/federal/us/434/357/.
[154] "Bordenkircher v. Hayes, 434 U.S. 357 (1978)."
[155] "Bordenkircher v. Hayes, 434 U.S. 357 (1978)."
[156] "Bordenkircher v. Hayes, 434 U.S. 357 (1978)."
[157] "Bordenkircher v. Hayes, 434 U.S. 357 (1978)."

constitutionally threaten the defendant with indictment if the defendant does not accept the deal at hand. This leaves the defendant no choice but to accept a deal, regardless of whether or not it is advantageous to them. This dynamic essentially traps the defendant who may otherwise exercise their right to a trial and instead is pressured into plea agreements out of fear of receiving harsher penalties. Such prosecutorial practices undermine the principles of due process by enabling coercions, ultimately diminishing the defendant's autonomy and further tilting the balance of power toward the prosecution.

As an observer or a strong believer in the American criminal justice system, you may be asking yourself, how does this happen? Why doesn't someone stop it? The reality is that the majority of plea negotiations take place behind closed doors, leaving them subject to very little regulation. Indeed, many deals are struck within the prosecutor's office without a third party present. This secrecy helps perpetuate practices such as overcharging because it keeps both the defendants and the public in the dark. The irony is that a system designed to "rectify the perceived evils of disparity and arbitrariness in sentencing" has created a system even more asymmetric and coercive.

3.1 Dilemma of Defense Attorneys

In theory, defense attorneys mitigate this coercion by providing the defendant with comprehensive legal advice. However, towering caseloads limit the amount of time and effort that each defense attorney can spend on the case. The National Defense Public Workload Study dictates that public defenders be assigned the following cases: felonies: 150 cases per year; misdemeanors: 400 cases per year; mental health cases: 200 cases per year; juvenile cases: 200 cases per year; appeals: 25 cases per year. However, Gerard described having many more cases. "I remember we would have like 120," she recalled, "60 in the morning and 60 in the

evening."[158] Oftentimes, public defenders will receive cases just minutes before the court starts This was the case with Bob Marro, a recently retired public defender who served in Providence, Rhode Island for thirty-three years, who received a stack of 50 cases as the judge walked in. The lucky defendants received five minutes of his time, while unlucky ones received less than a minute.[159] One public defender, Jack Talaska of Lafayette, LA, had 194 felony cases on his docket in a single day. This required him to do the work of five lawyers at once. Unfortunately, cases such as Marro's and Talaska's are not unique. There were two dozen more public defenders in Talaska's district with more cases than him, the highest being 413. Overworked attorneys cannot adequately devote time and energy to helping each of their clients navigate a plea bargain process. The excessive workload dumped on public defenders around the country motivates them to expedite their cases. They cannot afford to spend multiple hours explaining the potential consequences of each plea bargain to their client. Although many if not all public defenders act in good faith when serving a client, the stark realities of the system force them to prioritize efficiency over comprehension.

The incentive for defense attorneys to expedite cases is amplified by the absence of any legal requirement to inform defendants about the collateral consequences of accepting a plea bargain. This means that a defendant can accept a plea without knowing about the potential repercussions outside the courtroom, including loss of voting rights, sex offender registration, or loss of custody.[160] Defense attorneys do have a duty to give accurate advice where they "choose to warn," meaning that if and when legal counsel decides to mention such potential damages, they are required to do so accurately.[161] Known as the affirmative-misadvice exception, this rule

[158] Gerard, interview.
[159] Richard A. Oppel Jr and Jugal K. Patel, "One Lawyer, 194 Felony Cases, and No Time," *The New York Times*, January 31, 2019, sec. U.S., https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html,
[160] Alkon, "The Right to Defense Discovery," 417.
[161] Roberts, "Ignorance Is Effectively Bliss," 133.

came into being after *Roberti v. State* where Ronald Roberti pleaded no contest to various sexual assault charges.[162] He alleged that this was done under the guidance of his lawyer who told him that, because he would serve his probation out of state, he would avoid the consequences of the Florida Ryce which forced all individuals convicted of sexual assault charged to be temporarily committed to a mental institution.[163] Roberti later attempted to withdraw his plea after finding this advice to be incorrect.[164] The court accepted Roberti's argument after finding that civil commitment is a collateral consequence and Roberti's lawyer's misadvice on such collateral consequences "constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea."[165] However, this structure signaled to defense lawyers that "it is the safest thing to say nothing at all about 'collateral matters," as "guilty pleas are immune from attack if a defendant remains ignorant of the collateral consequences."[166] The collateral consequences rule and the affirmative misadvice exception allow legal counsel two assurances: "The guilty plea will stand so long as no information is offered to the client on the commitment consequence" and "the plea deal will fall apart should the defendant learn of the potential for the lifelong involuntary commitment."[167] This incentivizes the overworked defense attorney to remain quiet about the potential consequences of a plea to move on to the next case.

The impact of collateral consequences can be seen in the Alford plea, a specific type of plea bargain used in the United States. The Alford Plea originated from *North Carolina v. Alford* where the defendant, Henry C. Alford, was charged with first-degree murder in 1963[168]. Alford pleaded guilty to a second-degree murder charge to avoid the death penalty, but he continued to

[162] Roberts. "Ignorance Is Effectively Bliss," 133.
[163] Roberts, "Ignorance Is Effectively Bliss," 134.
[164] Roberts, "Ignorance Is Effectively Bliss," 135.
[165] Roberts, "Ignorance Is Effectively Bliss," 134.
[166] Roberts, "Ignorance Is Effectively Bliss," 134.
[167] Roberts, "Ignorance Is Effectively Bliss," 134.
[168] James W. Diehm, "Pleading Guilty While Claiming Innocence: Reconsidering the Mysterious Alford Plea," *University of Florida Journal of Law and Public Policy* 26, no. 1 (2015): 27.

assert that he was innocent in the matter. Upon entering the courtroom, Alford declared to the judge:

> "I pleaded guilty to second-degree murder because they said there is too much evidence, but I ain't shot no man, but I take the blame for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all. . . I'm not guilty but I plead guilty."[169]

Alford was sentenced to thirty years in jail during which he appealed his plea through a writ of habeas corpus. This procedure, commonly referred to as a writ of habeas, challenges the legality of the plea bargain agreement and asks the court to review the constitutionality of the defendant's confinement.[170] This is not considered part of the criminal legal proceedings but an independent civil procedure initiated by the defendant.[171] In the case of Alford, the US District Court for Middle North Carolina denied his appeal, but the US Court of Appeals accepted it, holding that the plea was involuntary if the defendant's sole motivation was to avoid death.[172] The US Supreme Court reversed this ruling, declaring that the plea was not invalid and setting the precedent that the defendant may plead guilty while maintaining their innocence. They wrote that his plea represented "a voluntary and intelligent choice among the alternative courses of action."[173] This ruling was received with mixed opinions by the legal community. Some scholars believed that the Alford plea allowed courts to balance "elements of the criminal justice system that are traditionally considered mutually exclusive[174]. They argued that it promoted efficiency

[169] Diehm, "Pleading Guilty While Claiming Innocence," 29.
[170] "Habeas Corpus," LII / Legal Information Institute, accessed February 27, 2025, https://www.law.cornell.edu/wex/habeas_corpus.
[171] "Habeas Corpus."
[172] Jenny Elayne Ronis, "The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System Case Notes and Comments," *Temple Law Review* 82, no. 5 (2009): 1418.
[173] Ronis, "The Pragmatic Plea," 918.
[174] Ronis, "The Pragmatic Plea," 920.

and justice by addressing both the defendant's and the victim's interests[175]. Opponents of the Alford plea argue that it is antithetical to the justice system by allowing innocent individuals to plead guilty.[176] Regardless, the Alford plea became a part of the prosecutor's toolbox as a way to establish convictions regardless of the defendant's guilt.

The collateral consequences of the Alford Plea are rarely expressed to the defendant. Remorse, or "a feeling of compunction or deep regret" is critical to sentencing, as it measures the likelihood that the defendant would reengage in criminal behavior.[177] Defendants who exhibit a lack of remorse are often assigned a more harsh sentence than those who appear to regret their actions. With an Alford Plea, "defendant shares no remorse because they deny all participation in any way in the crime," meaning that they are often given harsher sentences than those who admit guilt and demonstrate remorse[178]. A similar issue occurs with parole, as members of the parole board often weigh the defendant's remorse and supposed rehabilitation as a factor in gaining their freedom. Judges and parole boards classify prisoners who maintain their innocence as less deserving of parole. This was the case in *Silmon v. Travis* where Silmon pleaded guilty to manslaughter via Alford Plea but was denied parole for lacking "remorse and insight and accepting no responsibility for the action that resulted in the brutal homicide of his wife."[179] Even though the parole board was aware of the fact that Silman maintained his innocence, this did not factor into their decision to give him parole[180]. The real hidden consequence of the Alford Plea, however, occurs during probation[181]. One of the requirements of probation is that defendants are required to complete rehabilitation programs relating to their crime. These programs often

[175] Ronis, "The Pragmatic Plea," 918.
[176]Ronis, "The Pragmatic Plea," 921.
[177] Bryan H. Ward, "A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea," *Missouri Law Review* 68, no. 4 (2003): 917.
[178] Ward, "A Plea Best Not Taken," 917.
[179] Ward, "A Plea Best Not Taken," 918.
[180] Ward, "A Plea Best Not Taken," 920.
[181] Ward, "A Plea Best Not Taken," 921.

review and address the events that led to the jail time, presuming that the defendant is, in fact, guilty[182]. According to *Warren v. Schwartz,* defendants are unable to rely on their Alford pleas "as the mere fact that one has entered an Alford plea does not confer any rights concerning future conduct and terms of probation[183]." If defendants refuse to participate in programs that assume their guilt, their probation will be revoked and they will be placed back in prison.[184] Furthermore, Alford pleas can also serve as predicate offenses in sentencing guidelines. Some statutes require a previous offense to convict the defendant of another offense. The Third Circuit held that because "an Alford Plea is, without any doubt, an adjudication of guilt" then any sentence imposed under this plea "qualifies as a 'prior sentence."[185] In other words, taking an Alford Plea still constitutes criminal history despite the defendant maintaining their innocence. Some defendants have argued that their lack of information regarding the effects of an Alford Plea should constitute an invalid plea, but the court disregarded these concerns, declaring them as collateral consequences instead of violations of due process.[186] By declaring them collateral consequences, the defense attorney is absolved of their responsibility to inform the defendant of these repercussions. This asymmetry leaves the defendant to reconcile with the consequences of an Alford plea on their own.

Defense attorneys also lack the same negotiating power as the prosecutor. Defense attorneys are required to review each offer made by the prosecutor with their client. If the prosecutor "summarily rejects a plea bargain simply as a negotiating ploy" without informing their client, they face claims of "ineffective assistance of counsel."[187] By having to explain to the defendant each time an offer is made, the defense attorney not only loses precious time, but it

[182] Ward, "A Plea Best Not Taken," 920.
[183] Ward, "A Plea Best Not Taken," 921.
[184] Ward, "A Plea Best Not Taken," 923.
[185] Ronis, "The Pragmatic Plea," 1396.
[186] Ward, "A Plea Best Not Taken," 925.
[187] Rakoff, *Why the Innocent Plead Guilty*, 27.

prevents them from misrepresenting information about the case to obtain a better deal. This is a stark contrast to the prosecutor whose plan of action revolves around misrepresenting costs. If the client decides that they want to take the prosecutor's first offer on the table simply to end the uncertainty, the defense attorney has little power to dissuade them. Put simply, even if the defense attorney "thinks the plea bargain being offered is unfair compared to those offered by other, similarly situated prosecutors, she has little or no recourse."[188] This law undoubtedly increases the transparency between defense attorneys and their clients, but it essentially prevents the defense attorney from assisting the client to the full extent of their ability.

3.2 The West Memphis Three: A Case Study of Innocent People Pleading Guilty

In 1994, Damien Echols, Jason Baldwin, and Jessie Misskelley, also known as the West Memphis Three, were charged with a triple homicide in West Memphis, Arkansas. The three boys were 16, 17, and 18 years old at the time of the trial and were somewhat unconventional. They listened exclusively to angry, punk rock music and read Stephen King novels. Echols, who dressed only in black and sported long, dark locks, had a history of severe psychiatric problems that led to his prolonged stay at an inpatient care unit.[189] He had the word "evil" tattooed across his hand and supposedly took Misskelley and Baldwin to satanic rituals and witch gatherings.[190] When three young boys were found murdered in the woods near Echol's house, neighbors told the police they suspected Echols for his fascination with death and strange appearance.[191] The police questioned Echols three separate times but he maintained that he knew nothing about the crime.[192] A few days later Victoria Hutcheson, a neighbor and friend of Misskelley's, offered the police her help and they instructed her to create a ruse through which she could get closer to

[188] Rakoff, *Why the Innocent Plead Guilty*, 28.
[189] "The West Memphis Three Trials: An Account," accessed February 18, 2025, http://law2.umkc.edu/faculty/projects/ftrials/memphis3/westmemphis3account.html.
[190] "The West Memphis Three Trials: An Account."
[191] "The West Memphis Three Trials: An Account."
[192] "The West Memphis Three Trials: An Account."

Echols.[193] She instructed Misskelley to invite Echols over under the premise that they would go on a date. According to Hutcheson, Echols led her and Misskelley to a satanic gathering in the woods, close to where the boys had been murdered. Hutcheson's testimony led the police to question Misskelley for over 12 hours while denying him counsel.[194]Although he was 17 years old at the time, Misskelley had the IQ of a seven-year-old boy.[195] Confused and terrified, Misskelley began regurgitating what the police told him to end the ordeal.[196]

> "I kept telling [Inspector Gitchell and Detective Ridge] I didn't know who did it--I just knew of it--what my friend had told me. But they kept hollering at me...They kept saying they knew I had something to do with it because other people had told "them…That's when I went along with him. I repeated what he told me."[197]

Through the course of the confession, Misskelley repeatedly listed incorrect details, specifically that he tied the boys up with twine instead of rope. The prosecutors corrected him, forcing him to retell the story over and over until he "got it right."[198] Once prosecutors had coerced a confession out of him that aligned with the details of the crime scene, the police promptly arrested Misskelley, Baldwin, and Echols, all of whom had been implicated in the investigation. [199]They also interviewed an eight-year-old boy who alleged that he had seen the three men dragging the victims into the forest.[200] He later became a key witness for the prosecution. During the trial, the prosecutors presented evidence they found in Echols home including "eleven black t-shirts, the

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[193] "West of Memphis (2012) - IMDb," accessed February 27, 2025, https://www.imdb.com/title/tt2130321/.
[194] "West of Memphis (2012) - IMDb."
[195] Kaytee Vota, "The Truth behind Echols v. State: How an Alford Guilty Plea Saved the West Memphis Three," *Loyola of Los Angeles Law Review* 45 (2012 2011): 1003.
[196] ""The West Memphis Three Trials: An Account."
[197] Andrew Mobley, "New DNA Testing in West Memphis 3 Case May Exonerate Convicted, Find 'real Killer' in 2025," KATV, December 30, 2024
[198]"The West Memphis Three Trials: An Account."
[199] "The West Memphis Three Trials: An Account."
[200] "West of Memphis (2012) - IMDb."

book *Never of a Broomstick*, and the skull of a dog."[201] They also noted that the night of the murder was a full moon, which was significant to boys practicing witchcraft. In closing, the prosecution instructed the jury to consider "this satanic stuff" and how it served as a force to "do evil, and want to commit murders."[202] All three boys were found guilty on all counts. During the sentencing, the jury made a list of pros and cons for each defendant to help them decide how each should be punished. Damien was awarded pros for being "intelligent" but received cons for being "weird," and "blowing kisses to his parents." Jason received cons for having "low self-esteem."[203]

The Alford Plea was presented to the three men before the extent of prosecutorial misconduct had been excavated. In the years since the trial, new DNA testing statutes in Arkansas allowed the court to reopen the case and examine the previously collected evidence. The new DNA testing found no connection between Baldwin, Misskelley, and Echols to the crime.[204] Echols's lawyers were eager to bring this into the courtroom, and they believed it would win all three men a full exoneration. After multiple appeals, the judge offered an evidentiary hearing to assess the validity of the new evidence.[205] Prosecutors panicked when they learned that their work was being undone, so they offered an Alford Plea.[206]

The plea was coercive firstly because it hid the extent of prosecutorial misconduct. They later learned that the prosecution had also buried the fact that the supposed murder weapon, a knife found in a nearby lake, had been thrown in a year before the murders.[207] Their forensic analysis witness from the trial had never passed his board exams and was instructed, by the state,

[201] "The West Memphis Three Trials: An Account."
[202] Vota, "The Truth Behind Echols v. State," 1110.
[203] Vota, "The Truth Behind Echols v. State," 1112.
[204] "West of Memphis (2012) - IMDb."
[205] Vota, "The Truth Behind Echols v. State," 1114.
[206] Mobley, "New DNA Testing in West Memphis 3."
[207] "West of Memphis (2012) - IMDb."

to identify the knife as the murder weapon while on the stand.[208] They also ignored the fact that Victoria Hutcheson and the eight-year-old boy had recanted their entire testimony.[209] However, by offering the men an Alford plea, the prosecutors prevented the media and courts from feasting on this buffet of corruption. Instead, the state freed the three men while strategically maintaining their original conviction and preventing this wrongdoing from entering the courtroom. This tactic deprived the defendants of essential information, undermining their ability to make a "voluntary and intelligent choice."[210] Such an imbalance of power makes it impossible for the defendants to adequately weigh out their options. Baldwin initially resisted the proposal on these grounds, arguing that he wanted the chance to finally clear his name, but when he learned of Echol's feeble mental and physical condition on death row he changed his mind. "Taking the Alford Plea hurt my soul more than being found guilty in 1994 did," said Baldwin, "When they forced me to take the Alford Plea something in me broke."[211] Although the three men walked out of prison that day after eighteen years, they still carry the inescapable stain of a homicide conviction. In the state of Arkansas, these can include loss of voting rights, termination of employment, loss of professional licenses, and ineligibility for residential housing programs. It also renders them unable to work with multiple government convictions, purchase a firearm, or obtain an alcohol permit. If they do choose to take an Alford plea, they will be forced to reconcile with the consequences which will trickle down through each phase of the criminal legal system.

The Alford Plea epitomizes the coercive nature of the system by forcing an individual to choose between freedom and innocence. The allure of the Alford Plea is that it provides defendants with a moral lifeline. They will never have to admit their guilt in a courtroom, nor

[208] "West of Memphis (2012) - IMDb."
[209] "West of Memphis (2012) - IMDb."
[210] Ronis, "The Pragmatic Plea," 1399.
[211] "West of Memphis (2012) - IMDb."

will an admission of guilt be on record. However, based on the collateral consequences of the Alford plea, they are, for all reasonable purposes, recognized as a criminal by the state. This conflicts with the foundational idea of the justice system which states that "before we deprive a person of his liberty, he will have his day in court."[212] The Alford plea forces the individual to accept punishment when they have neither been found guilty nor admitted their guilt. This system "effectively substitutes a concept of partial guilt for the requirement of proof beyond a reasonable doubt."[213] This not only deprives the individual of their constitutional right to due process, but it lowers the bar for being found guilty. Instead of proof beyond a reasonable doubt, all defendants need to be found guilty in a substantive case against them. Given the informational advantages of the prosecutor, this is very common. If the defendant wants to avoid the brunt of the law, their only chance is to plead guilty. "There could hardly be a clearer violation of due process," remarks Alschuler. By divorcing the concept of innocence from punishment, the Alford plea signifies the crux of the plea bargain system: innocent people can and will be punished.

3.3 Separating Crime and Punishment

In the original Alford plea, Henry Alford declared that he "willingly, knowingly, and understandingly" pleaded guilty despite maintaining his innocence. He believed that the best course of action was to avoid a trial in the face of a "strong prosecutorial case" and accept his discounted sentence. This codified the idea, both to the legal community and to onlookers, that innocent people can and will plead guilty in a court of law. The idea of innocent people pleading guilty essentially undermines the duty of the prosecutor and points to a critical flaw within the system: if prosecutors can reliably secure a conviction from a defendant who did not commit the

[212] Rakoff, *Why the Innocent Plead Guilty*, 27.
[213] Albert W Alschuler, "Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas," n.d.

crime, why would they waste time identifying and prosecuting the individual who did? By divorcing the idea of innocence from punishment, prosecutors have little incentive to identify the guilty party. Instead, they can have innocent individuals take the brunt of the law "even if they are unwilling or unable to admit their participation in the acts constituting the crime."[214] There is no doubt that prosecutors would *prefer t*o identify the right individual(s), but in cases like the West Memphis Three, where the state has a vested interest in burying the past and maintaining their original conviction, the Alford plea allows them to sidestep the question of innocence and uphold their original ruling.

Without the prosecutorial incentive to identify the guilty party, the concept of innocence becomes insignificant. A few years after the West Memphis Three was released and multiple affidavits and DNA evidence had been gathered, the real story emerged. Terry Hobbs, the stepfather of one of the victims, had been caught by his stepson Stevie and Stevie's friends engaging in homosexual activities.[215] The murder had been a panicked and gruesome effort to prevent them from sharing what they saw. However, even with a clear picture emerging, the prosecutors asked him "two or three questions and said good day."[216] They already had three individuals convicted of the crime, so there was little point in investigating Hobbes. When asked why he refused to retry the three men and then prosecute Hobbes, the current West Memphis District attorney declared that "having three trials, trying to convince 36 jurors of the defendant's guilt using old evidence, failed memories, changed minds, dead witnesses and the parents of two of the victims" was simply not worth it. Instead, the state let the three men be declared legally guilty rather than begin the long process of prosecuting the actual killer. In this case, the question

[214] Andrea Kupfer Schneider and Cynthia Alkon, "Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining," *New Criminal Law Review* 22, no. 4 (November 1, 2019): 437, https://doi.org/10.1525/nclr.2019.22.4.434.
[215] Vota, "The Truth behind Echols v. State," 1007.
[216] Mobley, "New DNA Testing in West Memphis 3."

of innocence was second to the question of efficiency and resources. Regardless of whether or not the three men were guilty, the state had already invested time and money into their prosecution and was reluctant to expend more resources. The Alford plea served as a tool to broker the conflict between the prosecutor and the defendant without further investigating the crime or even poking at the question of innocence. “The fact that they are innocent doesn’t mean that they will be acquitted,” declares Judge Rakoff, a leading expert on guilty pleas, “because the laws put a lot more power in the prosecutor's hands.”[217] By prioritizing efficiency the concept of innocence fades into the background. “You're not answering the question of whether they did it or not,” says Cashman when asked about handling potentially innocent clients, “you're answering the question of what can the state prove.”[218] When asked about the concept of innocence in her work, Gerard didn’t hesitate to agree with Cashman: “It might matter for the client,” she said quietly, “but the system doesn’t care about accountability.”[219]

3.4 The Struggle of Defendants

From the defendant’s point of view, multiple facts entice them to plead guilty to crimes they did not commit or accept bad plea deals. The first is a rational analysis of the situation. For example, if a defendant is charged with selling heroin, the mandatory minimum for such a crime is ten years. However, the prosecutor may offer a plea deal that guarantees three years with the possibility of parole. If the defendant elected to go to trial, they would have to wait at least two years behind bars until their court date and then risk being found guilty. The plea bargain is the only way to ensure the defendant leaves prison with the least time possible. Factored into this choice is also the financial and social status of the defendant. Who will take care of their children while they’re in prison? How will they send money home? As defendants consider the

[217] “Watch Judge Jed Rakoff Explain America’s Guilty Plea Problem.”
[218] Patricia Cashman (Florida public defender) interview with the author, February 2025.
[219] Gerard, interview.

consequences of long-term incarceration, the question of innocence fades into the background. Therefore, the decision to take a plea bargain is a "rational, if cynical, cost-benefit analysis of the situation." Why gamble on more years of your life? Although this makes up most defendants' logic, pleading guilty to a lesser sentence may also be less psychologically daunting than going to trial and risking a much harsher punishment. "Research indicates that young, unintelligent, risk-averse defendants will often provide false confessions just because they cannot take the heat of the interrogation."[220] In rare situations, defendants plead guilty to escape the death penalty. Angela Garcia, a black woman from East Cleveland, is still behind bars after pleading guilty to arson and involuntary manslaughter. Her case, which took three trials, involved the death of her two little girls during a house fire. "There was no evidence that it was arson at all," said the Ohio Public Defender attorney, "the evidence they used was not validated by science."[221] In 2016, on the eve of the hearing where Garcia's attorneys prepared to prevent such evidence, prosecutors agreed to her current plea deal that would give her a life behind bars instead of the death penalty. Spared by the skin of her teeth, Garcia's story represents hundreds of other defendants who fell victim to the unfair process.

Some legal scholars argue that innocent defendants are better off in a system with plea bargains than without one. Many innocent defendants are recidivists convicted of petty crimes.[222] These cases can involve disorderly conduct, simple assault, and battery, or possession of drugs. Although these are frequent offenders, the nature of the crime makes the stakes of the case relatively low for both the prosecutor and the defendant.[223] In the case of these small-scale crimes, "prosecutors often provide bargain concessions that far exceed what is necessary to

[220] Rakoff, *Why the Innocent Plead Guilty*, 30.
[221] "Innocence Project: By the Numbers," Innocence Project, accessed March 6, 2025, https://innocenceproject.org/exonerations-data/.
[222] Josh Bowers, "Punishing the Innocent," 1119.
[223] Bowers, "Punishing the Innocent," 1119.

motivate pleas."[224] These concessions not only speed up the process, but they minimize the amount of prosecutorial resources spent on each case. It is easy to make such lenient bargains, as the state faces little public scrutiny for such minor cases.[225] The alternative to these quick and cheap plea bargains is a trial, which requires the defendant to languish behind bars until the court day comes around. This is hard for the defendant to justify, particularly if taking a plea bargain would only include a fine or court-mandated therapy, while a trial could result in ten years in prison. Why gamble years of your life when you could just accept a slap on the wrist? Therefore, the most convenient option for the defendant is to take a plea bargain and mitigate the amount of time spent behind bars.[226] Ultimately, "many recidivist innocent defendants are punished by the process and released by the pleas. [227]

Bower's argument, though accurate in its cost-benefit analysis, falls short of addressing the real problem at hand. Repeat offenders, by definition, are struggling to uphold the law. However, instead of addressing the root of the problem, prosecutors opt for the quickest method possible. Bowers's observations inadvertently highlight the skewed priorities within the criminal legal system, which favors short-term efficiency and case-clearance rates over meaningful rehabilitative interventions and long-term resolutions. Although certain defendants may benefit from plea bargains in the short-term, the crux of the problem is that plea bargains, especially for repeat offenders, amount to a bandaid over a bullet hole.

3.5 Disputes over Asymmetry

Legal scholars often dispute the asymmetrical nature of the plea bargain system by arguing that the defense attorney knowingly and fairly mediates between the two parties. Hallevy

[224] Bowers, "Punishing the Innocent," 1123.
[225] Bowers, "Punishing the Innocent," 1123.
[226] Bowers, "Punishing the Innocent," 1124.
[227] Bowers, "Punishing the Innocent," 1123.

sees plea bargains as a form of alternative dispute resolution with the defense attorney acting as the mediator between the prosecutor and the defendant.[228] Hallevy outlines the characteristics of all mediations: autonomy of the parties and their right to self-determination, the parties' informed consent, fairness, and impartiality.[229] Defense attorneys, or meditators, do not negate the parties' autonomy or right to self-determination, as their presence serves only to widen the range of options available to each party instead of limiting them.[230] The prosecutor serves to represent the public interest, which seeks to issue serious charges, while the defendant represents their interest in receiving a light sentence.[231] Unlike these two parties, the interest of the defendant's attorney is "secondary" in that they do not have " a direct interest in the specific details of the bargain or its consequences but, rather, in other concerns.[232] Their primary goal is to strike a deal between the two parties that simultaneously satisfies both their interests. This goal requires that two separate conversations take place: one between the defense attorney and the prosecutor and the other between the defense attorney and the defendant.[233] In other words, the defense attorney is tasked with convincing the defendant that they must accept a plea bargain while convincing the prosecutor they must offer one.[234] This doesn't limit their autonomy, he argues, as much as it clarifies "the opportunity of continuing their negotiations or beginning the full criminal process with all the possibilities and risks that entails."[235] Similarly, Hallevy alleges that all defense attorneys are required to explain to the defendant "relevant information" relating to the negotiations.[236] The fairness of the plea is established by the longstanding relationship between

[228] Gabriel Hallevy, "The Defense Attorney as Mediator in Plea Bargains," *Pepperdine Dispute Resolution Law Journal* 9, no. 3 (2009 2008): 496.
[229] Hallevy, "The Defense Attorney as Mediator," 502.
[230] Hallevy, "The Defense Attorney as Mediator," 507.
[231] Hallevy, "The Defense Attorney as Mediator," 516.
[232] Hallevy, "The Defense Attorney as Mediator," 516.
[233] Hallevy, "The Defense Attorney as Mediator," 529.
[234] Hallevy, "The Defense Attorney as Mediator," 529.
[235] Hallevy, "The Defense Attorney as Mediator," 527.
[236] Hallevy, "The Defense Attorney as Mediator," 527.

the defendant and the prosecutor, which ensures the fairness of a plea bargain and contractual obligation between the defendant's attorney and the client. Halley argues that these competing priorities balance each other out to ensure an equitable solution for both parties.[237]

Hallevy's argument wrongly assumes that both the prosecutor and the defense attorney have equal access to the same amount of information. The prosecutor receives extensive information about the case including full police interviews, grand jury testimony, forensic test reports, and follow-up interviews.[238] For defense attorneys, access to the client, and subsequently information about the case can be a challenge. When clients are in local jails, the issue is minimal. " I walk right over [to the jail] all the time," said Patricia Cashman, an Orlando defense attorney, "I could go over at two in the morning." [239] However, for defendants who are farther away, conversations can be difficult and costly. Cashman recalled working with a client in Osceola, which is over an hour's drive from her hometown of Orlando. "If I want to do a video visit with a client rather than drive, I have to pay fifteen dollars for thirty minutes with a client."[240] For Gerard, the trip to Rikers was not only arduous but exceedingly difficult to coordinate. She had to have the meeting cleared with multiple security teams and even then their interactions were limited to half an hour.[241] Oftentimes they had to wait until a meeting room had opened up and her client had to be located and brought out from their cell. The ability the defense attorney has to interact with and learn from their client is directly related to whether the client is on bail and the location of their jail. More importantly, Hallevy alleges that during the negotiation process, the defense attorney is the one "who will most likely use all of his or her powers of persuasion and ability to exert force as a party to the mediation efforts."[242] Given what

[237] Hallevy, "The Defense Attorney as Mediator," 527.
[238] Andrew Manuel Crespo, "The Hidden Law of Plea Bargaining," *Columbia Law Review* 118, no. 5 (2018): 1324.
[239] Cashman, interview.
[240] Cashman, interview.
[241] Cashman, interview.
[242] Hallevy, "The Defense Attorney as Mediator in Plea Bargains," 521.

has been revealed about prosecutorial power and its inherent advantage in negotiations, it is unlikely that the defense attorney can and will control the majority of the conversations. Their command of the case and the plea bargain negotiations are a direct function of the amount of time they had to analyze the case and speak with the defendant.[243] They are at the mercy of the prosecutor's charges while fighting their way out of an information deficit.

The system of asymmetry leads to a coercive practice of plea bargaining. Because the prosecutor and the defendant's actions are mutually dependent, the defendant's decisions rest heavily on the information they receive from the prosecutor and vice versa. Therefore, the prosecutor's ability to control the flow of information also allows them to control the defendant's actions and their perception of the case. Although the defendant is armed with an attorney, the towering caseloads assigned to public defenders incentivize them to resolve the case as quickly as possible. This brand of unfairness is perpetuated by disparities in information, but, unlike the issue of asymmetry, coercion exists at the individual level instead of the systemic one. Together, they create a two-pronged system of unfairness that characterizes the plea bargain system.

[243] Alkon, "The Right to Defense Discovery," 429.

Conclusion

Proponents of plea bargaining argue that plea bargains create an efficient method of expediting and solving cases that spare helpless defendants from the sharp teeth of the legal system. Opponents argue that plea bargains permit prosecutors to reconstruct the case so that they can pressure defendants to accept deals that are not in their best interest. The reality is that the plea bargain system is fundamentally unjust because of two separate but related issues. The first is a systemic system of asymmetry that privileges the prosecutor when it comes to gathering and holding information. Specifically, discovery and charge bargaining allow the prosecutor to withhold or falsify facts about the case. While defense attorneys mitigate some of this asymmetry, the constant mountain of cases on their docket prevents them from dedicating sufficient time to each case. Their overwhelming workload also incentivizes them to resolve the case as quickly as possible which often means neglecting to mention collateral consequences. The second aspect of unfairness is coercion. Prosecutors purposefully manipulate the defendant's impression of the case to trick them into accepting a lesser deal. An even more concerning byproduct of coercion is the fact that it forces innocent people to plead guilty. The West Memphis Three is one of the most notorious examples of such a flaw, as three men were wrongly convicted of a triple homicide crime they didn't commit and then coerced into an Alford plea by a state reluctant to air their dirty laundry.

These systems, although distinct, feed off one another to place the defendant in an inherently disadvantaged position. Without the ability to make rational and informed choices, defendants have no way to navigate the system they are placed into. Instead, they fall victim to the whims of the prosecutor. They also complicate the idea of reform, as any meaningful change would need to target both the systemic and the individual inequities.

4.1 The Effects

To gain a concrete understanding of the effects of the system, I spoke with Stephen B. Walker, Director of Correctional Health for the California Correctional Peace Officers Association (CCPOA). Before becoming director of the CCPOA, an organization that represents 30,000 correctional officers across the state of California, Walker worked as a Youth Correctional Officer in the California Youth Authority for thirty-five years.[244] His extensive work within the justice system and the correctional association has led him to become an advocate for the Black Youth Leadership Project and the Child Abuse Prevention Center.[245] I started the interview by inquiring as to whether or not there were any commonalities between the men who entered his facility. Walker described them as lacking basic needs such as shelter and safety, forcing them to enter what he called a "scarcity mindset" Scarcity mindset is "the perception of not having basic needs" leading an individual to engage in actions "that are counter to our basic interest in the belief that it solves this immediate problem in front of us."[246] Many of the men Walker encountered in prison experienced challenging and impoverished upbringings that led them to enter the system young.[247] "When you feel like you don't have a lot, you want to protect what you think you do have," says Walker.[248] One of the inmates in Walker's unit was his former next-door neighbor and childhood friend. "I was walking down at night doing a bed check," Walker recalled, "everybody else had kind of gone to sleep, and I walked by his room and he said 'Hey, Smiley."[249] Walker, startled by hearing his childhood nickname, turned around. In the

[244] Stephen B. Walker, (Director of Correctional Health) interview with the author, March 2025.
[245] Walker, interview.
[246] Walker, interview.
[247] Walker, interview.
[248] Walker, interview.
[249] Walker, interview.

dim light of the cell, the man rattled off each school the two had attended together, as well as the names of Walker's childhood friends and girlfriends.[250] Although Walker, as a correctional officer, was in a position of authority in the prison, he came from the same neighborhood as many of the inmates.[251] His brother had been killed after joining a gang in Sacramento.[252] Walker had managed to stave off this path by joining the Marines after high school, but his proximity to such violence and danger still shook him.

What troubled Walker more than these men ending up in prison was the neglectful way that the system handled them. "The system doesn't look at the context of offenses," he says, when asked about plea bargains, "we're quick to try and apply some form of justice."[253] Unfortunately, the removal of the individual from society and their subsequent subjugation does little to address larger issues. "If all we're doing is holding people for the offenses they committed, and we don't ever get to the root causes, we're just going to keep this revolving door cycle of recidivism spinning," declares Walker.[254] As it turns out, he's right. Right now, not only does the United States have the highest incarceration rate of any country in the world, but it also has the highest recidivism rate. At 70%, the rates are roughly three times that of any European country. These statistics suggest that "a criminal justice system is perpetuating a crime cycle, rather than rehabilitating or reforming its prisoners." The current system of allowing people to plead guilty and then leaving them to wait out their sentence behind bars is not working.

Walker's disbelief in the traditional role of a correctional officer led him to try and establish friendly relationships with some of the inmates.[255] He recalled a specific instance when a troubled 18-year-old bold entered the prison and Walker, concerned for his wellbeing,

[250] Walker, interview.
[251] Walker, interview.
[252] Walker, interview.
[253] Walker, interview.
[254] Walker, interview.
[255] Walker, interview.

attempted to establish a friendly physicality.[256] "I thought that if I wrestle with this dude, we could talk to one another," he recalled with a smile.[257] Instead, Walker was promptly fired from his position for physically engaging with an inmate. Although he was ultimately reinstated with the legal help of the correctional officer's union, this incident reinforced the sole duty of a correctional officer: to hold individuals against their will.[258] Looking back, Walker came to identify this moment as when he began to experience the brokenness of the system.[259] "Nothing will prepare you for coming in and overseeing the subjugation of a human being that is going through their own undiagnosed, unacknowledged, uninformed set of traumas," he declared.[260] The emotional and psychological toll of this work crept up on Walker through the years.

> "The infection of the environment you don't realize is happening to you. You believe you're immune because you're employed. And that's not the case…I woke up one morning after probably ten or eleven years in the agency and realized I was looking at a person I didn't recognize that my mother and father did not raise."[261]

Walker's candid testimony reveals the depth of hurt the criminal justice system creates, both for the inmates and the administrators. His reflections illustrate that even officers are not immune from the emotional and psychological toll the criminal legal system inflicts. More importantly, Walker's experience reveals the danger of a system that relies almost exclusively on plea bargains and mass incarceration to function. Instead of addressing the root of the problem, the system perpetuates cycles of trauma and recidivism. His testimony illustrates the need for fundamental reforms that emphasize rehabilitation and long-term solutions over efficiency.

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[256] Walker, interview.
[257] Walker, interview.
[258] Walker, interview.
[259] Walker, interview.
[260] Walker, interview.
[261] Walker, interview.

4.2 A Way Out: Plea Bargaining as a Collective Action Problem

I ended each of my interviews by asking my interlocutors the same question: what would happen if plea bargaining disappeared tomorrow? Interestingly enough, each answered with the same phrase: "That would never happen." Their staunch belief in the existence of plea bargaining is largely corroborated in legal scholarship, although certain authors hypothesize that the end of plea bargains would harm defendants. Thea Johnson, a scholar of criminal procedure at Rutgers University, writes that if plea bargaining disappeared tomorrow, "defendants throughout the criminal system would lose their primary means of circumventing the injustices of the system."[262] Others argued that while plea bargaining is a coercive practice, it is simply too engrained in our legal system to be withdrawn.

Regardless of the degree to which plea bargains are used, certain realities of the system will remain true. It is a well-established fact that the prosecutor and a defendant will both enter into a deal when they believe that the benefits outweigh the costs of not bargaining.[263] This is an individual calculation based on the bargaining position of the defendant about the prosecutor and vice versa. Although these calculations are made in the context of an individual case, they can influence the distribution of prosecutorial resources across the docket. For example, if Defendant A decides to take a plea bargain, the prosecutor can direct more time and resources into taking Defendant B to trial and vice versa. Ultimately, "the acceptance of a plea bargain strengthens the prosecutor's hand against the other defendant," by allowing them to allocate more resources towards a specific case.

However, this scenario would change if defendants could coordinate to reject plea bargains, preventing the prosecutor from allocating resources on a case-by-case basis. Plea

[262] Thea Johnson, "Lying at Plea Bargaining," *Georgia State University Law Review* 38, no. 3 (2022 2021): 634.
[263] Rasmusen, "Games and Information," 31.

bargains depend on 'the prosecutor's ability to make credible threats of severe post-trial sentences.' However, prosecutors in most jurisdictions have more cases than they have time to handle them. These limitations are often referred to as "the most persuasive justification for the plea bargaining institution" because they reflect the judiciary's inability to process many offenders adequately.[264] These limitations are largely hidden from the defendant who is aware only of their case. However, if defendants became aware of the surplus of cases on the prosecutor's docket and coordinated to simultaneously reject all plea bargains, the threat of trial and harsh sentencing would be significantly reduced.

What prevents defendants from mobilizing is their lack of coordination. Each defendant bargains individually with the prosecutor and is aware only of their case. This allows the prosecutor to give the impression they are only working with one defendant and can dedicate all of their resources to the case. The illusion is heightened by the existing information asymmetries and coercion within the process. The prosecutor's ability to falsify or exaggerate the charges makes it difficult for the defendant to turn down a plea bargain when the cost of going to trial appears so high. Even if the prosecutor has no intention of taking this defendant to trial, the defendant lacks knowledge of the prosecutor's priority list. Defendants indicted for serious charges such as manslaughter realistically comprehend that their case ranks above misdemeanors, but they may not know that the prosecutor has three manslaughter cases on their docket.[265] Their lack of coordination with and knowledge of other defendants prevents the defendants from taking advantage of prosecutorial limitations.[266]

This collective action problem implies a fundamental paradox about the plea bargain debate: people take plea bargains to avoid a trial, but trials are often a falsified threat used to

[264] Bar-Gill, "The Prisoners' (Plea Bargain) Dilemma," 749.
[265] Bar-Gill, "The Prisoners' (Plea Bargain) Dilemma," 755.
[266] Bar-Gill, "The Prisoners' (Plea Bargain) Dilemma,"751.

coerce people into plea bargains. The implications of plea bargains as a collective action problem have the potential to turn the entire debate on its head. Defendants accept deals primarily out of fear of trial, but the threat of trial is exaggerated if not illusory. If defendants had the opportunity to coordinate, they would notice that plea bargaining thrives not because it genuinely promotes justice, but because it exploits defendants' misunderstanding of the prosecutorial capacity.

4.3 A Positive Note

There are some good people out there trying to help. Although no longer a public defender, Gerard tackled each case assigned to her with compassion. “Part of doing my job was showing the humanity of my client to the judge and the prosecutor,” she declared, “and ensuring that even if the prosecutor has indicted 100 thefts that day, they understand the specifics of how my client's life and circumstances are unique to humans.”[267] In a system that so rarely considers the individual, Gerard’s emphasis on the humanity of each of her clients was a unique and noble pursuit. She fought against the systemic pressure to view clients solely as cases that needed to be cleared from the docket. Her unwavering commitment to recognizing and defending the dignity of each person gives hope to all of those working towards a more just legal system.

4.4 We Have So Much Work to Do

David Cannon is a real person. On the day of his hearing, he had already spent fifteen years of his life in prison but returned based on multiple counts of drug possession, violation of parole, and possession of a firearm. Cannon began using cocaine and meth at age fifteen after his uncle and legal guardian died unexpectedly. He had previously held down a job at the American Insulated Glass Factory followed by a meatpacking plant until a bullet to his leg caused him to resume drug use. Now, a father of three, he had racked up a total of 1,020 days in custody and

[267] Gerard, interview.

nine felony counts. He is one of 2.2 million people sitting behind bars in the United States and 97% of them arrived there by accepting a plea bargain.[268] Although people see plea bargains as saving the justice system, the reality is that they are a fundamentally unfair tactic that creates a revolving door effect. We dig ourselves deeper into the hole by using plea bargains because it blinds us from assessing what laws function and which ones need to be reformed. While scholars argue that eliminating plea bargains may be detrimental to many defendants, keeping the system around chips away at the American ideals of fairness and justice. Unfortunately, this dichotomy between the saving system and saving the individual complicates potential reforms. For there to be a true change within the criminal law, this system needs to be disrupted or the concept of justice needs to be fundamentally changed.

At the end of my interview with Walker, I asked him about his ultimate takeaways from his experience in the justice system. Without hesitation, he replied: "My God, Sophie, we have so much work to do."[269]

[268] "Innocence Project: "By the Numbers."
[269] Walker, interview.

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