A Study of Plea Bargaining, Political Power, and Case Outcomes in Local Criminal Courts

by

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Dissertation submitted in partial fulfillment of
the requirements for the degree of Doctor
of Philosophy in the Sanford School of Public Policy in the Graduate School
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ABSTRACT

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Abstract

In this dissertation, I seek to understand the power of legal actors in determining punitiveness in plea bargaining in criminal courts. Using a unique combination of administrative court data and qualitative interviews, I evaluate the influence of the chief elected prosecutor, line prosecutors, and defense attorneys on plea bargaining practices and punitiveness in case outcomes across multiple local court systems. Chapter 2 presents an analysis of the association between the elected chief prosecutor and prosecution and active sentence rates in four types of criminal cases in nine districts in North Carolina. The study finds that chief prosecutors influenced punitiveness, but their influence was not aligned with their political party. Although Democratic and Republican chief prosecutors did not differ in levels of punitiveness, the one progressive prosecutor in the sample reduced punitiveness across most crime types to the lowest levels out of all nine study districts. Chapter 3 examines how line prosecutors working in one progressive prosecutor's office reduced punitiveness in case outcomes, mainly by dismissing weak and low-priority cases even before they reached the plea bargaining stage. Finally, Chapter 4 explores the power of the defense attorney in plea bargaining, and shows how the legal actors and context of the plea bargaining interaction impacted defense attorneys' leverage and negotiation strategies. These chapters provide insights into current movements to reform prosecution and reduce mass incarceration in the

United States, and shed light on how punitiveness may be impacted through the complex process of plea bargaining.

Dedication

This dissertation is dedicated to my children, Charlie and Jamie Grodensky.

Contents

List of Tables

List of Figures

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1. Introduction

Incarceration rates in the United States have begun to decline rapidly over the past two decades following 35 years of growth. Although some of the decline is attributable to specific policy changes and falling crime rates, the trend is not entirely understood (Brandariz, 2022; Karstedt, Bergin, & Koch, 2019; Schrantz, DeBor, & Mauer, 2018). Even after the decline, the US continues to incarcerate nearly 2 million people and 0.6% of its residents, more than any other country in the world (Wendy, 2022). The forced separation of so many people from their communities and confinement in prisons and jails exacts tremendous humanitarian and economic costs (Kirk & Wakefield, 2018; Pettit & Lyons, 2009; Pleggenkuhle, 2018; Roberts, 2003; Sykes & Maroto, 2016; Wildeman, 2014; Wildeman & Wang, 2017). US prison populations have quintupled since the 1970s, growing steadily even as crime rates have experienced periods of growth, decline, and stagnation, leading scholars to conclude that legal and policy responses to crime have been significant drivers of incarceration over and above crime itself (Raphael & Stoll, 2013; Travis, Western, & Redburn, 2014).

The recent decline in incarceration rates presents an opportunity to examine our country's changing response to crime. Long the domain of sociology and economics, the criminal justice system has relatively recently been examined as a topic of interest in the field of political science. In a 2015 issue of the journal *Perspectives on Politics*, Jeffrey Isaac pointed out, *"In the past 10 years the so-called 'Big Three' of American political science*

journals…—the American Political Science Review, American Journal of Political Science, *and* Journal of Politics—*have published no more than a handful of pieces combined related to the topics of policing and incarceration"* (Isaac, 2015). The field has produced more compelling research on criminal justice in recent years, focused primarily on the effect of criminal justice involvement on civic engagement and how political ideology impacts governmental response to crime. But largely missing from the field of political science is research on the local officials responsible for the vast majority of criminal justice decisions in this country.

Local district and superior courts dispose of around 90% of all cases heard in the US (Judicial Learning Center, 2023), and the most powerful political actor in these court systems is the prosecutor. Prosecutors have the power to prosecute or dismiss the cases that are brought to their office, to select the severity and number of criminal charges that are prosecuted, and to make recommendations on the type and length of criminal sentences (Alschuler, 1968). Due to their traditional motivation to obtain high conviction rates and severe sentences and to their largely unchecked discretion in aspects of criminal case processing, prosecutors have been implicated in driving high incarceration rates in the US. The relationship between prosecutorial power and incarceration became especially apparent when incarceration rates increased dramatically in the 1990s after structured sentencing polices were enacted in the federal and state governments. These policies reduced the discretion of the judge in determining criminal sentences by tying

sentencing instead to the severity of criminal charges in the case, thereby transferring substantial power to prosecutors who are responsible for determining the criminal charges (Alschuler, 1968; Raphael & Stoll, 2009; Spohn, Verhagen, & Walker, 2022; Zimring, 2020).

In recent years, political movements aimed at decreased use of carceral sentencing have been steadily growing in federal, state, and local governments and in both political parties in reaction to the social devastation and considerable governmental expenses incurred by high incarceration rates (Cohen, 2019; Cullen & Graham, 2020; Galston & Dionne Jr, 2013; Sabol & Baumann, 2020; Takei, 2017). A novel arm of these movements is led by progressive chief prosecutors who have campaigned on promises to decrease reliance on incarceration, eliminate racial disparities, and increase use of rehabilitative and restorative justice strategies (Davis, 2019; Sklansky, 2017). Theoretically, progressive prosecution holds great promise to decrease incarceration: prosecutors' high levels of discretion should enable them to influence case outcomes in a less punitive direction. So far, researchers have identified and described several progressive prosecutor strategies such as diverting or dismissing cases from court (thereby avoiding a plea or trial); limiting practices that contribute to mass incarceration such as the unnecessary use of extreme charges, cash bail, long probation terms, and fines and fees; and increasing prosecutorial evaluation and accountability (Davis, 2019;

H. Pickerell, 2020). However, progressive prosecutors' success in reducing incarceration rates is hardly a foregone conclusion.

Although the influence of the prosecutor is likely stronger than that of any other court actor, criminal case outcomes depend upon the decisions of multiple court actors, especially because most cases that are prosecuted in the court system are resolved through a plea bargain (Fryer, 2020; Gajwani & Lesser, 2019). A plea bargain occurs when a defendant waives their right to a trial and pleads guilty to criminal charges in exchange for some degree of leniency in the criminal sentence. Plea bargains were developed to prevent backlog and increase efficiency in the court system, and today resolve around 95% of prosecuted criminal cases (Bibas, 2004, 2015). The prosecutor has discretion over many aspects of plea bargaining (such as the aforementioned dismissal, charging, and sentencing decisions), but ultimately the defense must agree to the elements of a plea deal and the final deal must be approved by a judge. If a prosecutor puts forward a deal that is unacceptable to one of these parties, the defense or the judge can reject the deal and either hold out for a better one or take the case to trial. Given that prosecutors are dependent on these other court actors to resolve cases, it is worth probing more deeply into the nature of the power prosecutors have over criminal case outcomes in the context of plea bargaining.

Power in plea bargaining is a critical piece in the puzzle of criminal justice reform in the US. If legal actors continue to make decisions in plea bargaining that lead

to large numbers of prison sentences, new state policies may not have their intended impact on reducing incarceration rates. If other court actors have the power to resist prosecutorial efforts to decrease prison sentences in plea bargaining, progressive prosecutors may not be able to influence punitiveness in their districts.. This dissertation seeks to build a foundation for understanding the power of the two main actors in plea bargaining, prosecutors and defense attorneys, and how they influence punitiveness in local court systems.

Research and literature on plea bargaining is plentiful, but it is necessarily limited by the informal, undocumented, and nontransparent nature of plea bargaining interactions. Most literature on plea bargaining is theoretical or anecdotal rather than empirical, and most of the empirical literature is limited either to experimental settings or to examinations of case outcomes without insight into the plea processes that produced them (Subramanian, Digard, Melvin Washington, & Sorage, 2020). The existing literature has produced powerful insights regarding some of the broad predictors of plea outcomes, such as the strength and types of evidence available in a case, the availability of information to each party, the characteristics and preferences of the defendant and attorneys, and going rates and norms in the courtroom community (Bibas, 2004; V. Edkins & Dervan, 2013; Mustard, 2001; Nardulli, Eisenstein, & Flemming, 1988; Subramanian et al., 2020; R. F. Wright, Roberts, & Wilkinson, 2020). But

few studies have focused on exploring how plea negotiations and outcomes are influenced by the relative power of individual legal actors.

My dissertation seeks to fill this gap in the literature by approaching plea bargaining from a political science perspective, focusing on the power available to elected chief prosecutors, to the line prosecutors on their staff, and to defense attorneys in plea bargaining, and how that power is used to influence case outcomes. I utilize qualitative methods to understand the perspectives and experiences of line prosecutors and defense attorneys exercising power in plea bargaining, and quantitative methods to analyze trends in punitiveness in case outcomes across entire districts when elected prosecutors change power. I focus on a sample of districts in North Carolina that allow for examination of multiple elements related to political power in the legal system: changes in individual elected chief prosecutors over time, variation in political ideology and partisanship of the chief prosecutor, and differences in courtroom organization and cultural context. These contrasts serve to highlight how plea bargaining processes and outcomes can vary when power shifts between different prosecutors and between the prosecution and defense.

My first paper, presented in Chapter 2, seeks to understand the impact of the chief prosecutor and their politics on punitiveness in district courts. Although scholars have consistently contended that prosecutors wield great power in courtrooms, they have had less to say about the impact of the elected chief prosecutor. The popular

Courtroom Communities Theory (CCT), for example, states that communities comprised of the line prosecutors, defense attorneys, and judges who negotiate cases in the courtroom every day collectively determine case outcomes, but does not explicitly address the role of the chief prosecutor (Nardulli et al., 1988). CCT was developed based on in-depth research that was conducted across diverse districts and found that court actors work together to develop and uphold "going rates" (typical levels of punishment agreed upon for specific types of common cases) to save time and preserve collegiality in their relationships (Merritt, 2006; Nardulli et al., 1988; Ulmer, 1997). Given that the chief prosecutor has a more supervisory and political role in the district and typically does not engage in plea bargaining directly, their influence on going rates independent of other court actors and the specific courtroom is unclear. Forty-five states elect instead of appoint their local chief prosecutors to help ensure that their practices reflect local public preferences (Hessick & Morse, 2019), suggesting that a newly elected chief prosecutor (especially one from a different political party) would be likely to effect changes in key outcomes such as punitiveness to reflect the views of their electorate. But prosecutor elections have been described as largely ineffective in this regard because voters are usually uninformed and uninvolved and because the elections are usually uncontested, meaning that prosecutors have little information on or incentive to fulfill the will of their electorate (Gordon & Huber, 2002; R. F. Wright, 2008).

Given these limitations, how much influence does the chief prosecutor have on punitiveness? This paper presents a quantitative study to explore this question across nine politically diverse prosecutorial districts in North Carolina. Utilizing state administrative court data on 586,935 misdemeanor and felony criminal cases, I created two indicators of punitiveness that could be compared across chief prosecutors and districts: the rate of case prosecutions (i.e., how often a case was selected for prosecution rather than dismissed by the prosecutor's office), and the rate of active sentences (i.e., how often a defendant was sentenced to jail or prison rather than probation or another less severe community sentence). I conducted a two-way fixed effects regression analysis to control for differences across districts and time that are unrelated to the elected prosecutor, and I included case-level characteristics in the model to control for differences in case composition. I focused on four types of criminal cases that were numerous in the study sample, eligible for either active or non-active sentence outcomes according to North Carolina sentencing statutes, and mentioned in formative research as especially susceptible to political influence and prosecutorial discretion: marijuana, larceny, possession of firearm by a felon, and driving while intoxicated (DWI).

Findings show that chief prosecutors do influence punitiveness in their districts. In other words, who the DA was at the time a case was disposed often influenced the likelihood that the case would be prosecuted and that the defendant would receive an active sentence. For example, one DA in the sample was associated with a nearly 30%

higher likelihood than her predecessor of dismissal for possession of firearm by a felon cases and a nearly 20% lower likelihood of sentencing defendants in those cases to incarceration, reflecting a far less punitive response to this type of crime in the district. All DAs were associated with either increased or decreased punitiveness in at least one crime type, but almost none became uniformly more punitive or lenient across all types of crime. For example, the aforementioned DA who was associated with decreased punitiveness in firearm cases was also associated with a nearly 6% increase in prosecution rates for larceny cases, suggesting that her influence on punitiveness varied by crime type.

Beyond the primary finding that the DA matters, the results did not suggest patterns across types of DAs or crimes. Exploratory analyses were conducted to determine whether punitiveness varied based on the chief DA's political party, and results suggested no difference between parties. Republican DAs, hypothesized to be more punitive based on the party's traditional orientation toward "law and order" policies, were not more punitive than the Democratic DAs in the sample. However, an exploratory analysis of the one progressive prosecutor in the study sample suggested that punitiveness for most crime types decreased when she took office: prosecution and active sentence rates for marijuana, larceny, and firearm crimes all dropped to the lowest or second lowest out of all nine districts after the prosecutor took office. Although these results are preliminary because they are only based on one year of the progressive

prosecutor's term, they suggest that a chief prosecutor's ideology, but not necessarily their political party, may have an impact on punitiveness in their district.

My second paper, presented in Chapter 3, is a deep dive into a single progressive prosecutor's office to understand how they influence case outcomes in their district through the decisions of their line prosecutors in plea bargaining. Line prosecutors are the attorneys employed by chief prosecutors who are responsible for disposing of the vast majority of criminal cases in a district. Line prosecutors wield a great deal of independent power in making decisions in plea bargaining, particularly in small and mid-sized prosecutorial districts that do not typically have a great deal of formalization and internal policy restricting decision-making (Nardulli et al., 1988). This study is conducted in a mid-sized district that recently experienced a change in the elected chief prosecutor, having replaced a Democrat who did not identify as a progressive with a new Democratic District Attorney (DA) who identified strongly with the progressive prosecution movement. Through qualitative interviews with all of the line prosecutors in the new DA's office, the study sought to understand how line prosecutors implement the vision of a new progressive prosecutor through individual case decisions in plea bargaining.

Findings of the second paper suggest that line prosecutors influence punitiveness in plea bargaining in accordance with the ideology of their chief DA by dismissing individual charges, dismissing entire cases, and recommending less punitive sentences

when possible in the cases they do not dismiss. Dismissing cases is perhaps the greatest power available to prosecutors in the courtroom (Bellin, 2018), and as such, dismissals were a particularly important means of enacting the progressive prosecutor's vision in this district. Prosecutors dismissed weak cases and certain types of low-priority charges and cases, particularly those involving marijuana possession, before even extending a plea offer, meaning that defendants were spared the collateral consequences of a criminal conviction and all parties were spared the costs of prosecution. In dismissing cases, prosecutors are able to focus their resources and attention on cases that are higher priority for the office, which in this district were violent crimes with victims. Based on findings in this district, dismissing cases before they even reach the plea bargaining stage appears to be an important strategy of progressive prosecutors seeking to reduce punitiveness in their districts.

However, this study also found an important barrier to line prosecutors implementing a progressive vision: they were limited in the amount of information they could obtain from defense attorneys. These prosecutors felt responsible for protecting public safety in their district, and were sometimes concerned that a defendant whose case was dismissed or who was released on probation rather than incarcerated would commit additional crimes to harm the community. In order to choose more lenient options in good conscience, prosecutors said that they needed information from defense attorneys about defendants indicating that they would not be a threat to public safety.

Although prosecutors reported that defense attorneys in their district generally supported less punitive case outcomes, they were not always forthcoming with this type of information about their clients. In this way, the power of the defense attorney mattered in punitiveness, even in a district with a progressive DA's office: defense attorneys have sole access to information about the defendant, and may choose to share it or conceal it during plea bargaining.

Because my second study was conducted only with prosecutors and only in one district, it is limited in its ability to speak to the defense perspective in plea bargaining. My third paper (Chapter 4 of the dissertation) seeks to understand, given the immense power prosecutors hold in plea bargaining, how defense attorneys exercise power over prosecutors to gain less punitive plea outcomes for their clients. The literature consistently shows that defendants who plead guilty receive significantly more lenient sentences on average than those who to go trial, but this "plea-trial differential" is highly variable across cases and districts (R. Covey, 2007; Ulmer, Eisenstein, & Johnson, 2010; Yan & Bushway, 2018). Through qualitative interviews in four districts with public defenders, who spend more time plea bargaining with prosecutors than any other court actor, this study seeks to understand how defense attorneys use their power to obtain favorable pleas for their clients and the factors that influence the amount and type of leverage they exercise in individual cases and contexts.

Findings from the third paper echo the importance of prosecutorial power in plea bargaining, and show that defense attorneys necessarily develop a wide variety of strategies to leverage power over the prosecution. These strategies range from threats (to go to trial, to delay a case, to make the prosecutor "work for it") to pleasantries, and their use and effectiveness vary considerably according to the particular prosecutor, district, and case characteristics. For example, a defense attorney can gain leverage by rejecting a plea offer and holding out for trial, which often persuades the prosecutor to offer a more lenient plea deal out of a desire to avoid the costs of going to trial (e.g., costs in time, resources, stress on victims, risk of acquittal). However, this strategy is less effective if, for example, the defendant is being held in jail during the pretrial period, if there are limited opportunities for scheduling trials on the district's court calendar, or if the DA's office has policies controlling the plea offers the prosecutor is allowed to extend. A defense attorney may also choose to use persuasion to convince a prosecutor that their client deserves a more lenient outcome, which can elicit a reduced offer or dismissal from the prosecutor. But this strategy is less effective if the specific prosecutor assigned to the case has especially punitive preferences or does not provide opportunities for communication with the defense.

Defense attorneys reported that the ideology of the elected DA impacted their leverage in certain types of cases: prosecutors in a district with a progressive DA frequently dismissed low-priority cases and granted lenient deals, meaning that defense

attorneys often did not need to exert great amounts of leverage in plea negotiations or that they could rely on persuasion and providing information rather than threatening trial. In other districts, defense attorneys needed to utilize a wider variety of strategies, often threatening to go to trial when plea deals were unfavorable. This paper illustrates how the ideology of the chief prosecutor may trickle down to impact the defense's power and practices in plea bargaining.

Taken together, these papers add nuance to the story of prosecutorial power, and suggest that progressive prosecutors may be able to use their power to decrease prison populations in the US. The progressive prosecution contexts explored in these studies reveal a large number of case dismissals, a different plea bargaining environment for both line prosecutors and defense attorneys, and ultimately less punitive outcomes compared with other districts. This dissertation is novel in focusing on power in the context of plea bargaining, a complex and poorly understood social and organizational process, in a way that is directly related to outcomes that impact US incarceration rates. From a policy perspective, the insights from these analyses may help inform criminal justice system policies and suggest ideological and contextual factors that may influence the practices of prosecutors and defense attorneys, potentially enhancing or reducing the intended policy impact. Looking forward, efforts to reform prosecution in the US will certainly impact the institution of plea bargaining, and a more nuanced understanding of the process is necessary in planning for these efforts.

2. The Effect of the Elected Chief Prosecutor on Punitiveness in Local Courtrooms

2.1 Introduction

The United States currently leads the world in the number and proportion of individuals held under correctional supervision, but incarceration rates have started to decline in recent years. A potential driver of decreasing punitiveness in the US legal system is a change in local prosecution. Prosecutors are widely considered to be the most influential actors in the courtroom because they have a great deal of discretion in criminal cases, including to dismiss or defer, determine charges, and make bail and sentencing recommendations (Alschuler, 1968; Bellin, 2018). Scholars have contended that prosecutors' use of power and discretion is so considerable that it has contributed to mass incarceration in the US (Raphael & Stoll, 2009; Western, 2006; Zimring, 2020).

In recent years, a number of progressive candidates have been elected as chief prosecutors in jurisdictions across the US based on promises to reform criminal justice system practices that drive mass incarceration (Davis, 2019; H. Pickerell, 2020; Sklansky, 2017). However, critics have questioned prosecutors' ability to unilaterally alter courtroom outcomes (Covert, 2021; Fryer, 2020; McWithey, 2020; Romero, 2020). Some of this skepticism stems from research suggesting that punitiveness is determined by "going rates," typical outcomes for similar types of cases that are established and upheld by multiple legal actors, not just prosecutors, through plea bargaining in local courtroom communities (Gordon & Huber, 2009; Nardulli et al., 1988).

This study seeks to understand whether individual elected prosecutors and their political ideology impact punitiveness in local courtrooms. Using administrative court data from nine politically diverse jurisdictions in North Carolina, two-way fixed effect models showed that chief prosecutors do impact dismissal and active sentence rates for four common categories of criminal cases: marijuana, larceny, possession of firearm by a felon, and driving while intoxicated (DWI). The study also conducts exploratory analyses to understand the impact of the chief prosecutor's political party and progressiveness on dismissal and active sentence rates. Most prosecutors are not uniformly punitive or lenient across all types of criminal charges, and don't adhere to traditional expectations about punitiveness and political ideology although one progressive prosecutor shows a particular trend towards lenience. Overall, findings suggest that the chief elected prosecutor does influence punitiveness in prosecution and active sentence rates in courtroom communities.

2.1.1 Political Influences on Case Outcomes in Courtroom Communities

The criminal justice system in the United States is a "*system of pleas, not a system of trials*," Justice Anthony Kennedy wrote in a 2012 Supreme Court decision ("Missouri vs. Frye," 2012). The plea deal, a largely informal mechanism of resolving around 95% of prosecuted criminal cases in the US (Bibas, 2015), was developed to increase efficiency in the courtroom by avoiding costly trials in cases with defendants who were ready to take responsibility for their crimes (Alschuler, 1968, 1979). Because most of the plea

bargaining process is undocumented and occurs outside of the courtroom, the factors that determine plea outcomes are difficult to measure empirically but have generated multiple theories (Bibas, 2004; Garrett et al., 2021; Reinganum, 2000; R. F. Wright et al., 2020).

The "courtroom communities" theory of plea bargaining posits that attorneys and judges working together in local jurisdictions establish sustained agreements through repeated interactions over time that influence their charging and sentencing decisions (Nardulli et al., 1988). These agreements result in consistent "going rates" that are sought for similar types of cases to promote efficiency and predictability in the face of limited court resources and overwhelming caseloads (Nardulli et al., 1988). As an example of a going rate, individuals convicted of felony cocaine possession in a district may nearly always be sentenced to a short prison term rather than other possible sentences such as probation or a long prison term. This short prison term would be considered the going rate for felony cocaine possession in the district, and attorneys and judges would be more likely to seek this most typical sentence in felony cocaine possession cases in order to save time and court resources. Empirical research supports this theory by showing that districts produce patterns of case outcomes that are internally consistent and also distinct from other districts (Holmes, Daudistel, & Taggart, 1992; Nardulli et al., 1988; Stemen & Escobar, 2018). However, the factors that predict variation in punitiveness in plea deals between districts are not well understood.

Courtroom size and organizational context (e.g., specialization, caseload, trial rate) have some influence on the consistency and severity of going rates in plea bargaining, but even across courtrooms of similar size and structure there can be considerable variation in policies, practices, and case outcomes (Arazan, 2007; Arazan, Bales, & Blomberg, 2019; B. D. Johnson, 2005; Merritt, 2006). In a large study of plea bargaining in nine districts by Peter F. Nardulli, James Eisenstein, and Roy B. Flemming (1988), districts varied considerably in their plea processes and outcomes even though the districts were similarly sized and demonstrated internal consistency in sentencing. Some districts normalized large charge reductions, some normalized highly punitive sentences, and different factors predicted charging and sentencing outcomes in each district (Nardulli et al., 1988).

Trends and variation have also been examined in prosecutors' dismissal of cases. Case dismissals are considered by some to be the purest exercise of prosecutorial discretion; as Jeffrey Bellin wrote, "*when we think about American prosecutors wielding 'unfettered, unreviewable' charging discretion, we should primarily be thinking about dismissals…. Prosecutors quietly and with little oversight usher droves of defendants out of the criminal justice system*" (Bellin, 2018). Prosecutors dismiss a substantial proportion of their cases: the Bureau of Justice Statistics showed that post-filing felony dismissal rates in state courts averaged around 25% in 2009 (Reaves, 2013), but studies have found higher rates depending on jurisdiction, with one district dismissing as many as 52% of

its felony cases and 63% of all charges (R. Wright & Miller, 2002). Most of the research on dismissals has focused on racial disparities, finding that defendants of different races have different likelihood of dismissals but in mixed directions (Kutateladze, Andiloro, Johnson, & Spohn, 2014; Spohn, Gruhl, & Welch, 1987; Tomic & Hakes, 2008). Unlike sentencing decisions, dismissals are entirely up to the prosecutor, but high dismissal rates may reflect a response to aggressive policing leading to false arrests in a jurisdiction (Tomic & Hakes, 2008).

Political factors have been relatively under-explored in courtroom communities research, and studies including political variables in predictive models of prosecution and sentencing outcomes across districts have yielded mixed results. Some studies have found that politically conservative counties produced longer sentences and larger racial disparities than more liberal counties, while other research found that conservative counties did not differ significantly from liberal counties in their use of the death penalty or variations from sentencing guidelines (Baumer & Martin, 2013; Enns, 2014; Helms & Jacobs, 2002; B. D. Johnson, 2006; Ulmer, Zajac, & Kramer, 2020). One gap in the courtroom communities research is understanding how punitiveness may be influenced by the elected prosecutor.

2.1.2. Prosecutorial Ideology and Regime

There are several reasons why punitiveness may change with a new elected prosecutor. One reason is the change in the composition of "line prosecutors," the

attorneys employed by the chief prosecutor to handle the majority of the district's cases. Often, individuals newly elected to political office replace some of the bureaucratic staff in the office with new staff who are more ideologically aligned with them. In prosecutor's offices, these new staff are often "young" prosecutors recently out of law school who may be able to be molded by the chief prosecutor. Such a change in the staff of line prosecutors in an elected DA's office may have a disruptive effect on relationships within the courtroom community and further change the average plea outcomes, as new attorneys may not be familiar with the pre-existing common outcomes or may not agree that they are appropriate.

Research on turnover in local prosecutorial staff is sparse, although a multivariable analysis of sentencing across districts found that courtroom communities with more stable working groups over time were more lenient: they were more likely to impose no fines and no restitution, compared with less stable working groups that imposed more fines and restitution (Haynes, Ruback, & Cusick, 2010). More research has shown that prosecutors who are new to the profession may produce different case outcomes from veterans, although this research is inconclusive in terms of new prosecutors' impact on punitiveness (Levine & Wright, 2017; Medwed, 2012; R. F. Wright & Levine, 2014). Regardless, research clearly suggests that the presence of more "young" prosecutors in a new DA's office may pose a challenge to going rates, which by

definition are created and maintained by legal actors who have created and upheld them over time.

Another reason why punitiveness might change after the election of a new chief prosecutor is because newly elected prosecutors may feel ideologically accountable to their constituents. In 45 states voters elect local chief prosecutors (Hessick & Morse, 2019), creating an environment in which voters can signal their preferences for local criminal justice practices and elected prosecutors may worry about their chances for reelection. In 38 states, voters have information on prosecutorial candidates' political party, which theoretically allows for preferences to be signaled along ideological lines (Hessick & Morse, 2019). Political parties have been discussed as mechanisms through which politicians can be held accountable by their constituents (Holcombe & Gwartney, 1989; Levy, 2004). Accordingly, prosecutors elected based on their political party may be motivated to influence case decisions in their office to conform to an ideological agenda to show voters that they are enacting their wishes. As politicians in the modern Republican party have often branded themselves as standing for "law and order" and harsh legal punishments (Beckett & Sasson, 2003; Jones, 2018; Simon, 2020; Smith, 2021), it would stand to reason that Republican prosecutors may want to signal to their constituents that they are employing more punitive practices, such as choosing more severe criminal charges and recommending harsher sentences. Concomitantly, modern Democratic prosecutors may want to signal the opposite, reflecting more lenient

sentences, more support for rehabilitation, and more use of community resources to divert from incarceration (Davis, 2019).

A link between the political party of elected officials and the level of punitiveness in the criminal justice system is supported by studies that show that elections of politically conservative politicians are associated with policies that increase incarceration (Gunderson, 2022; Jacobs & Carmichael, 2001; Unnever & Cullen, 2010). One of the few studies of DA ideology across districts bears this out somewhat: Don Stemen and Gipsy Escobar found that the presence of a Democratic District Attorney in a jurisdiction significantly increased the likelihood of case dismissal in Wisconsin jurisdictions, but was not significantly related to the likelihood of a guilty plea to a lesser charge or a non-custodial sentence following a guilty plea (Stemen & Escobar, 2018). Early evidence from studies of progressive prosecutors suggest that they have modified their approach to punitiveness in plea bargaining and affected more dismissals and lenient sentences in their districts over time (Grodensky, 2022; Hogan, 2022; Mitchell, Mora, Sticco, & Boggess, 2022).

It stands to reason that a change in the elected prosecutor, a powerful legal actor in the courtroom, could matter for the level of punitiveness in a particular district. However, this effect has not been thoroughly explored, as most studies on political influences in prosecution concern the election cycle and examine how prosecutorial behavior changes during election years but do not examine changes in punitiveness after

a new prosecutor takes office (Bandyopadhyay & McCannon, 2014; Nadel, Scaggs, & Bales, 2017).

The remainder of this paper describes the methods and findings of a novel research study to understand the impact of the elected prosecutor on punitiveness in local criminal cases in North Carolina. The next section describes the study design and methods for a fixed effects analysis to isolate the effect of the elected prosecutor from other district and time-varying factors, and to determine whether criminal case outcomes vary by chief prosecutor in nine prosecutorial districts. The study also conducts exploratory analyses to understand the impact of the chief prosecutor's political party and progressiveness on dismissal and active sentence rates. The following results section presents the study findings, which suggest that the chief elected prosecutor does matter for punitiveness, but not along expected political party lines. The final section discusses implications of study findings for understanding the impact of prosecutors and prosecutorial elections on punitiveness and communities, and directions for future research.

2.2 Methods

2.2.1. Study Districts

Nine prosecutorial districts were selected for this study, with each district encompassing only one county except one district which encompassed two. This study focused on mid-to-large sized districts that would have sufficient case numbers to show

variation in outcomes across time and to power a statistical analysis of prosecutorial influence. Another benefit of selecting larger districts is that the number of line prosecutors and defense attorneys is larger, minimizing the influence of individual court actors (Nardulli et al., 1988). The selected districts including the four most populous counties in the state (Wake, Mecklenburg, Guilford, and Forsyth) and five other districts based on similarity in size and geography, diversity in county politics, and election of a new DA during the study period (Orange and Chatham, Durham, Gaston, Johnston, Pitt).

Table 1 shows characteristics of the nine districts. During the 2005-2018 study period, prosecutor elections were held in all nine districts during 2006, 2010, and 2014, with the new DA assuming office in the following years. Each district elected at least one new DA during the study period; Durham County experienced the greatest amount of turnover with three new DAs elected during the time period. Only two DAs replaced incumbents from a different political party (one each in Pitt and Mecklenburg counties).

2.2.2. Court Data and Study Sample

Study data consisted of criminal offenses documented in the Automated Criminal Infractions System (ACIS) maintained by the North Carolina Administrative Office of the Courts (AOC) (North Carolina Administrative Office of the Courts, 2023). ACIS contains separate records for each individual charged offense including charge date, information on the related state statute and offense, and type and date of final

disposition. From the court records, I created a longitudinal file for each individual represented by one or more records. ACIS data contained identifying information, including the person's name, address on the date on which criminal charges were filed, birth date, gender, and race/ethnicity. This information was used to create a unique identifier to permit tracking of criminal charges and associated outcomes by person over time. The disposition date reflects the date the outcome of the charged offense was determined.

I used ACIS data on felony and misdemeanor criminal offenses that were resolved in each district from 2005 to 2018, but I excluded those resolved during a prosecutor's first year in office. This is because criminal cases often take many months to process, and much of a new prosecutor's first year is spent disposing of cases that were partially processed by the prior regime and may reflect that regime's practices. I aggregated all charged offenses that were resolved by the judicial system for an individual on the same day, either the date when the prosecutor declined to prosecute, the conviction date, or the sentencing date, whichever occurred later, into a single observational unit, which I term a "case."

I focused on four categories of criminal offenses in this study: marijuana possession and sale, larceny, possession of firearm by a felon, and driving while intoxicated (DWI). These categories were selected for four reasons: 1) they were offenses that were frequently charged in all of the study districts, 2) they represented different

types of public safety concerns, 3) they did not include charges that were associated with mandatory prison time in North Carolina's sentencing guidelines, and 4) they were mentioned during preliminary interviews with progressive prosecutors and defense attorneys as categories of offenses that may be particularly subject to prosecutorial discretion and district-level variation (Grodensky, 2022). The specific charges included under each category and their North Carolina criminal codes are listed in Appendix A.

This study was approved by the Duke University Institutional Review Board. A data use agreement was obtained from the NC Administrative Office of the Courts.

2.2.3. Dependent Variables

I selected two binary dependent variables to indicate punitiveness in the district for the four offense types, and created the variables following procedures described by Sloan et al. (Sloan, Gifford, Evans, & Kozecke, 2021). The first variable indicated whether the case resulted in prosecution of any charges (1=prosecuted, 0=not prosecuted). A charge was considered prosecuted if the ACIS method of disposition for that charge was "jury trial," "judge," "magistrate," "waiver-clerk," or "waiver-magistrate." A charge was considered not prosecuted if the method of disposition was "capacity dismissed without leave," "deferred proceeding or deferred prosecution dismissal by DA," "Habeas Corpus hearing (superior court only)," "capacity dismissed with leave," "no true bill returned," "no probable cause," "dismissal without leave by DA," or "dismissal with leave by DA."

The second dependent variable was created to indicate whether the defendant received an active sentence for any convicted offense in a case. According to North Carolina Structured Sentencing guidelines, active punishment means a sentence requiring a period of incarceration in prison or jail, as opposed to community or intermediate sentences which involve exclusively probation, treatment, or other types of confinement (Spainhour, 2014). A case was coded as 1 if it resolved in an active sentence, and as 0 if it resolved as a community or intermediate sentence or was not prosecuted at all. In some cases receiving an active sentence, the period of incarceration may have already occurred during the pretrial period ("time served"). Cases with time served were not distinguishable from other active sentences in the dataset, but they still reflect punitiveness due to the defendant being held for a significant period of time pretrial.

These two measures were selected because they reflect different types of prosecutorial influence. Generally, prosecution rates are thought to reflect prosecutors' determination about which cases should be prioritized by the office and have strong enough evidence to demonstrate probable cause. Active sentence rates reflected the severity of sentencing that prosecutors recommend in cases that were convicted, and how inclined prosecutors were to select the most severe form of punishment: incarceration.

2.2.3. Independent Variables

The key explanatory variables were binary variables to indicate the individual prosecutor in the district during the year the case was resolved (prosecutors and their terms are listed in Table 1). The time period included three full prosecutorial terms in office (2007-2010, 2011-2014, 2015-2018) and the last two years of the 2003-2006 term. The incumbent prosecutors who were in office at the beginning of the study period were the omitted reference group. I coded the binary explanatory variable as a 1 for each year and district a prosecutor was in office and a 0 for each year and district they were not in office (as previously described, all cases from each prosecutor's first year in office were dropped from the dataset). For example, if a case was disposed in 2009 in Durham County, the binary variable "Nifong" would be coded as a 1 and all other prosecutor variables would be coded as 0.

In all regressions, I included fixed effects for time and district. I coded binary variables for each prosecutorial district using 2009 definitions of prosecutorial districts, with Wake County as the omitted reference group. Year fixed effects were coded as binary variables for the year the case was disposed, with 2005 as the omitted reference group.

I also included covariates for defendant characteristics and legal case factors. The defendant's age at disposition was categorized as ages <18, 18-25, 26–35, 36-45, 46-55, 56-65, or >65 years (age 18-25 was the omitted category). The defendant's race/ethnicity was

defined as mutually exclusive categories for Black and non-Black (Black, the omitted reference group); Hispanic and non-Hispanic ethnicities were rarely indicated in the ACIS dataset, and so this indicator was not used in the analysis. Legal covariates included binary variables for most severe offense class charged (felonies A-I and misdemeanors level A1-3) and a binary variable indicating whether the defendant had any misdemeanor or felony convictions during the prior 3 years.

2.2.3. Multivariate Analysis of DA Impact on Punitiveness

I estimate a two-way fixed effects regression in Equation 1 to test a null hypothesis that individual elected prosecutors do not significantly impact punitiveness. The source of variation is the individual chief prosecutor within the nine districts over time. I select our control variables to allow us to account for factors that potentially explain this variation. For example, time-varying defendant and case variables account for factors that determine punitiveness in prosecution and sentencing in individual cases such as the severity of the charge, the prior record of the defendant, and defendant demographic factors. District and year fixed effects account for federal, state, and district policies, demographics, and other shocks that vary over time. For example, North Carolina passed comprehensive criminal justice reform legislation in 2011 that was designed to decrease the number of individuals in state prisons (La Vigne et al., 2014), and individual districts frequently update courtroom policies and procedures that may impact prosecution decision-making.

$$Y_c = \beta_0 + \beta_1 District_i + \beta_2 Time_t + \beta_3 Prosecutor_{it} + \beta_4 Non\text{-}BlackDefendant_c + \beta_5 DefendantAge_c + \beta_6 DefendantRecord_c + \beta_7 MostSeriousOffense_c + \varepsilon_c \quad (1)$$

Y is the binary outcome, the prosecution or active sentence of an individual case c in each category of crime included in our analysis sample. T_t. is an indicator of the calendar year of the case disposition, D_i is an indicator for district i, and P_{it} is a vector of indicators for each unique prosecutor in district i at time t. Defendant demographics for case c are represented by $Non\text{-}BlackDefendant_c$ and $DefendantAge_c$, and legal factors are represented by $DefendantRecord_c$ and $MostSeriousOffense_c$. Finally, ε_c is the error term. Linear regression analyses were conducted using the lm function in R version 4.2.2 (Team, 2021). A logit (nonlinear) model was also run and yielded the same pattern of results; the linear probability model results were selected to present in the paper because they are easier to interpret.

2.2.4. Exploratory Analysis of DA Political Party and Ideology

In addition to the main multivariate model, I explored the impact of DA political characteristics on the same punitiveness outcomes. Political ideology and political partisanship are two distinct concepts and have different influences on the behaviors of elected officials (Carmines & Berkman, 1994; Lupton, Smallpage, & Enders, 2020; Potrafke, 2018; Tamanaha, 2011). For that reason, I conducted two separate analyses, one

using the DA's political party according to the North Carolina State Board of Elections (North Carolina Board of Elections, 2022), and the other using the DA's progressiveness according to self-identification and affiliation with progressive organizations such as the Color of Change (adminnewspack, 2022; colorofchange.org, 2023; Gajwani & Lesser, 2019).

To examine the impact of DA political party, I computed the model-adjusted prosecution and active sentence rates for each DA in the study and grouped the rates by political party. The analysis of DA progressiveness did not use multivariate regression methods because there was only one progressive DA elected in the study districts, DA Satana Deberry, who was elected in Durham in 2018 but did not assume office until January of 2019 which is outside of the study period. For this reason, the analysis of DA progressiveness used a larger study sample that included cases from the first year of each prosecutor's term and 2019. To describe the impact of DA Deberry on punitiveness in Durham, I ranked the nine districts against each other on the two punitiveness outcomes across the four crime types for each year of the study, and described how the rankings changed in 2019. Only 2019 was used to represent the post-election period in this analysis due to concerns about the differential and potentially confounding impact of the Coronavirus pandemic across the study districts.

2.3 Results

2.3.1. Descriptive Statistics: Districts and Criminal Cases

Demographic and political characteristics of the nine study districts are described in Table 1. Districts ranged in population from 1.012 million in Mecklenburg, the largest district, to 175,510 in the smallest district, Pitt (Bureau, 2016). In 2005, the first year of the study period, three districts (Forsyth, Gaston, and Johnston) had Republican DAs and the rest had Democratic DAs. Out of 27 DA elections included in the study period, new Democrats replaced Democratic incumbents in six elections, only two of which were contested, and new Republicans replaced Republican incumbents in three elections, one of which was contested. Two districts replaced a Democratic incumbent with a Republican (Mecklenburg in 2011, Pitt in 2014). Out of 27 complete four-year terms included in the study period, twelve were held by a Republican DA and 15 by a Democrat (North Carolina Board of Elections, 2022).

Table 1: Study district population and political characteristics.

	Demographics and political characteristics (2016)				District Attorney elections		
	Population	% Black	Median household income, % poverty	% voted for Donald Trump	2006	2010	2014
Forsyth	364,691	25.9%	$53,583, 13.0%	43.4%	Republican incumbent re-elected	New Republican DA (O'Neill,	Republican incumbent re-elected

	Demographics and political characteristics (2016)				District Attorney elections		
	Population	% Black	Median household income, % poverty	% voted for Donald Trump	2006	2010	2014
					(Keith)	replaced Republican Keith)	(O'Neill)
Durham	294,618	39.46%	$62,812, 11.7%	18.5%	New Democratic DA elected (Nifong, replaced Democrat Hardin)	New Democratic DA (Cline) replaced Democrat (Nifong) in contested election	New Democratic DA (Echols) replaced Democrat (Cline)
Orange/ Chatham	Orange 139,807 Chatham 68,778	Orange 11.9% Chatham 39.7%	Orange $74,803, 10.3% Chatham $69,799, 9.6%	Orange 23.0% Chatham 43.5%	New Democratic DA elected (Woodall, replaced Democrat Fox)	Democratic incumbent re-elected (Woodall)	Democratic incumbent re-elected (Woodall)
Pitt	175,150	34.4%	$49,337, 17.1%	45.0%	Democratic incumbent re-elected (Everett)	Democratic incumbent re-elected (Everett)	New Republican (Robb, replaced Democ

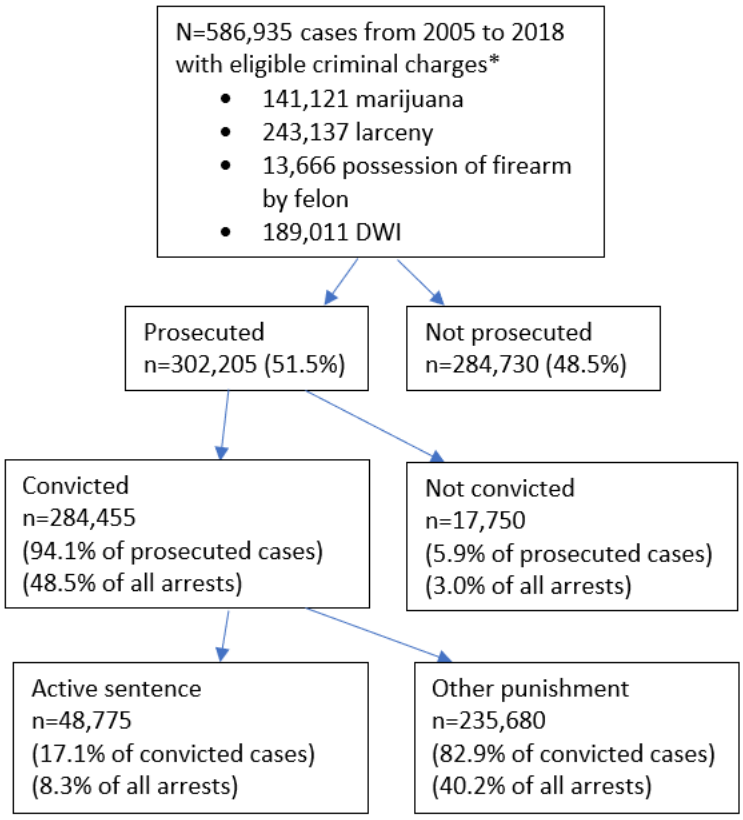
	Demographics and political characteristics (2016)				District Attorney elections		
	Pop-ulation	% Black	Median house-hold income, % poverty	% voted for Don-ald Trump	2006	2010	2014
							rat Everett)
Wake	998,576	20.1%	$83,567, 7.4%	37.9%	Dem-ocratic incumbent re-elected (Willough-by)	Dem-ocratic incumbe nt re-elected (Willoug h-by)	New Dem-ocratic DA (Freem an, replace d Democ rat Willou gh-by) in contest ed election
Mecklen-burg	1.012M	27.9%	$69,240, 11.0%	33.4%	Dem-ocratic incumbent re-elected (Gilchrist)	New Rep-ublican DA (Murray, replaced Democra t Gilchrist)	Rep-ublican DA re-elected (Murra y)
Gaston	211,753	19.1%	$53,474, 11.8%	64.8%	New Rep-ublican DA elected (Bell,	Rep-ublican DA re-elected (Bell)	Rep-ublican DA re-elected (Bell)

	Demographics and political characteristics (2016)				District Attorney elections		
	Population	% Black	Median household income, % poverty	% voted for Donald Trump	2006	2010	2014
					replaced Republican Lands)		
Johnston	182,155	15.5%	$61,806, 11.4%	64.0%	New Republican DA elected (Doyle, replaced Republican Lock) in contested election	Republican DA re-elected (Doyle)	Republican DA re-elected (Doyle)
Johnston	182,155	15.5%	$61,806, 11.4%	64.0%	New Republican DA elected (Doyle, replaced Republican Lock) in contested election	Republican DA re-elected (Doyle)	Republican DA re-elected (Doyle)
Guilford	511,815	29.27%	$54,794, 13.3%	38.7%	New Democratic DA elected (Hend-	Democratic incumbent re-elected (Hend-	Democratic incumbent re-elected

	Demographics and political characteristics (2016)				District Attorney elections		
	Pop-ulation	% Black	Median house-hold income, % poverty	% voted for Don-ald Trump	2006	2010	2014
					erson, replaced Democrat Albright)	erson)	(Hend-erson)

(Bureau, 2016; North Carolina Board of Elections, 2022)

There were 586,935 criminal cases brought to the nine district DA's offices in North Carolina from 2005 to 2018 with charges categorized as marijuana possession or sale, possession of firearm by a felon, DWI, or larceny (see Appendix A for the specific criminal charges included under each category). Figure 1 shows how those cases were resolved in the court system, specifically how many cases were prosecuted, how many prosecuted cases received a guilty conviction through plea or trial, and how many of those convicted received an active sentence. These numbers provide a sense of the frequency of each study outcome in this sample as well as where the outcome occurs in the legal process. Of the more than half a million eligible arrests in these districts, 302,205 (51.5%) were prosecuted and 284,730 were dismissed by the court or by the prosecutor. Of those prosecuted, the vast majority (94%) were convicted. And of the 284,455 arrests that were disposed with a guilty conviction, 17% received an active sentence



*Eligible charges for marijuana, possession of firearm by a felon, DWI, and larceny cases are listed in Appendix A.

Figure 1. Proportion of arrests prosecuted and sentenced to prison in study sample

Prosecution and active sentence rates varied across districts and over time. Figure 2a shows the annual rates of case prosecutions over the study period for the entire study sample. DWI cases had the highest prosecution rates out of all four crime types. Prosecution rates increased for DWI cases between 2005 and 2012 before stabilizing over the rest of the time period around 0.80. Similarly, prosecution rates for possession of firearm by felon cases increased between 2005 and 2012 before stabilizing, but at a lower rate of around 0.65. Prosecution rates for larceny and marijuana cases

were very similar to each other and declined throughout the study period, starting close to 0.50 at the beginning of the study period and ending in 2019 at just under 0.35.

Active sentence rates are shown in Figure 2b. As active sentence rates reflect the number of cases with an active sentence out of all prosecuted and dismissed cases, they are much lower than the prosecution rates. Active sentence rates were highest for possession of firearm by a felon cases, which fluctuated throughout the study period from a low of around 0.15 to a high of just over 0.25. Active sentence rates were next highest for larceny cases, which remained fairly stable around 0.12. Marijuana active sentence rates declined slightly from around 0.08 to 0.03, and DWI active sentence rates remained fairly stable around 0.03.

Forsyth had the highest prosecution rates for all crime types except DWI, which was prosecuted most often in Orange/Chatham district. The most punitive district was more variable in active sentence rates, with the highest rates in Pitt for marijuana cases, Orange/Chatham for larceny cases, Wake for possession of firearm by felon cases, and Durham for DWI cases. Prosecution rates and active sentence rates were somewhat correlated with each other, ranging from the weakest correlation of r=0.46 for DWI cases to the strongest correlation of r=0.70 for larceny cases.

It is impossible to discern from these trends whether individual prosecutors impacted punitiveness in any of these crime types compared with any other prosecutors, and there do not appear to be visual changes in rates around the 2006, 2010, 2014, and

2018 elections. The multivariate, two-way fixed effects model is needed to understand the effect of the prosecutor on these outcomes.

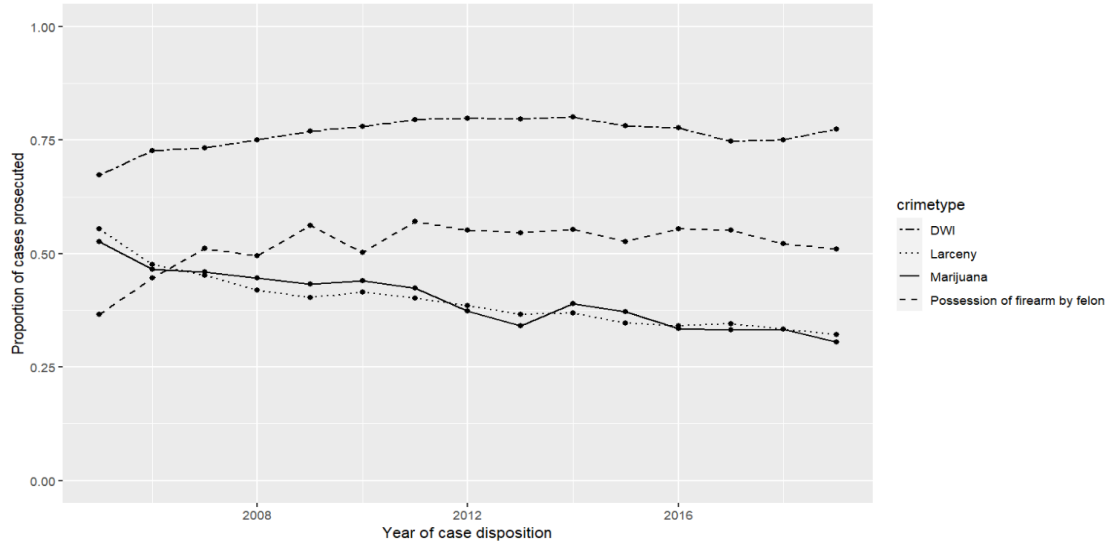


Figure 2a. Prosecution rates by year and crime type in nine study districts

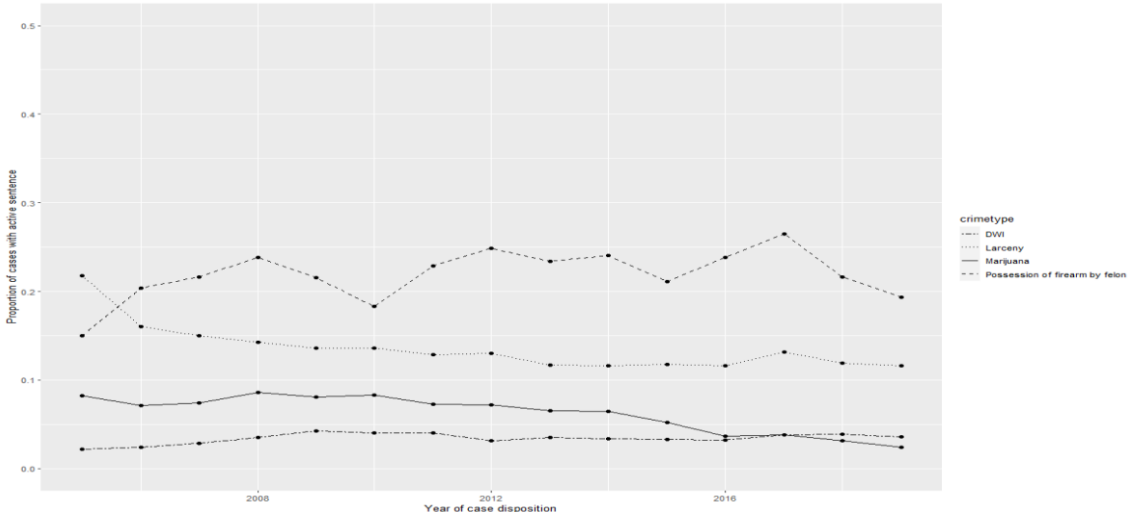


Figure 2b. Active sentence rates by year and crime type in nine study districts

2.3.2. Individual Prosecutor Effects on Prosecution and Active Sentence Rates

Results from the multivariate regression model predicting prosecutor effects on prosecution and active sentence rates for four types of criminal cases are shown in Appendix B. All of the elected prosecutors serving in the 9 study districts during the study period are listed in the left-most columns of Tables B1-B2 along with the number of terms they served in office, their political party, their district, and the specific years they served in office. In each district, the first prosecutor who was in office at the beginning of the study period is listed as the referent group across both outcomes and all crime types, and the coefficients for all subsequent prosecutors in that district represent comparison with that referent prosecutor, also controlling for year, district, and case-level factors.

The coefficients indicate that all the individual prosecutors in the study were significantly associated with more or less punitive case outcomes in at least one crime type, compared to the prosecutor who was in office at the beginning of the study period. The significance and direction of prosecutor effects on punitiveness are summarized in Table 2. No individual prosecutors were significantly more punitive than their predecessor across all crime types. One, Murray (Mecklenburg), was less punitive for all crime types than his or her predecessor, indicated by negative coefficients for all crime types and outcomes that were statistically significant for all but the possession of firearm cases. The rest of the prosecutors did not show consistently punitive or lenient trends in

comparison with the first prosecutor in the district across prosecution and active sentence rates for all four crime types.

Most prosecutors had effects that were in opposing directions (i.e., a positive coefficient for one outcome and a negative coefficient for the other) for the two outcomes within at least one of the crime types. This indicates that the prosecutors became more

Table 2. Summary of the relationship (direction and significance) between prosecutors and punitiveness compared to the first prosecutor in their district, across crime types, controlling for time and district effects.

DA political party	Prosecutor, Number of 4-year terms included in analysis	Prosecution rate increase (+) or decrease (-)				Active sentence rate increase (+) or decrease (-)			
		Mari-juana	Lar-ceny	Fire-arm	DWI	Mari-juana	Lar-ceny	Fire-arm	DWI
Dem-ocratic	Nifong, 1	+*	-**	-***	-	+***	+	-	-*
	Cline, 1	+*	-***	-***	-***	+*	-***	-	-.
	Echols, 1	-*	-***	-***	-***	+	-***	-	+
	Henderson, 3	+	+***	-***	-***	-**	-***	-***	-***
	Woodall, 3	+*	+***	+*	-	-	+*	-	-
	Freeman, 2	+***	-	+	-**	-**	+	+	+***
Rep-ublican	O'Neill, 3	-***	-***	-***	-***	+	-	-	-***
	Bell, 3	-***	-***	-	-	-	-*	-*	+
	Doyle, 3	+**	+**	+*	+***	-	-***	+	+
	Murray, 2	-***	-***	-	-***	-***	-***	-	-***
	Robb, 1	+.	-	-	+**	-***	-***	-***	-

P>0.1; *P < 0.05; **P < 0.01; ***P < 0.001.

punitive in one type of case disposition but more lenient in the other; for example, prosecuting more cases but being less likely to send the defendants to prison, or prosecuting fewer cases but giving harsher sentences to those who are convicted. It was

most common for prosecutors to have these types of contradictory outcomes in marijuana cases. Two prosecutors had significantly lower prosecution rates but positive active sentence coefficients for marijuana cases, and five prosecutors had higher prosecution rates but lower active sentence rates for marijuana.

2.3.3. Trends in Punitiveness by DA Political Party

Figures 3a-b show the distributions of prosecution and active sentence rates across crime types for Democratic and Republican prosecutors. The horizontal lines in each box represent the median rate for prosecutors in that political party, the boxes represent the inner 50% of data, and the whiskers represent the upper and lower quartiles.

Republicans had slightly higher median prosecution rates for all crimes except DWIs, which were prosecuted more frequently by Democrats. Republicans and Democrats had roughly equivalent active sentence rates for possession of firearm by felon, DWI, and marijuana cases, although Democrats had more variation in their rates for marijuana cases and Republicans varied more in DWIs. Democrats had higher active sentence rates for larceny cases.

Interestingly, the Republican prosecutors who replaced Democratic incumbents had mostly or entirely negative coefficients for all crime types and outcomes, reflecting increased lenience compared with their Democratic predecessors. This trend is opposite of the anticipated effect of increased punitiveness in the Republican party.

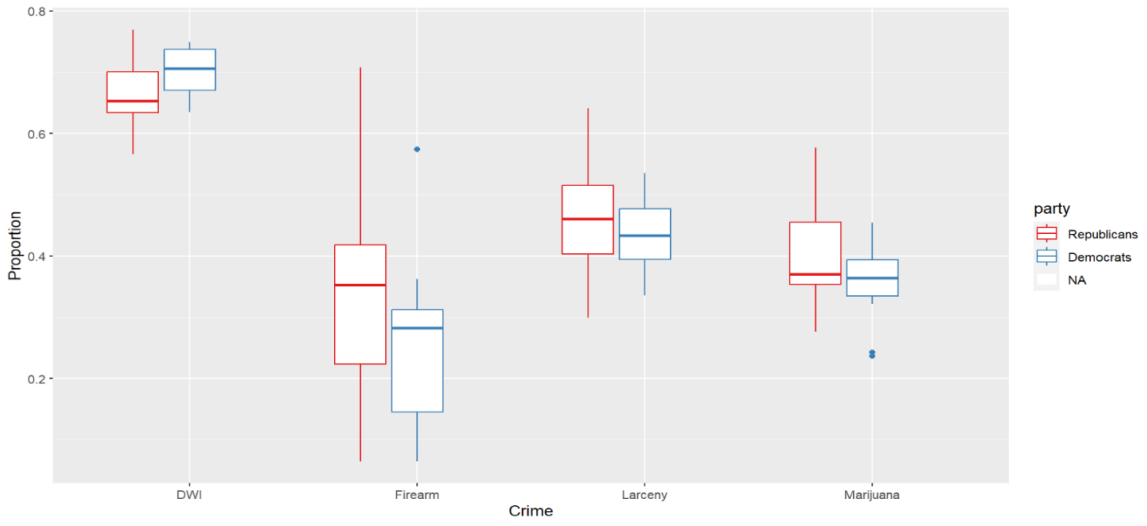


Figure 3a. Proportion of cases prosecuted by crime and DA political party

Prosecution rates for each prosecutor by party are listed in Appendix B.

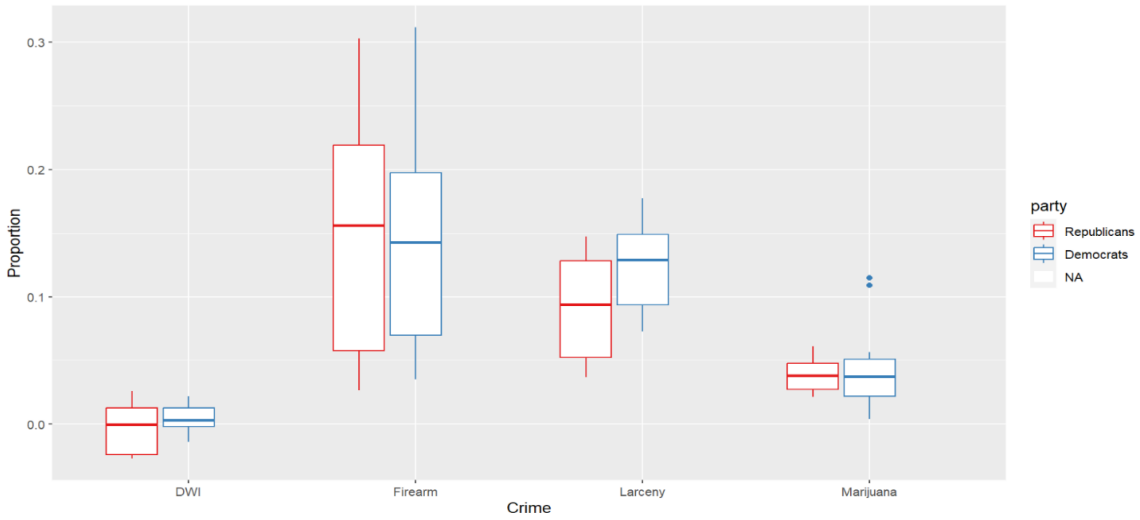


Figure 3b. Proportion of cases with active sentence by crime and DA political party

Active sentence rates for each prosecutor by party are listed in Appendix B.

2.3.4. Punitiveness Rankings for Progressive DA in Durham

To explore the impact of a progressive prosecutor on punitiveness, districts were ranked in their punitiveness for the four different crime types during the years of the study period and the first year of the progressive prosecutor's first term (2019). Rankings in prosecution and active sentence rates for Durham, the district with the progressive prosecutor, are shown in figures 4a-4h. Durham is ranked 9 when it is the most punitive out of all of the districts, and 1 when it is the most lenient. The leftmost horizontal dotted line marks when the progressive DA was elected in 2018 and the second when she assumed office in 2019.

In marijuana, felon in possession, and larceny cases, Durham's punitiveness ranking dropped to the least or next-to-least punitive out of all 9 districts when the new progressive DA took office. For prosecution rates, Durham seemed to be already declining somewhat in relative punitiveness before the progressive prosecutor was elected, and rates declined further or remained low when she took office. For active sentence rates, however, trends for the three case types were fairly stable and then decreased once the new prosecutor took office.

But trends are different for the DWI cases, shown in figures 4d and 4h. Durham traditionally shows fluctuating but often relatively high levels of punitiveness on DWI cases during the study period, and rates remained high with the new DA: third-highest of the 9 districts in DWI prosecution and the highest in DWI active sentence rates.

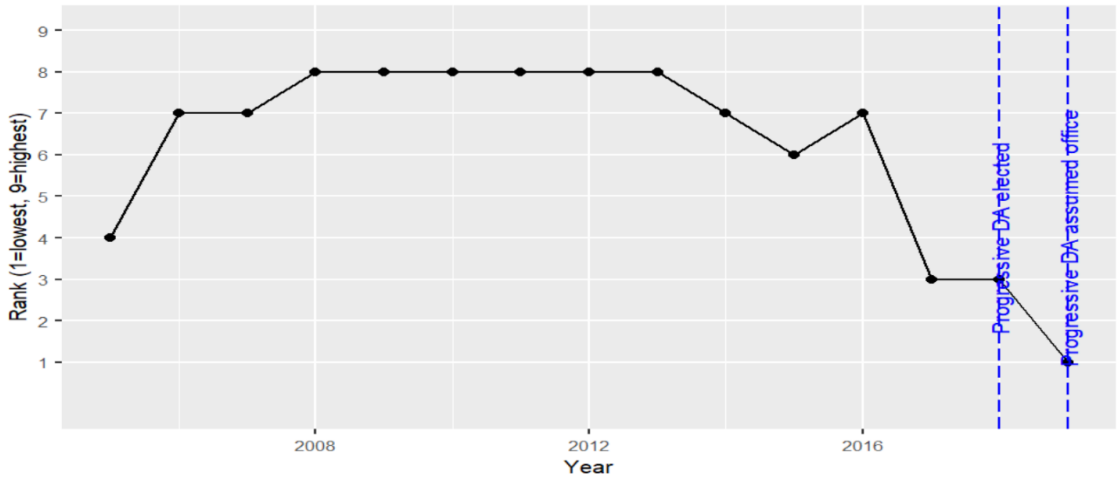


Figure 4a. Durham ranking in prosecution rates for marijuana charges

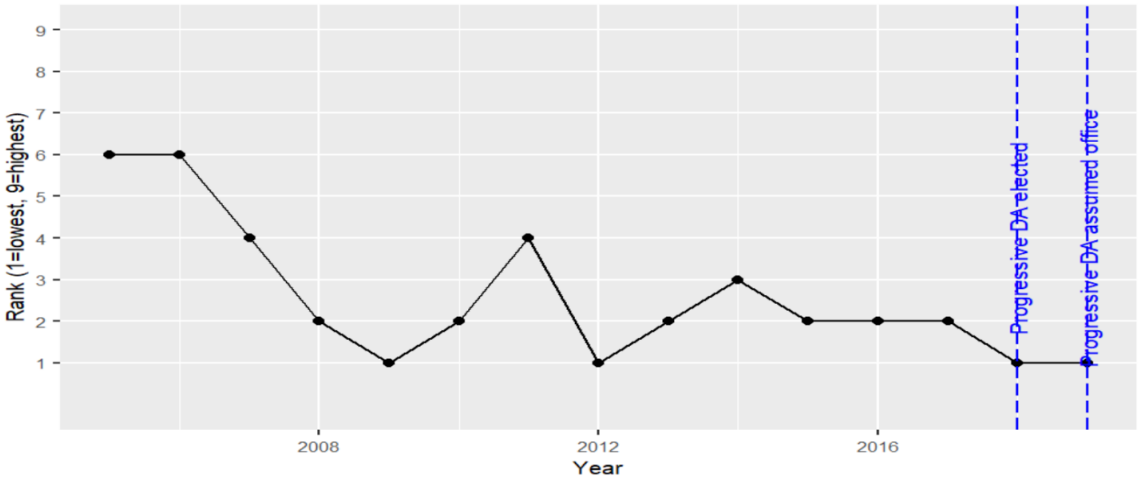


Figure 4b. Durham ranking in prosecution rates for possession of firearm by a felon charges

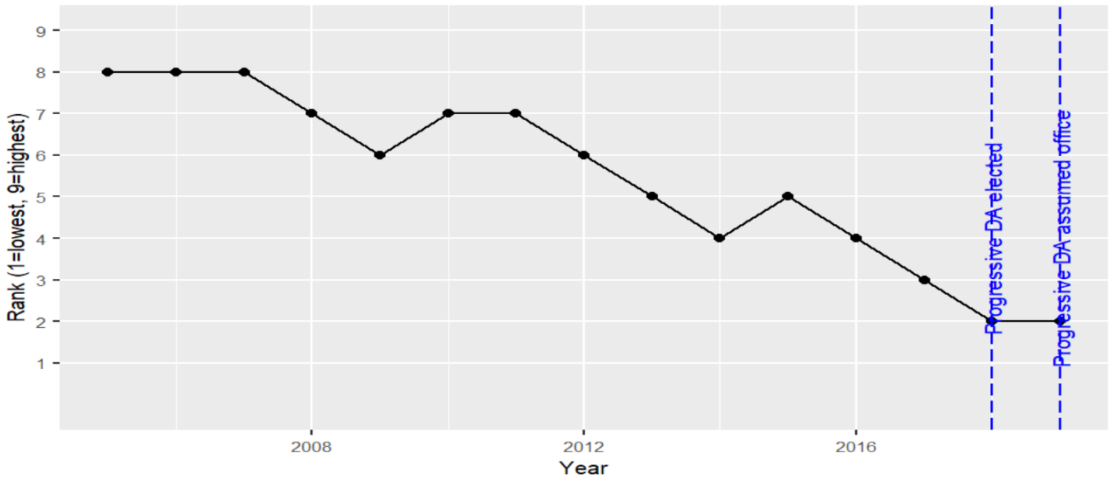


Figure 4c. Durham ranking in prosecution rates for larceny charges

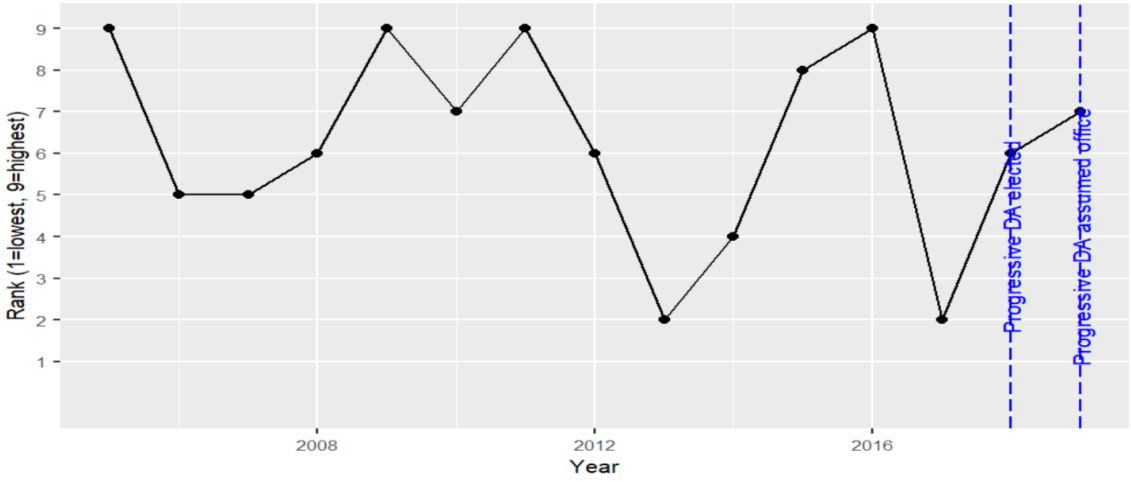


Figure 4d. Durham ranking in prosecution rates for DWI charges

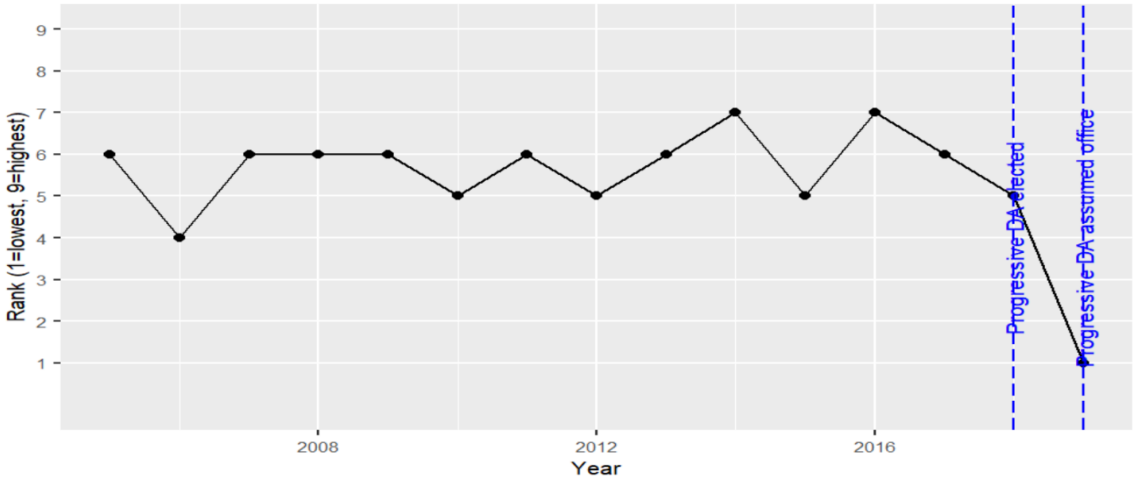


Figure 4e. Durham ranking in active sentence rates for marijuana charges

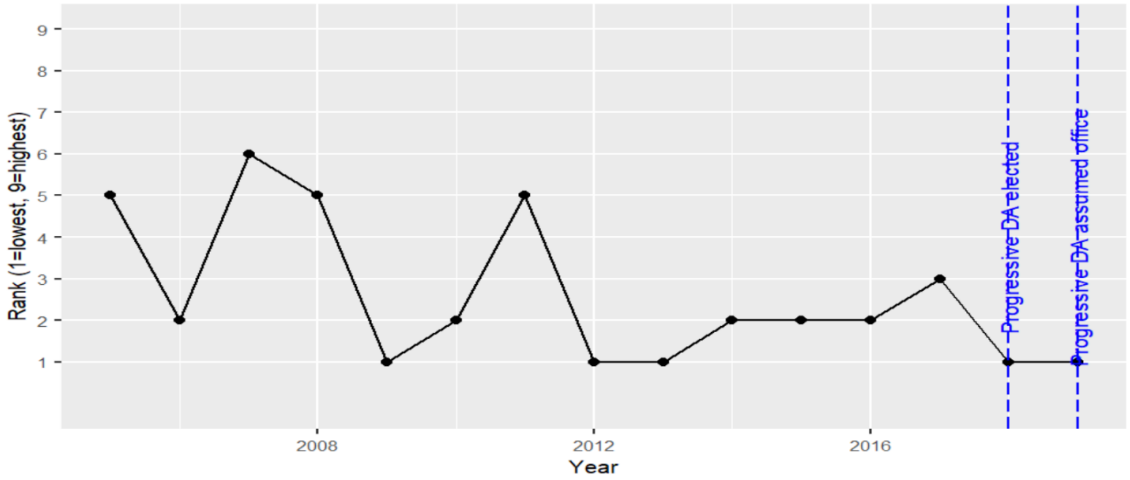


Figure 4f. Durham ranking in active sentence rates for possession of firearm by a felon charges

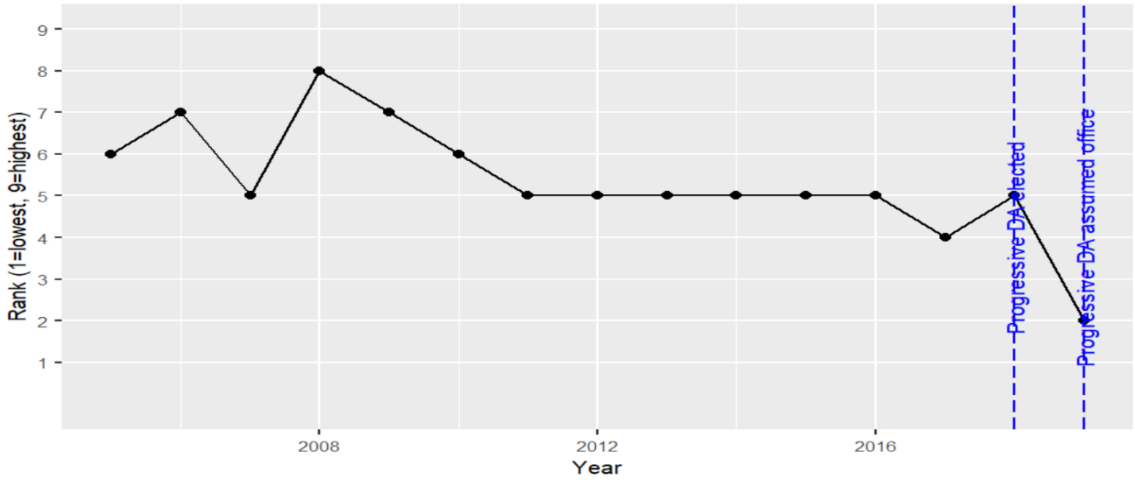


Figure 4g. Durham ranking in active sentence rates for larceny charges

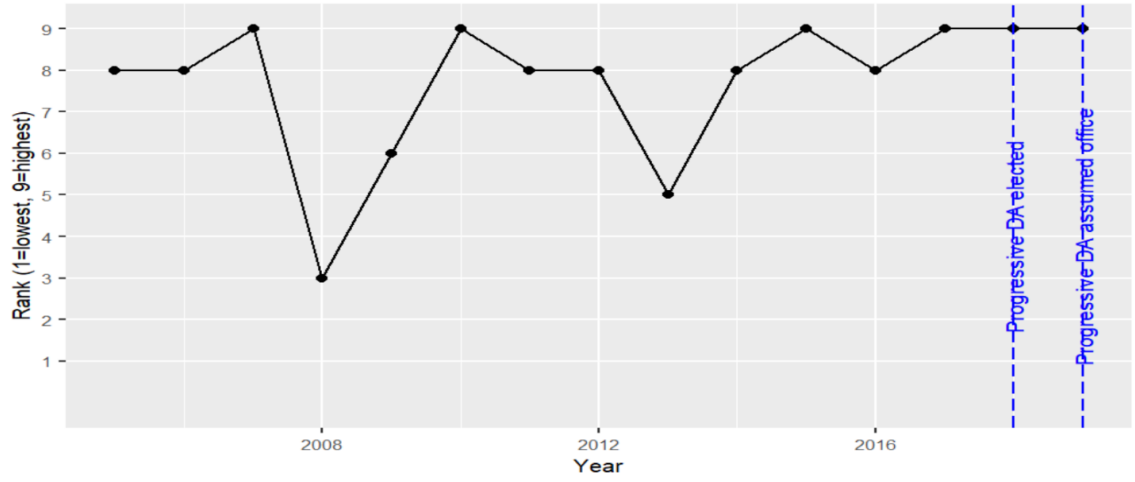


Figure 4h. Durham ranking in active sentence rates for DWI charges

2.4 Discussion

Prosecutors are often considered the most powerful actor in the courtroom, but little is known about how elected chief prosecutors impact punitiveness in their districts. This study shows that who is elected prosecutor matters a great deal. Punitiveness for

specific crimes often changes, sometimes dramatically, when one prosecutor is replaced for another in the same district. Beyond the overall impact of elected prosecutors, this study may be considered inconclusive due because it is difficult to detect patterns within the results. Most prosecutors did not become more punitive or more lenient across all crime types, nor did they become more punitive or more lenient across both prosecutions and active sentence rates. Often prosecutors grow more punitive for some types of crime and more lenient for others, or, for example, more likely to prosecute a type of crime but less likely to impose an active sentence.

Neither do the effects align with traditional political party affiliation. Neither Democrats nor Republicans appeared consistently more punitive across different crime types. Certainly Republicans do not appear more punitive as expected based on the party's law-and-order reputation. In fact, the two districts that replaced a Democrat with a Republican prosecutor experienced an almost universal reduction in punitiveness. The one ideological pattern that appears significant emerged from the exploratory analysis of the one district with a progressive prosecutor, Durham, where punitiveness decreased substantially across almost all crime types in line with the DA's campaign promises.

The two-way fixed effects analysis employed in this study is able to isolate the effect of the elected prosecutor from other district and time-varying factors, and the unique case mix factors have been controlled for using individual case characteristics. The method is strong in identifying the identity of the prosecutor as the cause of

variations in the two indicators of punitiveness—it is difficult to imagine an explanation for these findings other than the priorities of the elected prosecutor and their staff. The year and district fixed effects would control for trends that vary over time, such as increased cultural tolerance of marijuana, the economic recession, and state policies impacting sentencing; and that vary across districts, such as prison and jail space, public conservativism, and demographic composition. Not captured by the fixed effects are potential local events that could influence punitiveness such as local activism, simultaneous turnover in judges or law enforcement officials, or media events, but these are unlikely to align perfectly with the specific terms of these prosecutors and therefore unlikely to conflate these results.

2.4.1. Prosecution and Active Sentence Rates

This study employs two different indicators of punitiveness: the rate of prosecutions for all cases brought to the prosecutor's office, and the rate of active sentences for all cases brought to the office (of both prosecuted and sentenced cases). As outcomes, these are both reflective of punishment in the system—prosecutions are burdensome and costly even for the very small proportion of individuals who are acquitted at trial (i.e., the "process is the punishment") (Feeley, 1979), and active sentences involve time in jail or prison which, apart from the death penalty, is the harshest punishment in the US legal system. However, a chief prosecutor may influence each of these outcomes in different ways.

Active sentence rates may be more reflective of the "going rates" described in CCT. The going rate is not an active sentence for the cases in this study, likely due to the generally minor types of criminal charges selected for analysis. The highest rate of active sentences was around 25% for possession of firearm by felon cases, and the lowest rates were around 3% for marijuana and larceny cases. Active sentences in plea deals are dependent on the agreement of the defense attorney and the approval of the judge, both legal actors who are probably fairly consistent from one elected DA to the next. For this reason, a change in active sentence rates likely reflects changes in the elected prosecutor's approach to plea bargaining. Changes in plea bargaining may include the type of sentence recommended in the initial plea offers that line prosecutors extend to the defense, in the receptiveness of line prosecutors to mitigation or requests from the defense to reduce the sentence, or in the willingness of prosecutors to use coercive tactics such as overcharging or pretrial detention to pressure defendants into accepting a harsh plea.

Although dismissals do sometimes occur during the process of plea bargaining after an initial offer is made, most of the time they occur beforehand, when prosecutors are reviewing cases brought to them by the police to determine if they are strong and high priority enough to pursue. Unlike active sentence rates, dismissals are at the sole discretion of prosecutors in North Carolina (in some other states, judges may also dismiss cases). Dismissal rates may therefore be better indicators of a prosecutor's

priorities than sentencing, at least for non-serious cases that don't present significant danger or political concern to the community. A study of progressive prosecutors in one district found that they used dismissal as a method of dispensing with low-priority cases in the office (Grodensky, 2022). Dismissals may also reflect other district factors such as policing and the relationship between the prosecutor's office and law enforcement agencies. For example, law enforcement in some districts may charge aggressively and generate a large number of arrests with weak or no evidence, necessitating greater discernment and higher dismissals by the prosecutor's office (Tomic & Hakes, 2008). Other law enforcement offices may work closely with the prosecutor's office to screen cases, only charging those with strong evidence (Kutateladze et al., 2014; Spohn et al., 1987). The fixed effects analysis in this study would control for a change in aggressive policing in a district, but a new prosecutor may institute changes in their office's collaboration with policing agencies in a way that could affect dismissal rates.

The distinction between prosecution and active sentence rates is supported by this study's findings that some prosecutors had opposite effects on dismissals and active sentences within the same crime type, or a significant effect on one outcome and no significant change in the other. These results control for the specific mix of case characteristics being disposed under each prosecutor, meaning that unique differences in decision-making are reflected. More research is needed to understand prosecutorial

decision-making around the selection of strategies to increase or reduce punitiveness in a district.

2.4.2. Prosecutor Influence on Communities

Evidence of chief prosecutors' ability to influence case outcomes in their district is an important finding of this research. Those skeptical of recent prosecutorial reform efforts point out that other legal actors are also instrumental in determining case outcomes in a district, and courtroom communities theory supports the idea that individual actors may be reluctant to disrupt going rates in a courtroom (Fryer, 2020; Gordon & Huber, 2009; Nardulli et al., 1988). This study suggests that chief prosecutors are powerful enough to change prosecution and active sentence rates within a district, even prosecutors who are only in office for one term.

The importance of the chief prosecutor's power is underscored by the significant impacts that prosecution and active sentence rates have on courtrooms and communities. Individuals who are prosecuted for crimes can be burdened with court visits, fines and fees, jail time, pretrial requirements, and other restrictions, so much so that prosecution has been considered a punishment in and of itself (Feeley, 1979). Because guilty pleas resolve such a large proportion of prosecuted cases in this country (and over 90% of those in this study), a prosecutor's decision to prosecute a case usually means that an individual will be convicted of a criminal offense. Prosecutions, therefore, have a powerful effect on individuals and their communities, both in potentially

deterring criminal activity and in burdening those who interact with the justice system with the consequences of a criminal conviction (Hogan, 2022; Medwed, 2012).

Unlike prosecution, which is at the sole discretion of the prosecutor, the decision to recommend an active sentence is part of a plea deal and therefore must be approved by the defense and the presiding judge. Moreover, in North Carolina and many other states, structured sentencing policies mandate or prohibit active sentences for many types of crimes and offenders, further constraining prosecutorial discretion (Spainhour, 2014). In spite of these limitations, chief prosecutors in this study influenced active sentencing rates across all four types of crime. The societal costs associated with incarceration have received much attention in recent decades and prompted reform efforts at local, state, and national levels (Cohen, 2019; "First Step Act," 2018; Gold & Wright, 2020; Sabol & Baumann, 2020; Wildeman & Wang, 2017). This study suggests that chief prosecutors do have the power to hinder or advance decarceration efforts.

2.4.3. Elections and Partisanship

In addition to illustrating the influence of the chief prosecutor, this study also contributes to the literature on how partisanship and ideology impact prosecution. Scholars have debated whether elected DAs are accountable to their electorate in a similar way to other elected officials who engage in signaling and other forms of ideological alignment (Gordon & Huber, 2002; Lovrich, Pierce, & Sheldon, 1989; R. F. Wright, 2008). The regression analysis in this study controlled for prosecutorial district

and was therefore able to isolate the impact of the DA from the surrounding politics and context of the DA's district. Despite the Republican party's traditional support of "law and order" politics, Republican DAs in this study were not uniformly punitive compared to prosecution and active rates across the nine study districts, nor were Democratic DAs uniformly lenient. In fact, the two Republican DAs that replaced incumbent Democrats showed particularly lenient trends across all crime types. The lenient trends of these two DAs might reflect pressures on a newly elected opposite-party politician to court the voters who elected their predecessor.

There is reason to doubt that the elected prosecutor is always accountable to his or her political party in a way that would be reflected in case outcomes. Ronald Wright (2008) describes prosecutorial elections as the "*American solution to the weak institutional controls on prosecutors*", necessary because prosecutorial power is largely unchecked through internal or external policies, but largely ineffective (R. F. Wright, 2008, 2014). Prosecutorial elections are viewed as ineffective checks on prosecutors because voter turnout is low for local elections, voters generally have minimal information about prosecutorial candidates, most prosecutor elections are uncontested (in this study there were only 3 contested elections out of 27 occurring during the study period), and the incumbent almost always wins those that are contested (Gordon & Huber, 2002; R. F. Wright, 2008).

Typically in democratic elections, candidates need to differentiate themselves from each other, and the winning candidate may feel pressure to "deliver" on campaign promises in addition to fulfilling their true partisan preferences. However, in local prosecutorial elections, voters typically lack sufficient background knowledge to understand a prosecutor's strategy or philosophy, and lack access to information on their allocation of prosecutorial resources and case-level decisions (Gold, 2011). In an analysis of typical rhetoric in prosecutor election campaigns, Ron Wright found that "*debates do not pick up genuine ideological differences among candidates; they are misguided attempts to measure non-ideological competence*" (R. F. Wright, 2008). And the low frequency of contested elections means that most candidates do not need to differentiate themselves or make campaign promises at all. Of course, it is possible that prosecutors are highly responsive to their electorate, using means other than elections to assess and respond to public opinion, meaning that challengers see little use in running and elections have little to do in gaging public opinion. But it is also possible that prosecutors have little true accountability to the public that elects them.

2.4.4. Progressive Prosecution

Finally, prosecutorial elections may be driven by ideology, but not along traditional party lines. Political scientist Laurel Eckhouse shows that there are substantial racial divisions within the Democratic Party on issues related to criminal justice, and argues that political parties should be treated as coalitions rather than

homogenous groups (Eckhouse, 2019). Anna Gunderson found that Democratic governors who barely win their elections are associated with higher incarceration rates in their states than their Republican counterparts (Gunderson, 2022). Among prosecutors in this study, the division within parties is most obvious in progressive prosecution, which has seen mostly Democratic candidates elected as chief prosecutors based on promises to reform the system, often unseating Democratic incumbents.

The exploratory analyses in this study suggest that the progressive prosecutor elected in one of the nine study districts has reduced prosecution and active sentence rates in most of the crime categories to the lowest of all the districts in her first year in office. Progressive prosecutors may represent a unique category of prosecutorial candidates because their campaigns have garnered national attention and sponsorships and have dovetailed with other criminal justice reform movements such as the Color of Change (colorofchange.org, 2023), which could make them more courageous in disrupting local trends and enacting meaningful reforms.

However, this study also found that prosecution and active sentence rates remained high for DWI cases in spite of the new prosecutor, perhaps suggesting that the progressive prosecutor's impact may not extend to all crime types. DWI cases were selected as a crime category for this study because they are highly politicized and subject to special dismissal and sentencing requirements in North Carolina (R. F. Wright, 2002; R. F. Wright & Ellis, 1993). It is possible that DWI prosecution is more resistant to efforts

toward leniency because DWIs pose such a threat to public safety and the public supports harsh punishment. However, a study by Michael Nelson and Taran Samarth showed that a nationally representative sample of partisan voters were similarly supportive of prosecutorial lenience in sentencing for both cannabis possession and DWI, suggesting that public opinion may not drive differences in prosecution (Nelson & Samarth, 2022).

It is possible that the progressive prosecutor's failure to reduce punitiveness for DWI cases is motivated by the resistance of political groups such as MADD, or due to internal resistance by the office's traffic division. MADD has a long-standing court monitoring program through which members visit courts on a regular basis to observe case processing and record dismissals and sentencing outcomes, and this practice has arguably influenced punitiveness in these cases (Dewey-Kollen & Downes, 2008; Wherry Jr, 1993). The 2022 MADD Court Monitoring Report for the state of North Carolina describes its impact this way:

> *"Court monitors on the local scale can impact the handling of impaired driving cases by their mere presence in the court room. Court monitoring is intended to enhance transparency and accountability within the criminal justice system and reduce the likelihood of repeat offenses. One way this goal is achieved is by sharing data and observations with law enforcement, judges, prosecutors, and the public to promote*

awareness of impaired driving and ensure accountability for all impaired driving offenders" (Mothers Against Drunk Driving, 2022).

Durham is one of the districts with an active MADD court monitoring program, and so the mere presence of MADD volunteers in the courtroom could be a disincentive for the traffic team prosecutors or the office as a whole to increase lenience in DWI prosecutions.

2.4.5. Directions for Future Research

Further research is needed to understand how and why prosecutor offices exercise punitiveness, and the findings of this study point to some directions for this research. Most interestingly, prosecutors in this study appear to exercise more or less punitiveness depending on the type of crime. This variation may indicate that offices are responsive to specific local crime trends or public opinion, perhaps prioritizing prosecution and incarceration for crimes that are in the news (e.g., a shooting resulting from an unsecured firearm), inspiring local activism (e.g., a traffic fatality leading to a Mothers Against Drunk Driving rally), or causing individuals to feel unsafe (e.g., an increase in shoplifting). Offices may also respond to local calls for increased lenience or fairness (e.g., Black Lives Matter protests highlighting racial disparities in marijuana cases). Chief prosecutors may develop policies in response to such local developments that constrain line prosecutors' decisions in specific types of cases, exercise more formal

supervision in those cases to pre-approve or review plea offers and agreements, or use training and communication to illustrate office priorities.

Alternatively, the influence of the chief prosecutor may be less strategic and intentional. For example, future research should seek to understand the relationship between chief prosecutors and their staff. The chief prosecutor may try to control the case decisions of their line prosecutors, but they are faced with a classic Principal-Agent problem: they have limited information about line prosecutors' attitudes and past performance to inform their hiring decisions, and they lack the time and resources to monitor their behavior once they are hired to ensure they are adhering to office policies (Cook & Wood, 1989; Gailmard, 2012). New chief prosecutors may attempt to hire new line prosecutors who have specific preferences for prosecution and exercise more punitiveness in cases that are important to them, but they may also choose to retain some of the prior regime's staff in order to maintain continuity and retain district-specific knowledge. New chief prosecutors may be hindered in pursuing their own objectives by the line prosecutors they retain who may choose to adhere to the values of a prior regime. The majority of districts in this study are mid-sized, meaning that line prosecutors are generally less constrained by the policies and hierarchy that persist in larger offices and are able to exercise discretion over punitiveness in their cases (Nardulli et al., 1988). It is unclear to what extent the impact of a chief prosecutor on case

outcomes in their district may reflect the independent preferences of their staff rather than a unified office vision.

Another future direction for this research is understanding the complexities of ideology based on distinctions within political parties. For example, candidates may behave differently in office if they won a contested race, and differently still if the race was closely contested. After a closely contested election a new prosecutor may be more motivated to behave moderately and assuage the worries of their political opponents, compared with a landslide election in which the new prosecutor would want to fulfill promises to their own supporters. Additionally, future research should understand distinctions within the two main political parties beyond progressive prosecution; for example, many conservative politicians have begun to advocate for reduced incarceration in line with their support of limited government, some staunchly Republican states even legalizing marijuana (Cullen & Graham, 2020; Galston & Dionne Jr, 2013; Takei, 2017).

2.4.6. Limitations and Conclusions

There are several limitations to this study. First, these analyses were based on data from a single state, a state with structured sentencing guidelines and potentially different levels of prosecutorial discretion than other states, limiting the generalizability of our findings. Second, the districts selected for this analysis did not include small rural districts which are perhaps the most susceptible to prosecutor influence due to the small

number of individual line prosecutors. Third, study outcomes did not include other indicators of punitiveness such as charging, sentence length or terms, or level of supervision in probation sentences.

Finally, the use of binary prosecutorial district indicators in the analysis limits the ability to determine the district-level factors that may influence different case outcomes across districts and interact with individual prosecutor variables. In particular, the characteristics of judges in the district may have a significant influence on sentencing outcomes that is independent of the chief prosecutor's influence, and it is possible that impactful judges may be elected at the same time as new prosecutors which would make their impact undetectable in this study's model. Future research should use a larger multi-state sample allowing for multilevel analyses incorporating judicial and other district characteristics.

In spite of these limitations, this study enhances the current understanding of the power of the elected prosecutor to shape punitiveness in local courtrooms. Although prosecutor elections in these districts may not influence punitiveness according to traditional political ideology, they may significantly change how criminal justice is carried out in a district, particularly in the specific cases that are prioritized for prosecution and the defendants who are sent to jail and prison. Future research is needed to understand how and the extent to which the chief prosecutor reflects the

preferences of their electorate, and how new reform movements in prosecution may increase ideological predictability among chief prosecutors.

3. Understanding Plea Bargaining in a New Progressive DA's Office: How Line Prosecutors Understand and Implement Progressive Goals Through Plea Decisions

3.1 Introduction

Prosecutors wield considerable power in the United States judicial system, in large part because they have a great deal of discretion in criminal cases, including to dismiss or defer, determine charges, and make bail and sentencing recommendations. Scholars have discussed that prosecutors' use of power and discretion may have contributed to mass incarceration in the US (Raphael & Stoll, 2009; Western, 2014; Zimring, 2020). Over the past decade, increasing numbers of prosecutors have campaigned for office based on more progressive ideals and seek to consider local prosecution priorities such as reducing reliance on pretrial detention and prison sentences (Davis, 2019). Such progressive prosecutors have outlined a platform of strategies such as reducing reliance on cash bail, incorporating treatment and rehabilitation into criminal sentences, reducing punitiveness for nonviolent offenses, and not seeking the death penalty (H. Pickerell, 2020; Sklansky, 2017).

Of criminal cases that are not dismissed, the vast majority are resolved through a plea bargain rather than a trial (Bibas, 2006). Although the rules that structure plea bargaining and practices vary somewhat across states and localities, plea bargains essentially constitute agreements between prosecution and defense regarding the

specific charges that a person is convicted of, and the terms of the resulting sentence, which are generally more lenient than what would have been expected at a trial. Compared with trials, pleas require fewer resources and less judicial involvement, although judges in some jurisdictions may sometimes still reject or alter terms of a plea. This relative freedom from judicial involvement could make pleas ideal avenues for prosecutors to produce more lenient sentences unilaterally and rely less on incarceration. Past research suggests progressive prosecutors seek to reduce punitiveness and coercion, meaning that their plea bargaining tactics may rely less on leverage and more on building an understanding of the person charged with the criminal offense and their needs than the "law and order" tactics of traditional prosecution (Davis, 2019; H. Pickerell, 2020; Sklansky, 2017). However, little is known about whether and how line prosecutors would implement progressive strategies in plea bargaining.

Through qualitative interviews in a recently-elected progressive district attorney's office, we explored how line prosecutors engaged with and implemented the progressive goals of their office in plea bargaining. While previous studies have described the stated goals of elected prosecutors (Davis, 2019; H. Pickerell, 2020; Sklansky, 2017), this study is novel in its use of qualitative methods to dig deeper into how individual plea bargaining decisions are approached in an office implementing progressive reforms. This study is also novel in profiling a mid-sized jurisdiction, as

mid-sized jurisdictions are different from (and more prevalent than) the large districts that have been the subjects of progressive prosecution study, such as Philadelphia and Chicago. Findings shed light on the challenges of accomplishing progressive goals while balancing interests in assuring public safety.

3.1.1 Prosecutorial Discretion in Plea Bargaining

We have multiple reasons for focusing on plea bargaining in this study. First, plea bargaining constitutes the vast majority of case dispositions in U.S. criminal courts (Bibas, 2006). As the U.S. Supreme Court aptly stated: "*criminal justice today is for the most part a system of pleas, not a system of trials*" ("Lafler v. Cooper," 2012, p. 3). Pleas have increasingly supplanted trials, primarily for reasons of efficiency. Trials are highly regulated and procedural, requiring significant preparation time from the attorneys involved as well as additional court resources and time from judges and juries. Although the US significantly increased criminal justice spending in the 20th century, most of that money went to hiring police and prosecutors and building jails, and little of it funded additional court resources that would support the number of trials required to dispense with all the new criminal cases (Hessick, 2021). Ultimately, pleas may be preferable to trials because they generally result in lighter sentences. In most cases, pleas entail less severe charges and/or lighter sentences than trials, which incentivizes individuals to accept offers but also results in more lenient sentences overall (an

increasingly desirable outcome in a country plagued with the highest prison rate in the world).

A second reason to study plea bargaining is that it is a central area in which prosecutors exercise discretion and carry out their policy preferences. Even if police file initial charges, prosecutors are typically responsible for selecting the criminal charges to prosecute which anchor the ultimate sentence length according to sentencing statutes in many states (Painter-Davis & Ulmer, 2020). Unlike trials, during plea bargaining prosecutors can engage in charge-bargaining by offering to prosecute less severe charges or fewer charges if the plea is accepted, or by threatening to prosecute more severe charges at trial. Charge-bargaining is a powerful tool during plea bargaining but is not well-studied as in many jurisdictions as court records only document final pled charges. Prosecutors may also engage in sentence-bargaining wherein they agree to a lighter sentence that is still within (or even below) statutory guidelines in exchange for a guilty plea. In addition to offering more desirable outcomes in exchange for a plea, prosecutors may threaten to revoke their offers if the defense does not agree to certain stipulations of the deal, does not plead in a timely manner, or chooses to proceed to trial where the outcome is uncertain.

Our third reason for focusing on plea bargaining is that it is largely undocumented and therefore difficult to observe, which means it poses a particular challenge for chief prosecutors seeking to change how cases are handled in their

districts. Unlike trials, pleas are negotiated almost entirely outside of the public eye (Garrett et al., 2021). A chief prosecutor may read the transcript from a trial or even sit in the courtroom to observe her line prosecutors, critique and evaluate their performance, and provide feedback, but this type of scrutiny is not possible with plea bargaining, which may happen sporadically over a period of weeks, months, or even years in serious cases. Further, many prosecutors do not adopt written policies regarding plea bargaining (Garrett et al., 2021). Not only may a chief prosecutor lack data concerning pleas, but they may lack clear policy metrics with which to evaluate the process or outcomes of plea bargaining. This poses a central challenge for any supervising prosecutor. This project examines how line prosecutors implement office goals– insight that offices can rarely gain themselves.

3.1.2 Challenges for the Progressive Prosecutor

Scholars and the media have uncovered useful information about progressive prosecutors and their movement that suggest how they may intend to reform plea bargaining. Although no single factor has been identified that led to the progressive prosecution movement, scholars suggest that bipartisan backlash against mass incarceration and high-profile police brutality has increased public scrutiny of the criminal justice system, and prosecutors represent powerful elected officials who may be instrumental in affecting change (Taylor-Thompson & Thompson, 2022). At the time of this current study, no single repository existed to track all locations where progressive

candidates were running for DA, and so most of what is known about progressive prosecutors and their districts has come from scholars and the media describing the campaigns and practices of high-profile prosecutors in large districts. They have run campaigns committing "*to fairness and racial equity in the criminal justice system…. promising to use their power and discretion to implement policies to reduce the incarceration rate and make the system fairer to all*" (Davis, 2022). Many elected progressive prosecutors have faced extensive media scrutiny and political backlash, both from their opponents who blame them for increasing crime rates and their supporters who feel they are not doing enough to fulfill their promises (Davis, 2022).

Although legal scholars have commented on the novelty of self-described progressive prosecutors, little empirical research has described or evaluated the work of prosecutors seeking to reorient the priorities of an entire office. Progressive prosecutors are seen as promising change agents for the very reason that prosecutors have long been criticized as having undue influence: their largely unchecked power in screening cases and influencing court outcomes (Davis, 2018; Sklansky, 2017). Progressive prosecutors propose to use the power inherent in their position for purposes such as reduced incarceration, coercion, and racial disparities, rather than for traditional prosecutorial objectives such as high conviction rates and severe sentences. Critics question whether such a repurposing of power is possible (Fryer, 2020). Prosecutorial power, which has achieved almost mythical proportions in the legal system, may be limited in crucial

ways that would constrain reform efforts. Legal actors may not defer to reform-minded prosecutors the way they did to traditional ones; as legal scholar Daniel Fryer states, "*To the extent prosecutors have a lot of power, it is because other actors permit them to have it*" (Fryer, 2020). Prosecutors receive cases from law enforcement, negotiate deals with defense attorneys, and ultimately plead cases before judges. Chief prosecutors are elected by (and at least theoretically accountable to) the public and implement statutes created by the legislature. Even if other legal actors deferred to the traditional prosecutor, it is unclear whether they will respond similarly to a progressive one.

Critics have also discussed the potential difficulties progressive prosecutors may face in increasing leniency in case outcomes when other court and contextual factors remain unchanged (Covert, 2021; Fryer, 2020; McWithey, 2020; Romero, 2020). In particular, defense attorneys possess information about their clients that could enable prosecutors to arrive at more lenient plea outcomes, which prosecutors cannot access on their own (Bibas, 2011; Covert, 2021). Such information includes statutory mitigating factors that can situate an individual in a more lenient range for sentencing and contextual factors that can make possible the types of rehabilitative and restorative strategies that progressive prosecutors espouse (Covert, 2021; Marguilies & Lang, 2019). Thus far, progressive prosecutors have been largely silent on how they will bridge the gap to the people who are actuall charged with criminal offenses that will allow them to implement leniency goals. Their promises about defense attorneys have been largely

limited to providing information through open discovery rather than eliciting it from the defense (Davis, 2019; H. Pickerell, 2020; Sklansky, 2017).

Another critique of progressive prosecution points to the problem of coordinating the decisions of "line prosecutors." Reform-minded prosecutors have reported struggling to preserve the discretion of their line prosecutors while also recalibrating their daily decisions on cases to achieve office objectives, illustrating a fundamental "principle-agent" problem faced by many American bureaucracies (Bazelon, 2019; Cook & Wood, 1989). Perhaps due to the importance of discretion in handling individual cases, offices often lack strict written plea policies to guide line prosecutors' decisions, although some have "price lists" to guide sentencing for certain crimes (Abrams, 1971; M. L. Miller & Wright, 2008). Despite lacking written policies, prosecutors' offices do produce a blend of case outcomes unique to their district. Empirical studies have identified variations in sentencing across districts in the same state that are only partially explained by characteristics such as size, organizational structure, crime rates, public opinion, and available jail and prison space (Arazan, 2007; Arazan et al., 2019; Nardulli et al., 1988; Ulmer, 2019; Ulmer et al., 2020). Research on prosecutorial decision-making in two districts found that plea decisions are influenced by norms and communication between prosecutors and by feedback from supervising attorneys (Frederick & Stemen, 2012), suggesting that offices may be able to shift pleas in a progressive direction.

The current study seeks to understand how line prosecutors implement the ideology of a newly elected DA in their individual case decisions. By focusing on plea bargaining in a mid-sized district, we are able to examine prosecutorial decision-making that is relatively free of judicial influence and also less restricted by the office hierarchy and internal policies that typically characterize larger districts. Using qualitative methods, we explore five progressive objectives articulated by a new DA and how line prosecutors used their discretion to implement those objectives in developing and negotiating plea deals. In addition to illustrating how plea bargaining can differ when prosecutors are less driven toward traditional goals of punitiveness and convictions, our findings provide a novel glimpse into the front lines of an effort to rethink the prosecution function, that has implications for other prosecution offices.

3.2 Methods

3.2.1 Recruitment, Data Collection, and Data Analysis

The current study was conducted in a southeastern state, in a mid-sized prosecutorial district with a progressive prosecutor who was newly elected approximately one year earlier. At the time of this study there were 19 prosecutors in the office, about half of whom had been newly hired and did not work for the prior administration. The new DA had not yet promulgated written policies regarding plea bargaining, but rather relied on staff trainings and communication on priorities such as diversion and services for those convicted of low-level crimes. Approval was obtained

from the authors' Institutional Review Board to conduct the research for this study. We invited all 19 Assistant District Attorneys (line prosecutors, or ADAs) to participate in a one-time qualitative interview to discuss their decision-making in plea bargaining (the DA was not interviewed). The DA and two policy directors in the office described the study to the ADAs, then study staff contacted them via email to schedule a time to interview. All 19 prosecutors were interviewed between Fall 2019 and Spring 2020, in-person until the COVID-19 pandemic necessitated conducting them virtually via Zoom. Interviewers included the first author, a post-doctoral fellow, and a second-year law student. Informed consent was obtained prior to audio-recording the interview. Interviews averaged 57 minutes (*SD* = 21 minutes), ranging from 28-96 minutes.

The interview session began with the interviewer reviewing and obtaining informed consent from the prosecutor and answering any questions about the research study. The interviewer began the interview by asking the prosecutor about their background, then asking them to walk through their steps in deciding to dismiss or make a plea offer in a typical case. The interviewer then asked about the influence of various multilevel factors on the participant's plea decisions, and closed by asking them to share any research or policies that would be helpful in guiding their plea decisions. Interviewers probed for clarification and additional information throughout the interview, particularly when the prosecutor discussed parts of the process during which they exercised discretion. Appendix C includes the qualitative interview guide.

Interviews were audiorecorded and transcribed verbatim by a professional transcriptionist. A Master's-level researcher with extensive experience leading qualitative research studies led an analysis team to conduct a thematic content analysis of the interviews (Patton, 1999, 2015). The analysis team consisted of one post-doctoral associate, one second-year law student, and three undergraduate students, all of whom were trained by the Master's-level researcher on the fundamental goals and methods of qualitative inquiry and the techniques of thematic content analysis. The thematic content analysis used in this study employed both deductive and inductive approaches. A deductive approach was used to understand how prosecutor's plea decisions were influenced by specific case-, interpersonal-, organization-, and policy-level factors that were identified from existing research and prior categories. An inductive approach was used to understand goals, philosophies, and strategies that guided prosecutors' approach to plea bargaining that were emergent in the data. As in any research methodology, the values and assumptions of the researchers themselves may bias the types of data that are sought and identified in qualitative analysis. Potentially relevant values and assumptions that may have impacted this research include a positivist paradigm (i.e., the assumption that it is possible to understand the reality prosecutors experience by asking them about it) and a partnership between the authors' academic center and the office, which may have influenced participants to report more agreement with the new DA. To guard against the influence of the latter, interview guides were

worded in a neutral way so as not to express agreement or disagreement with the new DA, and interviewers were trained in neutral interviewing techniques.

First, the lead analyst developed a deductive codebook of topics and themes identified from the literature. Second, all analysts read through select transcripts and created memos with observations about important emergent topics that could be added to the codebook. A first draft codebook was developed and applied to relevant text excerpts in select interviews using the qualitative analysis software program Dedoose (Dedoose, 2016). The codebook was revised iteratively, then finalized and applied to all 19 interviews by two of the six coders (Appendix D includes the final codebook). Pairs of coders met regularly to assess qualitatively the inter-rater reliability of transcripts they jointly coded by identifying excerpts that were coded differently between members of the pair, discussing the reasoning behind their differences, and coming to consensus on a final set of codes for the transcript. Reports were generated for each code and used to analyze and describe themes across interviews.

3.3 Results

We interviewed 19 ADAs who ranged in tenure at the DA's office from 6 months to 15 years. and represented 6 divisions: drug and property (n = 6), traffic (n = 3), homicide and violent crimes (n = 3), special victims (n = 4), juvenile (n = 2), and domestic violence (n = 1). Eight had never worked as a prosecutor for another DA. Six had worked as a defense attorney and several more had wanted to be a defense attorney at some

point in their career. Respondents were White (n = 13), Black (n = 4), and Hispanic (n = 2), and 11 were male. Prosecutors articulated five main goals they felt were being promoted by the new DA regime and aligned with progressive prosecution: 1) dismissing low-level drug possession charges; 2) avoiding over-penalization, particularly for "victimless" crimes; 3) declining to prosecute weak cases; 4) communicating with the defense through mitigation and discovery; and 5) promoting racial equity in plea processes and outcomes. We analyzed interviewee responses to describe each goal and how prosecutors implemented the goal in their cases. Direct quotes are provided that reflect general sentiments across respondents, unless it is stated that they illustrate a divergent viewpoint.

3.3.1 Dismissing Low-Level Drug Possession Charges

3.3.1.1 Goal and Rationale

Nearly all interviewees mentioned that the DA placed low priority on prosecuting low-level drug possession charges. This meant that in cases where individuals were charged with only low-level drug possession, prosecutors could usually dismiss the entire case. One prosecutor explained, "…*there are certain offenses that we're not prosecuting. Generally, if it's substance abuse. No other related crime or aggravators, generally, we're declining to prosecute those.*" This also meant that in cases where individuals were charged with low-level drug possession in addition to other charges, prosecutors could dismiss the low-level drug charges and concentrate on prosecuting

other charges considered higher priority by the office. The same prosecutor explained, "*…generally when somebody's tried with driving while impaired and they have a small amount of marijuana on them, we would dismiss [the marijuana].*"

Two interviewees offered their perception of why the office was being encouraged to dismiss low-level drug charges. One implied that the office does not consider drug use to be criminal activity:

> *The idea is that we don't want to be an office who regulates personal choice. We want to punish criminal activity. And so, the focus is more so on the criminal activity that is out there and focusing more on the importers, the traffickers, you know, those who are bringing the poison into society.*

This prosecutor also articulated that a second reason for dismissing these charges is because they disproportionately impact people of color in the community: "*If you sat in court during any week you would see this--almost 90 or probably 95 percent of the individuals charged with a half-ounce are Black or brown.*" This aspect of drug case dismissals aligns with the office's goals around working against racial disparities in the criminal justice system. Another prosecutor spoke to broader policy-level justification of the office's goal of dismissing low-level drug cases, stating they are skeptical that criminal punishment has a deterrent effect on drugs in society:

So [the DA] would say that when it comes to drug policy, given the context, given the fact that we have the skepticism about the war on drugs, we have a skepticism about the efficacy of long sentences to deter drug use and deter drug sale.

3.3.1.2 Implementation

Many prosecutors, particularly those on the Drug and Property team, spoke in-depth about the nuance required in implementing the office's goal of dismissing low-level drug possession charges. One type of circumstance in which low-level drug crimes may not be dismissed outright is when a person shows signs of danger to society, in which case some intervention may be needed to protect the community. One prosecutor gave an example of why such cases make it difficult to have a blanket policy regarding drug possession: "*There are certain circumstances. 'Oh yeah, you just had a little bit of user amount of cocaine but you also had a sack of guns next to it.' Something like that, that we can't necessarily prepare for*." Another gave a specific example about the types of details they may consider to determine whether a case with low-level drug possession charges may need additional scrutiny:

Sometimes, there's a box on the citation where an officer can write further notes and you can read a report if something more serious happened…. 'Yeah, we responded to shots fired. That's what we think that this dude did. All we can get – enforce is half ounce at the moment. We're following up investigation, looking at videos.' Where that's the case

you don't want to [dismiss the entire case because] you know, 'cause there's far more going on and that dude may be dangerous.

Another nuance in carrying out the office's goal of dismissing low-level drug possession cases lies in distinguishing drug possession from drug trafficking. An early task of the office was to decide what types of drug cases should be dismissed as low-level possession. A member of the Drug and Property team explained how the office has considered this issue:

…after a year in the office the team has little bit more clarity on their parameters, like when do we charge trafficking versus possession or sale amount?... Not written-out, forward-facing policy but some internal parameters... Like absent certain circumstances, we're going to exercise our discretion to dismiss low amounts of drug possession, basically user situation. But again, that's not gonna be the case 100% of the time…

3.3.2 Avoiding Overly Punitive Outcomes

3.3.1.1 Goal and Rationale

Prosecutors spoke about how the office encourages less use of incarceration and overly harsh punishment, when possible, in dealing with criminal activity. Several interviewees described their office as less strictly punitive compared to other districts and the prior DA regime in this district, particularly in crimes without a harmed victim. One prosecutor described this change as it manifested soon after the new DA took office:

The first thing I had to do was go back and evaluate all the plea offers that were extended before they left. I found that they were extremely harsh. Not saying that [prosecutors from the prior DA regime] were not justified because they used their own standard, but it's just sometimes they were unreasonable…. That, in itself, gave us the opportunity to reevaluate some of the things that were going on. The scale slid from being extremely harsh to something that was reasonable and the defendants accepted and moved on.

Some prosecutors articulated the reasoning behind limiting punitiveness and incarceration in their district, often stating that this aspect of office philosophy was similar to their own. The most important reason prosecutors articulated for limiting punitiveness was the belief that criminal justice involvement and particularly incarceration can harm many individuals, particularly those who have the potential to be mentally or physically harmed in prison or to experience significant collateral consequences after release. One interviewee explained their particular concern for young people charged with crimes:

It's really hard with young people 'cause we have learned from the scholarship, they're not going to come out in a better position after prison. Of course, they're going to have collateral consequences from the conviction and they're going to most likely experience trauma in prison.

3.3.1.2 Implementation

Prosecutors explained several practices that allowed them to avoid overly punitive charging and sentencing. One practice was avoiding "enhancements," particularly the highly punitive habitual felon status charges which can increase a sentence exponentially. The DA imposed an office policy whereby all habitual felon charges needed her approval, which one prosecutor described as *"a pretty good deterrent as a management tool… if she doesn't want people to use it willy-nilly."* Prosecutors also mentioned limiting their use of other charges that are commonly considered enhancements such as Possession of Firearm by a Felon and drug trafficking, although they did not state that the DA required approval for their use. Similar to their process defining low-level drug possession, the Drug and Property team worked to determine the amounts of different drugs that would guide their use of particularly punitive drug trafficking charges that carry mandatory minimums and make lengthy incarceration more likely.

Other practices prosecutors described to avoid over-penalization involved giving opportunities and second chances to individuals with minimal or no prior criminal record. Some prosecutors acknowledged that it can be harmful to give someone a conviction, regardless of their criminal sentence; as one explained: *"with these young people, it's very serious for them to get a record, whether that be a misdemeanor record or a felony record. It's something that it's not done lightly."* The nature of these opportunities varied

depending on the seriousness of the current crime, with low-level property and drug cases potentially being dismissed outright and repeat or higher-level crimes being offered probation, rehabilitation, or restorative justice options in lieu of incarceration. One prosecutor explained how they made this distinction:

> *Because we are more of a progressive DA's office, we would look at cases, you know, more people for dismissal, types of cases that, this is your first charge, was anybody harmed, is it a violent crime as opposed to a property offense or a drug crime…. If someone's record level is higher, this isn't the first time that they've been in court, and this is a repeat type of offense, then I wouldn't look at a dismissal for that type of a case.*

In more serious cases that prosecutors felt they could not dismiss due to concern for public safety, they had numerous options for seeking less than the maximum punishment allowable by the law. One option was to implement a deferred prosecution or conditional discharge, in which a case could be dismissed if the person completed certain requirements. For example, in the traffic division, prosecutors explained that many cases could be dismissed after individuals demonstrated compliance through actions such as renewing an expired inspection or license plate, insuring their vehicle, or taking a driving safety class.

For other serious crimes that prosecutors felt they could not dismiss outright, they selected charges for prosecution that reflected the crime but did not require prison

terms according to state sentencing guidelines. One prosecutor explained this process in-depth while referring to the "blocks" on the state sentencing grid:

> *I have a lot of choices as a prosecutor. I can't charge you with more than what you did, more than what the facts can support, but I can depart down from that. I can say, 'You're in A block? I don't really think you deserve prison time… I'm going to offer you a lesser charge of common-law robbery,' which is taking by threat of force or intimidation but not necessarily with a deadly weapon. And now, look. You're looking at things that look more like a year to a year-and-a-half and you're looking at an I block. [Class] I means a judge can give a probationary sentence…. I can frame it very differently.*

When not required to recommend an active sentence, prosecutors expressed a willingness to support individuals whom they felt could be safe in society.

> *The way we always look at it is, 'Is there anything that is – can this person be safe in our community?' If the answer is yes, then we're going to use all these creative tools and things that we have. If the answer is no, then we're looking at the sentencing grid and figuring out how long can we keep the community safe.*

Examples of "creative tools" prosecutors mentioned included treatment for substance abuse and mental health, cognitive behavioral interventions, supervised probation, and restorative justice. An important component of implementing these tools is acknowledging that there may be a risk to society; as one prosecutor explained, *"We*

can give some treatment and see what happens, and know that that's the scary thing but it's worth it."

3.3.3 Declining to Prosecute Weak Cases

3.3.3.1 Goal and Rationale

Prosecutors described another goal of dismissing cases that lacked strong evidence. When prosecutors were asked how evidence impacted the type of plea they would offer, most responded that cases with weak evidence would likely be dismissed rather than offered a plea. Most prosecutors presented this as how they personally made decisions about prosecuting cases, but one added that declining to prosecute weak cases was an office policy:

> *This is office policies, not just me…. I'm not going to ask anybody to enter a plea when I'm like, 'Don't think that I can really prove it [but] we'll see if I can take you to take a plea.' That's really against what we're trying to do here….Maybe in some jurisdictions, the prosecutors are like, 'I don't think it's really beyond a reasonable doubt but let's just kind of throw it at the wall and see if something sticks.' We really don't want to do that. We want to decide before we walk into the courtroom or before we ask for a plea to it, is there evidence beyond a reasonable doubt of every element of the crime we're asking you to plea to before the jury?.'*

Most prosecutors did not articulate reasons why they would not prosecute weak cases, but two explained that it can be "*coercive*" and "*how you convict innocent people*."

3.3.3.2 Implementation

Although prosecutors stated that they generally do not offer pleas in cases with weak evidence, they described circumstances in which they may still offer a plea for the purpose of protecting public safety. Weak cases were described as fairly common in domestic violence cases and in cases with child victims, and in some of those cases prosecutors would move forward to protect victim safety. One prosecutor estimated that about 60% of domestic violence cases were dismissed because

> *…sometimes the victims do not cooperate. Sometimes the cycle of domestic violence goes in a way to which they fall back in love with their aggressor or we can't prove the case because the only two parties that were present were the two people that are in a relationship and they will have children.... They are unwilling to come to court or they're scared to come to court sometimes.*

In such cases, prosecutors may feel that danger to the victim is so significant that they offer a plea in the hope that the court can require supervision or treatment for the person charged with the crime. One interviewee described weighing these options: *"Is it better to dismiss it or is better to go ahead and offer probation when we wouldn't normally want to offer it because we can at least have a chance for some treatment?"*

In cases with child victims, particularly child sex abuse cases, it can be challenging to accumulate evidence that would prove a case beyond a reasonable doubt. Sometimes many years have passed before such crimes are reported, making physical

evidence difficult to obtain and memories less reliable. Even more difficult to count on are the testimonies of child victims who may be reluctant to incriminate family members or too traumatized to speak about the crime. One prosecutor explained the difficulty of relying on child testimony as evidence:

> *Sometimes I have victims that even I have a hard time getting narratives out of. You know, there's a lot that goes into where I believe the person really did it, but am I going to be able to get my victim ready for trial? …They're freezing up in the office with me and we're like doing the warm fuzzies, and how am I going to get them to trial? Like that's also something that goes into account as far as what my pleas are going to be.*

Similar to domestic violence, prosecutors dealing with child victims sometimes feel that a case cannot be dismissed because the individual is a threat to society and to the victim, but evidence may not support conviction at trial. In such cases, prosecutors may offer lighter charges or sentences to incentivize the defense to plea.

A consequence of dismissing more cases can be that police, and sometimes the public, may criticize prosecutors for not doing their part to administer justice. A small number of prosecutors mentioned that they made special effort to ensure that evidence supported the charges brought by police, with the hope that fewer cases would be dismissed due to weak evidence. One prosecutor explained that under the new DA regime they and their team worked extra hours early in cases to help police assess evidence to inform their charging decisions:

One thing that we do here is we try to get out front on the charging decisions… We'll take homicide calls and police shootings in the middle of the night. That ain't no fun, now, okay? But we try to get ahead of it so, that way, we're knowing what's going on, try to make an evaluation quickly. Because you don't want to charge somebody with a first-degree murder and you find out later it's a manslaughter. That's not good. The public does not like that. Because their first question, 'Oh, they're reducing this charge down from a homicide to a manslaughter. He must know somebody…'.

Another prosecutor described working with their team in training new police officers to improve the quality of evidence collected in traffic cases. These descriptions illustrate the proactive measures ADAs are taking to ensure that they do not dismiss cases that are worthy of prosecution while retaining a high standard for evidence and demonstrating probable cause.

3.3.4 Communicating with the Defense Through Mitigation and Discovery

3.3.4.1 Goal and Rationale

Considering information provided by defense attorneys was seen as another important component of prosecutors' work in this office. Prosecutors uniformly expressed willingness to consider mitigating factors in developing plea offers, particularly details about the charged individual as a person and factors that may have contributed to the crime. Like other goals, the desire for information from the defense attorney stemmed both from prosecutors themselves and from office leadership.

Prosecutors reasoned that receiving information from defense attorneys was important because the defense has the only contact with the person charged with the crime and can learn about factors that motivated the crime and may impact charging, or factors that exacerbated the crime such as substance abuse or mental illness that may need to be addressed through sentencing conditions. Without this information, prosecutors have an incomplete understanding of the crime and are less able to design a just plea. One described,

> *[The DA] told us all to encourage [defense attorneys] to bring us their mitigation…. I know nothing about [the person charged with the crime] personally, but you may know something. You may know that he got dropped on his head as a kid and that affected his brain… You need to let us know that so when that issue comes up, it can be addressed with the court and we can take a position, 'Judge, if the guy's got brain damage, do what you need to do'.*

Another important aspect of sharing information with defense attorneys is providing discovery, which prosecutors generally felt aided defense attorneys and the individuals they represent in plea bargaining and were therefore willing to provide. One prosecutor stated that turning over everything *"…eliminates 90 percent of the what-ifs and the unknowns. If you have all the information, everyone can make a better, informed decision."* Another said, *"It just makes the job easier. It makes it easier to administer justice when everybody's cards, you know, are all on the table.'*

3.3.4.1 Implementation

State law requires prosecutors to provide the defense with full open-file discovery in felony cases, and interviewees explained that they were required to share their files through the court's case management system at the point when charges were indicted to Superior Court as felonies. Several prosecutors stated that they were willing to share their files with defense attorneys even in District Court because they felt it would help both sides reach the best solution in a plea deal. One prosecutor explained,

> *So in District Court there's no general right to discovery until it's indicted to Superior Court. I have an open file policy where if I haven't indicted it yet and a defense attorney asks for a copy, I'll offer them the plea support and the things that I have in my file because it just makes it more efficient to be able to – they know what I have and then they'll maybe give me what's called 'reciprocal discovery' and tell me what they have so we can come to a good resolution, and so my file is open to anyone that wants it.*

Although prosecutors were alike in intending to consider information from the defense, they differed in how and when they incorporated the information into their plea decisions. One difference among prosecutors was whether they discussed cases with the defense attorney prior to making a first plea offer. A few prosecutors typically sent offers without discussing it with the defense beforehand, expecting the defense to negotiate changes if they possessed relevant information. Other prosecutors preferred to communicate with the defense attorney before making the first plea offer, thereby

necessitating less negotiation afterward. As one explained, *"I'm usually talking to them before I make the plea, so, you know, we're sort of baking in the negotiation into my first offer."* Another explained this choice as a matter of efficiency: *"I don't want to waste time writing them a plea if it's gonna be way different based on the information that I get. It could be worse or it could be better for that – more mitigation for that defendant."*

Prosecutors also varied in their willingness to change their initial plea offer in response to requests by the defense. A few prosecutors said that they were hesitant to negotiate with defense attorneys after making their initial plea offer, especially when they had already negotiated prior to the plea, when they had overwhelming caseloads, or when the criminal charges were not very serious. But by and large, prosecutors expressed willingness to consider changes requested by defense attorneys to their initial offers. One described their attitude toward counter-offers or modification requests from the defense this way:

> *I'm going back to the defense attorney and I'm like, 'So, what's the issue? Does this person not want to be on probation? Is he just saying that he didn't do it? What's going on?' So, I always want to know the rationale. Depending on what the why is or the reason will determine what my next steps are.*

Although prosecutors may prefer to receive information from the defense, they may be unable to do so. Sometimes prosecutors said they were unable to connect with the defense attorney early in a case and had to create an initial plea offer without their

input. Defense attorneys may lack time to provide information on a case given their caseloads. Communication may also vary depending on their relationship with the specific defense attorney assigned to the case, or on the defense attorney's preferences for negotiation. One prosecutor described a close relationship with a defense attorney: *"It could be via text message like, 'Hey, does your guy want to do whatever?' because we have this working relationship to where you are comfortable enough to contact me."* Other relationships between prosecutors and defense attorneys may be less conducive to open communication. Some prosecutors described tension with defense attorneys due to the adversarial nature of their relationship and the adversarial tactics used by some prosecutors and defense attorneys. One prosecutor explained that in the past, the DA's office would bias the negotiation by crafting artificially high initial offers:

> *The car salesman haggling thing was just like natural. So you always start with twice as much as you want, which I find reprehensible, like I hate that idea. Like we're talking about liberty and you're talking about justice here—'Well, I'll just start twice as much and then we'll see what happens'.*

Such an adversarial stance can work against open communication and lead defense attorneys to withhold necessary information. Ultimately, prosecutors acknowledged that the resulting lack of information during plea bargaining can worsen outcomes. As one lamented,

Sometimes I'll have this terrible experience where I think I know the [person charged with the crime] and then they pipe up in Superior Court and they start talking. And it's clear that the psychological profile I had about them is just totally wrong, you know what I mean? Because it's based on just very dry bits of information on a page, right? So I try to encourage the defense lawyer to tell me what they think is just. But many defense lawyers are reticent to do that.

3.3.5 Promoting Racial Equity in Plea Processes and Outcomes

3.3.5.1 Goal and Rationale

The final goal centered around reducing racial disparities in the district's criminal case outcomes. Race generally arose as a topic when interviewers asked about how an individual's race or ethnicity impacted the prosecutor's plea decisions and about the types of research or data prosecutors would like to see regarding plea bargaining. Prosecutors spoke consistently about personally wanting to ensure that the district was equitably treating people of color. One prosecutor stated,

So, you're seeing more of the people of color get into harsher sentences in this overall scheme. That's just a culture change that has to take place. I don't know if it will ever cure itself because we've been dealing with racial issues for hundreds of years, but there has to be a sophisticated way of doing it. I just think people are going to have to start thinking a little more moderately and… being more transparent about it.

3.3.5.1 Implementation

When prosecutors were asked whether race and ethnicity were considered in developing their plea bargains, about a quarter of respondents reported that race simply did not influence their decisions; for example, one said *"I don't consider race. Race is just not significant in terms of what is appropriate for a plea offer."* Most respondents acknowledged that they themselves may have implicit biases they need to guard against. Some stated that they employ strategies to guard against their own implicit racial bias such as hiding identifiers on cases. Two prosecutors said that they guard against their own bias by adhering more strictly to state sentencing guidelines because they are (at least purportedly) race-neutral. One described, *"I try to be right in the middle [of the sentencing range]…. All I see is the paper. These are the numbers."*

Some prosecutors reported that race has likely influenced their clients' past criminal justice system experiences, thus factoring into their current case. One ADA explained trying to consider these factors in developing a plea:

> *For me, I definitely want to sort of bring race to the forefront and think about whether bias might have affected any stage of this case, for instance, from a stop and frisk or a traffic stop or anything discretionary like that, how race might have played a role in the way it was charged – even by the officer – in the way it was perceived. And just to give it a careful look through a racial justice lens.... It's healthy to do a race-switching exercise*

in your head, like, 'How might this have gone differently during the law enforcement interaction in charging, everything had the races of the parties been switched?'

Prosecutors also mentioned that data are helpful in identifying and correcting racial biases, and reported that their office had instituted a new policy of saving plea transcript documents for that purpose. When we asked about the types of research or data prosecutors would like to see regarding plea bargains in general, several mentioned they would like to see data comparing case outcomes for Black and White individuals. They were interested in whether they themselves, their team, and the office were producing equitable outcomes for Black and White individuals with similar criminal behavior and history. A few prosecutors elaborated that this information would be particularly helpful because racism often manifests via implicit bias, which is by definition difficult to observe or change. As one described,

The problems with plea negotiations and plea deals are rooted in implicit bias and things of that nature. So it's hard to put policies to tell people 'Don't use your implicit bias' when it comes to formulating these pleas when that is in fact what implicit bias is. It's something that can't be controlled, and so I don't know what policies are that helpful.

When asked whether they had ever received training on implicit bias, this prosecutor stated they had not received such training in "new prosecutor school" (a curriculum offered through a local university), but newer prosecutors may be more likely to be offered such training.

3.4 Discussion

This qualitative study highlights ways in which achieving progressive goals in a prosecutor's office can depend on line prosecutors' plea decisions in individual cases, and often on their ability to collaborate with the defense. Our findings, based on self-reported plea bargaining behaviors, suggest that these line prosecutors are dismissing cases with weak evidence, selecting less severe charges, recommending lighter sentences, communicating with the defense, and seeking to reduce racial disparities, all of which hold promise for furthering the progressive goals of their elected DA. However, they also face challenges in balancing leniency with concerns for public safety, receiving desired input and communication with defense attorneys, and understanding how to impact racial disparities without broader systemic reform.

3.4.1 Dismissals and Punitiveness

Our study focuses on plea bargaining but also explores the related issue of dismissals. Dismissals are a critical tool for prosecutors who want to reduce the risk of coercion in plea bargaining, a goal articulated by ADAs in this project. This is because often traditional prosecutors make plea offers that reflect the anticipated punishment at trial discounted by the probability of conviction at trial, meaning that weak cases with low probability of conviction will receive especially lenient plea deals (Bibas, 2004). This practice can create pressure on innocent individuals to plead guilty. The prevalence of false guilty pleas is poorly understood, but some studies have found that as many as

37% of people pleading guilty reported that they did not commit the crime they pled to, likely due to coercion in plea bargaining (Redlich, Bibas, Edkins, & Madon, 2017; Redlich, Summers, & Hoover, 2010). Traditional prosecutor's offices may offer exceptionally lenient pleas in weak cases to avoid trial for cases they are likely to lose. Several ADAs stated that they avoided this practice, with some expressing a moral distaste for offering pleas when unsure of the charged individual's guilt. If progressive prosecutors consistently dismiss weak cases their caseloads may decrease, allowing more time for more serious and stronger cases. Perhaps more importantly, this practice may result in less coercive plea bargaining and fewer innocent people pleading guilty.

Prosecutors also discussed avoiding over-penalization, which aligns with the broader progressive prosecution goal of decreasing reliance on incarceration. ADAs described the challenge of balancing the traditional prosecutorial role of punishment with the more progressive concern for the individual and societal consequences that might accompany a sentence. ADAs in this study felt responsible for protecting public safety, which led them to seek incarceration in some cases when statutorily they could have chosen a community sentence. On the other hand, they also felt responsible for minimizing the potentially negative consequences of the criminal justice system on individuals and their communities, leading them to select more lenient charges in some cases than those prescribed by state statutes (Raphael & Stoll, 2009). The level of

prosecutorial discretion required to allow for both punitive and lenient plea decisions could make it difficult for progressive DAs to bend the entire system toward leniency.

As mentioned earlier, the DA's office had not yet developed written plea policies at the time of this study, although the Drug and Property team was actively developing its own internal guidelines based on the amounts of drugs involved in drug cases. Based on research on street-level bureaucrats, written guidelines that limit punitiveness and require the dismissal of certain cases may help line prosecutors enact the philosophies of their office in individual case decisions without feeling personally responsible for potential public safety repercussions (Lipsky, 2010). However, it is not yet understood how written policies might help or hinder line prosecutors from implementing progressive goals. Traditionally, many prosecutor's offices have instituted "price sheets" that dictate which charge reductions and sentences are allowed to be offered in specific types of cases, ensuring that plea offers are calibrated across different prosecutors and reflect the level of punishment the DA or office has deemed appropriate (Nardulli et al., 1988). Some progressive prosecutors have announced such plea policies publicly, for example stating that they would dismiss certain charges, not charge certain crimes as felonies, or not call for active sentences for certain charges (Davis, 2019). Many of these prosecutors have faced community backlash in response to those policies, jeopardizing their relationships with other legal actors (e.g., with the police in charge of arresting individuals who would not be prosecuted) and damaging their re-election prospects

(Davis, 2019). Further research is needed to understand how office plea bargaining policies impact case outcomes and to explore the benefits and drawbacks of written policies for progressive prosecutors.

3.4.2 Challenges Communicating with Defense

Reducing punitiveness can be difficult for prosecutors to do on their own, but it may be supported by another strategy ADAs described in this study: encouraging open communication with the defense. ADAs reported seeking and considering mitigation from the defense, and acknowledged that defense attorneys have critical information for screening, charging, and sentencing decisions. Line prosecutors often have very little information to determine whether an individual poses a true threat to victims or the public safety. They must form conclusions about future risk from police reports and criminal records, which may be tainted by past racial bias in the justice system and lack information about the charged individual's character or family responsibilities that may decrease their likelihood of recidivism (Eckhouse, Lum, Conti-Cook, & Ciccolini, 2019). A prosecutor who is interested in understanding these factors is not even legally able to contact the person charged with the crime. The defense attorney, in contrast, can meet with the person directly, often even meeting with family members and learning about what motivated the crime and what continued risk there might be. They may then use this information to persuade prosecutors to operate outside of the traditional trial prediction framework and focus on the needs of the person charged with the crime (R. F.

Wright et al., 2020). Thereby, the defense attorney is an essential partner for prosecutors who wish to decrease punitiveness but worry about potential risk to public safety.

ADAs in this study reported mixed success in their attempts to collaborate with the defense. ADAs successfully collaborated with the defense in many cases, but sometimes encountered difficulty obtaining meaningful and timely information when they requested it. There are many possible explanations for this finding of disconnect between prosecution and defense. First, defense attorneys, particularly public defenders, may lack time to meaningfully research each client and share information with the prosecution. This theory is supported by a survey of over 500 public defenders, which showed that despite aspirations to be highly active negotiators during plea bargaining, their actual legal preparation and communication with clients and prosecution often fell short (R. F. Wright et al., 2020). Second, the long-standing imbalance in power between prosecutors and defense attorneys may have led prosecutors to expect defense attorneys to be responsive to prosecutors' timelines and schedules, whereas increased flexibility on the part of the prosecution may accommodate defense attorneys' schedules and allow for the sharing of more information. It is well recognized that defense attorneys have less power in the courtroom than prosecutors (Nir & Liu, 2021). One study found that defense attorneys actually consider their position as the "*lowest rung on the ladder*," "*positioned below a powerful alliance of prosecutors, police, and at times, even judges*" (Nir & Liu, 2021). In a progressive prosecution office where prosecutors are showing new

interest in defense attorney input, it is reasonable to expect that defense attorneys may need more encouragement and assistance to act against such long-standing power dynamics. ADAs in this study did not mention any strategies that would share or transfer some of their power or resources to the defense, an omission that is consistent with the broader Progressive Prosecution movement's silence on this issue. Progressive prosecutors have been called upon to lobby for a stronger indigent defense system (Covert, 2021)—a stronger system may have funding and staff available to improve the amount of information public defenders are able to obtain and share about their clients, who are sometimes difficult to contact due to unstable housing and access to phone and email services. Defense attorneys could also be granted more regular access to and time with prosecutors for the purpose of sharing information and discussing cases. In short, progressive prosecutors may be able to do more than they are currently doing to increase defense involvement in pleas. A promising avenue for future research is to explore defense attorney perspectives on plea bargaining with progressive prosecutors, to elicit effective strategies for communication and to understand the potential for shifting power dynamics.

3.4.2 Racial Disparities

Reducing racial disparities in the criminal justice system is one of the most common stated goals of reformers, but also one of the most difficult to tackle (Davis, 2019; Fryer, 2020). When asked how an individual's race impacts their plea bargaining

decisions, some ADAs in this study stated that they do not consider race, while some acknowledged that they may have unconscious racial bias that would require training and feedback (e.g., from case outcome data) to correct. One ADA mentioned a potentially problematic strategy—making sure all sentences were in the middle of the sentencing range, so that no individuals received preferential treatment. Although only one prosecutor described such a strategy, it is worthy of attention because it speaks to a fundamental conundrum of prosecutorial discretion. It may be true that binding prosecutors to the middle of sentencing guidelines may decrease racial disparities within specific charges and prior record levels, as sentencing guidelines are based on these factors. However, adhering to this strategy may prevent prosecutors from exercising discretion in cases where it is deserved due to compelling mitigation or contextual factors. Sentencing guidelines also prescribe harsher sentences for individuals with more serious criminal records, which may reflect past racial discrimination they experienced in the legal system (Eckhouse, 2019; Eckhouse et al., 2019). Additionally, this strategy does not control for disparities that may arise in the prosecutor's selection of charges. A racially biased prosecutor may choose a harsher charge for a Black person with a similar crime as a White person, which could affect sentence length.

Importantly, racial disparities persist at every point of the criminal justice system (offending, arrest, charging, sentencing, incarceration, and release), and prosecutors influence some of this process. Several strategies have been identified by which

prosecutors can seek to reduce racial disparities. Such strategies include training staff on implicit bias and racial disparities in the criminal justice system, collecting data on office outcomes to identify racial disparities in charging and sentencing, hiring more racial minorities in line prosecutor and supervisory positions, declining to call police witnesses who have a history of racial bias, declining to pursue the historically discriminatory death penalty, and promoting diversion and non-prosecution in minor cases (Covert, 2021; Davis, 2019; H. Pickerell, 2020; H. L. Pickerell, 2020; Sklansky, 2017). Of these strategies, ADAs in the current study mentioned three; this is not to say that the office was not engaging in more of these strategies at the time, just that only three were mentioned in interviews with ADAs about plea bargaining. Office trainings and data collection were mentioned but not discussed in depth, possibly because those decisions were made by office leadership rather than by line prosecutors. The most significant and salient strategy mentioned was the office's tendency to dismiss low-level drug possession charges (particularly marijuana) that disproportionately impact Black individuals. In addition to expressing a moral distaste for "*criminalizing personal choice*" (i.e., using drugs), some prosecutors recognized that these low-level drug charges exacerbated racial disparities in the criminal justice system and should be dismissed when possible. If implemented rigorously by the office, this practice has potential to decrease racial disparities. Researchers have already determined that disparities are decreasing, in large part due to declines in marijuana cases (traditionally charged to

Black individuals) and dramatic increases in methamphetamine cases (traditionally by Whites; (Pew Charitable Trusts, 2022)). The extent to which declines in marijuana cases are linked to progressive prosecution practices has yet to be determined. It is also unclear how much a decrease in marijuana prosecution will impact other areas of the criminal system—even though these crimes are not being prosecuted the number of individuals being arrested for marijuana has not decreased (Pew Charitable Trusts, 2022). In any case, ADAs dismissing marijuana cases may lead to decreased racial disparities in charging and sentencing that align with the goals of the progressive prosecutor.

Another type of policy that may be helpful for progressive prosecutors in reducing racial disparities is requiring an internal impact statement or analysis for any written plea guidelines, inspired by impact statement policies used by states for promoting racial equity in sentencing (London, 2011). Such policies would require that prosecutor's offices systematically collect and track data on their pleas, a growing area of research that may provide more information on the sources of racial inequities in the justice system and methods for reversing them (Garrett et al., 2021).

3.4.3 Limitations

This study has several limitations. First, this study was conducted in one district, and the experiences of this office may differ from other progressive prosecutor's offices. However, the experience of this office transitioning from traditional to progressive

prosecution is an increasingly common one and this study's findings should allow for helpful generalizations regarding plea bargaining practices in this context. Because the office collaborated with the researchers conducting this study, their willingness to answers to our questions candidly may have been affected. However, we believe that interviewees were comfortable and provided thoughtful and candid responses during interviews. Participants were assured that their interview responses were confidential and would not be shared with office leadership, and interview questions did not ask about prosecutors' support of office leadership or policies or lack thereof. Finally, interviews were conducted early in the term of the new DA and before the rest of the court system (particularly defense attorneys) adapted to the changes, meaning that some experiences are not captured in the data. However, this timing has the benefit of capturing the implementation challenges of regime change.

3.4.4 Conclusion

The current exploration of plea bargaining in the office of a new progressive prosecutor elucidates how progressive goals are translated into case decisions by line prosecutors and discusses implications for these decisions. Line prosecutors have important roles in implementing goals of dismissing weak cases and decreasing punitiveness in the district, but to have the broadest impact they must engage with defense attorneys in ways that may require shifting some of their power in negotiation. Line prosecutors also have important roles to play in decreasing racial disparities in the

criminal justice system, but these actions require clear coordination, prioritization, and training from office leadership. Further research is needed to better understand how decision-making occurs between prosecutors, defense lawyers, and judges, particularly during the complex and iterative plea bargaining process. Any effort to programmatically rethink the prosecution function has much to learn from the challenges faced by prosecutors working on the front lines of the criminal justice system.

4. Defense Power in Local Plea Bargaining: How Public Defenders Use Leverage to Influence Plea Outcomes Across Cases and Contexts

4.1 Introduction

The American legal system assumes an egalitarian, adversarial relationship between prosecution and defense to ensure that all relevant evidence and legal arguments are employed zealously in the pursuit of justice (Bibas, 2012). However, there is ample evidence that the relative amount of power held by the prosecution and defense in criminal courts is unequal. Prosecutors hold more power than just about any other legal actor, mainly stemming from the discretion they have to prosecute or dismiss individual charges or entire cases, to select the criminal charges to prosecute in each case, and to make recommendations concerning pretrial detention and the type and length of a criminal sentence (Alschuler, 1968; Bellin, 2018; Goldstein, 1981; Sepulveda & Wilenmann, 2022). The power imbalance between prosecution and defense is so significant that it has been blamed for wrongful convictions, racial and economic disparities, and mass incarceration in the US (Raphael & Stoll, 2009; Travis, Western, & Redburn, 2014).

Even though the defendant has a constitutionally protected right to trial, the vast majority of criminal cases that are not dismissed by the prosecution are resolved in a plea bargain (Bibas, 2006). In a plea bargain, a defendant agrees to plead guilty to a

specific set of criminal charges and often a specific sentence, representing a negotiated agreement between the prosecution and defense that negates the need for a costly and time-consuming trial. Although ultimately subject to the approval of a judge, plea bargains are for the most part entirely negotiated between the prosecution and defense and have been called a "Black Box" due to lack of transparency and oversight in the process (M. L. Miller & Wright, 2008).

Little is known about the content of plea negotiation or the factors that influence attorneys' decision-making in individual cases. However, it is well-demonstrated that criminal defendants generally receive harsher sentences (one study showed 300-500% more punitive) in trial than they would receive in a plea bargain (R. Covey, 2007; Yan & Bushway, 2018). This plea-trial differential is considered by some to reflect a penalty imposed by a judge to punish defendants for exercising their right to trial, and by others a discount incentivizing the defendant to give up that right (Grunwald, 2020). Regardless of the source of the differential, it is reasonable to ask, considering the defense's generally weaker bargaining position, how do defense attorneys gain concessions in plea bargaining to secure such beneficial plea deals compared to what they would receive at trial?

Although the defense has fewer material resources and less control compared to the prosecution, defense attorneys do have strategies it can use to exert power in the criminal legal process. The defendant has a constitutional right to trial, and holding out

for trial is often discussed as the primary way the defense can exert leverage in the plea bargaining process (Alschuler, 1975; Henderson, 2019; Uphoff, 1995). Trial is a powerful threat for the defense because trials are time-consuming, resource-intensive, and in other ways highly undesirable to the prosecution. Legal scholars have proposed that defenders can even use collective power to "strike" by advising many clients to hold out for trial at once if prosecutors are broadly engaged in unacceptable plea bargaining practices, causing the court to slow down and new cases to backlog (Alschuler, 1975).

Beyond holding out for trial, legal scholars and empirical researchers have explored additional strategies the defense has at their disposal during plea bargaining such as delay, escalation, and presenting mitigation (Bowen, 2009; Lee & Ropp, 2020; Uphoff, 1995; R. F. Wright et al., 2020). However, it is not well understood when and how defense attorneys use these strategies and how strategies may vary across different cases, opponents, and courtrooms. The current study explores the following research questions: What stratgies do defense attorneys use to secure beneficial plea deals? How do the use and effectiveness of defense strategies vary across cases, courtrooms, and political contexts? I examine these questions qualitatively in four local judicial districts from the perspective of public defenders (PD), who generally spend more time than any other type of defense counsel actively engaged in plea bargaining with local prosecutors. Results indicate that defense attorneys have access to a variety of strategies to gain leverage, but many case and contextual factors influence their use and effectiveness.

4.1.1 Power Imbalance in Plea Bargaining

At their core, the prosecution and defense are pitted as adversaries in the American legal system, and each side has a professional role that is, in many ways, in conflict with the other. The mission of District Attorneys (DAs) and their assistants is reflected in their oath of office, which in the state of North Carolina reads: *"I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability in prosecution"* ("Oaths," 2023). The defense attorney, on the other hand, provides legal representation to an individual client. The literature has shown that there is plenty of variation in how prosecutors and defense attorneys fulfill their roles, with some prosecutors seeking punitiveness and others focused more on justice (Bellin, 2020), and defense attorneys varying in how zealously they defend their clients (R. F. Wright et al., 2020). At the same time, the prosecution and public defense share a common goal: caseload management. The number of criminal cases brought to courtrooms far exceeds the capacity of courtrooms to bring each case to trial, and the prosecution and defense are each motivated to resolve cases quickly outside of court. If cases backlog too drastically, the entire community suffers: victims wait to see justice served in their cases, defendants live with pending charges and pretrial restrictions, and attorneys continue to accumulate more cases. This shared goal motivates each side to bargain, perhaps even more cooperatively than typical adversaries.

Bargaining has been defined as "*a mixed-motive situation in which two or more parties engage in moves and counter-moves to resolve or manage a conflict*" (Lawler, 1992). The literature on bargaining is far more extensive than the literature on plea bargaining and is situated in the disciplines of economics, psychology, sociology, and political science, among others. Much of this literature concerns how the power of bargaining actors impacts outcomes. The Oxford English Dictionary provides two definitions of power: "*the ability to do something or act in a particular way*", and "*the capacity or ability to direct or influence the behavior of others or the course of events*" (Dictionary, 1989), the latter of which is the most applicable in plea bargaining. Nobel laureate and economist John Harsanyi contended that social power in bargaining relationships can be conceptualized as the resources and specific actions that each actor can use to influence the behavior of the other, the behaviors of each actor that are able to be influenced, and the opportunity costs for each actor of taking and not taking each behavior (Harsanyi, 1962). The balance of these resources and options predicts the likelihood of a favorable outcome for one side or the other; in other words, it is relative power, not absolute power, that matters in bargaining.

There is convincing evidence of the impact of relative power on outcomes in the legal system. Prior to the 1990s, the post-trial criminal sentence was primarily the decision of the judge, who would consider the criminal charges, defendant factors and prior record, and other aspects of the case to decide whether and how long to incarcerate

the defendant, place them on probation, or assign other conditions. Most states and the federal government adopted Structured Sentencing policies in the 1990s to impose uniformity on sentencing, which in most states was implemented in the form of an algorithm prescribing the type and length of punishment based on the severity of the criminal charge and the criminal record of the defendant (Spainhour, 2014). Although perhaps noble in their intent to reduce judicial bias, these reforms had unintended consequences of increasing the power of the prosecutor in the criminal justice system (Austin, Jones, Renninger, & Kramer, 2004; Painter-Davis & Ulmer, 2020; Stemen & Rengifo, 2011).

Structured sentencing granted prosecutors considerable discretion over the expected post-trial sentence (Frase, 2018), which is one of the known factors that predicts plea bargaining outcomes (Bibas, 2004; S. D. Bushway, Redlich, & Norris, 2014). If a defendant is convicted at trial, the judge is bound to impose a sentence within a restricted range dependent upon the charges selected by the prosecutor (Spainhour, 2014). If a prosecutor would like to make trial more unattractive to the defendant, they can select a more severe charge to prosecute (e.g., homicide instead of manslaughter). To increase pressure on the defendant to give up their right to trial, they may promise to prosecute a less severe charge if the defendant agrees to a plea (Piehl & Bushway, 2007; Vance & Oleson, 2014). A prosecutor may also manipulate the number of different charges (e.g., cocaine possession and reckless behavior in addition to manslaughter) or

the counts of each charge (e.g., twenty versus two counts of shoplifting), which can increase punitiveness by allowing for the application of consecutive sentences (Piehl & Bushway, 2007).

Other types of power inequality between the prosecution and defense have been well documented in the literature. Prosecutors typically make the first offer in a plea negotiation, activating an anchoring effect that may influence the final outcome (Alschuler, 1979; Chapman & Bornstein, 1996; Kahneman, 2011). A prosecutor can advocate for a defendant to be detained in jail pretrial, creating tremendous pressure on the defendant to accept any plea in order to be released (Dobbie, Goldin, & Yang, 2018; V. A. Edkins & Dervan, 2018). They can also often recommend an active sentence (i.e., involving incarceration in prison or jail) instead of a community or intermediate sentence, and can recommend longer sentence terms and more costly conditions (Alschuler, 1968). In some states like North Carolina, prosecutors have control over the court calendar and are able to schedule cases and trials at times that are optimal for their own preparation and coordination with experts and witnesses, with no requirement to consider the needs of the defense (Cromwell, 2010).

The defense and prosecution are also unequal in their material resources. Prosecutors are generally paid more than public defenders and have more administrative support for research, documentation, communication with victims and defendants, and review of evidence (Primus, 2017; R. F. Wright, 2004). In addition to

administrative resources, prosecutors typically enjoy such a close relationship with local law enforcement that they are often able to obtain more information on the specifics of criminal investigations, influence the collection of evidence, and advise the initial selection of criminal charges (Primus, 2017; Rakoff, 2014; R. F. Wright, 2004).

Prosecutorial power in plea bargaining has been identified as a source of coercion, leading innocent defendants to plead guilty. Innocent defendants may plead guilty in response to threats from the prosecution to seek harsher charges or penalties at trial, or to avoid pretrial detention (S. Bushway, 2019; Caldwell, 2011; Dervan & Edkins, 2013; V. Edkins & Dervan, 2013; Subramanian et al., 2020). It is difficult to estimate the frequency of innocent individuals entering guilty pleas, but studies have found that between 8 and 11 percent of DNA exonerations were of innocent individuals who pled guilty, and 20-51% of criminal justice-involved individuals reported to entering false guilty pleas in the past (Malloy, Shulman, & Cauffman, 2014; Redlich et al., 2010; Subramanian et al., 2020). Indeed, the likelihood of a false guilty plea has been found to be correlated with the use of high-pressure tactics by lawyers (Malloy et al., 2014).

The power imbalance between prosecution and defense has been cited by critics of plea bargaining as a reason for its abolishment or constrained use (Alschuler, 1979; Bibas, 2004; Hessick, 2021). But the fact remains that in spite of the power imbalance, plea bargaining is often in the best interest of the defense, and the ability to enter this type of contract saves a tremendous amount of resources for both sides and benefits the

public by preventing backlog and enormous public expense in the court system (Scott & Stuntz, 1991). Moreover, efforts to restrict or ban plea bargaining have generally failed (Carns & Kruse, 1991). Therefore, it is wise to focus more research on understanding power in plea bargaining in order to mitigate the negative impacts for defendants and society (Garrett, 2018). In particular, it is important to gain a better understanding of the sources of defense power and how they may be enhanced to level the playing field.

4.1.2 Sources of Defense Leverage

The theoretical and descriptive literature provide insights into how defense attorneys may use their leverage in plea bargaining. Two theories of plea bargaining are helpful to consider in understanding the role and goals of the defense attorney. The classic "Shadow of the Trial" model does not address defense leverage explicitly, but reflects the "*rational choice of independent economic actors*" in plea bargaining (Taylor, 2011). While SOT is meant to predict the decisions of the defendant specifically, it can be used to frame the decisions of prosecutors and defense attorneys (Redlich et al., 2017). SOT predicts that the value of the plea will reflect the likelihood of conviction at trial multiplied by the anticipated post-trial sentence, discounted to reflect the costs of going to trial. Parties look to similar cases that have been taken to trial in their jurisdiction to assess the likely sentence that would be imposed at trial and the likelihood that their case would result in a conviction. Then they discount the sentence by the likelihood of conviction at trial. For example, if a sentence after trial is likely to be twenty years in

prison and the chances of conviction are seventy percent, then it will be in the interest of both parties if the plea bargain entails a fourteen-year sentence. That is, it would be rational for the defendant to accept any deal that is fourteen years or less, and for the prosecutor to accept fourteen years or more (Bibas, 2004). The SOT model is appealing to scholars in a variety of fields because it can generate global predictions of plea outcomes that can be compared with trial outcomes to gain an understanding of plea bargaining that is largely unavailable through other means.

Another prominent theory of plea bargaining, Courtroom Communities Theory (CCT), introduces the concepts of courtroom norms, the preferences of independent court actors, and the impact of repeated interactions on plea outcomes. CCT states that each courtroom establishes "going rates," typical accepted outcomes for specific types of crime that allow both sides to arrive at agreements fairly quickly without significant transaction costs (Nardulli et al., 1988). Courtroom communities are shaped by their specific actors, policies, procedures, and histories, all of which contribute to set the value of going rates and the extent to which they are departed from. CCT has been supported empirically by studies showing that districts do have typical outcomes for types of criminal cases that are unique and distinct from other districts (Gordon & Huber, 2009; Nardulli et al., 1988). However, the theory has not been able to explain all of the variation in going rates between districts, or in the significant variation in individual plea outcomes within a district (Stemen & Escobar, 2018).

The influence of the defense attorney is conceptualized somewhat differently in these two theories, but each view is valuable in conceptualizing defense leverage. In SOT, the primary determinants of the final plea outcome (the expected sentence at trial, probability of conviction, and costs of going to trial) are essentially subjective and difficult to predict at the time of plea bargaining, particularly because there are so few trials to look to for reference (Bibas, 2004, 2015). If these predictions are truly the most important determinants of plea outcomes, defense attorneys would be wise to use strategies that would alter these subjective predictions in favor of a more lenient plea: decreasing the expected sentence at trial and probability of conviction, and increasing the cost of going to trial. In CCT, plea outcomes are the result of courtroom norms and repeated interactions and cooperation between legal actors. Defense attorneys according to CCT would use their influence in interpersonal relationships with other legal actors to shift the going rates for pleas in the courtroom.

The descriptive literature describes multiple strategies used by defense attorneys in plea bargaining. The bulk of legal research has focused on the defense's strongest bargaining chip: the defendant's constitutional right to trial, on which the entire plea deal depends. In pleading "not guilty" to their criminal charges, defendants force the prosecution to dismiss the case, take it to trial, or offer a better plea deal. At this point, prosecutors may respond with a revised plea offer that is more favorable to the defense, in the hopes that defendants will plead guilty and avoid the cost of trial. Due to the

potential of receiving this response, defense attorneys may choose to derive leverage through a different but related strategy: convincing the prosecutor that they are willing and able to go to trial, regardless of whether that is actually the case. Long-time defense attorney Rodney Uphoff explained that it is often the defense attorney's reputation and skill as a trial lawyer and willingness to go to trial that can convince prosecutors that trial will be risky, labor-intensive, and ultimately not worth the effort (Uphoff, 1995).

Although perhaps its strongest bargaining chip, holding out for trial, sincerely or not, can be incredibly risky for the defense. If the case does go to trial and results in a conviction, the defendant will likely face the most severe charges brought by the prosecution plus the possibility of a trial penalty—an especially severe sentence imposed by the judge as punishment for wasting the court's resources in going to trial (Grunwald, 2020). Trial incurs additional costs for the defendant such as attorney fees for those employing private defenders, time spent away from work and family traveling to the courthouse and sitting in court, a longer period of jail time for those being detained pretrial, and the stress and trauma of the entire experience (Earl, 2008; Feeley, 1979; Seidman Diamond & Salerno, 2020). And trial incurs costs for the defense attorney who must set aside the rest of their caseload to prepare for and participate in the trial (Alschuler, 1975; Hessick, 2021; Seidman Diamond & Salerno, 2020; Subramanian et al., 2020).

Because trial is so risky for the defendant, defense attorneys have found a variety of weaker, informal strategies to employ in plea bargaining. Uphoff contends that the defense relies heavily on persuasion of their opposing counsel: *"Because in most cases the prosecutor wields superior bargaining power, defense counsel generally will be attempting to utilize persuasive arguments, rather than threats, to gain concessions from the prosecutor"* (Uphoff, 1995). These types of strategies involve building relationships with prosecutors and humanizing clients, and using tactics such as delaying and bluffing their willingness to go to trial (Alschuler, 1975; Bowen, 2009; Uphoff, 1995). Defense attorneys may also choose to put more effort into preparation for a case by reviewing all evidence and looking for weaknesses that would compromise the prosecution's case and may elicit a more favorable plea or dismissal (R. F. Wright et al., 2020). Several legal scholars have described these weaker defense strategies, but none have produced a comprehensive inventory of strategies to increase leverage available to the defense in plea bargaining.

4.1.3 The Importance of Context

There is also little research demonstrating how defense power may vary across different settings. It is plausible that defense power is a missing explanatory variable in a body of research showing that case outcomes vary significantly across courtrooms (Stemen & Escobar, 2018; Ulmer et al., 2010; Ulmer & Johnson, 2004). The popular "courtroom communities" theory of plea bargaining posits that attorneys and judges working together in local jurisdictions establish sustained agreements through repeated

interactions over time that influence their charging and sentencing decisions (Nardulli et al., 1988). These agreements result in consistent "going rates" that are sought for similar types of cases to promote efficiency and predictability in the face of limited court resources and overwhelming caseloads (Nardulli et al., 1988). This theory is supported with evidence that districts produce patterns of case outcomes that are internally consistent and also distinct from other districts (Nardulli et al., 1988; Ulmer et al., 2010). However, the factors that predict variation in punitiveness in plea deals between districts, potentially factors that include variation in defense leverage, are not well understood.

Factors such as courtroom size and organizational context (e.g., specialization, caseload, trial rate) have some influence on the consistency and severity of going rates in plea bargaining, but even across courtrooms of similar size and structure there can be considerable variation in policies, practices, and case outcomes (Arazan, 2007; Arazan et al., 2019; B. D. Johnson, 2005; Merritt, 2006). Some studies have examined political factors influencing case outcomes and found that politically conservative counties produced longer sentences and larger racial disparities, but other research found that conservative counties did not differ significantly in their use of the death penalty or variations from sentencing guidelines (Baumer & Martin, 2013; Enns, 2014; Helms & Jacobs, 2002; B. D. Johnson, 2006; Ulmer et al., 2020). The presence of a Democratic District Attorney in a jurisdiction significantly increased the likelihood of case dismissal

in Wisconsin jurisdictions, but was not significantly related to the likelihood of a guilty plea to a lesser charge or a non-custodial sentence following a guilty plea (Stemen & Escobar, 2018).

Missing from these studies is an examination of how courtroom factors and politics may alter the power of the defense to advocate successfully for more lenient pleas. The defense has also been largely ignored in the research on recent prosecutorial reform efforts that may greatly impact defense leverage in plea bargaining. Over the past two decades, progressive candidates have been elected as chief prosecutors in districts across the country based on promises to fight mass incarceration and decrease disparities in the criminal justice system (Davis, 2019; Pickerell, 2020; Sklansky, 2017). Early evidence from studies of progressive prosecutors suggest that they have modified their approach to punitiveness in plea bargaining and effected more lenient outcomes in their districts (Grodensky, 2022; Hogan, 2022; Mitchell et al., 2022). Strategies proposed by progressive prosecutors include reduced reliance on cash bail and prison sentences, less prosecution of minor non-violent or "victimless" crimes, and more attention to the factors that produce wrongful convictions (Davis, 2019; Grodensky, 2022; H. Pickerell, 2020). Although progressive chief prosecutors have been largely silent on sharing power with the defense in plea bargaining, a recent qualitative study in a new progressive DA's office revealed that line prosecutors depend on and often seek out mitigating information from defense attorneys to implement their goal of decreased punitiveness

(Grodensky, 2022). In the context of progressive prosecution, defense attorneys may gain more leverage from persuasion and cooperative negotiation tactics because prosecutors are more receptive to the defendant's needs.

The most comprehensive examinations of how defense leverage is exercised in specific contexts in the current literature are qualitative. Qualitative methods are ideal for understanding complex social processes, and findings from a few qualitative studies illustrate how different courtroom contexts may lead to different defense strategies in plea bargaining. In one study conducted in a district where the prosecutor's office had adopted stricter internal plea policies, defenders were found to be limited in the amount they could negotiate with line prosecutors when plea offers were undesirable. These defense attorneys gained leverage primarily by escalating requests to prosecutors' supervisors or by "call[ing] prosecutors' bluff": advising their clients to reject the plea and hold out for trial (Bowen, 2009). In contrast, a study conducted in a district with less rigid prosecutor policies found that defense attorney strategies were mainly focused on cultivating relationships and reputation, building institutional knowledge, timing and frequency of contact with the prosecutor, sharing sympathetic information about the defendant, and having the defendant complete mitigation (Lee & Ropp, 2020). A third study conducted in four diverse districts found that defense attorneys across districts varied in their willingness to mention immigration concerns and other collateral

consequences, based on the receptivity of individual prosecutors and the prosecutor's office to those issues (T. Johnson, 2016). ,

Taken together, these qualitative studies offer important insights on how defense attorneys select strategies in plea bargaining that are appropriate to their courtroom context. In their qualitative paper on defense strategies, Lee and Ropp conclude by calling for increased qualitative work from varying jurisdictions (Lee & Ropp, 2020), which is important in understanding defense leverage in different contexts. I build on the existing qualitative literature by examining the types of leverage available to defense attorneys in plea bargaining and the factors that impact their leverage across four politically diverse districts in North Carolina. Using qualitative interviews with public defenders, defense attorneys' strategies for exerting leverage in plea bargaining are described along with case-, attorney-, and district-level constraints that make the strategies more or less effective.

4.2 Methods

4.2.1 Study Districts, Participants, and Recruitment

Four prosecutorial districts in North Carolina were selected for this study, with three districts encompassing only one county each and one district encompassing two neighboring counties. The districts were selected based on their size and the political party of their elected District Attorneys. Similar to the classic study on courtroom communities by Peter Nardulli and colleagues, this study selected mid-sized districts in

order to study the type of interpersonal negotiation that is more dominated by hierarchy and internal policy in larger districts and more heavily influenced by a few personalities in smaller districts (Nardulli et al., 1988). Two districts were selected because they elected a new District Attorney in 2018, one of which was progressive candidate replacing a Democratic incumbent and the other was a Democratic candidate replacing a Republican incumbent. The other two districts had long-term incumbent DAs, one a Democrat and one a Republican. All four districts were located roughly centrally in the Piedmont region of the state. District populations ranged from approximately 175,000-365,000, median household incomes ranged from approximately $50,000-$75,000, and poverty rates ranged from 10-17%, and the percentage of the population that was African American ranged from 25-40% (Bureau, 2016).

This study focused on public defenders (PDs) rather than private and court-appointed defense attorneys because public defenders in these districts work full-time defending clients in the court and therefore have the most experience with plea bargaining. Each of the four study districts has a public defender office funded by the Office of Indigent Defense Services, which supports offices in %% of North Carolina's 100 counties. These offices are led by a chief public defender who is appointed by the district's senior superior court judge. They are structured such that the staff PDs start by handling misdemeanor cases in District Court and after several years of experience generally progress to handling felonies in Superior Court, although some more

experienced PDs preferred to remain in District Court or to focus on specialized courts such as DWI, DV, or juvenile court.

I first met individually with each chief public defender to describe the study and request permission to contact 5-10 public defenders to participate in interviews. Three chief PDs permitted me to contact all of the PDs in their office, and one chief PD provided names of 10 PDs they suggested that I interview. I emailed PDs directly to ask if they were interested in learning more about the study and participating in a one-time, one-hour interview about their work plea bargaining in their county, and those who indicated interest scheduled an appointment with me over Zoom. At the time of the appointment, I reviewed the informed consent form with them and answered any questions. If they provided informed consent, I conducted the interview during the same meeting. All 37 PDs were interviewed between Fall 2021 and Spring 2022. Interviews lasted approximately 1 hour. All study procedures were approved by the Duke University Campus Institutional Review Board.

4.2.2 Data Collection and Analysis

Interviews were semi-structured, guided by a set of core questions that were asked every time but otherwise flexible to follow the interest and expertise of the participant using open-ended probes. I began each interview by asking the PD about their position at the PD's office, their background and motivation for becoming a PD, and the number and type of cases they handle. Then I asked about what structures and

policies existed in the PD office, how PDs approach and negotiate plea deals with the prosecutors or Assistant District Attorneys (ADAs) in their district, and how plea bargaining is influenced by other legal actors and politics in their district. I closed by asking PDs to share anything about plea bargaining that had not already been addressed in the interview that the participant thought I should know. I probed for clarification and additional information throughout the interview, particularly when the PD discussed parts of the process during which they used leverage in plea bargaining.

Interviews were audio recorded and transcribed verbatim by a professional transcriptionist. I led an analysis team of two undergraduate students to conduct a thematic content analysis of the interviews (Patton, 2015). I trained the students on the fundamental goals and methods of qualitative inquiry and the techniques of thematic content analysis. The thematic content analysis used in this study employed both deductive and inductive approaches. A deductive approach was used to understand how PDs' plea decisions were influenced by specific case-, interpersonal-, organization-, and policy-level factors that were identified from existing research and prior categories. An inductive approach was used to understand goals, philosophies, and strategies that guided PDs' approach to plea bargaining that were emergent in the data.

First, I developed a deductive codebook of topics and themes identified from the literature. Second, two coders and I read through select transcripts and created memos with observations about important emergent topics that could be added to the

codebook. A first draft codebook was developed and applied to relevant text excerpts in select interviews using the qualitative analysis software program Dedoose (Version, 2016). The codebook was revised iteratively, then finalized and applied to all 37 interviews by both coders. Because of the large number of codes, the coding was divided into three rounds, with the two coders using a separate section of the codebook to code all interviews in each round. The coders and I met regularly to assess qualitatively the inter-rater reliability of transcripts they jointly coded by identifying excerpts that were coded differently between members of the pair, discussing the reasoning behind their differences, and coming to consensus on a final set of codes for the transcript. Reports were generated for each code and used to analyze and describe themes across interviews.

4.3 Results

I interviewed 37 PDs whose demographics and professional characteristics are described in Table 3. Most had worked at their current PD's office for more than 10 years or less than 2 years, and most were White and male.

Table 3. Characteristics of public defender study participants.

Participant characteristic	N (%)
Gender	
Male	21 (57%)
Female	16 (43%)
Race	
White	22 (59%)
Black	8 (22%)
Latinx	1 (3%)

Age: Mean (range)	41 (27-61)
Years of experience as defense attorney: Mean (range)	10 (<1 – 29)
Percentage of caseload comprised of the following types of cases: Mean (range)	
Misdemeanors	30% (5-95%)
Juveniles	5% (0-50%)
Traffic	19% (0-95%)
General felony	38% (0-90%)
Specialized felony unit	6% (0-80%)
Number of jury trials during career	
None	8 (22%)
1-5	12 (32%)
6-25	8 (22%)
26-39	3 (9%)
More than 40	6 (16%)

In describing their decision-making in plea bargaining, PDs' responses were categorized into five main categories of strategies. Although defense attorneys may employ a wide variety of strategies in plea bargaining, the strategies explored in this paper are those specifically aimed at gaining leverage over prosecutors. These strategies are not mutually exclusive: PDs may engage in several different strategies on a single case, or use strategies that employ multiple types of leverage. First, PDs described gaining leverage by holding out for trial, which often prompted more lenient offers or dismissals from the prosecution out of the prosecution's desire to avoid the cost and risk of trial. Second, PDs described engaging in activities to weaken the prosecution's case and increase the likelihood that they would earn an acquittal at trial. Because prosecutors are typically more motivated to avoid trials they are likely to lose, these

strategies can prompt the prosecution to extend more lenient plea offers or dismiss cases entirely. Third, PDs presented information to the prosecution to challenge the culpability of the defendant and mitigate sentencing. This type of information is meant to decrease the severity of the sentence that the defendant is likely to receive at trial, requiring the prosecutor to decrease the offer further to provide sufficient discount for the defendant to plead guilty. Fourth, PDs used interpersonal tactics to persuade prosecutors to exercise lenience in their plea offers, relying on their relationships and knowledge of the prosecutors' attitudes and sympathies. Finally, PDs escalated cases within the DA's office, seeking leverage from office hierarchy to secure more lenient pleas. Figure 5 shows the strategies to the left and an arrow depicting their influence on the desired outcomes to the right.

Additionally, several other important factors influence defense attorneys' selection of strategies and their ultimate effectiveness in impacting lenience. Borrowing a term from the literature on causality, I have termed these factors moderators. A moderator is "*a third variable that modifies a causal effect*" (Wu & Zumbo, 2008). In a causal model, a moderator effects when and for whom the independent variable causes a dependent variable. For example, in a study finding that a medical treatment is highly effective in males but less effective or totally ineffective in females, sex is the moderator (Wu & Zumbo, 2008). In the current study, if a defense strategy was considered an independent variable, and a concession or dismissal by the prosecution was considered

the dependent variable that is influenced by the strategy, moderators are additional variables that explain when the strategy is most influential and when it is weak or non-existent. Because defense attorneys are repeat actors and learn which strategies will be effective in which circumstances, they may decide not to use a strategy when disadvantageous moderators apply. For example, when a defense attorney knows that a prosecutor has particularly punitive attitudes toward drunk drivers, they may choose not to employ persuasive strategies with that prosecutor. In that case, the prosecutor attitude is the moderator, but the defense attorney uses the information they learned from past plea deals to avoid using the strategy at all. Therefore, the moderators in this study can be considered both factors that enhance or constrain defense leverage and factors that influence whether a defense attorney will select the strategy in the first place. Moderators identified in this study are grouped into the following categories: defense attorney reputation, skills and relationships; defendant constraints; prosecutor attitudes and receptivity; and district policies and resources. Figure 1 shows the moderators with a downward arrow pointing at the arrow connecting the defense strategies with the plea outcomes, indicating that moderators influence the effectiveness of the levers on the outcomes. A leftward pointing arrow indicates that moderators can influence the strategies that are employed in a plea bargain. Interviewee responses were analyzed to describe each strategy and moderator. Direct quotes are provided that reflect general

sentiments that were salient across respondents, unless it is stated that they illustrate a divergent viewpoint.

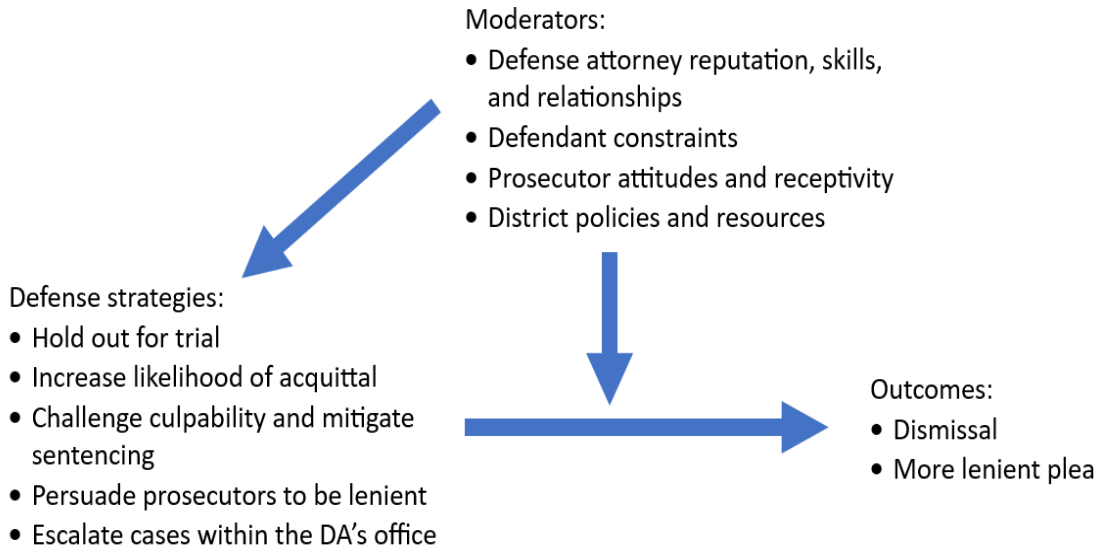


Figure 5. Defense leverage and moderators in plea bargaining

4.3.1 Strategy 1: Hold Out for Trial

The most powerful way for defense attorneys to exercise leverage in plea bargaining is by rejecting plea offers, which can motivate prosecutors to avoid trial by extending more lenient plea offers or dismissing the case entirely. This is consistent with the literature, which most often discusses exercising the right to trial as the defense's most powerful bargaining tactic. Although it is the defendant rather than the defense attorney who ultimately exercises their right to trial, PDs in this study reported that defendants usually follow their defense attorney's recommendations and so it is largely the attorney's decision whether to "hold out for trial".

The defense attorney's leverage in holding out for trial lies in the significant cost and risk of trial to the prosecution. Prosecutors have large caseloads and trial takes time away from their other cases; additionally, the court itself is at risk of backlog if too many cases are tried, a problem which may be blamed on prosecutors if the cases are deemed unworthy of the court's time. One PD described leveraging concern about backlog during plea negotiation by telling a prosecutor, *"All right, we're just going to try this case if you're not willing to work with me on this. And if we lose, then you're the one that's going to have to explain why this crap of a case is now in superior court clogging up the system.*" A particularly experienced defender said that sometimes holding out for trial is a matter of wearing down the prosecutor: "*In some cases, I will hold on. I'm not really one that just holds on to stuff all the time, but some cases, you have to. It's like, okay, maybe I'm going to need to wear you down on this one. Let's just hold this one out for a while and see what we can do."*

Although PDs reported that holding out for trial is a common strategy, PDs from all districts reported that their cases rarely actually go to trial. This is because trials can be inherently risky for both the defense and prosecution, motivating both sides to work toward a plea. As one PD said, *"You never really quite know how it's going to play out in district court in front of a judge, or in superior court in front of a jury."* Another PD explained that this uncertainty motivates both prosecutors and defenders to avoid trial if possible:

> *"A lot of people lament this thing of, 'Oh, we never have trials anymore. Oh, there are never trials. Oh, trials are what it's really all about.' I'm like, 'No, trials are really when*

you can't do anything else. Trials are really a last resort when nobody can agree on anything reasonable.'… If you can get cases dismissed, mediated, deferred, worked out in some kind of way, or even pled down to something that your client's willing to do, I think in the vast majority of cases that is going to be preferable to trying a case. Because in a trial, there's just no guarantee that any justice is ever going to be served and, in fact, usually it's not."

Some PDs said that trials are undesirable because instead of the burden of proof being on the prosecutor and the defendant presumed innocent, in reality, the defendant often seems to be presumed guilty by the court. One explained, *"If you don't prove your innocence in court, you're going to be found guilty. That's not how it's supposed to work…. Even if defendant does testify and there's holes in the story, who is the judge normally going to believe, the witness or the defendant? The witness, the victim."*

A defense attorney may be especially likely to hold out for trial when the plea offer is "bad" or worse than the anticipated outcome from trial. In such cases, the defense "might as well" hold out for trial because the plea would not benefit them. A PD said,

"*The last trial I had, the offer from the State was absolutely horrible. It was essentially worst case scenario what he could get if he was convicted at trial. So at that point, we might as well have a trial because what's the harm? There's no loss there. So if I have a bad offer, that's not going to change, then I will take something to trial even if I don't*

think I'm going to win, just because I think maybe the judge will either give that bad sentence or they'll give less than that. There's no way they could give more than that, so we might as well try."

Conversely, when the pleas offered are very good, the defense does not benefit from holding out for trial because the prosecution is unlikely to reduce the plea further. Prosecutors from one district in particular stated that there are so few trials in their district because the pleas are so good: "*[COUNTY] actually really gives good plea, which is why a lot of cases don't necessarily go to trial... They'll make a plea offer in a heartbeat for your client to get probation. And if my client is out of custody or that gets my client out of custody, they're probably going to take that instead of going to trial*."

4.3.2 Strategy 2: Increase Likelihood of Acquittal

PDs can also gain leverage from strategies to weaken the prosecution's case, motivating prosecutors to avoid a trial they may likely lose. A defense attorney may marshal exculpatory evidence or find flaws in incriminating evidence to weaken the case. The prosecution may make a better offer to avoid trial or even dismiss the case if they realize they have weak evidence. Because of the power of evidence alone to motivate prosecutors to reduce plea offers or dismiss cases, many PDs said that they examined the case evidence before they considered any other strategies. If they noticed a prosecutor had weak evidence, they would often show it to the prosecution directly in order to prompt a reduction in the plea. One PD said, *"I like to get the discovery, I like to*

know what the evidence is. So if there are holes that I can use in my negotiation like, 'Hey, you can't really prove that, or that's not a credible witness,' so that I can talk to the DA."

PDs also use delay tactics as a strategy to improve their position and increase the likelihood of acquittal. PDs said that they were often able to delay cases by requesting continuances over many months or years. Not all judges would grant multiple continuances, but in the cases that were delayed, witnesses for the prosecution could become unavailable, stop cooperating, or lose their memory of the events related to the case. One PD said, *"By the time 18-plus months have passed, memories fade, witnesses are gone. And I can sometimes use that then to leverage a misdemeanor plea or sometimes get the case outright dismissed."* Prolonging cases can also be effective for cases that PDs suspect are low priority for prosecutors. Rather than continuing a low-priority case over a long period of time, many prosecutors will dismiss the case to remove it from their caseload. The effects of delay on the strength of cases and willingness to plea for the prosecution was especially evident during the Coronavirus (COVID) pandemic when prosecutors were unable to take cases to trial due to court closures and concerns about exposure. One PD described, *"By delaying their case for a year, the state's caseload has gotten greater. And so they've gotten offers in 2021 that they didn't get in 2020. So some cases were able to plead out in your client's favor when they were not able to plead out that way in 2020."*

Delaying the resolution of a case can also be beneficial to a client they can engage in activities that will increase the prosecution's preference for lenience in sentencing. For

example, for clients being held in jail, longer case disposition times can benefit their sentence by earning them "time served", such that an active sentence may be significantly shortened or eliminated entirely. One PD said, *"When they've got jail credit, it's like a get-out-of-everything-free card, except you have a conviction. But jail takes care of almost everything. It's kind of a magical pill. Everyone's like, "Okay. Jail credit. Yeah. Okay. Let's plead to that."* Additional time can also allow the person charged with the crime to engage in activities such as treatment or community service that would mitigate their sentence. Some PDs said that if the client *"does what they are supposed to"* and does not pick up additional charges pretrial, they can use this as evidence of good behavior that may mitigate a sentence or lead to a dismissal.

4.3.3 Strategy 3: Challenge Culpability and Mitigate Sentencing

Defense attorneys may also present information to try to earn a better plea offer by altering prosecutors' expectations for the post-trial sentence. If the expected post-trial sentence is lower, prosecutors are often prompted to extend more lenient offers to incentivize the defendant to plead guilty. One tactic PDs mentioned to reduce the expected post-trial sentence was showing that the client was not culpable for the criminal behavior, presenting factors aside from criminal intent that may have contributed to their committing the crime. If a client suffered from mental illness or used intoxicating or addictive substances, PDs often chose to argue that they deserved a more lenient sentence. As one participant said,

"If I have a client that has severe mental health issues, and that led to the reason the charge exists, I'm going to play that up early, because the more you get into the DA's side, this person's mentally ill, or even if it's an issue where you have to get an evaluation (whether they're competent) done, and they come back competent, the DA's like, 'Maybe mental illness did play a part in this, I don't want to prosecute somebody just because they're mentally ill'."

PDs can also present mitigation to alter prosecutors' expectations for the post-trial sentence in plea bargaining. It is important to note that PDs' examples of mitigation expanded far beyond statutory mitigation, which is information that is explicitly listed in criminal statutes that allows for more lenient sentencing for certain crimes. As one PD explained,

"I mean there is a mitigation statute that, and that's pretty much formal for like when you're in court and you're being offered a mitigating sentence, you have to put on the record which factor you're submitting to get that mitigating factor. But outside of the statute in court, it's very broad…. I mean, mitigation can be the client's mental health, if they're having mental health issues or struggles, that could be a mitigation. If they're working with a nonprofit organization or they're doing community service, I mean, anything that really just helps their case."

Some of the information relevant to culpability may also serve as mitigation; for example, mental health evidence may both reduce culpability and also provide social

background evidence for mitigation at sentencing. PDs also provided mitigating information about clients' substance use, economic hardship, family situations, history of trauma, IQ, and many other factors. Two defenders even mentioned that they could hire a mitigation specialist to assist with assembling strong information for a defendant in a serious case, although they had never actually done so.

Defenders also reported showing evidence that their clients were working hard to cooperate with the court and make amends for their crimes. Defenders often recommended that their clients demonstrate cooperation even before their court date by completing classes (e.g., gun safety class for gun charges, anger management class for domestic violence charges), procuring licenses or insurance for traffic charges, undergoing mental health or substance abuse assessments, or performing community service. Many defenders said that they wanted to be able to provide very strong evidence that clients were cooperating and "jumping through hoops" to comply with the court. One defender explained, *"I want to wave a lot of papers around in the air. I want to be able to say, 'Look, and this and this.' Obviously, more and better information is better.*" Additionally, several said that it was helpful to provide this information early in the case to capture the prosecutor's attention early enough to potentially influence dismissal and charging decisions as well as sentencing. *"We try to get all of that information that we can up front from our clients. Sometimes we don't automatically get it up front, but we try to find*

out everything good that we can find out because you can use that with negotiation as well, not just sentencing."

Finally, defenders presented information to show that defendants did not need to be incapacitated because they were not at risk of committing additional crimes. For example, if defendants adhered to pretrial conditions and did not acquire any new charges, this could serve as positive evidence that they could behave in the community without detention or supervision. As one PD said, *"Depending on the DA you're working with, they'll use, a common thing is, 'Okay, well, if this person behaves well in our pretrial program for six months, I'll dismiss the charges'…if you have a client who's doing well on pretrial here, and you can often get them to give them a reduced sentence, or a reduced criminal conviction, or something, or a dismissal if they do well..."*

4.3.4 Strategy 4: Persuade Prosecutors to be Lenient

PDs also used persuasive tactics to convince prosecutors to be more lenient in their plea offers. This type of leverage is different from the previous one because it does not target the expected post-trial sentence, but rather the prosecutor's own attitudes and preferences for lenience in the case. Mainly, PDs influenced prosecutors by building relationships with the prosecutors. PDs discussed their relationships and interactions with prosecutors more than any other topic during the interviews, emphasizing that they purposefully maintained positive, professional relationships. All PDs in this study reported that their relationships with prosecutors in their current districts were

generally professional and cordial, although some mentioned that they had worked in other districts where prosecution-defense relationships had been more contentious. Many PDs said that they tried to cultivate a friendly and pleasant relationship with prosecutors, exemplifying (and in two cases, directly referencing) the adage of *"you catch more flies with honey than vinegar"*. One prosecutor explained,

> *"I think most people try to be pretty friendly, both because obviously, I think one, it's helpful to your clients to not have the prosecutor hate you. Obviously. Also, you're just there. They're nice folks. Sometimes I disagree with them more or less strongly on their stance. Sometimes we completely agree, we just... you know they've got a job and I've got a job. So, it depends person to person, but it's generally pretty congenial. I, personally, can be extremely difficult of a human being, but I try to be not unpleasant while saying, 'No, I'm not going to do that. I'm not going to help you. I'm not going to agree to that.' But I'll be nice."*

PDs aimed to humanize their clients by presenting them as likeable, relatable, and human. In fact, several participants said that humanizing clients was the most important part of their job. They said that both attorneys and judges often have a difficult time remembering that a defendant is an individual human being, beyond the crime they allegedly committed and the details of the case. When a defendant is perceived as only the crime they committed, it is more difficult for prosecutors to see why they should exercise leniency. Examples of details that may make defendants seem

more sympathetic or relatable included *"likes to fish with their dad," "living in poverty and trying to go to college,"* and *"single mother"*. One defender explained the importance of demonstrating that a client is unique:

> *"'Here's how my client is different.' You have to do that for every case. And it's so easy with the volume of cases we see, especially in District Court, to just dial it in. I just know the judge is like, 'Oh God, I've heard this same larceny case 15,000 times already, and yep, they did it. Yep, whatever,' and for every kind of case just be like, 'I know what's going to happen.' …But my job is to stop and make people say, 'Oh, but this person, this person could be me. This person could be my child. This person could be whoever.' So, humanizing the defendant is the vast majority of my job."*

Defenders also sometimes emphasized how punishment would harm the client and society. For example, young clients could be traumatized and suffer collateral consequences from a prison sentence or felony conviction. People with no prior felony record could suffer collateral consequences from acquiring a felony conviction. The elderly may die in prison or parents or caregivers could not care for family members if they were incarcerated. Finally, individuals who work or volunteer could not contribute to their communities they are incarcerated.

However, PDs' friendliness with prosecutors had limits. Some PDs explained that they were not always friendly with prosecutors due to the adversarial nature of their relationship. For example, a PD may maintain more distance with a prosecutor

while they were actively preparing for trial against them. Another PD said that they were willing to go have a drink with a prosecutor but would not become close personal friends with them.

All PDs described paying attention to prosecutors' preferences and behaviors in order to understand the factors that led them to exercise leniency in their cases. They would strategically highlight those factors when working with those prosecutors. Some of these were individual details about defendants that made them more or less relatable to prosecutors. For example, a prosecutor may be particularly sympathetic toward young clients or single mothers, and the defender would make special effort to highlight those details when bargaining. Also, different prosecutors may place higher priority on different types of charges, and defenders learn which types of cases can be emphasized or de-emphasized to their advantage. As one PD remarked, "*So this one ADA might not care about a drug charge, but he does care about this felony breaking and entering. Whereas this other ADA does care about the felony drug charge and the breaking and entering of this business doesn't matter as much. So, I mean, it depends on the particular ADA*".

4.3.5 Strategy 5: Escalate Cases Within the DA's Office

Finally, PDs also sometimes choose to gain leverage by escalating cases to a supervising ADA or to the chief DA when plea negotiations with individual ADAs fall short of desired outcomes. When successful, this strategy persuaded ADAs to decrease their offers. Most examples of escalation consisted of a PD asking a different ADA to

offer an opinion on what they felt was an unreasonable offer extended by the ADA assigned to the case. PDs described instances when they escalated a case because the assigned ADA was not adequately considering mitigation or was unwilling to consider a community or intermediate sentence, or in the rare case that an ADA was acting unethically. One PD described that sometimes escalation was helpful in gaining a different perspective on a case:

> *"In terms of the team leads, sometimes some of them might have a more open mind towards what you're trying to say, or just even just a different set of ears. Some might hear this stuff differently and differ and give your client what you're actually asking for. And so sometimes it's not even just going over someone's head it's, 'Hey, I talked to so and so, this is what they said, but can you look at it as well and see if you see something different?'"*

Two PDs described instances in which they had coordinated with other PDs to escalate patterns of ADA decisions to the DA. In both circumstances, the PDs believed that ADAs were offering pleas that were inconsistent with the DA's office policy, and coordinated efforts to present evidence of these pleas to the DA. One PD had engaged in this type of escalation in a different North Carolina district from the one they worked in currently (not one of the four districts in this study). In that instance, some of the PDs in the district had heard the DA make public statements about wanting to reform the criminal justice system, but the PDs felt that their dismissal rates for marijuana cases

were too low to truly reflect reformed practices. The PDs in the office attempted to collect dismissal data from the NC Administrative Office of the Courts and present them in a public forum. They described, *"We're like, 'Well, then, let's actually pull the data, and submit these questions, and say, 'Tell us. You say don't care about marijuana, but your dismissal rate on Class IIIs is whatever percent'"*. Ultimately this attempt at escalation was unsuccessful because of difficulty accessing the needed data.

The other PD who discussed organized escalation was currently gathering information on plea deals offered by the traffic team in their district. This activity was inspired by PDs noticing that private defense attorneys were able to obtain more favorable pleas than the public defenders and wanting to bring cevidence of this practice to the elected DA. The PD described,

> *"We see it far too often, private attorneys just getting better negotiated deals. They're more willing to break their policies for private attorneys. I can't say why, other than I suspect it's an old boys' club sort of thing, but we see it all the time. We've been trying to take note of it when it happens, but it happens a lot…. The head DA is an elected position, and [we are] wanting to bring to light the discrepancies and the fact that these policies that [the DA is] purporting to uphold aren't really being upheld by [the DA's] team."*

4.3.6 Moderator 1: Defense Attorney Reputation, Skills, and Relationships

PDs discussed factors, referred to here as moderators, that influenced the types of leverage they used and the effectiveness of their plea negotiation strategies. These were categorized into four types of moderators: those arising from the defense attorney themselves, the defendant, the prosecutor, and the district.

The first category of moderators concerns characteristics of the defense attorney. PDs said that defense attorneys who had built a reputation of being "better" or more experienced at trial may be more likely to earn better plea offers because prosecutors were especially motivated to avoid facing them at trial. Additionally, prosecutors may be more motivated to avoid trial against defenders who have a reputation of consistently following through on threats to go to trial, versus those who are known for "bluffing" their intention to go to trial but then accepting pleas as originally offered. Some PDs stated that it is important to build such a reputation by taking cases to trial regularly: *"If you don't get what you want, you try the case. Even if we lose it, you make [the prosecution] work for it…. It really is incumbent upon you to try it, even if you have to lose this one to get the kind of bargaining power that you need the next time that you threaten to try a case. They'll know you're serious about it."*

Another moderating factor enhancing the leverage of PDs was the longevity of their relationships with prosecutors in the district. For example, the PDs who described using escalation in their cases were generally more experienced PDs who knew that

certain ADAs would not react negatively to escalating a case. One described, *"We have very longstanding relationships, because most of the supervisors in the DA's office started around the same time I did, so we were baby lawyers together and we've just kind of grown together*." Because of their history with the ADA, this PD was willing to escalate cases to them when needed.

4.3.7 Moderator 2: Defendant Constraints

The second category of moderators includes preferences and characteristics of the defendant. Defense attorneys may gain less leverage from persuasion and mitigation with defendants who appear to the prosecution to be threats to public safety. PDs reported that the defendant's criminal record has a tremendous impact on their leverage in a case. If the defendant has a good criminal record, a very old criminal record, or even a criminal record without history of the specific crime committed in the case, the defender could argue that the client did not have a pattern of behavior that would continue in the future, and plead with the prosecutor to help keep the defendant's record clean. As one defender described, "*Try and keep someone's record clean, even if they do have a record, but they don't have a record of assaulting anyone, or they don't have a record of stealing anything, or they don't have a record of doing anything similar to what they're charged with, the DA will still offer them a deal*." Some participants even said that if the client had a good record, little else was needed to convince prosecutors to exercise leniency. On the contrary, if the client had a bad criminal record, defenders needed to use other strategies

to convince prosecutors to be lenient, and prosecutors were far less likely to respond. "*Once you start getting to the people who have extremely terrible records, that's when [prosecutors] become more hesitant to even really care about what you got to say.*"

Holding out for trial is often less effective and riskier for defendants who have strong evidence against them and whose crime or criminal record are more serious. Cases with strong evidence against the defendant carry a higher likelihood of conviction, and in cases with particularly egregious crimes, prosecutors are unlikely to extend a lenient offer. One PD said, "*Especially in DV cases, if they truly feel like it was a bad assault, they're not really open to anything other than prison*." Also the effect of presenting details of particularly heinous crimes in court can lead a judge to impose worse sentences. As one PD explained "*Well, If the facts are particularly egregious, and you draw it out and call attention to as much of it as possible by having a trial, then that's going to hurt you*." Holding out for trial may also be less risky for cases that are on a District Court rather than a Superior Court docket. This is because District Court handles low-level cases with less potential for severe sentences involving incarceration, and also because cases with undesirable outcomes in District Court can be appealed to Superior Court.

The behavior of the defendant during the pretrial period also impacted defense attorneys' leverage in plea bargaining. For some defendants inclined toward risky or criminal behavior, delay was a counterproductive strategy because a longer amount of time pretrial increased the likelihood that they would be caught violating their pretrial

conditions or committing additional crimes, which would worsen their ultimate sentence. Delay was also less helpful for defendants who could not build up positive mitigation due to being unwilling to perform the mitigating requirements or lacking the time, financial and other resources required for these activities.

PDs were also limited in their bargaining leverage when they were not able to contact a defendant, which happened frequently. PDs who were not able to discuss their defendant's preferences and testimony before their court date had less time to develop a bargaining strategy and less time to employ strategies to increase leverage against the prosecutor. Because this study was conducted in an indigent defense setting, many defendants faced considerable obstacles to communication and court appearance: one PD said, *"When you're dealing with public defenders, I was shocked… on how little contact I have with a lot of the clients… they change their numbers a lot these days. A few might not even have a phone. The phone might be turned off."*

Other constraints on defender leverage are created by the preferences of the defendant. PDs reported that in the majority of their cases, defendants were open to following their advice in terms of pleading or holding out for trial. All of the PDs emphasized that it is ultimately the defendant's decision whether to accept a plea or go to trial, and that it was their job to represent the defendant in whatever choice they made. As one PD explained, *"It's always your client's decision, but of course they largely, will do what you think makes sense for them."* However, some defendants have strong opinions

related to trial and timeline that significantly impacted their leverage in bargaining. Defendants may be particularly motivated to resolve a case quickly if they are being held in jail during the pretrial period, facing restrictions in their housing or employment due to pending criminal charges, or simply impatient to put the stress and logistics of managing a criminal case behind them. One PD explained that in some cases, *"People would literally plead guilty to get out of court sooner."* In such cases, defendants may be more likely to want to accept the first plea deal that is offered by the prosecutor instead of waiting for a better one, resulting in little or no reduction between the first offer and final plea.

Defendants also may have different preferences for trial, with some defendants wanting to go to trial, some wanting to avoid it, and many falling somewhere in between on the spectrum of trial avoidance. Those who want to go to trial may not be motivated to plead guilty even by an especially lenient offer, whereas those who want to avoid trial may not want to risk holding out for a better plea out of fear that the offer would be rescinded. These preferences influence how much negotiation the defense attorney will engage in and how much the prosecutor is called upon to reduce the plea offer before it is accepted. Some defendants had strong preferences to avoid trial, even with strong exonerating evidence, or to go to trial, in spite of strong incriminating evidence. PDs reported that client preferences resulted in their bringing cases to trial that were often the weakest in their caseload. *"The majority of the time of the trial, I would*

say 70% of the trials, 75 to 80, if there's a quote unquote winning and a losing, we lose those trials, get found guilty, because they're not good trials to begin with."

Multiple factors can influence a defendant's preferences for trial apart from the legal advice of their defense attorney. Because these attorneys were all public defenders and their clients were all indigent, none of them mentioned attorney costs as a cost of trial, but some did mention the costs associated with missing work, transportation, and other logistics of attending multiple court sessions. Other factors impacting defendants' preferences for trial included their risk tolerance and their perception of being innocent or guilty of the crime. Innocent defendants were seen as typically more willing to go to trial, although PDs reported that it was rare for their clients who were completely innocent of all charges to be unable to obtain a case dismissal based on the evidence in the case.

4.3.8 Moderator 3: Prosecutor Attitudes and Behaviors

The third category of moderating factors concerns traits and behaviors of the assigned prosecutor in a case. Some prosecutors were particularly difficult to negotiate with because they were not available for negotiation or they were rigid in their general attitudes about appropriate punishment. PDs in all districts said that they had to adjust their plea negotiation tactics depending on the individual prosecutor assigned to the case. Some prosecutors were very difficult to communicate with, not returning phone calls or emails and unavailable to meet to talk about cases. In those cases, PDs' ability to

gain leverage using persuasive tactics was limited. One PD explained that contacting prosecutors was one of the hardest parts of their job:

> *"That's one of the most difficult parts of the job, honestly. It's not even actually getting into the negotiations, it's actually getting the ADA to be available so you can discuss the case…. A lot of times it's very difficult for some ADAs to make time because we're bombarded with cases, they're bombarded with cases…. Our best bet is to try to catch them in person and the unfortunate reality is sometimes, we're rushing negotiations because we're doing it in court room instead of trying to be in the office setting. So it'll be in between cases, in the middle of cases, we're trying to call the ADA to the side to discuss the case, but I feel technically you need more time, you need more preparation for that…. They have a process where you're supposed to be able to schedule appointments to meet them. And some of them abide by it, some of them don't do as good of a job."*

When prosecutors were especially difficult to contact over multiple cases, PDs said that they were less likely to attempt negotiation in the future: *"It definitely affects me wanting to talk to them again about stuff. So then we sort of set everything for trial. I don't know, it definitely affects work environment, number one, and then yeah, you get a lot of cases set for trial."*

PDs also mentioned that some prosecutors were very punitive as a rule, and were not receptive to reducing pleas from incarceration to probation. One PD explained, "*I think some of them steer away from the fact that, hey, we're trying to rehabilitate this person*

or we're trying to help them become a better member of society. And so while I'm advocating for that, they're just advocating to punish, punish, punish. Sometimes so they can become difficult because some of them are just getting to the point where 'No, we need to send them to prison'." In the progressive district, the traffic team was reported to be especially punitive in comparison to the rest of the office, and PDs had to adjust their expectations for lenience when working in traffic court: *"They're more old school prosecutors. And that can be frustrating at times when you have an elected DA who is very progressive and very restorative justice based, and then you have these assistant DAs that do not follow those policies or the way they handle cases doesn't follow that line of thinking and some campaign promises she made. So that has been frustrating."* Particularly punitive prosecutors may be less receptive to mitigating evidence related to substance abuse or mental illness, arguing that these factors would make a client more dangerous and therefore more in need of incapacitation.

Finally, different prosecutors were reported to have different attitudes towards trial, which impacted the effectiveness of PDs holding out for trial. Some prosecutors have more distaste for trial and may be more likely to grant concessions when threatened with trial, particularly prosecutors who are currently preparing for another trial and are trying to clear out other cases. Other prosecutors may be more likely to punish defendants who hold out for trial; as one PD described, *"If you disagree with them, it becomes personal. It becomes an attack upon them when it's not an attack upon them."*

Prosecutors also constrained the ability of the defense to hold out for trial when they threatened to pursue more or harsher charges at trial than they would offer in a plea. One PD explained, "*If I decided to plea a DWI with a whole bunch of other charges attached, most of the time other charges are going to get dismissed. If I take to trial, they're going to pursue every charge and then try to run [the sentences] consecutively.*"

4.3.9 Moderator 4: District Policies and Resources

Defense leverage was also constrained by characteristics of the district in which they plea bargained. Organizational, political, and policy factors all impacted the types of strategies PDs felt were available and effective in plea negotiation. One district factor that impacted PDs' ability to effectively hold out for trial was the court calendar. Several PDs from the smallest district mentioned that there are very few days set aside for trials in their district's Superior Court calendar, meaning that they could not take many felony cases to trial compared to other counties. Although they said that this did limit the number of trials held in the district, they said that the pleas offered by the district's prosecutors were usually so good that they did not feel the need to push for more trials than were allowed in the calendar, possibly indicating that this constraint impacted prosecutors as well. One PD explained, "*We don't have a lot of trials. Our ADAs, I guess, are more and more reasonable. They don't want to have a trial. They would rather like agree. They'd rather work collaboratively in that way, which is nice.*"

Another constraint related to the trial calendar was the fact that it is controlled by prosecutors, a fact common to all districts in North Carolina. Because the calendar was controlled by prosecutors, PDs said that sometimes they did not know whether or when their scheduled cases would be called on a given day and were unable to prepare adequately. One PD described,

> *"[The prosecutors] have docketing authority. And some of the ways they flex their power, is when they set a case, or when they call a case, at what point of the day they call a case, or when they set a case for trial…. And if I want to plead a case on a docket say on a Monday, they decide when that case is called. So I can sit there all day, my client can sit there all day, and it's up to this one human ADA in this sea of cases that day with other ADAs and other defense attorneys, on when they call my case. And everyone is human, and I think that it's nearly impossible to not take advantage of such power."*

Additionally, PDs may be expected to be prepared for multiple trials on a given day, requiring intense preparation that compromised their ability to manage other cases. This lack of knowledge and control over their court schedule impaired PDs' ability to plan their time and to defend effectively during trial, weakening trial as a lever in negotiation.

Another district-level factor impacting trial leverage was district politics. In the most conservative district, some PDs said that prosecutors were less likely to offer a reasonable plea out of concern that the community view the prosecutor's office as too

soft on crime. In some cases, those prosecutors would rather take a case to trial than extend a lenient offer or dismissal, even if they would lose, meaning that holding out for trial and any other efforts to negotiate a better plea deal were less advantageous for the defense. In the progressive district, on the other hand, prosecutors were seen as more willing to proactively seek out and consider mitigation, to be responsive to defense requests, to dismiss weak and minor cases, and to avoid incarceration when possible. One PD said of the progressive DA's office, *"You're getting more plea offers for probation versus incarceration…. I will say if they do offer a prison sentence, you can try to usually get it down to… the lower level or lower sentences."*

Certain types of cases were described as more politically sensitive for prosecutors than others. DWI cases were so politically sensitive that advocacy by groups such as Mothers Against Drunk Driving had inspired an entirely distinct sentencing framework in North Carolina, and prosecutors treated those cases carefully out of concern for backlash from interest groups and the public. One PD described,

> *"It has an implication on the reputation of the elected DA, how DWIs work out, how those cases work out…. Most of the time someone gets a DWI it's in the news or it's in somewhere, and then if they go out and they get another one and they just had one, that looks bad. People are going to start wondering, 'What's going on with the DA's office where this person is just out driving, getting all these DWIs?' whatever. I think it has implications on the reputation of the elected DA, the DWIs and the outcome of them. So*

that was a rule, like, 'No, we're going to be very hard with DWIs,' because of course they're horrible and we want to deter people from doing them, and we want to let them know that if they do do DWIs, we're going to take a hard stance on them as an office."

PDs also reported that gun charges could also be politically sensitive, causing otherwise lenient judges and prosecutors to resist PD strategies to obtain lenient deals and dismissals. The political sensitivity surrounding firearms was seen to stem from their dangerousness (aggravating the seriousness of a crime) and their rejection by liberals. This duality was mentioned in one liberal district in particular. One PD described: *"People are so firearms adverse today, and especially in [COUNTY], we're a pretty liberal district attorney's office and a pretty liberal bench, a very liberal bench. And so, I think politically there's a pretty strong disposition against firearms. I mean, that's kind of a bit... It's more of a philosophical/political battle, not a legal battle."*

In all districts, certain judges were seen as constraints on PDs' ability to secure a lenient plea. Some judges may not approve a plea that they view as too lenient, or they may be more likely to convict, making it more risky for PDs to hold out for trial. One PD said,

"I do feel like [judges] are more, almost a wild card. Some judges you could take something in front of, I could take the same case in front of two different judges and possibly get two different outcomes. So depending on what judge is in there, it could also have an effect on whether or not it would be a good day for a trial. Some judges are more

likely to convict. Even with evidence against a conviction, some are more likely to convict. And so that thought process goes into whether or not to advise on a plea, see if we can get a continuance for a trial in front of another judge or something like that."

Another PD explained that different judges may be risky in different ways, which can be weighed in assessing the potential risks in a particular case: "*There are some judges that are very good for trial, but will put you in jail. And there are some judges that are terrible for trial, but they'll never put you in jail*." Some judges were seen as more likely to impose a trial penalty in sentencing. Ultimately, a lenient judge increases a defender's leverage from going to trial because the risk of a negative outcome is reduced. Although PDs said that prosecutors were generally willing to work together to "judge shop" (reschedule a case if the presiding judge was unlikely to approve a plea), this was sometimes not possible and introduced delay and other logistical barriers to negotiation.

Characteristics of the prosecutor's office in the district also impacted the types and amount of leverage PDs had during plea bargaining. The different DA's offices varied in the extent to which they adhered to strict plea policies or "price lists," and these policies impacted how much of a reduction PDs could obtain through negotiation. PDs in the largest and most conservative district reported that the DA's office policies limited the amount that ADAs could reduce pleas during negotiation for certain types of charges, meaning that ADAs would not offer lenient pleas due to fear of being reprimanded or fired. One PD said they recently asked for a reduction in a plea: *"So the*

people that work for him are saying, "We're not allowed to do this anymore. This is a new policy for our office." It was also common practice for ADAs in this district to use "exploding pleas", which are plea offers that have an expiration date for acceptance after which the charge or sentence becomes more severe. This technique limited PDs' ability to use delay as a tactic, and limited the amount of time available for mitigation and persuasive strategies. The most progressive office, on the other hand, had instituted policies in the opposite direction, restricting prosecution of certain low-level crimes. This meant that PDs did not need any leverage or strategy to gain dismissals for many cases: *"Usually without explanation you can just hand the prosecutor a file and they will stamp it for you, they just dismiss it with a stamp."*

Another characteristic of the DA's office impacted PDs' use of escalation as a lever. In larger prosecutor's offices, the number of prosecutors is large enough to allow for specialization and organization into teams based on the type of cases being handled. Escalation was mentioned much more frequently by PDs in the two larger districts, perhaps indicating that the hierarchy and team structure that is in place in larger offices offers more opportunities for this strategy to be effective. One PD discussed this specifically: *Having this team structure where if you're not getting what you need or you think is fair from one DA, being able to take it to another one I think is helpful."*

Another district-level factor moderating PDs' leverage was the availability of treatment resources in the district for mental health and substance abuse treatment.

Presenting mental illness and substance abuse as mitigation was seen as particularly effective if treatment was in place that would make future criminal behavior from the defendant less likely. If defendants had access to drug treatment facilities, support groups, or inpatient or outpatient mental health care, defenders could facilitate linkages with those resources and propose treatment instead of a more punitive sentence. One PD explained, *"If it's a substance abuse issue, then I feel like my biggest sort of negotiating tool, is to get the person into treatment, whether that's in-patient or out-patient."* Another specified, *"I like to share with them that someone has such and such mental health diagnosis, they have support in the community, they have these resources set up. If they don't have that stuff, I try to get that stuff set up, so that I can present to the DA that things are going better for them."* If resources were not available to the defendant, defenders sometimes felt reluctant to mention mental illness and substance abuse to prosecutors because they might be used as evidence that the defendant was unstable and a threat to the public.

Another moderating factor mentioned by PDs was the support they received from working in a public defender's office. Although all of the participants in this study worked in a public defender's office, they frequently compared their experiences to those of private defense attorneys and court-appointed attorneys. Working in a public defender's office allowed PDs to benefit from the support and advice of their colleagues, who helped them select appropriate strategies for working with certain prosecutors, judges, and types of cases. New PDs in the district frequently asked their more

experienced colleagues for advice on how hard to push particular prosecutors and whether they were likely to earn a reduced plea using certain strategies. More experienced PDs also regularly consulted one another to share information on their successes and failures in plea bargaining, resulting in quicker learning about prosecutors and district trends that translated to more effective negotiation. Some PDs speculated that their ability to share information with their fellow PDs made them more successful in plea negotiation than defense attorneys providing indigent defense in districts without public defender offices. One PD even said that they were often asked for advice by private defenders in the district about the best strategies for dealing with prosecutors.

PDs also discussed state-level policies that impacted their leverage in plea negotiation. Marsy's Law, a North Carolina policy passed in 2018 that increased prosecutors' responsibility for involving victims in prosecution, was mentioned by some PDs as constraining their ability to negotiate for lenient deals because prosecutors felt beholden to victim preferences. One PD who had worked for many years as an ADA explained how Marsy's Law changed plea bargaining for both sides:

> *"When I was an assistant DA, Marsy's Law didn't exist…. Even before Marsy's Law, obviously, you'd talk to the family. But we didn't have the paper trail, if you see where I'm going with this, that we now have to do. [ADAs] have to be able to prove that they've done this, this, this, this, and this, regarding the victims or the victim's family, depending on ... If it's a child, you're obviously talking about the parents; if it's a*

murder, you're talking about the family, or whatever. That puts a lot of pressure on the ADAs now that I didn't have in the late '80s. ….I didn't have to worry about it. Did I meet with families? Did we go over stuff? Did I explain why I'm offering this plea, or if we go to trial, this is what's going to happen? Yeah. But we weren't ... In a lot of ways, in those victim cases, the ADA's under a whole lot more pressure now. If it's a drug trafficking case, there's no victim. The ADAs just got a drug trafficking case, he doesn't care. He might deal with a ticked off officer because he a certain plea offer, but he doesn't have to do a paper trail of that. So that in itself can complicate things for the ADAs. And I know that because I keep going back: 'Boy, it's a good thing I left the DA's office when I did.'…. It is harder. It is much harder for the prosecutors now, which makes it harder for us to get better plea offers sometimes."

Another relevant state policy impacting PDs' ability to marshal evidence was North Carolina's discovery law, which mandates the sharing of evidence with the defense. Although this study was limited in its ability to explore differences in policies between states, one PD who had worked as a defense attorney for several years in a different state mentioned that North Carolina's policy led to significant delay and extra work on the defense side in order to obtain needed discovery: *"I feel like in [the other state], one, we have a lot more information because we have better discovery rules. We have police reports and videos right away instead of having to hunt them down."* A common theme in all districts was that the Public Defender's Office, or specific attorneys, had made special

arrangements with the DA's Office or certain prosecutors to share evidence informally, earlier, and in a wider variety of cases than required in the statute so that PDs could marshal evidence for their cases. Example statements about these types of arrangements included:

> *"Our office has a special relationship or an understanding with the DA's office that actual discovery in the officer's file should be turned over the week of the court date."*
>
> *"At some point our prosecutors do allow you to read the reports, which is different than most counties, because you're not entitled to discovery in District Court on felonies. And so a lot is just relationships with the prosecutors here do allow us to read the reports when they have it."*
>
> *"Sometimes, if we ask very, very nicely, they may give us pre-indictment discovery. In District Court, we have the option on felonies of having probable cause hearings, or hearings in front of a District Court judge to determine if there's sufficient evidence to bind it over to Superior Court. And sometimes, if we wave probable cause in certain cases, the DAs will give us pre-indictment discovery instead, so they'll give us early discovery before indictment."*

These types of arrangements allowed PDs to marshal evidence sooner (before indictment) and in more circumstances (District Court in addition to Superior Court) than specified in North Carolina's discovery laws.

However, PDs still said that their leverage was sometimes limited due to how slowly they received discovery in some cases, and to the administrative burden of needing to issue two separate documents to request discovery. PDs reported waiting on discovery up to 15 months in some cases, which limited their ability to negotiate effectively for their clients. Sometimes discovery would be delayed and then "dumped" on the defense all at once right before trial, which required the PD to review copious amounts of evidence at the last minute in order to advise their client whether to accept a plea deal. One PD explained, *"If we've rejected plea offers and we're on the cusp of trial, one of our biggest frustrations is we tend to get a lot of discovery dumped on us at the last minute. Because all of a sudden, the DA actually has to try this case, so they're getting all these police reports and things, so there inevitably are things that you're getting like the week before trial. And sometimes, those things can really change the picture."*

Finally, PDs said that North Carolina's sentencing policies greatly limit PDs' leverage to negotiate more lenient deals in DWI cases. One PD explained, *"There's no negotiations on DWIs. So it's either you're pleading guilty or you're having a trial essentially."* North Carolina is one of the most punitive states in the country for drunk driving due to several aspects of its sentencing policy that PDs alluded to. First, the type of mitigation that can be presented in DWI cases is limited. Second, there is no lesser included offense in the DWI charging, and so prosecutors and judges are required to dismiss a DWI charge rather than reduce it. State policy requires that prosecutors complete a special

type of dismissal with DWI cases called a "implied consent dismissal", which can be traced back to the individual prosecutor and requires extensive detail and justification for the dismissal that is not required in other cases. One PD described the complexity of the dismissal form:

> *"The regular dismissal will say we're dismissing it for the following reason, and it's generally because they're pleading to something else and they're dismissing this charge and the DA signs off on it. The DWI dismissals… are two-sided and on the back you have to fill out more additional stuff like what facts do you believe you could prove, which ones you don't believe you could prove. Was the officer available? What was the blow? Did the individual have any prior DWI convictions or impaired driving revocations? And they generally have to attach their driving record…. Why is this person dismissing this DWI?"*

All of these factors made it less likely that PDs could use leverage successfully in plea bargaining for DWI cases.

4.4 Discussion

It has been long understood that prosecutors have considerable power in plea bargaining due to their broad discretion to dismiss cases, decide on the specific criminal charges that constrain sentencing, and recommend types and conditions of sentences (Bellin, 2018; Bibas, 2004). This study focused instead on the defense attorney, exploring the main types of leverage available to the weaker party in plea bargaining and the

factors that influenced their use. Qualitative research is powerful in its ability to yield rich descriptions of complex human behaviors, making it a useful tool for examining the nuances of plea bargaining which has long been considered a "Black Box" by legal researchers (Garrett et al., 2021). According to the public defenders interviewed in this study, defense attorneys may exert leverage in plea outcomes using a variety of strategies such as holding out for trial, mitigation, persuasion, and escalation. However, although a variety of strategies are available to defenders, their effectiveness is often significantly limited by case-, defendant-, attorney-, and district-level factors.

This research is novel because it allows for an examination of the inner workings of plea bargaining across different districts, resulting in insights about specific factors that empower and constrain defense attorneys in different contexts. Prior quantitative research on plea bargaining has, by necessity due to lack of data, focused on plea outcomes rather than processes in plea bargaining, limiting the potential for complex insights into the process (Garrett et al., 2021). Prior qualitative research has yielded a modest inventory of defense attorney strategies in plea bargaining, but limited to single districts (Bowen, 2009; Lee & Ropp, 2020). Although all of the defense attorneys interviewed in this study were full-time public defenders working for the Office of Indigent Defense in a mid-sized North Carolina prosecutorial district, they reported different experiences with leverage in plea bargaining both within and across districts. This type of in-depth exploration is essential to an understanding of the micro-processes

contributing to variation in plea bargaining, and for reformers who seek to equalize the balance of power.

4.4.1 Defense Leverage in Theory

This qualitative study was designed to develop a better understanding of defense leverage in plea bargaining, and as such, the interview questions were written broadly without the purpose of testing specific pre-existing theories of plea bargaining. However, the findings of the study are useful to consider in light of the theoretical literature on plea bargaining. The findings of this study demonstrate how defense attorneys can use leverage to influence the main predictors of plea outcomes according to SOT theory: the expected post-trial sentence and probability of conviction. A weak case (i.e., a case with a low probability of conviction) will earn a more lenient offer from the prosecution, and so the defense will marshal evidence and use delay to make the case appear as weak as possible. A case with a lower expected post-trial sentence will also earn a more lenient offer, and so the defense uses mitigation and persuasion to lower the prosecution's expectations for the post-trial sentence. These findings do not contradict the SOT necessarily, but they do suggest ways that the primary elements of SOT may be endogenous to the plea bargaining interaction and dependent upon leverage of the defense attorney. A defense attorney with constrained leverage to alter the prosecutor's perceived probability of conviction and expected post-trial sentence will not be able to earn a reduced offer or dismissal from the prosecution. Therefore,

variations in the accuracy of SOT in predicting plea outcomes across different settings may arise in part from factors that enhance or constrain defense leverage.

Another component of the SOT subject to defense leverage is the perceived cost to the prosecutor of going to trial. As the cost of going to trial increases for the prosecution, offers become more generous, discounted further to incentivize defendants to plead (Bibas, 2004). Plea discounts can be quite large, far larger in cases where the prosecutor is motivated to obtain a conviction without going to trial; they have even been theorized to have "*no lower bound*" (Redlich et al., 2017; Zottoli, Daftary-Kapur, Winters, & Hogan, 2016). The prosecution's perceived cost of going to trial may be impacted by the skill and reputation of the defense attorney, the individual prosecutor's skill or attitudes toward trial, or circumstances such as COVID. Adding even more nuance, the prosecutor may be influenced by the *relative* costs of going to trial—the prosecution's costs compared to the defense's costs—with the assumption that the party with the lower cost of going to trial has the greater leverage from holding out for trial. Understanding the relative costs of going to trial is an important future direction for plea research. Is the prosecution or defense under more pressure to dispose of cases quickly? Do the time and resources required for the prosecution to prepare for trial exceed those of the defense due to the burden of proof?

Some of the moderators explored in this study may also fit comfortably into the CCT. A key assumption of CCT is that prosecutors and defense attorneys act more

cooperatively than combatively during plea bargaining, relying on going rates rather than haggling over every deal (Nardulli et al., 1988). This study does not speak to the frequency of court actors passively seeking going rates versus negotiating specific deals for individual cases. However, it does suggest that the tendency to engage in cooperative versus combative tactics may vary according to the types of defense leverage available in each courtroom. In some districts in this study, PDs were able to effectively employ persuasive strategies, or to accept "good pleas" and dismissals without holding out for trial or even needing to do much negotiation. But in one district, and even in certain types of cases across districts, PDs were more inclined to threaten trial due to constraints arising from DA office policies. The seminal study of CCT described how negotiation norms varied across districts but largely did not find patterns that predicted the variation (Nardulli et al., 1988). This study suggests that district moderators of defense leverage may play a significant role in shaping courtroom communities and influence going rates.

4.4.2 Enhancing Defense Leverage Within Courtrooms

Although ubiquitous, plea bargaining has long been controversial, and scholars and practitioners have offered numerous suggestions for its reform. The results from this study provide an interesting lens for considering the potential impact of specific plea reforms on defense leverage and its moderators. This section of the discussion will

speak to several courtroom-level reforms mentioned in existing literature and practice and how they may enhance or constrain defense leverage in plea bargaining.

The American Bar Association (ABA) recently issued a Task Force Report on plea bargaining, synthesizing an extensive review of relevant testimony from experts and criminal justice-involved individuals, literature, and state and local policies. The report outlined eight principles to guide plea bargaining in the US, the first of which states that "*A vibrant and active docket of criminal trials and pre- and post-trial litigation is essential to promote transparency, accountability, justice, and legitimacy in the criminal justice system*" (Association, 2023). Although the report declines to prescribe an optimal number of trials for a legal system, they state that "*The current trend toward ever fewer trials is deleterious to the ability of the criminal justice system to perform its basic functions and must be reversed*" (Association, 2023). Other critics of plea bargaining have called for a greater number of trials to serve as "safety valves" for adjudication when guilt is truly in doubt, to provide a reference for the probability of conviction and likelihood of sentence for defendants deciding whether to accept a plea deal, and to ensure that trial infrastructure is present for when defendants do wish to exercise their constitutional right to trial (Bibas, 2015; Hessick, 2021).

In the four districts in the current study, trial was an important source of leverage for both sides in plea bargaining. Defense attorneys received more lenient plea offers and even dismissals due to prosecutors' desire to avoid trial. When prosecutors

were less inclined to avoid trial, as in the conservative district when they felt a dismissal or lenient plea would be politically undesirable, the defense was less successful in winning reduced pleas from holding out for trial. Mechanistically increasing the number of trials in the legal system without altering other factors may result in the unintended consequence of constraining the most significant source of defense leverage. In fact, defense attorneys were part of recent backlash against David Leavitt, a Utah County Attorney elected in 2018, who was voted out of office after sweeping measures to increase the number of cases taken to trial in the district (J. Miller, 2022). Reducing the number of plea deals can also be viewed as denying defendants the right to enter into contracts in their favor. As Scott and Stuntz speculate, *"If the freedom to exchange entitlements were denied altogether in the allocation of criminal punishment, defendants would not have the option of pleading guilty in exchange for foregoing the burden and expense of a full trial"* (Scott & Stuntz, 1991).

In contrast, the leverage gained by the prosecution from exploiting the defense's motivation to avoid trial, particularly through increased charging severity and anticipation of a trial penalty, has been shown to lead to coerce innocent defendants into pleading guilty (Dervan & Edkins, 2013; V. Edkins & Dervan, 2013; Medwed, 2012; Rakoff, 2014). Accordingly, the ABA report outlines additional principles that could diminish coercion of defendants: proscribing the use of *"impermissibly coercive incentives"*, trial penalties, selection or amendment of charges, and bail or pretrial

detention for the inducement of guilty pleas (Association, 2023). The findings of this study certainly reflect that holding out for trial may feel too risky for defendants who are afraid of enhanced charges and trial penalties, and to those whose pleas would end a period of pretrial detention, potentially decreasing the leverage available to the defense from holding out for trial. Fortunately, reforms are underway to decrease unnecessary pretrial detention: bail reform efforts are being refined and expanded each year (Jorgensen & Smith, 2021), and pretrial services programs are enabling the release of defendants in jurisdictions across the country (Hatton & Smith, 2020; Mahoney, Beaudin, Carver III, Ryan, & Hoffman, 2004; Tanner, Wyatt, & Yearwood, 2008). But how do court systems prevent overcharging and trial penalties?

Reforms to improve prosecutor ethics and office-based standards have been suggested as strategies to limit coercive overcharging (Association, 2023; Bibas, 2015; R. D. Covey, 2009; Findley, Amaya, Hatch, & Smith, 2022). Progressive prosecutors' offices have been successful in decreasing punitiveness in case outcomes, and some have explicitly professed goals of limiting coercive tactics such as overcharging in plea bargaining (Grodensky, 2022; Mitchell, Mora, Sticco, & Boggess, 2022). Beyond this movement, other prosecutors are engaging in reform efforts and advocacy through such organizations as Fair and Just Prosecution (Prosecution, 2018, 2023). There is a paucity of literature on the impact of internal DA office policies or "price lists" on punitiveness in courtrooms, but this study's findings suggest that they may play a powerful role in

constraining defense leverage and should be the subject of further study in plea bargaining research. Allison Redlich and colleagues also call for further research on the coercive impact of prosecutorial norms such as "first best strategies" and refusing to negotiate past the grand jury (Redlich et al., 2017). Other potential DA office reforms may focus on shifting the culture of punitiveness within the office and the attitudes of individual prosecutors, which were also significant in restricting defenders' leverage in negotiating.

Courtrooms would also benefit from efforts to improve communication with defendants in plea bargaining. PDs described a wide variety of extralegal defendant factors that influenced their leverage, many of which could be addressed through better client education, social services, and retention strategies. Such efforts do not need to be the exclusive domain of the defense attorney. Many districts support pretrial services programs that, in addition to gathering information about defendants to inform pretrial release decisions, supervise defendants on pretrial release to monitor their compliance with release conditions and ensure they appear in court (Mahoney et al., 2004). Research suggests that pretrial services programs are effective in improving court appearance and access to resources, but the programs are often understaffed, underfunded, and serve only a subset of a court's defendants (Byrne & Stowell, 2007; Hatton & Smith, 2020; Mahoney et al., 2004; Tanner et al., 2008). Additionally, many districts do not have pretrial services programs. Further research is needed to explore ancillary benefits to

pretrial programs that may extend to defendants' engagement with their defense attorney and case decisions.

4.4.3 Policy Implications

Defense leverage was constrained by factors that are amenable to change using state policy. This section offers directions for policy reform that may improve defense leverage in plea bargaining. First, improvements in discovery policy may improve defense leverage. When defense attorneys have access to all the relevant evidence in a case and the time and resources to review it, they and the defendant gain a better sense of what charges can be proven at trial and the expected punishment. If the evidence against the defendant is weak, they can also use this information as leverage to obtain a reduced plea offer or dismissal from the prosecution. However, PDs in this study reported constraints in their ability to review all evidence in a timely fashion both due to lack of time and resources and to limitations of discovery laws (Grunwald, 2016). Reformers have suggested changes to discovery laws to enhance defense attorneys' access to evidence, which may make it easier for defense attorneys to access all of the relevant evidence in a case early enough to use it effectively in their defense. North Carolina law provides for discovery, but only for Superior Court cases and only at the initiative of the defense attorney. And in reality, even the required discovery often arrived too late for defenders to use it effectively. Shortcomings of North Carolina law required attorneys in all districts to create their own informal agreements about sharing

discovery earlier and more broadly. Better access to discovery required by statute may improve defense leverage across all districts.

Policy reforms providing for third party neutral review of evidence for all legal actors may also improve PD leverage. PDs in this study echoed findings in the literature in describing challenges in reviewing all of the evidence they received in a case (Grunwald, 2016; Turner, 2019). Potential reforms to address this constraint on defender leverage are introducing a third party for evidence review and increasing funding for public defenders. Introducing a neutral third party or judge as a reviewer of evidence for both prosecution and defense has been suggested as a means of improving accuracy in the court system and protecting against some of the coercion in the plea bargaining process (Bibas, 2015; R. D. Covey, 2009; Findley et al., 2022). More resources for public defender's offices, particularly related to the review of evidence and to communication and education with clients, would improve defenders' ability to prepare a defense that meets their clients' needs and leverages their informed preferences in plea bargaining (Brown, 2017; Holmes et al., 1992; Wooldredge, 1989).

Funding and infrastructure for public defense is another policy that can enhance defense leverage in plea bargaining. This study found benefits to defenders in working in a public defender's office. This study exclusively interviewed public defenders, and so the ability to generalize to private and court-appointed defense attorneys is limited. However, PDs in this study reported that they are empowered by their ability to share

knowledge and strategy with other defense attorneys in their office and, in rare occurrences, to coordinate escalation strategies when prosecutors are engaging in unacceptable practices. Some states in the US, and some districts in North Carolina, do not have public defender offices, and attorneys providing indigent defense in those locations lack this type of leverage. Increasing the number and reach of public defender offices would increase defense attorney leverage for indigent clients who are often the most vulnerable to coercion in the court system (Alschuler, 1975; Primus, 2017).

Improvements in social services for criminal justice-involved populations at the state and local level may also enhance the leverage of defense attorneys in plea bargaining. PDs reported that prosecutors were more likely to agree to a sentence of treatment if there were treatment resources available for defendants to access. This finding may also be reflected in research by Brandon Garrett, Anne Metz, and colleagues supporting the "treatment resource hypothesis": increased availability of treatment resources in a district increases judges' reliance on such programs for alternative sentencing purposes (Garrett, Jakubow, & Monahan, 2019; Metz, Monahan, Garrett, & Siebert, 2019). In addition to allowing for the incorporation of treatment into sentencing, increased access to substance abuse and mental health treatment in a locality may have other benefits. Previous economic research establishes that better access to psychiatric treatment is associated with improved psychiatric health, reduced crime, and better outcomes across several metrics such as evictions and access to social services

(Bondurant, Lindo, & Swensen, 2018; Corredor-Waldron & Currie, 2022; Messel, Swensen, & Urban, 2023; Swensen, 2015). Therefore, defense attorneys would have greater leverage in cases with mentally ill and substance abusing defendants if their surrounding districts had better infrastructure for treating these issues.

Finally, policies regarding victim's rights may have unintended consequences for defense leverage. PDs discussed the victim as a constraint on defense leverage in plea bargaining, and the passage of Marsy's Law in North Carolina was mentioned as noticeably impacting defenders' ability to obtain more lenient pleas in some cases. Specifically, PDs believed that prosecutors were more concerned about involving victims and honoring their wishes in order to comply with the policy, which sometimes prevented them from granting defense requests. Marsy's Law has been discussed in the literature as both granting important protections to victims in the legal process and creating redundancy and confusion in prosecution (Denning, 2017; Elliott, 2017; Paukner, 2020; Richardson, 2011). Victims'rights are already enshrined in North Carolina's constitution, and the new law adds further protections that lack specificity; for example, it states that victims have "*the right to proceedings free from unquestionable delay*," but does not spell out how to balance this right with the defendant's right to representation and trial (Denning, 2017). Additionally, it states that victims have a right "*to be treated with fairness and respect*," but does not provide clarity on what this right entails (Denning, 2017). Empirical research has begun to explore the impact of Marsy's

Law on punitiveness in the criminal justice system, so far finding that the policy has been associated with increased delay in parole hearings (Richardson, 2011). In terms of its impact on defense leverage, it appears that policies increasing prosecutorial responsibility for victims may have negative impacts for defendants' position in plea bargaining. Further research is needed to explore this question in order to inform future policy work.

4.4.4 Limitations

This study has several limitations. First, this study was conducted with public defenders in four mid-sized districts in North Carolina, and therefore does not capture the experiences of defenders working in small or large districts, private and court-appointed defense attorneys, or those in other states. Prosecutor's offices in larger districts are often more formalized and policy-driven, which might suggest less power for defense attorneys, but they have also been found to be less punitive in some studies (Bowen, 2009; B. D. Johnson, 2005; O'Neill, 2004; Ulmer & Johnson, 2004). The literature shows significant differences in the experiences of different types of defense attorneys (Alschuler, 1975; Primus, 2017; Spangenberg & Beeman, 1995), but the perspectives of public defenders are perhaps the most useful for this study's aim to understand dynamics in plea bargaining for criminal cases in specific districts, which these public defenders spend most of their time doing. North Carolina is likely significantly different from other states in the power available to defense attorneys, both in culture and its

specific blend of policies related to prosecutorial power and indigent defense (Brown, 2017; Spangenberg & Beeman, 1995; Stemen, Rengifo, & Wilson, 2005).

Because interviewees were being asked about their work, there is a risk that their responses may reflect social desirability bias and a desire to appear professional and competent at their jobs (Krumpal, 2013). These risks were minimized as PDs were ensured of their confidentiality and the interview process included opportunity for rapport-building and normalization of potentially socially undesirable responses, and PDs' responses generally reflected candor and honesty. However, defense attorneys did present themselves as uniformly organized and meticulous in their work in spite of their large caseloads, which contradicts other research that suggests that defense attorneys sometimes shirk their duties and fail to uphold their side in negotiation (Alschuler, 1975; Grodensky, 2022; R. F. Wright et al., 2020). Because this study concerned the strategies available to defenders and not necessarily their conscientiousness in using them, it is unlikely that the study results were impacted by this type of social desirability bias.

4.4.5 Conclusions

The current exploration of the defense attorney in plea negotiation elucidates how strategies to increase leverage are utilized by public defenders and constrained in different contexts and cases. Defense attorneys are often ignored in the ongoing conversation about prosecutorial power and its role in mass incarceration, but they have privileged access to information about the defendant that is vital to the administration of

justice. Findings of this study suggest that when the power of the defense is compromised, plea deals are likely to be more punitive and even innocent defendants are less likely to exercise their right to trial. Prosecutors, judges, and other court actors need to understand the types of leverage available to defense attorneys in order to design practices and policies that protect defense leverage and minimize undue punitiveness and coercion in plea bargaining. More broadly, state policy-makers who feel powerless to address concerns about prosecutorial discretion and power imbalances in plea bargaining would benefit from considering the impact of specific policies on defense leverage. The upside of the current plea system is the "bargain" offered to both sides in saving time and resources and reducing the overall level of punitiveness from what would result from a system of trials. The current study demonstrates just how easily the benefits of the plea bargain can be reduced for the defendant by altering determinants of power. Moving forward, research should focus on understanding and evaluating efforts to preserve defense power to improve this system of pleas.

5. Conclusion

The three studies presented in this dissertation provide a novel exploration of political power in local criminal courts, particularly power that is exercised in the highly complex and inscrutable process of plea bargaining. Plea bargaining has been called a "Black Box" due to the lack of transparency and oversight in the process, and for that reason it has been difficult to study directly (Garrett et al., 2021; M. L. Miller & Wright, 2008). These three studies utilize rigorous research methods to uncover important insights about elements of the plea bargaining process that are unavailable through theoretical and laboratory studies. Qualitative methods are ideal for understanding the types of complex social processes that undergird plea bargaining, and interviews with prosecutors and defense attorneys yielded insights into a myriad of important power mechanisms that may be occurring within the Black Box and amenable (or resistant) to reform efforts. The two-way fixed effects analysis on nearly 600,000 criminal cases is a powerful method of isolating and assessing the impact of the chief prosecutor on plea outcomes. These papers, taken together, suggest that power dynamics in plea bargaining are complex but chief prosecutors seem capable of decreasing punitiveness in their districts, especially through case dismissals. This evidence supports the promise of the prosecutorial reform movement to impact punitiveness and incarceration rates in the US.

Appendix A

Criminal cases were included in the study sample if the most serious charge (or one of the most serious charges) was one of the offenses listed below.

Table A1. Eligible criminal charges for inclusion in four crime categories

Crime category	NC General Statute	Offense description	ACIS Code	Type of offense (T=traffic, M=misde-meanor, F=felony)
Marijuana	90-95(A)(1)	SELL OR DELIVER MARIJUANA	3542	F
	90-95(A)	SELL MARIJUANA	3543	F
	90-95(A)	P/W/I/M MARIJUANA	3546	F
	90-95(A)	P/W/I/S MARIJUANA	3547	F
	90-95(A)	P/W/I/D MARIJUANA	3548	F
	90-113.22A	POSSESS MARIJ PARAPHERNALIA	3400	M
	90-95(A)(1)	SELL/DELIVER SCH VI CS	3408	F
	90-95(A)(1)	SELL/DELIVER MARIJUANA	3421	F
	90-98	CONSP SELL/DELIVER MARIJUANA	3422	F
	90-98	CONSP SELL/DELIVER SCH VI CS	3439	F
	90-95(A)(1)	SELL MARIJUANA	3440	F
	90-95(A)(1)	SELL SCH VI CS	3449	F
	90-95(A)(1)	DELIVER MARIJUANA	3455	F
	90-95(A)(1)	DELIVER SCH VI CS	3464	F
	90-95(D)(4)	POSS MARIJ >1/2 TO 1 1/2 OZ	3470	M
	90-98	CONSPIRE SELL MARIJ	3480	F
	90-98	CONSPIRE SELL SCH VI CS	3485	F

	90-98	CONSPIRE DELIVER MARIJ	3490	F
	90-98	CONSPIRE DELIVER SCH VI CS	3495	F
	90-95(A)(1)	MANUFACTURE SCH VI CS	3506	F
	90-95(A)(1)	PWIMSD SCH VI CS	3520	F
	90-95(D)(4)	FELONY POSSESSION SCH VI CS	3527	F
	90-95(H)(1)	TRAFFICKING IN MARIJUANA	3528	F
	90-95(H)(1)	CONSPIRE TO TRAFFIC IN MARIJ	3532	F
	90-95(D)(4)	SIMPLE POSSESS SCH VI CS (M)	3540	M
	90-95(A)(1)	MANUFACTURE MARIJUANA	3541	F
	90-95(A)	PWISD MARIJUANA	3544	F
	90-95(A)(1)	PWIMSD MARIJUANA	3545	F
	90-95(D)(4)	FELONY POSSESSION MARIJUANA	3549	F
	90-95(D)(4)	POSSESS MARIJUANA UP TO 1/2 OZ	3550	M
Larceny	14-72.1(A)	SHOPLIFTING CONCEALMENT GOODS	2342	M
	14-72	ATTEMPTED LARCENY (M)	2353	M
	14-72(A)	AID & ABET LARCENY (M)	2318	M
	14-71.1	POSS STOLEN GOODS/PROP (M)	2343	M
	14-72(A)	MISDEMEANOR LARCENY	2322	M
	14-72(A)	LARCENY OF MOTOR VEHICLE (M)	2392	M
	14-72	ATTEMPTED LARCENY (F)	2327	F
	14-71.1	POSS STOLEN GOODS/PROP (F)	2341	F
	14-72(A)	FELONY LARCENY	2321	F
	14-72(A)	LARCENY OF MOTOR	2391	F

		VEHICLE (F)		
	14-72(A)	AID & ABET LARCENY (F)	2319	F
	14-72(B)(6)	HABITUAL LARCENY	2316	F
Possession of firearm by felon	14-415.1	POSSESSION OF FIREARM BY FELON	5224	F
DWI	20-138.1	DWI 2ND OFFENSE	5459	T
	20-138.3	DWI - PROVISIONAL LICENSE	5526	M
	20-138.1(A)	DWI - LEVEL 1	5511	T
	20-138.1(A)	DWI - LEVEL 2	5512	T
	20-138.1(A)	DWI - LEVEL 3	5513	T
	20-138.1(A)	DWI - LEVEL 4	5514	T
	20-138.1(A)	DWI - LEVEL 5	5515	T
	20-138.1(A)	DWI - LEVEL 5 - AID/ABET	5516	T
	20-138.1(A)	DWI (.10) - LEVEL 1	5517	T
	20-138.1(A)	DWI (.10) - LEVEL 2	5518	T
	20-138.1(A)	DWI (.10) - LEVEL 3	5519	T
	20-138.1(A)	DWI (.10) - LEVEL 4	5520	T
	20-138.1(A)	DWI (.10) - LEVEL 5	5521	T
	20-138.1(A)	DWI (.10)-LEVEL 5 AID/ABET	5522	T
	20-138.1(A)	DWI - AGGRAVATED LEVEL 1	4724	T
	20-138.1	DRIVING WHILE IMPAIRED	5405	T
	20-28(A1)	DWLR IMPAIRED REV	4726	T
	20-138.5	HABITUAL IMPAIRED DRIVING	5527	F
	20-28(A1)	AID&ABET DWLR IMPAIRED REV	4728	T

ACIS: Automated Criminal Infractions System (ACIS) maintained by the North Carolina Administrative Office of the Courts (North Carolina Administrative Office of the Courts, 2023)

Appendix B

Table B1. Individual prosecutor effects on the probability of cases being prosecuted vs. dismissed

Prosecutor, Political party (D=Democrat, R=Republican), Number of 4-year terms included in analysis	District	Time period	Probability of being prosecuted vs. dismissed			
			Marijuana[a] (n=141,121)	Larceny (n=243,137)	PFF (n=13,666)	DWI (n=189,011)
			β (SE)	β (SE)	β (SE)	β (SE)
Hardin (D), 0.25	Durham	2005-2006	*Ref (Durham)*	*Ref (Durham)*	*Ref (Durham)*	*Ref (Durham)*
Nifong (D), 1	Durham	2008-2010	0.042* (0.019)	-0.043** (0.014)	-0.223*** (0.051)	-0.012 (0.015)
Cline (D), 1	Durham	2012-2014	0.039* (0.019)	-0.117*** (0.014)	-0.181*** (0.052)	-0.101*** (0.014)
Echols (D), 1	Durham	2016-2018	-0.040* (0.020)	-0.139*** (0.015)	-0.273*** (0.053)	-0.059*** (0.016)
Keith (R), 1.5	Forsyth	2005-2010	*Ref (Forsyth)*	*Ref (Forsyth)*	*Ref (Forsyth)*	*Ref (Forsyth)*
O'Neill (R), 2	Forsyth	2012-2019	-0.061*** (0.016)	-0.052*** (0.011)	-0.270*** (0.062)	-0.072*** (0.011)
Lands (R), 0.5	Gaston	2005-2006	*Ref (Gaston)*	*Ref (Gaston)*	*Ref (Gaston)*	*Ref (Gaston)*
Bell (R), 3	Gaston	2008-2019	-0.066*** (0.017)	-0.101*** (0.011)	-0.090 (0.061)	-0.003 (0.012)
Albright (D), 0.5	Guilford	2005-2006	*Ref (Guilford)*	*Ref (Guilford)*	*Ref (Guilford)*	*Ref (Guilford)*
Henderson (D), 3	Guilford	2008-2018	0.006 (0.012)	0.056*** (0.009)	-0.297*** (0.049)	-0.044*** (0.010)
Lock (R), 0.5	Johnston	2005-	*Ref*	*Ref*	*Ref*	*Ref*

		2006	*(John-ston)*	*(John-ston)*	*(John-ston)*	*(John-ston)*
Doyle (R), 3	Johnston	2008-2019	0.057** (0.021)	0.049** (0.018)	0.179* (0.090)	0.067*** (0.013)
Gilchrist (D), 1.5	Mecklenburg	2005-2011	*Ref (Meck-len-burg)*	*Ref (Meck-len-burg)*	*Ref (Meck-len-burg)*	*Ref (Meck-len-burg)*
Murray (R), 2	Mecklenburg	2012-2018	-0.078*** (0.006)	-0.096*** (0.005)	-0.000 (0.021)	-0.153*** (0.005)
Fox (D), 0.5	Orange/ Chatham	2005-2006	*Ref (Or-ange/ Chat-ham)*	*Ref (Or-ange/ Chat-ham)*	*Ref (Or-ange/ Chat-ham)*	*Ref (Or-ange/ Chat-ham)*
Woodall (D), 3	Orange/ Chatham	2008-2019	0.064* (0.029)	0.143*** (0.019)	0.163* (0.082)	-0.011 (0.014)
Everett (D), 2.5	Pitt	2005-2014	*Ref (Pitt)*	*Ref (Pitt)*	*Ref (Pitt)*	*Ref (Pitt)*
Robb (R), 1	Pitt	2016-2018	0.024. (0.013)	-0.008 (0.010)	-0.058 (0.037)	0.033** (0.012)
Willoughby (D), 2.5	Wake	2005-2014	*Ref (Wake)*	*Ref (Wake)*	*Ref (Wake)*	*Ref (Wake)*
Freeman (D), 2	Wake	2016-2019	0.008*** (0.007)	-0.000 (0.006)	0.007 (0.027)	-0.015** (0.006)

.p<0.1, *p<0.05, **p<0.01, ***p<0.001. SE: standard error. β: Beta test coefficient. [a]Charges included for marijuana, possession of firearm by a felon, driving while intoxicated, and larceny analyses are listed in Appendix A. Notes: Models were estimated using multinomial linear regression. For models of probability of being prosecuted, 3,119 cases were excluded from the regression due to missing information on outcome or covariates. For models of probability of being sentenced to prison, 19,776 cases were excluded from the regression due to missing information on outcome or covariates. All models controlled for defendant race/ethnicity (Black (omitted), non-Black), age (<18, 18–25 (omitted), 26–35, 36-45, 46-55, 56-65, >65), type of defense attorney (public defender (omitted), other), number of previous felony convictions, class of most serious initial

charge (felony class A-I, misdemeanor level A1 and 1-3), and fixed effects for the disposed year, 2009 judicial district, and elected prosecutor. Study sample included ACIS data on felony and misdemeanor criminal offenses that were resolved in each district from 2005 to 2018, excluding those resolved during a prosecutor's first year in office.

Table B2. Individual prosecutor effects on the probability of cases receiving an active sentence

Prosecutor, Political party (D=Democrat, R=Republican), Number of 4-year terms included in analysis	District	Time period	Probability of active sentence vs. non-active sentence or dismissal			
			Mari-juana[a] (n=141, 121) β (SE)	Larceny (n=243,137) β (SE)	PFF (n=13, 666) β (SE)	DWI (n=189, 011) β (SE)
Hardin (D), 0.25	Durham	2005-2006	*Ref (Dur-ham)*	*Ref (Dur-ham)*	*Ref (Dur-ham)*	*Ref (Dur-ham)*
Nifong (D), 1	Durham	2008-2010	0.045*** (0.010)	0.012 (0.010)	-0.029 (0.044)	-0.013* (0.006)
Cline (D), 1	Durham	2012-2014	0.021* (0.010)	-0.053*** (0.010)	-0.068 (0.044)	-0.012. (0.006)
Echols (D), 1	Durham	2016-2018	0.010 (0.010)	-0.065*** (0.011)	-0.050 (0.046)	0.002 (0.007)
Keith (R), 1.5	Forsyth	2005-2010	*Ref (For-syth)*	*Ref (For-syth)*	*Ref (For-syth)*	*Ref (For-syth)*
O'Neill (R), 2	Forsyth	2012-2019	0.017 (0.009)	-0.013 (0.008)	-0.066 (0.053)	-0.019*** (0.005)
Lands (R), 0.5	Gaston	2005-2006	*Ref (Gas-ton)*	*Ref (Gas-ton)*	*Ref (Gas-ton)*	*Ref (Gas-ton)*
Bell (R), 3	Gaston	2008-2019	-0.007 (0.009)	-0.019* (0.008)	-0.130* (0.052)	0.000 (0.005)
Albright (D), 0.5	Guilford	2005-2006	*Ref (Guil-ford)*	*Ref (Guil-ford)*	*Ref (Guil-ford)*	*Ref (Guil-ford)*

Henderson (D), 3	Guilford	2008-2018	-0.018** (0.006)	-0.023*** (0.007)	-0.192*** (0.043)	-0.025*** (0.004)
Lock (R), 0.5	Johnston	2005-2006	*Ref (Johnston)*	*Ref (Johnston)*	*Ref (Johnston)*	*Ref (Johnston)*
Doyle (R), 3	Johnston	2008-2019	-0.015 (0.011)	-0.044*** (0.013)	0.082 (0.077)	0.009 (0.005)
Gilchrist (D), 1.5	Mecklenburg	2005-2011	*Ref (Mecklenburg)*	*Ref (Mecklen-burg)*	*Ref (Mecklenburg)*	*Ref (Mecklenburg)*
Murray (R), 2	Mecklenburg	2012-2018	-0.088*** (0.003)	-0.104*** (0.004)	-0.022 (0.018)	-0.022*** (0.002)
Fox (D), 0.5	Orange/ Chatham	2005-2006	*Ref (Orange/ Chatham)*	*Ref (Orange/ Chatham)*	*Ref (Orange/ Chatham)*	*Ref (Orange/ Chatham)*
Woodall (D), 3	Orange/ Chatham	2008-2019	-0.012 (0.016)	0.034* (0.014)	-0.019 (0.069)	-0.001 (0.006)
Everett (D), 2.5	Pitt	2005-2014	*Ref (Pitt)*	*Ref (Pitt)*	*Ref (Pitt)*	*Ref (Pitt)*
Robb (R), 1	Pitt	2016-2018	-0.067*** (0.006)	-0.072*** (0.007)	-0.109*** (0.032)	-0.007 (0.005)
Willoughby (D), 2.5	Wake	2005-2014	*Ref (Wake)*	*Ref (Wake)*	*Ref (Wake)*	*Ref (Wake)*
Freeman (D), 2	Wake	2016-2019	-0.009** (0.003)	0.000 (0.004)	0.012 (0.023)	0.029*** (0.002)

·p<0.1, *p<0.05, **p<0.01, ***p<0.001. SE: standard error. β: Beta test coefficient. [a]Charges included for marijuana, possession of firearm by a felon, driving while intoxicated, and larceny analyses are listed in Appendix A. Notes: Models were estimated using multinomial linear regression. For models of probability of being prosecuted, 3,119 cases were excluded from the regression due to missing information on outcome or covariates. For models of probability of being sentenced to prison, 19,776 cases were excluded from the regression due to missing information on outcome or covariates. All models controlled for defendant race/ethnicity (Black (omitted), non-Black), age (<18, 18–25 (omitted), 26–35, 36-45, 46-55, 56-65, >65), type of defense attorney (public defender (omitted), other), number of previous felony convictions, class of most serious initial charge (felony class A-I, misdemeanor level A1 and 1-3), and fixed effects for the disposed year, 2009 judicial district, and elected prosecutor. Study sample included ACIS data on felony and misdemeanor criminal offenses that were resolved in each district from 2005 to 2018, excluding those resolved during a prosecutor's first year in office.

Appendix C

Prosecutor Plea Deal Study Interview Guide

Thank you for talking with me today about your work on plea deals in COUNTY. My name is _____ and I am a _____ at _____. My colleagues and I are interested in learning about the important components of plea negotiations and how recent policy changes at the DA's office have impacted how you negotiate plea deals.

Our conversation shouldn't take more than one hour. We're talking to as many COUNTY prosecutors as we can. After we talk I am going to mark your interview with a number, which will only be linked to your name in a separate password-protected file. None of your answers will be linked to your name in any study reports or papers. I am asking to audio record your interview so that I can type it up into a transcript, so that I can remember all the details we talked about and make sure I don't get anything wrong. After we transcribe the interview, we will delete the audio file.

There are no right or wrong answers to any of my questions—you are the expert and I'm here to learn about what you think and what you've experienced. If any of my questions are confusing to you, please let me know and I'll ask it a different way. If you don't want to answer any of my questions for any reason, we'll skip it and move on.

Do you have any questions for me before we get started?

[TURN ON RECORDER]

<u>Background and caseload</u>

1. First, could you tell me about your position here at the DA's office and how long you've been in it?
2. What was your position before you joined the DA's office?
    a. Have you ever worked as a defense attorney?
    b. Have you worked for other DAs?
3. What drew you to serve as a prosecutor?
4. What is your typical caseload?

Dismissals and Plea deals

Thank you. Now I'm going to ask you about dismissals and plea deals.

5. What proportion of your cases ultimately get dismissed? (probe for exact percentage)

6. How do you decide whether to dismiss a case? Are there specific guidelines you follow in determining whether to dismiss?

7. If there is weak evidence in the case, how do you decide whether to dismiss or to offer a plea?

8. When a case is dismissed, how is that documented? (on paper, in the computer system) Would you be willing to jot down some information about the cases you dismiss, similar to how we are doing the plea tracker? If so, what would be the most convenient way to do that?

Thank you for talking about dismissals. Now I'll ask about how you create and respond to plea deals.

9. You said that about ___ of your cases are dismissed. Of your cases that aren't dismissed, what proportion are typically resolved by a plea deal? (probe for exact percentage)

10. How do you decide which defendants to offer a plea deal?

11. Please walk me through the steps you take when you are developing and offering a plea deal.

12. How do you decide on the specifics of a plea?

    Probe if not mentioned:

    a. Probability of conviction at trial?
    b. Strength of evidence?
    c. Defendant criminal history?
    d. Defendant's race?
    e. Defendant age?
    f. Other defendant characteristics?
    g. Victim factors?

13. How does the judge assigned to the case influence your plea offers, if at all?

14. How does the defense attorney assigned to the case influence your plea offers, if at all?

15. What information do you need or want from defense attorneys to develop a plea? When and how do you generally get that information?

16. How and when are files shared with the defense through open file discovery? How does open file discovery influence the plea process?

17. Are there differences in working with public defenders vs. private defense attorneys?

    Probe if not mentioned:

    a. Differences in the pleas you offer their clients?
    b. Differences in the efficiency of communication or the amount of mitigation introduced?

18. How do defense attorneys respond to your initial plea offers? What happens when they don't accept the plea offer?

19. What do you consider a good or successful plea deal?

20. What type of feedback do you get on whether your plea deal was a success? What type of feedback would be useful?

21. When does the head of your team get involved in reviewing or helping with your pleas? When does the DA get involved? How helpful or unhelpful would it be to have a time set to review cases with others in the office, on a regular basis? (If helpful) What would that need to look like in order to be helpful to you?

<u>Plea Policy and Research</u>

Now I'm going to ask you about other factors related the practice of plea deals at the COUNTY DA's office.

22. Is there a formalized plea policy at the COUNTY DA's office? How about on your team?

a. (If YES): What is the plea policy at the COUNTY DA's office / on your team?

23. What types of cases are being prioritized in the COUNTY DA's office? What types are lower priority or likely to be dismissed?
24. How has this changed since the new DA took office?
25. How is this different from offices you've worked for in the past?
26. How do you determine what bail recommendations to make on a case? How do you think bail recommendations influence the plea process?
27. What type of research or data would help you in developing plea deals, if any?
28. What policies do you think would be helpful regarding pleas in the justice system?

Closing

29. Thank you for talking with me. Before we end, is there anything I haven't asked you about that you think would be important information for this study?

Thank you!

Appendix D

Qualitative Codebook for Thematic Content Analysis

Bail: Use this code to capture any discussion of bail or bond

Charges / Charging: Use this code to capture any discussion of determining the criminal charges to be prosecuted in a case

Data / research: Use this code to capture any discussion of data that could be helpful to the office, data that are currently collected by the office, or research that could be / is currently helpful in formulating pleas

DA priorities/vision: Use this code to capture any indication of the level of priority (high or low) that the DA's campaign and/or office gives to particular types of cases/work

Defendant factors: Use this code to capture when the participant discusses the extent to which defendant history and characteristics factor into plea decisions. Use these codes even when the participant states something is NOT a factor (e.g., "I don't consider race")

Defendant age or race: Use this code to capture when the participant discusses the extent to which a defendant's age or race factors into plea development. Use this code even when the participant states it is not a factor

Mental health: Use this code to capture any discussion of trauma or mental health conditions experienced by defendants or victims, and/or mental health treatment

Mitigating or aggravating factors: Use this code to capture factors that may alter the severity of a plea deal. Sub-codes include criminal history (how a defendant's criminal history factors into a plea deal) and substance abuse (how substance abuse and substance abuse treatment by defendants factor into plea deals)

Defense attorney: Use this code to capture any discussion of communication with defense attorney, information exchanged (or not exchanged) with defense attorney, how defense attorney impacts (or doesn't impact) plea development. This also includes the participant's own experience working AS a defense attorney, if they did that in a previous job

Deferred prosecution, Dismissal: Use this code to capture any discussion of agreements wherein defendants fulfill requirements (e.g., treatment, restitution, etc.) in exchange for charges being dropped. Also use this code for discussions of cases being dismissed

Feedback / evaluation: Use this code to capture any discussion of information the participant or office receives after a case to indicate how well or badly it went, or information the participant seeks to assess their plea before offering it (e.g., from a colleague or supervisor / team lead)

Good quotes: Use this code to capture when the participant states something in a particularly clear or poignant/impactful way

Judge: Use this code to capture any discussion judges in plea bargaining

Motivation to be a prosecutor / progressive prosecutor: Use this code to capture any discussion of the participant's own motivation to become a prosecutor or to choose a progressive prosecution office, or when the participant speculates about other prosecutors' motivations

Other interesting themes: Use this code to capture any discussion of other interesting ideas worth remembering that aren't captured by any of the existing codes

Philosophies / policies / guidelines: Use this code to capture any reference to explicit philosophies, policies, or guidelines. These could be guidelines in the DA office or in other offices they've experienced, or their own personal philosophies they use in their work

Probability of conviction, evidence: Use this code to capture any discussion of the role of evidence and estimated probability of conviction in plea development. This includes a prosecutor's decision to dismiss a case due to inadequate evidence, or to make a plea offer less severe due to potential difficulty proving their case at trial

Progressive prosecution: Use this code to capture any discussion of progressive prosecution practices and philosophies, including how those are / aren't espoused in the DA office. This may include discussion of how to be less punitive as an office or how to use alternatives to incarceration. Also use this code to capture discussions of NON-progressive or traditional prosecution in contrast

Prosecutorial power / discretion: Use this code to capture any discussion of how much power prosecutors hold, how much discretion they have in developing charges and pleas, and the benefits/drawbacks of that power/discretion

Public safety / Recidivism: Use this code to capture prosecutors' consideration of public safety, the potential dangerousness of a defendant, or their likelihood of recidivism in developing pleas

Sentencing grid: Use this code to capture discussion of how the state sentencing grid is used in developing pleas

Thinking outside the box: Use this code to capture when participants discuss trying to find creative solutions for defendants, usually ones that involve treatment, restitution, or other non-incarceration sentences

Trial: Use this code to capture any discussion of trial experiences and decisions about whether to go to trial

Victim: Use this code to capture any discussion of how the victim influences the plea development process

What makes a successful plea deal: Use this code to capture examples of successful plea deals and/or the answers given in response to the "what makes a successful plea deal" question

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Biography

My name is Catherine Aspden Grodensky, and I am a public health and public policy researcher. I grew up in Winston-Salem, North Carolina, where I attended R.J. Reynolds High School. I earned a Bachelor of Arts in Anthropology at the University of Virginia in Charlottesville, Virginia, and a Master's of Public Health (MPH) in Health Behavior at the University of North Carolina at Chapel Hill. After earning my MPH, I worked for twelve years at the UNC Chapel Hill School of Medicine conducting research on health promotion and disease prevention in health care and correctional settings. At UNC I published peer-reviewed manuscripts on HIV prevention, medication adherence, and health care for criminal justice involved populations, and co-led the UNC Criminal Justice Working Group. In 2018, I began a doctoral program at the Sanford School of Public Policy at Duke University in order to study the United States criminal justice system and build skills to conduct research on criminal justice policy. While at Duke I initiated collaborative relationships with local court systems in North Carolina to conduct mixed methods research on court appearance, local jail populations, and plea bargaining. I have obtained both internal and external funding for this work, presented my findings locally and nationally, co-authored reports for dissemination to policy-makers and stakeholders, and published in peer-reviewed journals.