Episode 2: Present
Fight the Power: The Evolution of Prosecutorial Discretion

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ABBY: Hey everyone, welcome to the second episode of Fight the Power: the Evolution of Prosecutorial Discretion. Previously, you heard about prosecutorial power in the United States from the Antebellum period before the Civil War through the Civil Rights Movement. Today we are talking about prosecutorial power in its current form. We are your hosts Abby Kim,

FAITH: Faith Chang,

JORDAN: And Jordan Hoover.

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ABBY: "Plea bargaining is not some adjunct to the criminal justice system; it is the criminal justice system".

FAITH: Those are the words of former Supreme Court Justice Anthony Kennedy in the 2012 *Missouri v. Frye* case.

JORDAN: Today, plea bargaining exemplifies prosecutorial discretion at its fullest. In the United States, plea bargaining has become the main way to resolve criminal cases. Let's get into it.

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ABBY: First let's define our terms. What is plea bargaining? Rutgers University Law Professor Thea Johnson explains it best:

JOHNSON: A plea bargain is what it sounds like. It's a bargain struck between the parties so that they can reach a plea agreement so that the defendant, instead of going to trial in lieu of going to trial, will plead guilty. And oftentimes that agreement involves the promise from the state that the defendant will receive either a better charge, you know, like a lower charge—you were charged with robbery, and we'll turn that robbery into a theft, let's say, or that they receive a lower sentence, so you're facing a potential 20 years if you go to trial and instead, if you are willing to plead guilty, defendant, we will at this point offer you five years, you know, for the agreement to plead guilty.

ABBY: You might say what's wrong with that? After all, a plea bargain lessens the amount of jail time that a defendant faces. You get out faster, you rebuild your life quicker, and you don't have to deal with the risk that comes with being locked up in prison for a lot of years.

JOHNSON: There is a huge benefit to saying I will plead guilty rather than pursue this case at trial. But what are the risks of that? And of course you know the risks of that are again, innocent people may indeed plead guilty and in fact we have evidence that that of, you know, innocent people being falsely arrested for drug crimes and pleading guilty because they were so terrified of the option of going to trial.

ABBY: Johnson is part of the Plea Bargain Task Force, which was created by the American Bar Association's criminal justice section. Earlier this year, the task force released a report that analyzed the current condition of plea bargaining in the nation's criminal justice system and how it could be reformed.

JOHNSON: We brought together a diverse group of academics, lawyers, both defense attorneys and prosecutors, public policy makers, judges, who worked on the issue over the course of almost three years.

ABBY: In August of this year, the ABA adopted fourteen principles that the task force recommended. They include eliminating bail and pretrial detention, and training law students, lawyers and judges on the use and practice of plea bargaining in its current context.

JOHNSON: I think what's important about the principles in thinking about them globally is that they represent sort of what we saw as the biggest issues with the criminal system and what's important to understand about plea bargaining is that you really can't isolate plea bargaining. It's not like plea bargaining is its own little island within the criminal system. Plea bargaining touches almost every aspect of criminal practice, so it touches sentencing. It touches bail reform. It touches issues with discovery. It touches issues with the right to counsel, a defendant's right to counsel, and so the lack of data. I mean, and these are the things that we focused on in the principles. So one of the things I say when I'm, you know, talking to people about the report is that you'll notice when you read the principles, is that many of the principles don't seem to be clearly or automatically related to plea bargaining.

ABBY: So basically, plea bargaining is the bread and butter of our criminal justice system. But how exactly did it become so? To answer the question, look no further than to the war on drugs.

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ABBY: It's the 1970s, and New York is dealing with a heroin epidemic and rising crime rates. Governor Nelson Rockefeller, who had previously supported drug rehabilitation, job training and housing for drug addicts, is feeling political pressure. It is at one meeting with his close aide Joseph Persico that his stance completely changes, according to NPR. Persico said Rockefeller proposed harsher drug laws after studying Japan's war on drugs. The basic premise was this: get tough by creating mandatory minimum sentences for even the most minor of drug crimes.

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ABBY: In 1980, the U.S. Department of Justice published The Principles of Federal Prosecution. The guidelines have been revised repeatedly since then. But the DOJ has consistently urged prosecutors to charge a defendant with the most serious offense possible. Congress also got into the act by passing the Sentencing Reform Act of 1984, which abolished parole, instituted determinate sentencing, and authorized the creation of the United States Sentencing Commission to establish sentencing guidelines. Since then, the Sentencing Commission has determined the range of punishment for all crimes, including drug offenses. According to Human Rights Watch, street-level dealers who sell to retail customers can easily distribute 300 grams of crack or 500 grams of methamphetamine in a month, with a retail value of $20,000 to $50,000. The guidelines establish a sentencing range of 10 to 12 years for a nonviolent, first-time offender distributing that quantity of drugs to an adult. That's more time in prison than if a defendant is convicted of forcible rape of an adult, killing a person in voluntary manslaughter, disclosing top secret national defense information, or violent extortion of more than $5 million involving serious bodily injury.

ABBY: Congress and state legislatures also created mandatory minimum sentences for many drug offenses. Washington and Lee University Law Professor Jon Shapiro explains:

SHAPIRO: For many drug offenses, there are mandatory minimum sentences that must be imposed depending on the kind of drug and the amount of drug, and that sort of thing, and they can be very severe. And oftentimes, the only way a defendant can avoid a mandatory minimum sentence, which could be 10 years or 15 years, which is an enormous amount of time, is by striking a deal with the prosecution and cooperating, and then the prosecutor can ask the Court to ignore the mandatory minimum and to sentence someone below it, and it's only the prosecution that gets to make that request, not the defense. So, there's, you know, often times, depending again on the kind of case and many other factors, enormous pressure on a defendant to give up the right to trial, not to go to trial, to enter a guilty plea and cooperate in the hopes of avoiding an enormous sentence, so that's like a primary example of the imbalance of power between the defense and prosecution.

ABBY: Sentencing guidelines had already given prosecutors enormous power by taking decision-making away from judges. In other words, prosecutors can pre-determine the outcomes of cases through the crimes they charge a defendant with committing. Mandatory minimums became yet another powerful tool that prosecutors can—and do—use to ensure lengthy sentences—or leverage in the plea bargaining process, as Shapiro talked about.

ABBY: The U.S. Sentencing Guidelines were mandatory, meaning judges had no choice but to follow the mathematical formula that the Sentencing Commission had created to calculate punishment. But in 2005, the Supreme Court ruled in *Booker v. United States* that the sentencing guidelines violated the Sixth Amendment, or the right to trial by jury. The Court said the guidelines were no longer mandatory. Instead, the justices ruled that guidelines were advisory, meaning judges were not bound to adhere to them. But judges continued to stick with what they knew. Eighty-seven percent of drug possession sentences were still within sentencing guidelines ranges in 2022, according to the U.S. Sentencing Commission.

ABBY: So, what does all of this mean? Well, if the judges are still imposing long sentences, and if the prosecutors are using the guidelines as leverage in plea bargaining, then we never left the status quo.

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FAITH: One of the most concerning things about plea bargaining is the lack of transparency. Plea bargaining is a private affair between the prosecutor and defense attorneys. Their negotiation is largely left off the record–until they really have a firm deal. New Jersey is one of the only states that requires prosecutors to keep a record of the steps in the plea negotiation, including all offers made and whether they were accepted. Right now, the public is not privy to the changes the deal goes through. Nor does any member of the public or the press get to see the justification behind the offers and the terms of the agreement. Typically, nothing is filed on the official court record until right before a defendant goes into court to enter a guilty plea. (Turner).

FAITH: Why is this an issue? The opacity during a plea bargain makes it difficult to hold prosecutors accountable. Southern Methodist University Law Professor Jenia Turner wrote in an article published Notre Dame Law Review that the lack of transparency risks creating a system where coercion and concealment can go unchecked. Johnson agrees.

JOHNSON: "We want plea bargains, that we can have faith in the rightness of the bargain in the accuracy of the bargain. We want to have more transparency rates so that there's greater transparency for the public to see what the government is doing on their behalf. But also, there's greater transparency. So someone like me, a scholar, can go in and study plea bargaining in a meaningful way."

FAITH: The lack of public information also makes it difficult for defense attorneys to tell whether the terms of the bargain are reasonable. That's because they cannot easily compare the offer in one case to another. Defense attorneys are already at a disadvantage. They often do not have the time or the resources that the prosecution has. Prosecutors are far better funded by local governments. They have larger staffs. And can rely on police departments to do their investigations. Shapiro says defense attorneys don't have those kinds of resources.

SHAPIRO: "There's a great imbalance of power. And it's not just related to the plea-bargaining process, but throughout the entire system. For one thing, you know, the federal government has tremendous resources, and they can investigate cases for years, actually, before they even bring charges against someone. And then usually, once they do, at least in the Eastern District of Virginia, where I practice, largely, you can expect to go to trial within a couple of months, three months, maybe. So, you know, you're sort of behind the ball immediately, because of, you know, the imbalance of the amount of time spent in preparing preparation, that sort of thing

FAITH: When a defendant pleads guilty, there is a hearing in court before a judge**.** This is usually the first time that a judge hears about a guilty plea. The judge's main role is to make sure that the terms of the deal are fair, and that the defendant is aware and willing to plead guilty. The judge asks the defendant a series of questions that are designed to ensure that the guilty plea was not coerced, or there were any inappropriate promises made.

FAITH: Johnson also says defendants often know little if anything about the strength of a prosecutor's case against them when they're asked to consider a plea bargain.

JOHNSON: We have a concern about the lack of discovery, which is the information that the state shares with the defendant. About what they've got in their files. Right. Like, what is the evidence of guilt that you, the state, have in your possession about this particular defendant. And in many ways, we see, you know, sort of modern criminal practice sees discovery as a trial, right? You are entitled to the discovery in the prosecutor's file when you go to trial. But in a system in which no one goes to trial, you know, what we are arguing in the report is that we should re envision the right discovery,

FAITH: But defendants only are entitled to know the evidence against them if they decide to go to trial. It is at that point that the defendant has access to evidence against them—and evidence that the police and prosecution know about that a jury could view in a defendant's favor.

SHAPIRO: The Supreme Court has established for decades now that the government is required to provide the defense with evidence that they're aware of, which is, the legal term is exculpatory, which tends to undermine their case, or to show that the defendant is not guilty, or

even evidence which could be used to impeach their own witnesses, for example, evidence that their witnesses have told lies in the past, or they're getting a benefit for their testimony against the defendant. All those sorts of things, by Supreme Court precedent, are required to be provided to the defense, the problem that arises from time to time, is that sometimes it's not provided. And you only find out about it after trial, that there's something which should have been provided, which wasn't. And then there's an uphill battle to correct that.

FAITH: Shapiro is talking about the Brady doctrine, which is named after the famous Supreme Court decision *Brady v. Maryland* in 1963. Prosecutors are required to disclose exculpatory evidence during a trial and sometimes shortly before. But prosecutors are under no such obligation during negotiations of a plea bargain. In fact, the federal courts are currently split on whether the Brady doctrine even applies to plea bargains.

FAITH: George Alvarez is an example. In 2008, when he was seventeen, he accepted a plea deal in Texas and was sentenced to eight years in prison for assaulting a detention officer. Several years later, his defense attorney received access to a video that prosecutors had in their possession but hadn't shared. The video demonstrated Alvarez's innocence. Alvarez was eventually exonerated in 2010. He later sued the city of Brownsville. A jury awarded him 2 million dollars in 2014. But three years later, the 5th Circuit Court dismissed the lawsuit, ruling that the Brady doctrine did not apply to the video during the plea bargaining process.

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JORDAN: Josh Elrod is the Commonwealth's Attorney for Buena Vista, a city in Virginia with a population of 6,563. Elrod has been the prosecutor there since 2019, and he says prosecutorial power should be respected—especially by prosecutors.

ELROD: I want to start by recognizing that and saying that it's, I think, a worry for anybody who's ever exercising any power over another person, even in just the way that we treat other people that we should be vigilant about, considering our biases.

JORDAN: A 2017 research study by Loyola Marymount University Law Professor Carlos Berdejó found evidence of racial bias in plea deals. The study analyzed more than 30,000 Wisconsin cases over seven years. Berdejó found that white defendants were 25% more likely than black defendants to have their most serious initial charges completely dropped during the plea deals. On the other hand, black defendants were more likely to be charged with the most serious offense**.**

JORDAN: Racial disparities in plea bargains are even greater in misdemeanor and low-level felonies. For misdemeanor cases, white defendants are 75% more likely to have all charges carrying potential imprisonment dropped or reduced.

Sound of gavel hitting table

ABBY: What factors can help reduce bias in plea bargaining?

JORDAN: One way to reduce bias, would be to slow down the plea process. St. John's University Law Professor Elayne Greenberg wrote in a 2020 law journal that the speed of the plea bargain process can determine whether implicit bias plays a part.

JORDAN: Elrod says he can take his time.

ELROD: We're also a small enough community, that there is the opportunity to kind of look closely at each case. And although I think that my job keeps me busy enough, I don't feel overwhelmed by the workflow. And I think in larger jurisdictions where there's less personal knowledge about the individuals who are, are coming before the criminal justice system, and maybe also a lot of times less time to deal with those individuals that those biases might be more pronounced. I don't know that that's the case, somebody from their jurisdiction might disagree. But I think it's an advantage that we have: just being able to look closely at cases.

JORDAN: Elrod says smaller cities and towns have another advantage: he feels as if he is more familiar with Buena Vista residents and its repeat offenders.

FAITH: I think that it is also important to note that Buena Vista's demographics show that nearly 88 percent of its residents are white. A larger city that has a more diverse demographic would logically experience more racial bias in plea agreements, right?

JORDAN: Exactly! The statistics are sure to be different when comparing small and large jurisdictions. Do they always accurately portray bias? Elrod says there are possible biases—but they're different.

ELROD: We are a small enough jurisdiction that one, people are kind of well known. And I say that that can lead to its own bias in ways but it's less a bias about more superficial characteristics like color, or race and more kind of long-term biases about people not changing or this is the person, we know this person, we've dealt with them before they know that they're difficult, or we know that they're ill-intentioned, or whatever it is.

JORDAN: A final factor to consider when talking about bias in plea agreements is mandatory minimum sentences–and how prosecutors use offenses that carry mandatory minimum sentences in crafting plea bargains. Shapiro talks about the possibility of eliminating them.

SHAPIRO: I've got no, you know, silver bullet for that. I mean, it's, it's gonna be, you know, electing people who, you know, are sensitive to how destructive these kinds of sentences can be. I don't think we're anywhere near that place.

JORDAN: Elrod, as a prosecutor, has a more optimistic view.

ELROD: People should have faith in the system that we have. I think if people go to court sometimes just as a concerned citizen and watch court and try to make sure that they understand and maybe ask questions of the prosecutor, do the kind of interview you're doing, and educate themselves, I think at the end of the day that they would hopefully have some faith in in the system

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ABBY: In this episode, we looked into the impact of plea bargaining in our modern day criminal justice system. How it's incentivized through mandatory minimum sentencing guidelines,

FAITH: how transparency is a big issue,

JORDAN: and how racial bias affects the people, the defendants, who get locked up for often lengthy sentences.

FAITH: Thanks for tuning in. You've been listening to *Fight the Power: The Evolution of Prosecutorial Discretion* with Abby, Faith and Jordan.

JORDAN: Next, in our podcast, we will explore possible reforms to the criminal justice system. See you next time!

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