PROSECUTORS AND MASS INCARCERATION

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It has long been postulated that America’s mass incarceration phenomenon is driven by increased drug arrests, draconian sentencing, and the growth of the prison industry. Yet among the major players—legislators, judges, police, and prosecutors—one of these is shrouded in mystery. While laws on the books, judicial sentencing, and police arrests are all public and transparent, prosecutorial charging decisions are made behind closed doors with little oversight or public accountability. Indeed, without notice by commentators, during the last ten years or more, crime has fallen, and police have cut arrests accordingly, but prosecutors have actually increased the ratio of criminal court filings per arrest. Why? This Article presents quantitative and qualitative data from the first randomized controlled experiment studying how prosecutors nationally decide whether to charge a defendant. We find rampant variation and multiple charges for a single
crime along with the lowest rates of declination in a national study. Crosscutting this empirical analysis is an exploration of Supreme Court and prosecutor standards that help guide prosecutorial decisions. This novel approach makes important discoveries about prosecutorial charging that are critical to understanding mass incarceration.

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INTRODUCTION

It is now rote to say that the United States incarcерates too many people.¹ The United States has been the world leader in incarceration for

¹ Barack Obama, The President’s Role in Advancing Criminal Justice Reform, 130 HARV. L. REV. 811, 816 (2017) (“[The United States] keep[s] more people behind bars than the top thirty-five European countries combined, and our rate of incarceration dwarfs not only other Western allies but also countries like Russia and Iran.”); Dorothy E. Roberts, The Social and Moral Cost of Mass Incarceration
decades and will likely be for years to come. Even though many are aware of the problem, mass incarceration is not improving any time soon. The oft-


repeated story is that the war on drugs, legislative sentencing practices, or the growth of prisons has caused mass incarceration. These are all contributing causes. However, in the last ten or more years, the number of crimes committed have decreased, the number of arrests per year have decreased consistently, and while people are still serving long sentences, some federal sentences have been reduced.

5. MARC MAUER & RYAN S. KING, SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 2 (2007) (identifying the carceral impact of the war on drugs); Rodriguez, supra note 4, at 1593 (attributing the “2.3 million people held captive by the state” as an unintended consequence of the war on drugs); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 37, 39, 143 (2017) (discussing draconian drug sentences that disproportionately impacted minority defendants); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 60 (2d ed. 2012) (arguing that the war on drugs, fueled by racism, drove mass incarceration); MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT 23–29 (2016) (demonstrating how the Sentencing Reform Act of 1984 gave increased power to prosecutors to plea bargain in the federal context, increasing sentence lengths and the numbers of individuals prosecuted).

6. MAUER & KING, supra note 5, at 7–8 (describing how harsh sentencing laws from the 1980s affected the federal sentencing guidelines, resulting in more people incarcerated for longer periods of time); KARA GOTSCHE & VINAY BASTI, SENTENCING PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018) (“The War on Drugs and harsher sentencing policies, including mandatory minimum sentences, fueled a rapid expansion in the nation’s prison population beginning in the 1980s.”); MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025, at vii (2016) (“No one admires American sentencing systems. They are arbitrary and unjust, they are much too severe, they ruin countless lives, and they have produced a shameful system of mass incarceration.”). Also, those convicted of felonies in the United States are far more likely to be sentenced to prison and are sentenced to longer terms than similarly situated defendants in other countries. See id. at 12.

7. SCHOFENFELD, supra note 4, at 22 (“[P]rison capacity fueled the politics of crime, not vice versa.”); GOTSCHE & BASTI, supra note 6, at 5–9 (illustrating the trend toward privatization of prisons in the United States through data); Adam Gopnik, How We Misunderstand Mass Incarceration, New Yorker (Apr. 3, 2017), http://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration [https://perma.cc/8N3B-R7PJ] (“The prevailing theory of mass incarceration] insists that, first, the root cause of incarceration is the racist persecution of young black men for drug crimes, which overpopulates the prisons with nonviolent offenders. Then mandatory-sentencing laws leave offenders serving long prison sentences for relatively minor crimes. This hugely expanded prison population, one that tracks in reverse the decline of actual crime, has led to a commerce in caged men—private-prison contractors, and a specialized lobby in favor of prison construction, which in turn demands men to feed into the system.”). See generally KEVIN MUIHITCH & NAZGOL GHANDDOOSHI, SENTENCING PROJECT, PRIVATE PRISONS IN THE UNITED STATES (2021) (providing a brief overview of the privatization of prisons in the United States).


9. The number of arrests nationally has decreased since 2006. Baughman, supra note 8, at 85–86 (comparing U.S. arrest rates and noting the 1998 rate reached 25.72%, decreased in 2004 to 21.98%, and has not yet risen back to the 1998 level).

10. NAT’L Rsch. Council of the Nat’l Acads., supra note 2, at 54–55 (finding that longer sentences increased prison admissions in the 1980s to 2010); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 17–18 (2019) (discussing the problem of long sentences, lack of support for rehabilitation, and harsh collateral consequences); see infra note 86.

An alternative explanation for the persistence of mass incarceration is prosecutor felony filing decisions since the 1980s. This explanation relies on an increase in the number of felony filings by prosecutors. Misdemeanor filings have gone largely unnoticed from explanations of mass incarceration, and no one has analyzed data to see what impact these filings have had on mass incarceration. According to our analysis of national data, since 2003, prosecutor charging per arrest has gone up every year. In the face of both falling crime and public pressure to stop mass incarceration, prosecutors are not responding as readily as police, a point almost completely unnoticed by commentators.

Throughout criminal justice—and maybe even across the law generally—the prosecutor may be the government official with the most

1. See infra Section 1.B.

12. John F. Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform 72 (2017) [hereinafter Pfaff, Locked In] (using a forty-four state sample to show that in 1994 about one of every two arrests turned into a felony case, and by the end of the 2000s, it was two out of every three arrests); John F. Pfaff, Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth, 111 Mich. L. Rev. 1087, 1106 (2013) (“At least since 1994, it appears that almost all the growth in prison populations has come from prosecutors’ decisions to file felony charges.”); John F. Pfaff, The Causes of Growth in Prison Admissions and Population 1 (Jan. 23, 2012) [hereinafter Pfaff, Growth in Prison Admissions] (unpublished manuscript) (available at https://ssrn.com/abstract=1990508 [https://perma.cc/7UEX-EZMU]) (“[T]he growth in prison populations has been driven almost entirely by increases in felony filings per arrest.”); see also Emily Bazelon, Charged: The New Movement to Transform American Prosecution and End Mass Incarceration, at xxv (2019) (discussing prosecutors’ contributions to mass incarceration since the 1980s due to their “unfettered power” and claiming they are “not the only ones at fault” but “their decisions are the ones that matter most of all”).

13. Pfaff, Locked In, supra note 12, at 71–72 (following data starting in the 1990s through 2007 demonstrating that increases in prosecutor charges filed track the growth in prison admissions); Alexandra Natapoff, Misdemeanor Decriminalization, 68 VAND. L. REV. 1055, 1063 (2015) (comparing the 2.3 million felony cases filed every year in the United States to the 10 million misdemeanor cases filed every year); Kohler-Hausmann, supra note 4, at 42 (showing New York police made 251,000 misdemeanor arrests in 2010, a roughly fourfold increase from the 65,000 misdemeanor arrests in 1980).

14. By the 2010s, roughly half of all misdemeanor cases resulted in dismissal. Kohler-Hausmann points out that by that time there were more arrests and higher racial concentration, but lower conviction rates and jail sentences. Kohler-Hausmann, supra note 4, at 51, 60, 67. Kohler-Hausmann argues that lower courts then decide to “manage” individuals, rather than decide whether they committed the crime. Id. at 73; see also Alexandra Natapoff, Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal 2–3 (2018) (arguing people are punished for misdemeanors long before they are convicted).

15. See infra Section 1.B.

Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct

of a case.

charges to bring, what penalties to seek, and when a plea bargain is appropriate. And since 94% of criminal convictions are resolved by plea bargain, prosecutors—not judges—determine a defendant’s fate the vast majority of the time.20

Prosecutors can decide not to bring any charges at all21 or drop any or all of the charges at any time.22 For instance, with misdemeanor cases, unreviewable discretion.23 In 2017, the U.S. criminal legal system processed around five million felony and twelve million misdemeanor cases each year.24 These cases are all in the hands of one criminal justice actor: a prosecutor. None of these arrests become cases unless a prosecutor decides to charge. Prosecutors decide whether to initiate criminal proceedings, what

17. Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. PA. L. REV. 959, 959 (2009) (“No government official has as much unreviewable power or discretion as the prosecutor.”); Jeffrey Bellin, Theories of Prosecution, 108 CALIF. L. REV. 1203, 1204 (2020) (noting that “[s]cholars view prosecutors as ‘the most powerful officials in the criminal justice system,’ and blame them for ‘[m]uch of what is wrong with American criminal justice’ “); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (noting that prosecutors’ “routine, everyday decisions . . . have greater impact and more serious consequences than those of any other criminal justice official” despite “that they are totally discretionary and virtually unreviewable”); Adam M. Gershowitz, Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?, 51 WAKE FOREST L. REV. 677, 677–78 (2016) (“No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”); Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. REV. 669, 672 (explaining that “[i]n exercising the charging function, the prosecutor enjoys broad, indeed virtually unlimited, discretion”); Logan Sawyer, Reform Prosecutors and Separation of Powers, 72 OKLA. L. REV. 603, 613 (2020) (noting that “there is very little formal oversight of the decisions prosecutors make outside of the courtroom—where their most important decisions are made”); Kay L. Levine, The New Prosecution, 40 WAKE FOREST L. REV. 1125, 1127 (2005) (noting prosecutors have “near total control over the decision of when and what to charge in a potential criminal case”).

18. In total, there were 17.4 million criminal cases filed in 2017. NAT’L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2017 DATA 2 (2017) [hereinafter CASELOAD DIGEST 2017]. In 2017, based on data from twenty-six states, there were 3.5 misdemeanor cases to every 1 felony case, or about 71.5% were misdemeanors and 28.5% of cases were felonies. Id at 9. Therefore, that year, there were likely about 5 million felonies and about 12.4 million misdemeanors filed. Cf. Natapoff, supra note 13, at 1063 (estimating that misdemeanors comprise approximately 80% of most state dockets); KOHLER-HAUSSMANN, supra note 4, at 2 n.5 (estimating 9.5 million misdemeanor cases filed each year in the thirty-five sampled states); NATAPOFF, supra note 14, at 251 (estimating the “total size of the 2015 US misdemeanor docket [at] 13,240,034 criminal filings”).

19. See infra notes 93–103.


21. See STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUST., PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 8 tbl.10, 9 fig.3 (2011) (relying on the 2007 Census of State Court Prosecutors, 47% of all state prosecutor offices publicly reported a declination to prosecute).

22. Samuel J. Levine, The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion, 12 DUKE J. CONST. L. & PUB. POL’y 1, 4 (2016) (“[T]hrough the decision whether or not to file charges, the prosecutor determines if a particular individual will face the machinery of the criminal justice system, while other discretionary decisions, such as those relating to what charges to file and the terms of a plea bargain, have a substantial—and often determinative—effect on the outcome of a case.”); Geoffrey S. Corn & Adam M. Gershowitz, Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct, 14
prosecutors decide to drop charges up to 80% of the time.23 However, once a prosecutor charges a crime, the damage to a defendant is often done—even if charges are later dropped.24 A defendant with criminal charges often is detained pretrial and then has a criminal record, which may cause collateral consequences for life.25 Understanding how prosecutors make charging decisions is essential in determining the impact of charging on defendants as well as the underlying causes of mass incarceration.

Hundreds of articles in recent years have been written about prosecutors.26 Some have recently envisioned a more progressive prosecutor who refuses to charge cases and is focused on criminal justice reform.27

BERKELEY J. CRIM. L. 395, 399 (2009) (“Prosecutors can charge bargain, add, or subtract offenses in order to reach the prison sentence they desire.”).


24. Anna Roberts, Arrests as Guilt, 70 Ala. L. REV. 987, 997–1000 (2019) (discussing the ways in which people who are arrested are treated as guilty); Natapoff, supra note 13, at 1091 (“Police are more likely to arrest an individual who has been arrested or charged before.”).

25. The impacts of mass incarceration are not just prison numbers and families split apart, but also increased numbers of people who cannot be productive members of society because they have a charge on their record. Even those who are not incarcerated (or leave jail after a short stint) are permanently excluded from much of public life because of their “record.” See SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM 77–92 (2017); Michael Pinard, Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity, 85 N.Y.U. L. REV. 457, 459 (2010) (demonstrating the “wide range of collateral consequences stemming from [criminal] convictions”); Natapoff, supra note 13, at 1091 n.168 (noting over 45,000 collateral consequences of criminal conviction and infractions).

26. See, e.g., sources cited supra note 17; infra notes 27–30; Sonja B. Starr & M. Marit Rehavi, Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker, 123 YALE L.J. 2, 6 (2013) (“The modern criminal justice process is prosecutor-dominated. Prosecutors have broad charging and plea-bargaining discretion, and their choices have a huge impact on sentences.”); Benjamin Levin, Imagining the Progressive Prosecutor, 105 MINN. L. REV. 1415 (2021) (describing different types of progressive prosecutors and their various areas of focus); Bellin, supra note 17, at 1212–15 (articulating an alternative “servant-of-the-law” theory to govern prosecutors); see also Bruce A. Green, Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry, 123 DICK. L. REV. 589, 606 (2019) [hereinafter Green, Prosecutorial Discretion] (“[T]here is no established vocabulary for judging prosecutors’ exercise of discretion . . . .”); George C. Thomas, III, Discretion and Criminal Law: The Good, the Bad, and the Mundane, 109 PENN ST. L. REV. 1043, 1058 (2005) (arguing that discretion is inevitable but that some kinds are more acceptable than others); Bennett L. Gershman, The Zealous Prosecutor as Minister of Justice, 48 SAN DIEGO L. REV. 151 (2011); Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 FORDHAM URB. L.J. 607 (1999) [hereinafter Green, Seek Justice]; Daniel S. Medwed, The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit, 84 WASH. L. REV. 35 (2009); Kenneth Bresler, Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice, 9 GEO. J. LEGAL ETHICS 1301 (1996); Bruce A. Green & Samuel J. Levine, Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis, 14 OHIO ST. J. CRIM. L. 143 (2016).

27. W. Kerrel Murray, Populist Prosecutorial Nullification, 96 N.Y.U. L. REV. 173, 176–77 (2021) (discussing prosecutors who refuse to charge cases in effect “nullifying” the law); Levin, supra note 26; Bellin, supra note 17, at 1206 (providing examples of prosecutors across the nation whose acts depict them as “representatives of a national movement to leverage prosecutorial power to achieve criminal justice reform”); Levine, supra note 17, at 1127–29 (recasting the prosecutor as head “problem-
There are many conflicting theoretical frameworks to understand prosecutors. What has been lacking is empirical data to narrow the field of theories. The existing empirical data is localized, often dated, and not nationally representative. Even worse, the archival data does not include the key variables of interest, which would be the granular facts of the cases, as presented to prosecutors. Accordingly, we cannot understand what might be happening with prosecutor charging—otherwise known as the “black box” of criminal justice.

Despite the importance of understanding prosecutorial decisions, we have the answers to so few of the basic questions about how prosecutors make decisions. For instance, how many charges on average does a prosecutor charge for a single incident? How often do prosecutors decline to charge when they have evidence to do so? When do they impose a fine, a role that involves counseling of defendants, not just acting as an advocate, and working on crime reduction and other nontraditional tasks to improve criminal justice; Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 307 (2001) (concluding that “[p]rosecutorial discretion requires public moral judgement” over theories of legal or personal moral judgment); M. Elaine Nugent-Borakove, *Performance Measures and Accountability, in The Changing Role of the American Prosecutor* 91, 93–94 (2008) (outlining some prosecutorial theories as well as five types of prosecutors and their respective goals or objectives); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 722 (2020) (comparing “the new progressive prosecutors to the Progressive Era criminal justice reformers to identify the benefits and concerns that accompany a prosecutorial reform movement linked to popular politics”).

28. See, e.g., William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1891–93 (2000) (arguing that the reason for the difference between the public and prosecutorial interest is that individual prosecutors do not reflect on the impact of their decisions); R. Michael Cassidy, *Administering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 981 (2014) (“While other authors have explored the tensions between a prosecutor’s adversarial duties and ‘minister of justice’ role . . ., few have explored what it means to be an ‘administer’ of justice in the wider political arena.”); Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 906 (2012) (highlighting the “smart on crime” movement for prosecutors, which emphasizes fairness and accuracy, reducing recidivism, crime prevention, transition out of prison, and cost efficiency); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 287 (2014) (calling on “prosecutors to exercise their discretion to decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities”).

29. See infra notes 135, 137. But see Eric Rasmusen, Manu Raghav & Mark Ramseyer, *Convictions Versus Conviction Rates: The Prosecutor’s Choice*, 11 AM. L. & ECON. REV. 47, 70–75 (2009) (studying the effects of prosecutors’ case selection and conviction rates using SCPS 1990–2002 felony defendants and testing two models of prosecutorial behavior, one that balances the social planning goal against personal objectives and a goal of high conviction rate). The study found that conviction rates rise with budgets and are higher where prosecutors are elected rather than appointed. *Id.* However, it also revealed that overall prosecution rates do not have a clear correlation with budget increases and that conviction rates are slightly lower in high-crime districts where the prosecution rate is higher. *Id.*


31. These questions can be answered with data, but this data is often neither collected nor released.

32. We have national estimates on declination, but we do not have information on whether prosecutors declined to charge because they lacked appropriate evidence or because they felt that the crime did not warrant a charge. We also lack data on cases where prosecutors declined to charge, which could provide insight into their thinking on declination. See infra notes 198–207.
or incarcerate an individual? Under what circumstances does a prosecutor charge a felony or misdemeanor? These are all basic charging questions every prosecutor answers every day. Without an understanding of how prosecutors make decisions, it is difficult to create a cogent theory to understand prosecutors or mass incarceration.

The reason we know so little is because prosecutors are nearly impossible to study. They do not release information on how they make charging decisions, and often they do not even internally analyze these critical decisions. A review of empirical data on prosecutors demonstrates this problem.33 Existing prosecutor studies do not provide answers to the basic charging questions that we most want to know about.34

This Article studies prosecutorial charging decisions both empirically and theoretically, focusing on the role admissions—rather than time served—plays in the prolonged existence of mass incarceration. The empirical backbone of this Article—our study about prosecutor decisionmaking using a national sample of state prosecutors—questions the conventional wisdom of the root causes and persistence of mass incarceration.35 Of particular interest is prosecutors’ discretion in the initial charging decision, since this discretion may reduce the efficacy of upstream reforms such as reduced arrests or downstream policy changes like sentencing reform.36 This Article explores how prosecutors use discretion in

33. See infra Section I.B.
34. See infra notes 134–38 for previous prosecutorial studies.
36. Rachel E. Barkow, Sentencing Guidelines at the Crossroads of Politics and Expertise, 160 U. PA. L. REV. 1599, 1602 (2012) (“[Sentencing] commissions could and should do more to address the relationship between guidelines and prosecutorial power... Because some amount of prosecutorial discretion is necessary and inevitable, guidelines must account for that reality.”), Kate Stith & Karen Dunn, A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch, 58 STAN. L. REV. 217, 221 (2005) (“[O]ver the past two decades, sentencing authority has been transferred from judges through a politically weak Commission to Congress and, in the end, to prosecutors.”); Russell D. Covey, Rules, Standards, Sentencing, and the Nature of Law, 104 CALIF L. REV. 447, 483 (2016) (“When they are aware that mandatory-minimum sentencing provisions might require imposing onerous sentences even when mitigating facts exist, prosecutors might file less serious charges or drop prosecutions altogether to avoid what they consider to be unjustifiable results.”). In addition to trying to address mass incarceration, it is also important to test upstream policy remedies, such as blinding prosecutors to defendant race and class information, which may reduce biases in or increase perceived legitimacy of prosecutor decisions. Sunita Sah, Christopher T. Robertson & Shima B. Baughman, Blinding Prosecutors to Defendants’ Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System, BEHAV. SCI. & POL’Y, Dec. 2015, at 69, 71 (arguing that one way to “manage bias is to acknowledge its existence and create institutional procedures to prevent bias from influencing important decisions”); Robertson et al., supra note 35, at 808 (examining how prosecutors use their “very broad discretion in the initial charging decision, since this discretion may reduce the efficacy of downstream policy reforms such as sentencing guidelines, which have been enacted to reduce disparities in outcomes”).
the initial charging decision, whether they decide to punish an individual, and how much they decide to punish. This analysis suggests three important conclusions that challenge our understanding of prosecutors. First, prosecutors in our study charged defendants 97% of the time—contradicting existing estimates that prosecutors decline up to 50% of cases, a difference which may be due to prosecutors in the experiment charging what they wish they could charge, without the burden of a real world caseload.37 Second, prosecutors in our study recommended much harsher punishments than we anticipated based on previous studies—even though most prosecutors did not impose jail time, they charged an average of three crimes for a single incident and almost half of the recommended fines.38 Third, we found great disparity in prosecutorial decisions for the same hypothetical crime, which has important implications for defendant equity and proportionality in punishment. We compare all of these novel results with guidance from the Supreme Court and prosecution standards. This statutory and case law analysis considers whether prosecutors are acting in accord with Court precedent and statutory dictates in their charging decisions. It also considers the role of prosecutorial discretion and transparency in our understanding of how prosecutors contribute to mass incarceration.

This Article proceeds in three parts. Part I provides an in-depth background on prosecutor discretion and its impact on criminal justice. It also delves into the empirical debate on the prosecutorial role in the persistence of mass incarceration and addresses limitations of previous prosecutorial research. Part II describes results from our study of prosecutor decisionmaking in which real prosecutors were asked to review realistic but hypothetical cases and make charging decisions. Part III discusses more fully the decisions of prosecutors in light of the latest instructions from the Supreme Court and national prosecution guidelines. The Conclusion provides some thoughts on balancing prosecutor discretion and transparency.

37. There is significant variation in estimates of the percent of cases in which prosecutors decline to bring charges. However, a recent estimate from Miller et al. demonstrated a 52% declination rate over a ten-year period in New Orleans. Wright & Miller, infra note 30, at 74.

As previously noted, the charging decisions in this experiment likely reflect what the prosecutors wish they could charge initially, rather than what they could actually end up charging. The large gap between experimental outcomes and current estimates is likely due to the absence of real-life constraints, such as the pressure of a large caseload and limited office resources, and the fact that the experiment was what prosecutors would charge initially, rather than what has been observed in other studies as actually being charged.

38. The question of the “appropriate” level of prosecutor severity is something we will discuss very briefly in this Article, see infra notes 213–15, and more fully in a forthcoming work. See Megan Wright, Shima Baradaran Baughman & Christopher Robertson, Inside the Black Box of Prosecutor Discretion, 55 U.C. DAVIS L. REV. (forthcoming 2022).
I. UNDERSTANDING PROSECUTOR DECISIONS

For many years, the leading theory has been that the war on drugs and changes in sentencing are responsible for mass incarceration. Later, scholars noticed the growth of prisons—as both public and private—and the accompanying new motivations to fill prisons—as another contributing cause to mass incarceration. In recent years, John Pfaff and Emily Bazelon have both argued that prosecutors are primarily to blame for mass incarceration. Relying on felony data from 1990 to 2007, Pfaff asserts that prosecutors have caused the epic mass incarceration problem by filing more felonies per prosecutor each year. This theory has been challenged prominently by two scholars.

In this Part, we will briefly summarize Pfaff’s theory and his critics, as well as provide data beyond the years provided by Pfaff, examining what has happened with prosecutors in the last ten years. We analyze both felony and misdemeanor data and demonstrate that prosecutors have actually reduced the rates of crimes charged from 2003 until 2018. So instead of annual increases in criminal charges by prosecutors, we have seen annual decreases. However, despite the decrease in crime rates over those same years and the 25% decrease in arrest rates, prosecutors have not decreased charging commensurately with arrest rates during this same period. Indeed, prosecutors have increased their ratio of criminal court filings per arrest. In essence, prosecutors present a formidable obstacle to cutting mass incarceration—not only with felony filings, but also with misdemeanor filings. Section I.A discusses the significant discretion prosecutors possess. Section I.B delves into the prosecution data supporting mass incarceration; and Section I.C discusses previous empirical work on prosecutors.

A. PROSECUTOR DISCRETION

Understanding who prosecutors are and how they make decisions is important to determining their role in mass incarceration. Prosecutors are government attorneys who represent the State in criminal cases and decide whether to charge after an arrest. A prosecutor investigates and prosecutes

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39. See Pfaff, Locked In, supra note 12, and Bazelon, supra note 12, for books addressing this issue.
40. See Pfaff, Locked In, supra note 12.
41. Id.; Bazelon, supra note 12.
42. Criminal Justice Standards for the Prosecution Function § 3-1.2(a) (Am. Bar Ass’n 2017) (“The prosecutor is an administrator of justice, a zealous advocate, and an office of the court.”); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“So long as the prosecutor has probable cause . . ., the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).
criminal cases and provides advice regarding criminal matters.\textsuperscript{43} 

In their role as an advocate for the state, prosecutors have substantial discretion.\textsuperscript{44} What does this mean? Prosecutors decide whether to initiate criminal proceedings,\textsuperscript{45} what crimes to charge,\textsuperscript{46} or decline,\textsuperscript{47} how and when to prosecute the charges,\textsuperscript{48} what penalties to seek,\textsuperscript{49} when to offer plea

\begin{footnotesize} 
\begin{enumerate}
\item See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION \S 3-1.1 (AM. BAR ASS’N 2017).
\item Wesley MacNeil Oliver & Rishi Batra, Standards of Legitimacy in Criminal Negotiations, 20 HARV. NEGOT. L. REV. 61, 67 (2015) (“Prosecutors possess extraordinary power to charge defendants.”); Thomas, supra note 26, at 1043 (“Discretion in enforcement and prosecution of crime is inevitable . . . .”); Brandon K. Crase, Note, When Doing Justice Isn’t Enough: Reinventing the Guidelines for Prosecutorial Discretion, 20 GEO. J. LEGAL ETHICS 475, 475 (2007) (“The discretion afforded prosecutors exists at every level of the criminal justice system, whether the defendant is Martha Stewart or the guy next door, and the impact on the defendant is substantially the same.”).
\item Sarah Ribstein, Note, A Question of Costs: Considering Pressure on White-Collar Criminal Defendants, 58 DUKE L.J. 857, 868 (2009) (“Prosecutors in street-crime cases have a great deal of discretion as to whether or not to indict . . . .”); Robert L. Misner, Recasting Prosecutorial Discretion, 86 J. CRIM. L. & CRIMINOLOGY 717, 773 (1996) (“Current prosecutorial discretion is virtually unlimited . . . .”); Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 STAN. L. REV. 29, 49–50 (2002) (“Through deliberate choices about screening, a chief prosecutor can change the place of jury trials, the pattern of convictions and dismissals, the allocation of police and correctional resources, and the public’s access to information about the system.”).
\item NAT’L PROSECUTION STANDARDS § 4-2.1 (NAT’L ATT’YS ASS’N 2009) (“It is the ultimate responsibility of the prosecutor’s office to determine which criminal charges should be prosecuted and against whom.”); Nicole T. Amsler, Note, Leveling the Playing Field: Applying Federal Corporate Charging Considerations to Individuals, 66 DUKE L.J. 169, 176 (2016) (“The number of violations a federal prosecutor can choose from when charging someone with a crime is so enormous that it is essentially countless.”); Craig H. Solomon, Note, Prosecutorial Vindictiveness: Divergent Lower Court Applications of the Due Process Prohibition, 50 GEO. Wash. L. REV. 324, 324 (1982) (“Prosecutors enjoy considerable discretion in deciding what charges, if any, to bring against a suspect.”).
\item Josh Bowers, Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute, 110 COLUM. L. REV. 1655, 1700 (2010) (“Prosecutors have significant authority to decline charges for equitable reasons . . . ., but their professional position leaves them cautious. They have power, but they may lack will and perspective.”); Daniel C. Richman & William J. Stuntz, Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 COLUM. L. REV. 583, 605 (2005) (describing how crimes with consistent legal definitions cause prosecutors to enforce the crimes “as written” resulting in more systematic and aggressive enforcement).
\item See Peter L. Markowitz, Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty, 97 B.U. L. REV. 489, 490 (2017) (“Prosecutorial discretion refers to the power . . . . to determine how, when, and whether to initiate and pursue enforcement proceedings.”); Cynthia Alkon, The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye, 41 HASTINGS CONST. L.Q. 561, 598 (2014) (“Prosecutors can decide, almost without limit, to add additional charges or enhancements after the case has been filed, as long as the additions are at least arguably supported by the evidence.”).
\item Russell M. Gold, Promoting Democracy in Prosecution, 86 WASH. L. REV. 69, 84 (2011) (“Prosecutors exercise sovereign authority when they determine who may be punished for legal transgressions and who will not.”); Shima Baradaran Baughman, Subconstitutional Checks, 92 NOTRE DAME L. REV. 1071, 1090 (2017) (“Prosecutors have the latitude to charge a wide range of crimes and to seek a wide range of penalties as long as the prosecutor believes the charges and sought-after penalties are ‘consistent with the nature of the defendant’s conduct’ or the likelihood of success at trial is high, without regard to the incarceration effect of the charges.”).
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bargains.\textsuperscript{50} and what sentencing recommendations to advise.\textsuperscript{51} Prosecutors can “freely choose” between charging options, and defendants are generally stuck with these choices.\textsuperscript{52} Prosecutors’ discretionary power is not unlimited, as the scope of the power depends on statutes passed by legislatures.\textsuperscript{53} However, in most states criminal statutes are numerous, and there are often more than enough options for criminal charging in every area.\textsuperscript{54}

The prosecutor may have more discretion than any government official.\textsuperscript{55} Most profoundly, when deciding whether to charge a case, the

\textsuperscript{50} Kate Stith, \textit{The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion}, 117 YALE L.J. 1420, 1454 (2008) (“Since prosecutorial discretion and plea bargains control most outcomes, the system as it actually operates relies on both the priorities and the judgments of prosecutors. The default is the plea bargain (or sentence bargain), with the adversarial jury trial serving as a kind of judicial review for defendants who are not content with administrative adjudication by the prosecutor.”); Jeffrey Standen, \textit{Plea Bargaining in the Shadow of the Guidelines}, 81 CALIF. L. REV. 1471, 1472 (1993) (“As the sole ‘purchasers’ of criminal defendants’ convictions and incriminating information, prosecutors . . . possess substantial power to overwhelm criminal defendants in the plea bargaining process.”); Alkon, \textit{supra} note 48, at 599 (“Prosecutors also have the power to decide not to make a plea offer. In effect, the prosecutors hold all the cards; defendants only have the power to throw a monkey wrench into the system by demanding a jury trial.”); Michael M. O’Hear, \textit{Plea Bargaining and Procedural Justice}, 42 GA. L. REV. 407, 449 (2008) (“Prosecutors can reassure defendants of their neutrality and trustworthiness by employing objective criteria in making plea bargaining decisions, explaining their decisions, and demonstrating consideration of defense arguments in favor of lenience . . .”); Cynthia Kwei Yung Lee, \textit{Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines}, 42 UCLA L. REV. 105, 107 (1994) (“The prosecutor may engage in plea negotiations with the defendant and may threaten increased charges should a defendant fail to accept the prosecutor’s plea offer.”).

\textsuperscript{51} James Vorenberg, \textit{Decent Restraint of Prosecutorial Power}, 94 HARV. L. REV. 1521, 1521 (1981) (“The decisions [prosecutors] make determine in large part who will be convicted and what punishment will be imposed.”); Ronald F. Wright, \textit{Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation}, 105 COLUM. L. REV. 1010, 1012 (2005) (“Prosecutors have become more powerful through the potent combination of far-reaching and duplicative criminal codes, relatively few resources available for trial, and nondiscretionary sentencing laws. While judges now find themselves increasingly accountable to the law of sentencing, prosecutors have accumulated new powers and encounter no new regulation of their authority.”).

\textsuperscript{52} Jeffrey Bellin, \textit{The Power of Prosecutors}, 94 N.Y.U. L. REV. 171, 178 (2019); Michael Tonry, \textit{Prosecutors and Politics in Comparative Perspective}, 41 CRIME & JUST. 1, 5 (2012) (“Discretionary prosecutorial decisions are for all practical purposes immune from judicial review.”). Bruce A. Green and Fred C. Zacharias argue that prosecutors should make decisions based on articulable principles or subprinciples that command broad societal acceptance. Bruce A. Green & Fred C. Zacharias, \textit{Prosecutorial Neutrality}, 2004 Wis. L. REV. 837, 840. “[S]pecific rules or criteria constraining prosecutorial decisionmaking cannot be formulated without first identifying fundamental governing norms. Although these norms need not be universally accepted, they ought to have some claim to public support.” Id. at 904. This proposal could prove challenging to implement because prosecutors have never attempted to identify workable norms for the array of discretionary decisions that prosecutors’ offices make every day.

\textsuperscript{53} Bellin, \textit{supra} note 52, at 184 (noting that “all prosecutors’ . . . powers depend on an enforceable statute enacted by the legislature”).

\textsuperscript{54} See Baughman, \textit{supra} note 49 (discussing overcriminalization and the increasingly large number of criminal statutes from which prosecutors may choose to charge an individual); \textit{see also} Wright, \textit{supra} note 51.

\textsuperscript{55} Bibas, \textit{supra} note 17. However, prosecutors’ ability to bring and dismiss charges can be limited by other officials. For example, in Virginia, police can bring charges in misdemeanor cases and a prosecutor often will not see the case until after arraignment, meaning a judge would have to sign off on
prosecutor brings the ultimate weight of the state down on the defendant.\textsuperscript{56} The constitutional checks that could exist on prosecutors do not typically exist.\textsuperscript{57} Judges and the public could pose a check on prosecutors, but this is often not the case.\textsuperscript{58} Judges are usually unable to intervene on behalf of criminal defendants when it comes to severe or disparate charging.\textsuperscript{59} About 94\% of criminal convictions are resolved through plea bargaining, which often takes place in private meetings.\textsuperscript{60} Accordingly, elections are not the check that the Constitution envisioned for prosecutors.\textsuperscript{61}


\textsuperscript{56} Angela J. Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 IOWA L. REV. 593, 408 (2001) (noting the many facets of a prosecutor’s power to charge an individual, “arguably the most important prosecutorial power”). The United States has never ascribed to “mandatory prosecution,” which theoretically allows prosecutors the ability to decline to charge. Albert W. Alschuler, A Teetering Palladium?, 79 JUDICATURE 200, 201 (1996) (book review) (“[T]he discretion of prosecutors . . . not to enforce the law is not only tolerated but applauded . . . ”); Vorenberg, supra note 51, at 1551 (“[S]ome nonenforcement of the law will occur . . . ”).

\textsuperscript{57} Baughman, supra note 49, at 1071 (arguing that the lack of constitutional checks on prosecutors has had negative impacts on criminal law, including increased filings and excessive plea bargaining, among others). There are some minimal constitutional limits. For example, prosecutors cannot engage in selective or vindictive prosecution. See, e.g., Wayte v. United States, 470 U.S. 598, 608 (1985); Blackledge v. Perry, 441 U.S. 21, 28–29 (1974).


\textsuperscript{59} Lee, supra note 50, at 164 (“[C]ourts are reluctant to intervene when their own notions of what constitutes a proper charging decision conflict with the prosecutor’s charging decision because they believe the nature of the decision is one that the prosecutor is equipped to make competently and independently.”); Standen, supra note 50, at 1510 (“In the world of the sentencing guidelines, the judge has little power to check prosecutorial charging decisions.”).

\textsuperscript{60} Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. REV. 911, 912, 923 (2006). Jeffrey Bellin argues that judges can act as a check on prosecutorial decisions, claiming that “[a]ll prosecutors can do by themselves is let people off—a tactic that does not lend itself to filling prisons.” Bellin, supra note 58, at 857. However, this is far from the reality. Prosecutors can charge as many crimes as they want and plea bargain virtually without any checks. There are laws that prevent prosecutorial accountability, and, while lawyers and judges should report misconduct, this rarely occurs. Jennifer Lee, Note, Justice for All’: The Necessity of New Prosecutorial Accountability Measures, 90 MISS. L.J. 497, 504–05, 517 (2021) (“[D]efense attorney[s] . . . are frequently reluctant to file a complaint [against prosecutors] due to fear of hindering professional working relationships . . . . Judges also experience hesitancy to report prosecutorial misconduct in the courtroom because they do not want voters in future elections to view them ‘soft on crime.’ . . . Finally, there is no way to compel reporting, and no external body holds judges and practitioners accountable for turning a blind eye to unethical behavior.”). Judges often rubberstamp a prosecutor’s charging decision and plea bargain.

\textsuperscript{61} See Carissa Byrne Hessick & Michael Morse, Picking Prosecutors, 105 IOWA L. REV. 1537 (2020) (considering whether elections are a check on prosecutors by analyzing data collected from the most recent election cycles for all states that elect their prosecutors).
This wide discretion creates opportunity for prosecutorial abuse, including racial and gender bias,\textsuperscript{62} overcharging,\textsuperscript{63} vindictiveness,\textsuperscript{64} plea-bargaining abuses,\textsuperscript{65} and wrongful convictions.\textsuperscript{66} On the other side, prosecutorial discretion allows prosecutors to adapt to different scenarios involving unique facts and defendants and provides a way for prosecutors to manage their expansive caseloads through plea bargaining,\textsuperscript{67} which some argue is necessary for the administration of justice.\textsuperscript{68} Arguably, prosecutorial discretion puts decisionmaking in the hands of those with in-depth

\textsuperscript{62} See State v. Monday, 257 P.3d 551, 556 (Wash. 2011) (“Prosecutor Konat injected racial prejudice into the trial proceedings by asserting that black witnesses are unreliable . . . .”); see also United States v. Sacco, 58 F.3d 754, 774 (1st Cir. 1995) (“[C]ourts must not tolerate prosecutors’ efforts gratuitously to inject issues like race and ethnicity into criminal trials.”); Andrew E. Taslitz, Judging Jena’s D.A.: The Prosecutor and Racial Esteem, 44 HARV. C.R.-C.L. L. REV. 393, 420 (2009) (arguing that “race-shaken sentencing outcomes” cannot occur without prosecutorial support); JDAI TASK FORCE ON GENDER & JUST., REPORT OF THE JDAI TASK FORCE ON GENDER AND JUSTICE (1993), reprinted in 58 Mo. L. REV. 485, 506 (1993) (explaining that prosecutors may assign low priority to domestic violence cases because they lack understanding, sensitivity, and may not believe female victims). But see Robertson et al., supra note 35, at 844 (showing “insignificant findings of race or class bias” among prosecutors).

\textsuperscript{63} Albert W. Alschuler, The Prosecutor’s Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 104 (1968) (arguing the rise of plea bargaining incentivizes prosecutors to overcharge); see also Wright & Miller, supra note 30, at 29, 32 (arguing for a hard screening system to prevent prosecutorial overcharging); H. Mitchell Caldwell, Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System, 61 CATH. U. L. REV. 63, 72 (2011) (arguing that game theory sheds light on prosecutors’ incentives and motivations in overcharging defendants).


\textsuperscript{65} See Mabry v. Johnson, 467 U.S. 504, 506, 510–11 (1984) (holding withdrawal of plea offer after acceptance but before execution of plea not violative of due process); North Carolina v. Allford, 400 U.S. 25, 40 (1970) (Brennan, J., dissenting) (characterizing the majority opinion as holding that the threat of death penalty to force a defendant to plead guilty to a lesser murder charge is not coercive); United States v. Kennard, 46 F. App’x 426, 428 (9th Cir. 2002) (unpublished) (noting a prosecutor’s promise to treat a third party leniently during plea bargaining is not coercive per se); United States v. Speed Joyeros, 204 F. Supp. 2d 412, 444 (E.D.N.Y. 2002) (describing extended pretrial incarceration caused defendant’s physical and mental health to deteriorate, but the plea bargain was acceptable despite the danger of due process violations by the intensive pressure on defendant to plead guilty).

\textsuperscript{66} See Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 WIS. L. REV. 291, 291 (discussing how wrongful conviction cases “challenge[] the traditional assumption that the criminal justice system does all it can to accurately determine guilt”). See generally Peter A. Joy, The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System, 2006 WIS. L. REV. 399, 403 (noting that an “initial study of the first sixty-two persons exonerated by DNA evidence found some degree of prosecutorial misconduct in twenty-six cases”).

\textsuperscript{67} George Fisher, Plea Bargaining’s Triumph, 109 YALE L.J. 857, 865 (2000) (arguing that “crushing workloads” explain why prosecutors began to choose plea bargaining and why they continue to do so today).

involuntary knowledge of the criminal justice system. Despite these benefits, many legal scholars assert prosecutorial discretion is too broad and gives prosecutors unchecked power.69

Whether wide discretion is positive or not is difficult to assess due to a lack of transparency.70 Legal commentators have characterized the “black box”71 of prosecutorial discretion as “dangerous”72 and “tyrann[ical]”73 because it is “unreviewed and its justifications are unarticulated.”74 Commentators also emphasize that “many decisions and actions of a prosecutor are never recorded, or are recorded in documents that are difficult

69. See William J. Stuntz, The Collapse of American Criminal Justice 295 (2011) (“[P]rosecutorial power is unchecked by law and, given its invisibility, barely checked by politics.”); Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 STAN. L. REV. 869, 869 (2009) [hereinafter Barkow, Institutional Design] (“There are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion. . . . In a government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception.”); Rachel E. Barkow, Separation of Powers and the Criminal Law, 58 STAN. L. REV. 989, 1049 (2006) (“A system where upwards of ninety-five percent of all convictions result from pleas and where prosecutors make all the key judgments does not fit comfortably with the separation of powers.”); Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After Gideon v. Wainwright, 122 YALE L.J. 2150, 2150 (2013) (“The U.S. criminal system is not truly adversarial because prosecutors possess broad, unchecked power and therefore determine results in criminal cases with little or no input from the defense.”). But cf. J. Harvie Wilkinson III, In Defense of American Criminal Justice, 67 VAND. L. REV. 1099, 1130 (2014) (noting critics of the U.S. criminal justice system “argue that unfettered prosecutorial discretion and the ‘relative absence of efforts to standardize and regulate charging practices’ lead to arbitrary charging decisions, often with an outsized impact on minorities and the poor.”).

70. See Murray, supra note 27, at 226–27 (“Much of the prosecutorial accountability gap stems from the difficulty of evaluating performance,” as well as “community confusion about the prosecutorial function . . . .”); David Alan Sklansky, The Changing Political Landscape for Elected Prosecutors, 14 OHIO ST. J. CRIM. L. 647, 671 (2017) (arguing the public lacks the ability to evaluate prosecutorial function due to a “lack of transparency”); Juleyka Lantigua-Williams, Are Prosecutors the Key to Justice Reform?, ATLANTIC (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252 [https://perma.cc/HL6Y-RM4Y] (discussing the difficulty of procuring prosecutor charging data, and noting that in 2016, the Manhattan district attorney’s office held the only office that permitted outside access to its files).

71. Wright & Miller, supra note 30 (characterizing this lack of transparency as a “Black Box”); Wright et al., supra note 38 (same).

72. Robert H. Jackson, The Federal Prosecutor, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (“Therein is the most dangerous power of the prosecutor; that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”); see also Bennett L. Gershman, The New Prosecutors, 53 U. PITT. L. REV. 393, 408–09 (1992) (“Uncontrolled discretion . . . has the potential for abuse. In the hands of prosecutors, this potential is now a reality.”).

73. Henderson v. United States, 349 F.2d 712, 714 (D.C. Cir. 1965) (Bazelon, C.J., dissenting); see also Davis, supra note 56, at 399 (noting that “[t]he current constitutional design is dysfunctional as a check on prosecutorial power”).

to obtain.” And prosecutors have no reason to open up their decisions for review.

Despite the difficulty of obtaining data on prosecutorial decisionmaking, the next Section explores what we know empirically about the role of prosecutors in mass incarceration, particularly in the last ten to fifteen years.

B. DEBATES ABOUT PROSECUTORS’ ROLE IN MASS INCARCERATION

John Pfaff claims that prosecutorial discretion is the single largest cause of mass incarceration and is responsible for the expansive growth in felony convictions since the 1970s. His claim is controversial because it focuses on admissions and disregards the other piece of the mass incarceration equation: sentence lengths. Pfaff points out that violent crime increased by 100% between 1970 and 1990, and the number of line prosecutors (those who try cases) rose by 17%. According to Pfaff, when crime rates fell from 1990 to 2007, “the number of line prosecutors rose by 50%,” and the number of prisoners also increased. Unlike the fluctuating volume of arrests during this period, “felony case filings tracks the number of [prison] admissions quite closely.” However, such a historical comparison must be viewed with some caution, as the National Center for State Courts (“NCSC”) data underwent methodological changes in 2003. Pfaff demonstrates that in his thirty-four state sample, between 1994 and 2008, filings grew 34% and

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78. See discussion infra note 86.
79. Locked In, supra note 12.
82. See infra note 96.
admissions grew 40%. Pfaff claims that the prosecutor’s decision to file charges appears to be at the “heart of prison growth.” Pfaff claims that particularly with violent crimes, prosecutors were especially tough. Pfaff argues that this may explain the central paradox of mass incarceration: fewer crimes, more criminals; less wrongdoing to imprison people for, more people imprisoned. Put simply, Pfaff blames prosecutors for mass incarceration over any other leading cause.

While Pfaff’s claims are provocative, two scholars provide serious challenges to his empirical analysis: Jeffrey Bellin and Katherine Beckett. Jeffrey Bellin challenges Pfaff’s assertion that prosecutors are the reason for mass incarceration, stating that “few can persuasively explain how the phenomenon arose or what can be done to make it go away.” Bellin specifically takes on two of Pfaff’s arguments: (1) American prisons filled through increased admissions, not longer sentences, and (2) felony filings were the one variable that changed with respect to admissions. Bellin and Beckett both dispute Pfaff’s assertion that more felonies were filed, but sentence lengths did not increase between 1980 and 2010. Indeed, other researchers have found dramatic increases in sentences between 1980 and 2010. Bellin also claims that the increase in felonies reported by Pfaff is

83. Pfaff, Growth in Prison Admissions, supra note 12, at 10; see also Pfaff, Locked In, supra note 12.
84. Pfaff, Locked In, supra note 12, at 110.
85. Id.
86. See Katherine Beckett, Mass Incarceration and Its Discontents, 47 CONTEMP. SOCIO. 11, 20 (2018) (reviewing JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017)) (“[I]t is difficult, perhaps impossible, to assess the reliability of Pfaff’s findings regarding the apparent increase in the filing-to-arrest ratio . . . . The available evidence . . . suggests that the share of felony filings that resulted in a felony conviction did increase and therefore that prosecutors’ filing decisions were not the only cause of the increase in the arrest-to-admission ratio.”).
87. Bellin, supra note 58, at 836, 850 (“Broader criminal laws, tougher sentencing rules, harsher judges, and a diminished likelihood of release on parole all increase the probability of convictions and severe sentences. The plea deals prosecutors offer, and defendants agree to, undoubtedly reflect those changes, leading to increased prison admissions and time served.”).
88. Id. at 844; Beckett, supra note 86, at 17 (“Studies . . . consistently find that time served did increase notably in recent decades, especially in the 1990s.”); see STEVEN RAFAEL & MICHAEL A. STOLL, WHY ARE SO MANY AMERICANS IN PRISON? 66 (2013) (calculating the average sentence length in 1985 as compared to 2000 and 2009).
89. According to the National Research Council, the estimated increases in time served for individual categories of crimes are as follows: murder—238% (1981–2000); sexual assault—94% (1981–2009); drugs—19% (1981–2000); aggravated assault—83% (1980–2000); burglary—41% (1980–2000); robbery—79% (1980–2000). NAT’L RSC. COUNCIL OF THE NAT’L ACADS., supra note 2, at 53. The Council concluded that the increase in incarceration rates “can be attributed about equally to the two policy factors of prison commitments per arrest and increases in time served.” Id.; see also RAFAEL & STOLL, supra note 88, at 51 tbl.2.4 (finding that the average time served for murder and negligent manslaughter increased by 55%, 44% for robbery, and 21% for burglary between 1984 and 2004); Alfred Blumstein & Allen J. Beck, Population Growth in U.S. Prisons, 1980–1996, 26 CRIME & JUST. 17, 36 (1999) (“There seem also to be upward trends [in time served] for [burglary, sexual assault, other assaults,
questionable when State Court Processing Statistics ("SCPS") data is considered alongside NCSC data.\textsuperscript{90} However, Pfaff defends his data, claiming that the state felony filings did in fact go up during this period and that the data he relies on is the most representative.\textsuperscript{91} In addition, the last SCPS report was published in 2009, limiting the ability to compare the two data sets moving forward.\textsuperscript{92} Bellin, however, notes a study of federal prosecutors conducted during a similar period did not find any increase in felony charging,\textsuperscript{93} and California reported no increase in felony filings during this period.\textsuperscript{94} Given this criticism, there is some dispute as to whether prosecutors increased felony filings over the time period alleged, and whether they are the largest contributor to mass incarceration.

We do not insert ourselves in this empirical debate on whether historically prosecutors are a bigger cause of mass incarceration than other criminal justice actors like police, judges, or legislators. But we are interested in the current dynamics and persistence of mass incarceration. Also, while mass incarceration typically is seen as having two components—admissions and sentence lengths—we focus on admissions. To do this, instead of examining only felony data, we examine total criminal filings (meaning both felony and misdemeanor filings) to see what trends we can observe with

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90. Bellin points out that it may be helpful to cross-check NCSC data with SCPS data on felony filings. See Bellin, supra note 58, at 843. However, the comparison could prove unilluminating. SCPS data is generated through a sample of felony cases processed on randomly selected business days in May in 40 of the nation’s 75 largest counties. Brian A. Reaves, U.S. DEP’T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 33 (2013). With NCSC, states voluntarily send in the caseload numbers, with some states reporting how many cases are felonies and how many are misdemeanors. Court Statistics, NAT’L CTR. FOR ST.CTS., https://www.ncsc.org/services-and-experts/areas-of-expertise/court-statistics [https://perma.cc/656T-4LDE]. NCSC felony numbers are not a statistically designed survey, but rather self-reported numbers that NCSC brings together. In some years, twenty-eight states report felony filings, other years forty report. It would be difficult to use the states provided by NCSC in a year SCPS also collected data and make them represent similar jurisdictions to allow for comparison.


93. Bellin, supra note 58, at 844; Raphael & Stoll, supra note 88, at 62 (concluding a study of federal charging behavior between 1985 and 2009 revealed “little evidence of systematic change in the rate at which U.S. attorneys prosecuted criminal suspects”).

94. Bellin, supra note 58, at 844.
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prosecutor charging. As a frame of reference, among states that report felony and misdemeanor data, around 70% of criminal cases are misdemeanor cases, while 30% are felony cases. Today, any meaningful analysis of mass incarceration must consider the role of misdemeanors.

Some elementary analysis shows that the trend for filings by prosecutors has reversed from what Pfaff argues. Starting in 1990, the NCSC reported that there were an estimated 13 million total criminal case filings and by 2002, case filings went up to 15.4 million. While historical comparisons before and after 2003 are discouraged due to methodology changes by the NCSC, we can look at the period beginning in 2003. In

95. NCSC numbers are the best nationally representative numbers we have on felony and misdemeanor filings. See NAT’L CTR. FOR STATE CTS., STATE COURT GUIDE TO STATISTICAL REPORTING 1 (2020) (“Comparable data from the state courts allows the [Court Statistics Project (“CSP”), a joint project participated in by the NCSC] to publish national trends and analyze caseload statistics for use by state court leaders, policy makers, and local court managers.”). Criminal caseload filings are cases filed in trial court. CSP does not combine trial and appellate caseloads. “The national totals reported . . . may include estimates for states that were unable to report caseload data in time for publication or whose data do not strictly conform to the reporting guidelines set forth in the State Court Guide to Statistical Reporting”; however “[s]tates for whom estimates were used will not appear in any state-level tables . . . or any displays available on the CSP DataViewer.” NAT’L CTR. FOR STATE CTS., STATE COURT CASELOAD DIGEST: 2018 DATA 4 (2020) [hereinafter CASELOAD DIGEST 2018]. Note that the national numbers in this section are referred to by NCSC as the “Number of Incoming Cases” in their reports, see id. at 7, but this paper uses the term “filings.” NCSC defines incoming cases as “the sum of new filings plus reopened and reactivated cases,” a figure it says offers “a more complete assessment of the work of state courts.” NAT’L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS, 2004, at 42 (Richard Y. Schauffler et al. eds., 2005) [hereinafter STATE COURTS 2004]. For more details, see id. at 39–49 (for instance, the three-state example that NCSC shows that “new filings” are the vast majority of “filings” as we refer to them). As defined in NAT’L CTR. FOR STATE CTS., STATE COURT GUIDE TO STATISTICAL REPORTING 14 (2020), a “filing” is the original charging document (such as a complaint, information, or indictment) and marks the beginning of the case. “Reopened” cases are those “in which a judgment has previously been entered, but which have been restored to the court’s active pending caseload due to the filing of a request to modify or enforce that existing judgment . . . .” Id. at 17. Finally, “reactivated” cases are those cases moving from an inactive to an active status. Id.

96. This is according to data from NCSC. Only some states break down their reporting into felony and misdemeanor cases, meaning the breakdown of the felony or misdemeanor numbers may not be accurate as a national number from year to year. See CASELOAD DIGEST 2018, supra note 95. While there is not a national felony filing number, NCSC does publish state-level information on those states that do report felony case numbers. For example, in 2016 between 70–74% of cases were misdemeanors and 24–28% were felonies among 31 states. See COURT STAT. PROJECT, STATEWIDE CRIMINAL CASELOAD COMPOSITION IN 31 STATES (2016), http://www.courtstatistics.org/__data/assets/pdf_file/0013/24052/ewsccrim-page3-comp-by-state.pdf [https://perma.cc/J8NT-VPMW]. In 2018, looking at the aggregate of thirty-two states, 77% of cases were misdemeanors, while 23% were felonies. CASELOAD DIGEST 2018, supra note 95, at 13.

97. See NATAPOFF, supra note 14; KOHLER-HAUSMANN, supra note 4.


99. See STATE COURTS 2004, supra note 96, at 9 (“The introduction or reallocation of case types as defined in the Guide has had a subtle but discernable effect on the time-series data reported by the CSP. For this reason, caseload trends in this year’s Examining the Work of State Courts are not necessarily comparable to those published previously.”).
2003, the criminal caseload was at 20.6 million cases and increased to 21.6 million cases at the height of mass incarceration in 2006. Since 2006, total criminal case filings have steadily decreased, falling to 17 million in 2018. From 2006 until 2018, prosecutors charged less felonies and misdemeanors each year than the year before, resulting in a 21.3% decline in filings. Therefore, contrary to Pfaff’s findings in the earlier period, after 2006, prosecutors reduced charges filed each year. In other words, prosecutors reduced their mass incarceration footprint between 2006 and 2018. As such, Pfaff’s large mass incarceration claim of prosecutors increasing filings—if true—ended in 2006. However, the story of prosecutors’ connection to mass incarceration is not finished until we consider arrest rates.

In addition to prosecutor charging, we also consider how police arrests have impacted the persistence of mass incarceration over roughly the last ten to fifteen years. While prosecutors have filed fewer cases, arrests have decreased at an even steeper rate in the same period. Indeed, the decrease in prosecutor filings is not commensurate with the decrease in arrests, meaning that while prosecutors have decreased filing, they have not decreased proportionately to what we would expect given the sharp decline in police arrests. In 2003, there were an estimated 13.6 million arrests in the United States. Arrests increased to 14.4 million in 2006. After 2006, arrests began to decrease steadily until 2018, when they dropped to 10.3 million. Overall, from 2006 to 2018, arrests decreased nationally by 28.3%. Figure 1 shows the decline in arrests and cases filed since 2006. Regarding the

100. Id. at 41; NAT’L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS, 2007, at 12 (Robert C. LaFountain et al. eds., 2008) [hereinafter STATE COURTS 2007].
101. CASELOAD DIGEST 2018, supra note 95, at 7.
102. Calculation: [(17,000,000 – 21,600,000) / 21,600,000] * 100 = -21.3%.
103. While there was a slight rise in 2013, overall, from 2006–2018, filings have gone down. See STATE COURTS 2007, supra note 100, at 12; CASELOAD DIGEST 2018, supra note 95, at 7.
105. FED. BUREAU OF INVESTIGATION, Estimated Number of Arrests (Table 29), CRIME IN THE UNITED STATES 2006 [hereinafter CRIME IN THE UNITED STATES 2006], https://www2.fbi.gov/ucr/cius2006/data/table_29.html [https://perma.cc/5PKV-W9W2].
107. Calculation: [(10,310,960 – 14,380,370) / 14,380,370] * 100 = -28.3%. This trend of decreasing arrest numbers had been going on for years prior to 2006, but less dramatically. From 1990-2010 there was an 8% decrease in estimated arrest numbers (14.2 million in 1990 to 13.1 million in 2010). HOWARD N. SNYDER, U.S. DEP’T OF JUST., ARREST IN THE UNITED STATES, 1990–2010, at 16 tbl.2 (2012). This includes the last ten years for which we have data, as the latest state criminal filings for 2018 were published in 2020.
108. For sources and calculations, see infra Appendix.
discrepancies between the number of arrests and filings, there are a few possible explanations. First, the additional filings could be due to parole or probation revocation cases, meaning there was no new arrest, but there was a new filing.109

Second, in the last ten years or so, prosecutors have increased charging rates per arrest. Comparing prosecutor filings and police arrests rates in the last decade—police cut arrests much more than prosecutors reduced charging rates. In the most recent years where data is available (2006–2018),

arrests went down 28.3%. Prosecutors converted arrests into more criminal case filings (felony and misdemeanor), but their rate went down somewhat to 21.3%. This could mean that prosecutors are actually filing more per arrest in 2018 than previously. As shown in Figure 2, in 2003 there were 1.51 filings per arrest, which rose to 1.73 in 2013, before plateauing in 2018. We acknowledge that FBI estimates are nowhere near perfect given gaps in data collection. However, national trends show that police have decreased arrests, but prosecutors have not shown a commensurate decrease in felony and misdemeanor case filings. In other words, prosecutors are disproportionately charging more cases than police are arresting, and in so doing, are contributing more to mass incarceration than police as far as admissions go.


111. See State Courts 2007, supra note 100. From 2008–2017, criminal caseloads have dropped a total of 18%. Caseload Digest 2017, supra note 18, at 9. According to NCSC, “[c]riminal caseloads comprise person cases (including homicide), property cases, drug cases, weapons cases, DUI/DWI cases, and others. The U.S. has seen state trial court criminal caseloads drop at an average annual rate of about 2 percent for the last 9 years. There was a slight increase reported in 2013 but caseloads continued the decline in the following year.” Id.

112. State Courts 2004, supra note 96, at 14 (20.6 million incoming criminal cases in 2003); Snyder, supra note 107 (13,646,642 estimated arrests in 2003). Calculation: 20,600,000 million (Incoming Cases) / 13,646,642 (Number of Arrests) = 1.51 filings / arrest.


114. Crime in the United States 2018, supra note 107 (10,310,960 estimated arrests in 2018); Caseload Digest 2018, supra note 96, at 7 (17 million incoming criminal cases in 2018). Calculation: 17,000,000 million (Incoming Cases) / 10,310,960 (Number of Arrests) = 1.65 filings / arrest.

115. Snyder, supra note 107 (showing reported arrests and estimated arrests differing by 2–4 million per year between 1990 and 2010, due to the percentage of agencies reporting ranging from 75–88%). While arrest numbers are not perfect, according to the best national estimates, arrests decreased 28% between 2006 and 2018. Id.

116. See supra note 95 for discussion of NCSC data usage.
These trends, though taken with some degree of caution due to persistent errors in reporting, demonstrate an important finding. Although prosecutors have dramatically reduced case filings, their reductions should be much more dramatic given arrest numbers. The question left unanswered with the data is despite what we know about mass incarceration, why are prosecutors continuing to charge in greater amounts, when crime and arrests have gone down? That is to say, why have they not further reduced their contribution to mass incarceration? Our empirical study in Part II provides some insight on national prosecutor charging, but first we must understand empirical work on prosecutor charging.

The next Section discusses the prior empirical studies on prosecutors and their limitations.

C. LIMITATIONS OF PRIOR RESEARCH OF PROSECUTORIAL DECISIONS

Existing research on prosecutors has significant limitations and fails to answer basic questions about prosecutor charging. How many crimes does a prosecutor charge based on a single incident? How often do prosecutors decline to charge a case when they have evidence to charge? When does a prosecutor charge a felony when a misdemeanor will do? These basic questions are left unanswered.
Many existing studies are outdated or lack empirical rigor.\textsuperscript{117} For example, some prior work is based on important, though anecdotal, experience of a single prosecutor.\textsuperscript{118} And while several experiments have studied prosecutorial decisions, including plea bargaining,\textsuperscript{119} most of these have relied on lay persons as the subjects, rather than actual prosecutors.\textsuperscript{120} Some have treated prosecutors as economic actors by using game theory or other economic theories to model hypothetical prosecutorial decisions.\textsuperscript{121} Others have looked at the organization of prosecutors’ offices to determine

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\item 117. See Wright et al., supra note 75, at 44–46 (recognizing some of the potential weaknesses of such qualitative research).
\item 118. See, e.g., Paul Butler, Let’s Get Free: A Hip-Hop Theory of Justice (2010) (describing the challenges with race and police corruption in his experience as a prosecutor in Washington D.C.); Alexander, supra note 5 (describing the problems of mass incarceration and the “new racial caste system” based on her experience as a civil rights lawyer).
\item 119. Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, An Explicit Test of Plea Bargaining in the “Shadow of the Trial,” 52 Criminology 723 (2014) (demonstrating in an experiment with 378 prosecutors that prosecutors offer and defendants accept plea bargains “in the shadow” of the likely trial outcomes, such that the severity of the agreed punishment tracks the ease of proving guilt and the heinousness of the crime); Wright et al., supra note 75, at 35 (referencing Milton Heumann’s studies interviewing prosecutors finding that “prosecutors . . . started out their criminal justice careers in a highly adversarial, trial-oriented mode, but slowly drifted into plea bargaining”); Wright & Miller, supra note 45, at 74 (testing the “screening/plea bargaining tradeoff” within the New Orleans District Attorney’s Office and noting higher rates of open pleas and lower rates of charge bargains and dismissals than other jurisdictions); Leonard R. Mellon et al., The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States, 72 J. Crim. L. & Criminology 52, 79–81 (1981); see infra note 126.
\item 120. Dan Simon, Doug Stenstrom & Stephen J. Read, Partisanship and Prosecutorial Decision Making: An Experiment, Presentation at the University of Southern California Gould School of Law: Fourth Annual Conference on Empirical Legal Studies (Nov. 20, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443562 (https://perma.cc/L5YL-T7H5) (determining with a study of lay people that anger likely plays a role in prosecutorial decisions in a case); Lucian E. Dervan & Vanessa A. Edkins, The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem, 103 J. Crim. L. & Criminology 1, 28–43 (2013) (studying college students to demonstrate that they would falsely admit guilt for something in return); Barbara O’Brien, A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making, 74 Mo. L. Rev. 999, 999 (2009) (noting that “when people are judged primarily for their ability to persuade others of their position, they are susceptible to defensive bolstering at the expense of objectivity” and arguing that prosecutors are “particularly susceptible to biases that undermine their ability to honor obligations that require some objectivity on their part”); Christoph Engel & Alicia Reuben, The People’s Hired Guns? Experimentally Testing the Motivating Force of a Legal Frame, 43 Int’l Rev. L. & Econ. 67 (2015) (using students as hypothetical prosecutors and studying in a game theory experiment whether prosecutors risk taking a case to court and following their duty).
\item 121. .\textsuperscript{114} Oren Gazal-Ayal & Limor Riza, Plea-Bargaining and Prosecution, in CRIMINAL LAW AND ECONOMICS 145 (Nuno Garoupa ed., 2009) (conducting a law and economics approach to prosecutorial decisions, including plea bargaining); Scott Baker & Claudio Mezzetti, Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial, 17 J.L. Econ. & Org. 149 (2001) (using game theory to model prosecutorial plea bargaining and other decisions); Josh Bowers, Punishing the Innocent, 156 U. Pa. L. Rev. 1117 (2008) (modeling plea bargaining and arguing that quick pleas are preferred and do not harm innocent defendants); Jennifer F. Reinanum, Plea Bargaining and Prosecutorial Discretion, 78 Am. Econ. Rev. 713 (1988) (relying on game theory to understand plea bargaining and model prosecutorial discretion).
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whether group dynamics impact decisions.122

Prior research has examined factors prosecutors consider when deciding to file criminal charges in particular cases,123 and their decision to dismiss or decline to pursue a case after charges have been filed.124 Much of this prior work deals with sexual assault and murder cases, of which findings are limited.125

Prior studies conflict on how often prosecutors decline to charge cases.

122. Mellon et al., supra note 120, at 79–81 (discussing how office management and organization and community differences affect prosecutor charging and other decision patterns in a large study of prosecutor offices in urban areas); Wright et al., supra note 75, at 40–41 (finding that prosecutors’ offices with pyramidal organizational structures had “the greatest sense of team membership as well as a strong staff loyalty to, and respect for, the administration,” whereas offices with flat organizational structures “expressed low levels of regard for the administration and tended to conceive of themselves and their coworkers in independent terms”).

123. See Celesta A. Albonetti, Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processing, 24 CRIMINOLOGY 623, 625 (1986) (“[C]laim information that decreases uncertainty concerning victim/witness management will increase the probability of continued prosecution. . . . In addition, the data indicate that prosecuting attorneys are less likely to continue prosecution of cases involving female defendants and are more likely to continue prosecution of defendants whose bail outcome includes financial conditions for release.”); Eric P. Baumer, Steven F. Messner & Richard B. Felson, The Role of Victim Characteristics in the Disposition of Murder Cases, 17 JUST. Q. 281, 304 (2000) (finding that “victim characteristics affect the processing of murder cases” and that “disreputable or stigmatized victims tend to be treated more leniently by the criminal justice system”); Dawn Beichner & Cassia Spohn, Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit, 16 CRIM. JUST. POL’Y REV. 461, 490 (2005) (concluding certain victim factors, such as risk-taking behavior and moral character, functioned as predictors of prosecutors’ decisions to file charges by comparing a Kansas City sex crimes unit to a nonspecialized Miami unit and finding “very few differences” between the two, with 49% in Kansas and 47% in Miami resulting in prosecution); Cassia Spohn & David Holleran, Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners, 18 JUST. Q. 651, 682 (2001) (“[V]ictim characteristics influenced the decision to charge or not in cases in which the victim and the suspect were acquaintances, relatives, or intimate partners.”).

124. VERA INST. OF JUST., FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS (1977); Richard S. Frase, The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 U. CHI. L. REV. 246, 251 (1980) (“[L]ess than one-fourth of the complaints received by the ninety-four U.S. Attorneys appear to result in the filing of formal charges.”); Michael Edmund O’Neill, Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predicative Factors, 41 AM. CRIM. L. REV. 1439, 1445, 1497 (2004) (finding that “as federal criminal justice resources have expanded, declinations have fallen” from 36% in 1994 to 26% in 2000); Kenneth Adams & Charles R. Cutshall, Refusing to Prosecute Minor Offenses: The Relative Influence of Legal and Extralegal Factors, 4 JUST. Q. 595, 600–01 (1987) (indicating that variables such as number of charges, prior arrests, number or witnesses, value of stolen merchandise, gender, race, residence, and age “have a statistically significant relationship” with the decision to prosecute); Carole Wolff Barnes & Rodney Kingsnorth, 24 J. CRIM. JUST. 39, 46 tbl.5 (1996) (indicating that the percentage of cases rejected at the outset is 16.4% for African Americans, 14.2% for Latinos, and 10.4% for Caucasians); Carl E. Pope, The Influence of Social and Legal Factors on Sentence Dispositions: A Preliminary Analysis of Offender-Based Transaction Statistics, 4 J. CRIM. JUST. 203, 203 (1976) (“The age, race, sex, and previous criminal histories of felony defendants are considered with regard to sentence outcomes and the length of both jail and probation commitments.”); Reilly, supra note 55 (example of limits on prosecutors’ ability to file or dismiss charges).

125. See Albonetti, supra note 124, at 623–44.
Based on local data from 1978, Leonard Mellon, Joan Jacoby, and Marion Brewer demonstrate that the declination rate of prosecutors in three cities ranged from 43% in New Orleans to 4% in Brooklyn. A national study from the 1980s asserted prosecutors dismissed around 50% of felony cases. Yet a 1998 national study of state prosecutors and some of the latest nationwide surveys found that prosecutors dismissed cases 25% of the time. A declaration study by Marc Miller and Ronald Wright demonstrated high declination rates at about 52% in New Orleans over a period of eleven years. However, a careful look at the Miller and Wright study shows that when prosecutors declined to charge, it was because they were charging some other crime, they lacked evidence or victim cooperation, or they had some other legitimate reason. It is not clear in the study when the prosecutor declined the charges, but, given the reasons for declining are largely witness or evidence based, it may be that the prosecutors charged initially and then dropped charges as they got further into the evidence.

Importantly, most of the prior work is based on federal charging decisions, which meaningfully differ from state charging decisions.

126. Mellon et al., supra note 120, at 79 tbl.1A (noting in Salt Lake City in 1978, prosecutors declined to charge in 11.9% of cases.). Mellon et al. blame the differences in charging on the different policies, goals, and backlogs of offices. Id.
127. BARBARA BOLAND, ELIZABETH BRADY, HERBERT TYSON & JOHN BASSLER, U.S. DEP’T JUST., THE PROSECUTION OF FELONY ARRESTS, 1979, at 2 (1983) (roughly 50% of all cases “carried forward,” meaning they were brought to trial or settled in plea bargaining); BARBARA BOLAND, PAUL MAHANNA & RONALD SONES, U.S. DEP’T JUST., THE PROSECUTION OF FELONY ARRESTS, 1988, at 3 (1992) (roughly 55% of all cases carried forward); see also Frase, supra note 125, at 278 (filling in less than 20% of federal criminal cases); Bellin, supra note 58, at 846 (referencing the findings from Barbara Boland et al. in 1983).
129. Wright & Miller, supra note 45, at 74 (“The prosecutors declined prosecution in 39% of all cases received (or 52% of all charges) . . . .”).
130. Miller & Wright, supra note 30, at 136 tbl.1.
131. Id.
132. Kathleen F. Bricey, Charging Practices in Hazardous Waste Crime Prosecutions, 62 OHIO ST. L.J. 1077, 1110 (2001) (“[F]ederal [Resource Conservation and Recovery Act] prosecutions are based not on a single isolated act, like disposing of a solvent-laden rag, but on a course of conduct that more often than not involves multiple violations of several criminal statutes.”); Frase, supra note 125, at 274 (noting that “state offenses for which [] defendants were to be charged were not always direct counterparts
charges constitute the vast majority of the criminal caseload. Despite the relative importance of state prosecutors, many studies rely on federal criminal cases and study federal prosecutors.\textsuperscript{133} While there are 93 U.S. Attorneys, there are about 2,400 chief state-level prosecutors, most of whom are elected locally.\textsuperscript{134} The federal criminal docket is largely made up of drug crimes, firearms, and immigration cases.\textsuperscript{135} State prosecutors handle the violent felonies like murder, rape, and robbery. In addition, cases filed by state prosecutors constitute the biggest contributors to the U.S. prison population.\textsuperscript{136} Given the larger volume of misdemeanors they handle, state prosecutors could decline to prosecute more cases than federal prosecutors. In order to adequately understand incarceration in the United States, it is critical to study state prosecutors.\textsuperscript{137}


\textsuperscript{134} See generally \textit{PERRY} & \textit{BANKS}, supra note 21; Lantigua-Williams, supra note 70; \textit{BYRNE HESSICK, Univ. of N.C. SCH. OF L., THE PROSECUTORS AND POLITICS PROJECT: NATIONAL STUDY OF PROSECUTOR ELECTIONS} (2020).


\textsuperscript{136} Beckett, supra note 86, at 18 (“[B]y 1998, more than two-thirds of people admitted to U.S. state prisons for a violent offense had been sentenced under a [truth-in-sentencing] law that required that they serve at least 85 percent of their sentence . . . , and there is evidence that these statutes increased both time served and prison populations . . . .”).

\textsuperscript{137} Wright, Levine, and Miller emphasize that state prosecutors handle “larger volumes of criminal cases,” process the bulk of misdemeanor cases, and have a more “varied docket.” Wright et al., supra note 75, at 31. “An understanding of the true impact and variety of criminal prosecution in the United States, therefore, must give the state prosecutor a starring role rather than a bit part.” \textit{Id}.\footnote{While there are 93 U.S. Attorneys, there are about 2,400 chief state-level prosecutors, most of whom are elected locally.}
Instead, the studies are focused on particular jurisdictions or types of crime and lack many details because their source of data is based on court records, written files, and budget data. None of these address the qualitative questions of what the prosecutor is thinking, or why they do what they do.139

Still, there are many foundational qualitative studies of prosecutorial...
exception for a few, they are either somewhat outdated or discredited.\footnote{Milton Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys 11–14 (1978) (examining opinions on plea bargaining in Connecticut following the Supreme Court’s Santobello decision and finding a willingness of court participants to discuss plea bargaining, a break from the attitude in previous studies); Pamela J. Uitz, Settling the Facts: Discretion and Negotiation in Criminal Court, at xi, xiv (1978) (finding that “while the inner dynamics of negotiation push each side to objectively consider the other side, there are often pressures—such as public apprehensiveness about crime, severe penal code, and illegitimacy of prosecutorial policy making—that bind participants to rigid institutional roles” after fifteen months of field work in California’s San Diego and Alameda counties); Alschuler, supra note 63, at 52 (interviewing prosecutors, defense attorneys, trial judges, and other officials in ten urban jurisdictions, and arguing in favor of the abolition of plea bargaining through “a comprehensive analysis of the guilty-plea system and its alternatives”); Donald J. Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, 46 J. Crim. L. Criminology & Police Sci. 780, 781, 788 (1956) (concluding from a survey of ninety-seven felons convicted in one Wisconsin jurisdiction that the majority of the convictions were the result of an informal bargaining process between defense and prosecution); Melon et al., supra note 120, at 5253 (concluding, based on a study of ten geographically dispersed prosecutors’ offices, that differences in prosecution policy are often mandated by environmental factors outside of the control of individual prosecutors); Lisa Frohmann, Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decision Making, 31 L. & Soc’y Rev. 531, 534 (1997) (finding that organizational concern about the ability to convict in “discordant locales” was a frequent unofficial justification for case rejection after observing and interviewing members of a sexual assault unit of a prosecutor’s office in a major metropolitan area on the West Coast). See generally Frank W. Miller, Prosecution: The Decision to Enforce a Crime 11–14 (1969) (concluding that the role of the executive in charging needs to be reevaluated based on the results of a field study of cities and rural areas in Wisconsin, Kansas, and Michigan from 1955 through 1957); Peter F. Nardulli, James Eisenstein & Roy B. Flemming, The Tenor of Justice: Criminal Courts and the Guilty Plea Process (1988) (finding that plea negotiations are influenced by various factors—including charging practices, prosecutorial screening, centralization of plea offers, judge shopping, and the frequency of sentence (as opposed to charge) bargaining—following a multi-year study analyzing the decisions of the head prosecutor in nine different offices).}

One 2014 study relies on extensive interviews with 267 misdemeanor or felony prosecutors conducted over a three-year period to determine how they view themselves and their roles. Wright et al., supra note 75, at 38. The authors conclude that using mixed-methodology studies will allow researchers to better understand prosecution culture and better map prosecution behavior. Id. at 47. See Kay L. Levine & Ronald F. Wright, Prosecution in 3-D, 102 J. Crim. L. & Criminology 1119, 1122–23 (2012), for an earlier paper based on the same interviews that focuses on forty-two interviews with misdemeanor and drug prosecutors from two metro areas in the Southeast and that suggests “a prosecutor’s professional identity might affect, or be reflected in, the outcomes she achieves in criminal cases and the consistency of those outcomes.” Id. at 23. Other recent studies rely on surveys, interviews, observations, and court data. See Deirdre M. Bowen, Calling Your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization, 26 Just. Q. 2, 6–7, 25–26 (2009) (providing observations on forty-two plea negotiations and attorney interviews in Seattle, which demonstrated that in a reformed plea bargaining system, neutrality did not materialize, prosecutors had more power than under the traditional plea bargain model, and, while there was greater efficiency, it is not clear that justice was achieved); Kay L. Levine, The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload, 55 Emory L.J. 691, 706–09, 745–46 (2006) (concluding from interviews with California deputy district attorneys that prosecutors operate in organizational settings, respond to collective understandings about which cases are prosecution-worthy and why, and construct typologies of offenders to manage large caseloads of similar events); Levine, supra note 17, at 1125, 1127, 1211–14 (using mailed surveys and thirty interviews of statutory rape prosecutors in California to criticize the “new prosecution” model—in which prosecutors take on additional roles such as counselor, legislator, and investigator—for eroding the separation of powers); Ellen Yaroshefsky, New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson, 25 Geo. J. Legal Ethics 913, 916–17, 941–42 (2012) (describing interviews with New Orleans First District prosecutors and criminal justice actors
localized. And even if they were current, they fail to answer the basic questions we want to know about prosecutor charging.

Several surveys have tried to gain some insight into prosecutor decisions. But surveys may not allow for causal inference. The gold standard is a field study or randomized controlled trial. But thus far, there have not been any randomized controlled trials of prosecutor decisionmaking; in fact, there have been only a few experiments. As Wright, Levine, and Miller have astutely pointed out, prosecutors will be tempted to offer a more flattering picture of their decisionmaking that may not match up with their decisions in a real case. Indeed, some qualitative research has failed to offer a “reliable portrait of the actual job performance of the prosecutor.” As Wright et al. point out: “The best research settings are those that allow researchers to confirm a prosecutor’s claims about performance with a statistical record of that performance.” This is important because individual prosecutors differ in demographics, career regarding the Orleans Parish District Attorney’s Office’s compliance with defense disclosure obligations following an increase in caseloads.

142. Wright et al., supra note 75, at 34 (discussing outdated studies). See supra note 136 for localized studies.

143. See supra text accompanying notes 31–33.

144. See, e.g., BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUST., THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING (2012) (relying on surveys, focus group discussions, and court data from two jurisdictions to find that “prosecutors’ decisions were guided by two basic questions: ‘Can I prove the case?’ and ‘Should I prove the case?’ ”); Don Stemen & Bruce Frederick, Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making, 31 QUINNIPIAC L. REV. 1, 83 (2013) (finding that prosecutor decisions were shaped by internal rules, external resource constraints, and interdependent relationships); Kim Banks Mayer, Comment, Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?, 1996 WIS. L. REV. 295, 307–08 (describing survey of Wisconsin prosecutors that revealed hesitancy toward charging guidelines open to public access).


147. Wright, Levine, and Miller elaborate:

Qualitative research centered on semistructured interviews of prosecutors has one significant drawback that is particularly relevant to this research: it does not offer a reliable portrait of the actual job performance of the prosecutor. The interviewee might talk about how she selects charges or decides whether to take a case to trial, but that self-portrayal might not prove accurate if the full statistical record were available. We recognize that many people are inclined to paint themselves in the best light when talking to interviewers . . . .

Wright et al., supra note 75, at 44.

148. Id.

149. Id. at 45.
goals, work quality, and experience. It is also important, as others have recognized, to study offices of various sizes from a variety of regions, as well as to question defense attorneys “for an alternative take on the work of prosecutors in the jurisdiction.” Our study below attempts to avoid some previous limitations of mixed methods studies and is the first national study attempted of its kind.

II. NATIONAL PROSECUTOR STUDY

We designed a mixed methods study of prosecutor decisionmaking that contained a web-administered questionnaire embedded with experimental vignettes, close-ended questions, and open-ended questions. The vignettes contained police reports describing an incident that ends in an arrest, and the reports varied the race and class of the defendant. After reviewing the reports, the prosecutor participating in our study was then asked to decide whether to charge the individual with a crime (a felony, misdemeanor, or both), whether to pursue a fine or imprisonment, and the amounts thereof. As part of the study, the prosecutors were also provided the opportunity to write comments justifying their charging and punishment decisions and describing how charging decisions are usually made in their local offices.

This Part summarizes the descriptive quantitative and qualitative results of our mixed methods study. Some results from the experiment have been published, but the normative implications of our survey results and the qualitative analyses have not been published—until now.

A. SAMPLE

We sought to study real prosecutors. However, no comprehensive database of U.S. prosecutors is available for research purposes, and initial discussions with prosecutor organizations were unfruitful for research collaboration. We reached out to the National District Attorneys Association (“NDAA”) and the American Bar Association Criminal Justice Section about our study of prosecutors. The NDAA seemed open to cooperation

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150. Id.
151. Id.
152. See Robertson et al., supra note 35, at 818–22. The vignettes contained different race and social class descriptions of the individual to determine whether race and social class affect prosecutor decisionmaking. We found no such effect. Id. at 826.
153. The first paper discussing this 2017 experiment discusses the lack of racial or socioeconomic bias observed in prosecutor charging decisions. See Robertson et al., supra note 35, at 826. Other papers that are forthcoming discuss other aspects of prosecutorial decisionmaking revealed by the study. Some of the descriptions of the experiment in Sections II.A-D are taken from the Robertson et al. article.
until we showed them our study. They were concerned that our study could reveal that prosecutors are racially biased.\textsuperscript{155} Without access to any national prosecutor lists, we constructed a sample of state prosecutors by selecting one to two states from each of the nine United States Census regional divisions. Non-federal prosecutor names and email addresses were collected from prosecutor office websites and state bar associations. To identify more prosecutors, we sent FOIA requests to states to obtain additional prosecutor names and contact information. Information was obtained for at least one respondent from most states.

After collecting contact information for 4,484 prosecutors, we emailed them an invitation to participate in the study.\textsuperscript{156} Respondents were told that, “the purpose of this research study is to understand how prosecutors make decisions.”\textsuperscript{157} In total, 541 prosecutors completed the study for a 12.09% response rate.\textsuperscript{158}

Although we did not conduct a random sample of prosecutors, the profile of the respondents is representative of state prosecutors in several ways.\textsuperscript{159} Nearly a quarter, 23%, of respondents were lead prosecutors,\textsuperscript{160} and 79% worked in the felony division. The length of time respondents served as prosecutors ranged from less than a year to forty-five (45) years with a median length of service of ten (10) years. Approximately 65% of the respondents were men. Respondents ranged in age from twenty-six (26) to seventy-seven (77), with a median age of forty-five (45). Ninety-six percent of respondents were non-Hispanic, 90% were white, 4% were Black, 4% were “other,” and the remainder were Native American or Asian. Few respondents came from highly populous jurisdictions. Only 8% of

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\item 155. We did not find racial or socioeconomic bias, however. Id.
\item 156. In 2017 and 2018, respondents received a link to the study hosted on Qualtrics and were offered a five-dollar Amazon gift card for participating. See generally DON DILLMAN, JOLENE SMYTH & LEAH CHRISTIAN, INTERNET, PHONE, MAIL, AND MIXED-MODE SURVEYS: THE TAILORED DESIGN METHOD (4th ed. 2000) (offering nominal compensation improves response rates).
\item 157. The protocol was approved by the University of Utah Institutional Review Board.
\item 158. In our prior work, we reported experimental results from 468 prosecutors based on the experimental portion of this study. In the prior study, if a prosecutor did not answer the question on their recommended punishment, the prosecutor was excluded from analysis because that question was the outcome of interest. We report on the full sample in this study because we are mostly focused on their qualitative responses. If a prosecutor did not answer all questions, the prosecutor may still have provided valuable information on their decision-making process. See Robertson et al., supra note 35.
\item 159. Robertson et al., supra note 35.
\item 160. Ronald Wright has suggested that because we had so many lead prosecutors, the sample might have been skewed. Prior work has demonstrated that senior prosecutors tend to be more lenient than junior prosecutors. See Ronald F. Wright & Kay L. Levine, The Cure for Young Prosecutors’ Syndrome, 56 ARIZ. L. REV. 1065, 1084 (2014) (concluding prosecutors with less experience were more likely “to ignore the human dimension of many cases, approaching each file with a standardized view, focusing on the need to punish everyone”). However, if there were such a skew, it would mean that our findings regarding excessive prosecutor charging may be even more true of junior prosecutors.
\end{itemize}
respondents were in a jurisdiction of over 2 million, 11% in a jurisdiction of between 1–2 million, 10% in a jurisdiction of 500,000–1 million, 28% in a jurisdiction of 100,000–500,000, and 43% in a jurisdiction of less than 100,000. Due to differences in data availability and response rates, the sample primarily consists of prosecutors from the Mountain (23%), East North Central (21%), South Atlantic (16%), Pacific (12%), West North Central (11%), and East South Central (9%) regions. Relatively few respondents were from the New England, Mid-Atlantic, and West South Central states. Additional information on the sample can be accessed in our other publications.161

B. MIXED METHODS STUDY DESIGN

Study respondents first viewed hypothetical police reports. The police reports in the study were purposely designed to allow a prosecutor to charge major, minor, or no crimes at all. In the police report vignette, a slightly intoxicated man is found in a subway station yelling obscenities, asking people for money, and brandishing a knife. He is frustrated that no one will give him money and reports having just broken up with his girlfriend to police. At one point, he is angered that a certain woman does not give him money after repeated requests and grabs her arm. He does not threaten her specifically but does “dangle a knife at his side by his other arm.” The police then arrive and arrest him. He has no prior criminal record.

The report describes a circumstance that can be viewed as assault or potentially aggravated assault, depending on how the prosecutor understands the situation and individual. The vignette is designed to allow for maximum discretion of the prosecutor for optimal study of discretion. We also chose assault as the crime because we are especially interested in how state prosecutors charge in violent crime cases.162 Given the data-backed argument that violent crimes fuel mass incarceration,163 we thought a violent crime—though one that was marginal—would be helpful in determining how prosecutors use their discretion. Nonetheless, we hypothesized that maximal prosecutor discretion might be in a situation in which no victim is physically harmed.164 We anticipated that some prosecutors would charge the individual, and that many would refuse to charge given the lack of physical injury. Prosecutors were also provided with an abbreviated two-page (623-word) statutory code defining eight different crimes and

161. Robertson et al., supra note 35, at 823 tbl.1; see also Megan Wright et al., supra note 38.
162. See supra note 137 and accompanying text.
163. See supra notes 78–79 and accompanying text.
164. We certainly appreciate that the fact scenario we devised may have caused emotional harm or trauma to the victim.
sentencing guidelines based on the laws of a real state, specifying the punishment ranges for each crime. The study was designed to take participants about fifteen minutes to complete.

Respondents were first asked which charges they would apply, with choices ranging from no charges to aggravated assault. Respondents then indicated if they would press multiple charges. Next, respondents were asked to “indicate which confinement term and/or monetary penalty, if any, you would most likely seek in a plea deal with the suspect (i.e., the term and/or penalty that would ultimately satisfy your pursuit of justice). In answering this question, you may refer to the sentencing guidelines if you wish.” Respondents had separate blanks for confinement and monetary penalties and were also able to note suspension of these penalties. Most respondents also provided additional comments justifying their charging decisions, which we studied and coded separately. The vignettes manipulated the race and social class of the defendant in order to assess whether these status characteristics affected prosecutors’ decisions. We found no such effect. The findings from the experimental part of the study have been previously published.

We also collected information regarding how prosecutors make charging decisions, what information prosecutors need to make charging decisions, information about respondents’ careers as prosecutors, and demographic information, using both closed-ended and open-ended questions, the latter of which lent themselves to the qualitative analysis. We coded the written responses both deductively (based on the type of questions we asked) and inductively (based on themes that emerged from the data). We do not discuss strengths and limitation of our study design in this Article, as they have been addressed in prior work and will be discussed in future work.

165. We relied on the Utah criminal code, but all participating prosecutors received the same sample criminal code and were asked to charge based on that.
166. The case vignettes were manipulated between subjects in five conditions, a 2x2 factorial + control design to test effects of the individual’s race (white versus Black) and social class (accountant versus fast-food worker). In the control condition, race and class are redacted altogether in order to assess differences from the baseline. Moreover, a control allows us to pilot test a potential blinding reform to be used in the field, in which real prosecutors would make charging decisions without knowledge of these extraneous factors of race and class. The results of this aspect of the randomized controlled experiment are discussed in Race and Class: A Randomized Experiment with Prosecutors. Robertson et al., supra note 35, at 822–43.
167. Id.
168. An in-depth discussion of the study’s strengths and weaknesses will be available in our forthcoming article, Inside the Black Box of Prosecutor Decisions. Wright et al., supra note 38.
C. STUDY FINDINGS

Our study provides insight into the prosecutor’s role in continuing mass incarceration. For example, how many crimes do prosecutors charge based on a single incident of the type recorded in the study vignette? How much jail time do prosecutors propose on average for this type of incident, and what is the range of fine amounts? How often do prosecutors choose to decline charging? Is there national variation in the severity of charging?

Our study revealed several important findings, which we describe in detail below. First, while the vast majority of respondents did not opt to charge the most severe charge or impose incarceration or a fine, prosecutors often filed multiple charges, which is indicative of severity. Of the prosecutors who chose to charge a crime, 84% of prosecutors chose to charge only misdemeanors and 16% clearly chose to file felonies and misdemeanors).¹⁶⁹

Second, the number of charges filed and the declination rate deviated from expected outcomes. Based on prior research,¹⁷⁰ we thought that more prosecutors would impose no charges at all. We purposely provided a minor crime with little actual harm caused but with a potential for serious crime to be caused, and we described a suspect with no criminal record and obvious circumstantial difficulties. Yet 97% of prosecutors in our study chose to charge the suspect with either a misdemeanor or felony, and they charged him with an average of three crimes. In contrast to our observed 3% declination rate, prior studies have estimated 25–50% declination rates.¹⁷¹ This is probably the most significant finding that could help explain the filing increases discussed in Section I.B. These results may also reveal what prosecutors would like to charge, if they had the resources to do so.

Third, prosecutors imposed nonuniform punishments, even though they were given the same criminal code and asked to charge based on those standards. Some prosecutors in the same region fined a defendant $5,000 and others imposed no fine. Some recommended five years of incarceration and others only imposed community service. A few prosecutors recommended no charge, and some recommended up to eleven charges. The national lack of consistency or oversight of prosecutors is disturbing.

¹⁶⁹. Some of the options for charges were clearly misdemeanors and others were felonies. The only clear felony was aggravated assault. Sixteen percent of prosecutors charged this crime. However, there were other crimes that could have been intended as felonies (felony harassment, for example). So, of the 84%, other prosecutors likely were choosing to charge misdemeanors, but we cannot be sure. We did not consider these charges felonies in a choice to be conservative in the face of uncertainty. See Robertson et al., supra note 35.

¹⁷⁰. See sources cited supra notes 120–25 and infra notes 200–05.

¹⁷¹. See sources cited infra notes 208–22.
The following Section will discuss the results in more detail. Figures 3–5 illustrate the results discussed below.

1. Number of Charges

Prosecutors could choose from eight possible charges: disorderly conduct, loitering, public nuisance, criminal nuisance, harassment, endangerment, assault, and aggravated assault. Prosecutors could select as many charges as they thought appropriate and indicate if they would file multiple counts of the same charge. Almost 97% of prosecutors filed at least one charge. The mean number of charges was 3.16 [CI 2.98, 3.33], and excluding the fifteen (15) prosecutors who declined to bring charges, the mean number of charges was 3.26 [CI 3.09, 3.44]. The number of charges ranged from one (1) to eleven (11) (the maximum number of possible charges was sixteen (16)). The most common number of charges were two (26%), three (20%), and four (15%).

We also found extremely wide heterogeneity in how prosecutors resolved the exact same case, as illustrated in Figure 3. Although fifteen (15) prosecutors resolved the case without pressing any charges, the modal respondent imposed two charges, and some prosecutors sought seven or more charges, topping out at eleven (11).

FIGURE 3. Number of Charges per Prosecutor

![Bar chart showing the distribution of charges per prosecutor. The x-axis represents the number of prosecutors, ranging from 0 to 140. The y-axis represents the number of charges: zero, one, two, three, four, five, six, and seven or more. The chart indicates a high variation in charge filing across different prosecutors.](image-url)
2. Felony or Misdemeanor Charge

We examined whether a prosecutor would charge the defendant with a felony versus a misdemeanor (or no charge at all). Only 16% of prosecutors opted to charge the defendant with aggravated assault (the clear felony available), whereas 84% opted for charges that were a misdemeanor only (or could be either a felony or a misdemeanor). Thus, even though prosecutors had the option to charge a felony, most chose not to.

3. Monetary Penalty Recommendation

We also investigated whether a prosecutor would recommend a monetary penalty, and if so, the dollar amount of the penalty. About 41% of prosecutors opted to recommend a monetary penalty, whereas 59% opted for no monetary penalty. The mean monetary penalty recommended, including all prosecutors who recommended no monetary penalty, was $242.75 [CI $191.90, $293.60]. Excluding prosecutors who did not recommend a monetary penalty, the mean recommended fine was $640.25 [CI $530.77, $749.73]. There were wide disparities in monetary penalty recommendations. Of those prosecutors that recommended a monetary penalty, the amount recommended ranged from $10 to $5,000. The most common recommended amount was $500 (55/160 prosecutors recommended a $500 fine) with other common recommendations of $100, $200, $250, $750, and $1,000, as illustrated in Figure 4. The modal respondent sought $500 or less. Some of the qualitative responses on the monetary penalty will be discussed later.

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173. As noted above, we also studied whether the charges were dependent on race or socioeconomic status of defendant. See Robertson et al., supra note 35, for findings.
174. One advantage of our study design is that respondents were able to explain the reasons for their charging decisions. Many prosecutors took advantage of this opportunity. Of these respondents, thirty-five prosecutors said that they might increase or decrease charges depending on defendant cooperation. Twenty-nine respondents said they would charge a felony but allow the suspect to plead to a misdemeanor. Three respondents would have filed multiple charges but offered a plea to one felony charge in favor of dropping additional misdemeanor charges. Five respondents said they would charge multiple misdemeanors but allow the suspect to plead to a single misdemeanor charge. Ten respondents said they would charge multiple counts at various levels in order to expand plea options.
4. Confinement Recommendation

Next, the study examined whether a prosecutor would recommend a term of confinement, and if so, the minimum days of confinement. About 27% of prosecutors recommended confinement, whereas 73% opted for no confinement. The mean recommended minimum time of confinement, including prosecutors who recommended no confinement, was just over 21 days (21.40, CI [15.02, 27.79]). Excluding prosecutors who did not recommend confinement, the mean was 80.17 days [CI 59.51, 100.83]. Of those prosecutors that recommended confinement, the minimum number of days of confinement recommended ranged from 1 to 720 days, and the most common recommended amount was 30 days (31/122 prosecutors recommended) with common recommendations of 10, 90, and 180 days. Confinement results are shown in Figure 5 below. Most strikingly, we saw a wide disparity in prosecutors’ decisions with many prosecutors resolving the case without any jail time while others demanded a month, or even five years in one case. Some of the qualitative responses on confinement will be discussed later.

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175. Id. If nine extreme values are recoded to a maximum value of 95% percentile of the distribution, or 180 days, when prosecutors recommend confinement, the mean minimum number of days recommended becomes 63.05 [CI 51.15, 74.95].
D. DISCUSSION OF FINDINGS

Our national study of prosecutor decisionmaking illuminates a few key findings. Prosecutors charged a crime more often than we expected considering the estimates of prior studies,\textsuperscript{176} and rarely declined to charge. In addition, prosecutors were harsher with confinement and fines than may have been warranted. While it might be reassuring that prosecutors only charged the most serious crime 16% of the time, given the absence of physical harm and the defendant’s lack of criminal history, we were surprised that 97% of prosecutors charged any crime in this scenario and that the majority of prosecutors charged between two to four charges. The decision to file multiple charges could be for plea bargaining purposes, as prosecutors may have decided to charge everything they reasonably could with the idea that some charges could be bargained away during plea negotiations.

It is not just the number of charges that indicate severity. While about 70% of prosecutors in our study indicated that confinement was not appropriate, those who did recommend confinement most commonly suggested thirty days. To put these findings into perspective, thirty days of confinement has the average cost to defendants of $11,400 and could mean

\textsuperscript{176} See sources cited supra notes 126–29. Further discussion of this finding will be undertaken in future work.
the loss of employment, family, and housing. Of all prosecutors surveyed, 41% recommended a monetary penalty, with the most common fine imposed being $500. The fine of $500, which may not seem draconian to a white-collar professional, is more than the average American has in savings. These findings could demonstrate that prosecutors may be out of touch with the life circumstances of an average defendant.

We purposely gave prosecutors a scenario that was borderline and potentially understandable: a younger defendant with no criminal record who apparently had been drinking after a breakup, dangling a knife but not brandishing it or causing any injury. It could have involved a simple discussion with the suspect and his attorney, avoiding the creation of a record for the suspect. However, only 3% of prosecutors declined to charge the defendant. Indeed, almost every prosecutor charged the defendant with a crime, and the average number of crimes charged was three. What is significant about this is that the suspect in this scenario obtains a criminal record that could carry with it collateral consequences, sometimes for life in cases of felony charges, and could impact his employment prospects, even if the charge is later dropped. We recognize that the decision to charge may be complicated and not be driven simply by sympathy for an individual or concerns about evidence, but also by many other factors that affect the decision to charge a case. Evidentiary issues could doom a marginal case, while a sympathetic case with strong evidence may be charged.

Another key finding is that prosecutors demonstrated little uniformity, with some proposing a fine of $5,000 and others imposing no fine, even though they were given the same sample criminal code. Some recommended five years of prison time while others imposed community service. A few prosecutors recommended no charge, and some recommended up to eleven years. While maintaining individual discretion may be important for prosecutors, it may be surprising to the public to learn that the results could be so different depending on the prosecutor they happen to encounter.

Finally, and probably most importantly, the prosecutor decisions we

177. Shima Baradaran Baughman, Costs of Pretrial Detention, 97 B.U. L. REV. 1, 16 tbl.3 (2017) (discussing the economic studies tallying the costs borne by a defendant during pre-trial incarceration).
179. See discussion of collateral consequences supra note 25 and accompanying text.
witnessed may have parallels in the real world and may impact incarceration rates. It is possible that the dramatically low rate of declination and much higher rates of severe punishment we witnessed in our study are also found in real cases these prosecutors are handling. The high rates of prosecutor charging in this study could indeed explain the higher ratio of prosecutor charging to police arrests over the last ten years. The extremely low declination rate by prosecutors (3%) may also be a good indicator that the cases being dismissed are for evidentiary or witness-related reasons discovered later in the case. This finding indicates that prosecutors may be declining cases not due to the prosecutor’s progressive desire to cut incarceration rates or mercy for an individual, but because their case is simply not viable, especially when faced with a heavy caseload. The fact that prosecutors were harsher overall and declined to prosecute much less than anticipated supports the idea that prosecutors are a key contributor to mass incarceration. It also supports recent data that prosecutors have not eased up on charging like police have eased on arrests—and that despite the reduction in crime, prosecutors continue to charge with impunity. The implications of these findings are discussed in more detail in Part III.

III. PROSECUTOR IMPACT ON MASS INCARCERATION

We learned through our nationwide study that prosecutors may be harsher, less uniform, and less likely to decline cases than we might have expected based on earlier studies. There are many ways to further understand these findings. One approach would be to reconcile prosecutor actions with anticipated behavior to understand whether prosecutors are acting appropriately given public expectations. These findings could also be understood as revealing what a prosecutor would charge, without other real-world factors such as burdensome caseloads, limited office resources, and victim input. Another approach would be to consider, from a punishment theory standpoint, the typical prosecutor punishment and examine whether it is fitting for the crime. Yet another approach is to understand prosecutor actions and compare them to how scholars might predict prosecutors would act in this situation. Another potential approach would be a prescriptive one: we know what is wrong with prosecutors, so how do we begin to fix it? While all of these approaches are important and should be undertaken in time, the first question we want to ask is whether prosecutors generally acted lawfully and appropriately. In essence, did prosecutors get it right?

To determine whether prosecutors were generally on the right track, we

180. See supra note 144 (exploring how caseloads and other external factors impact prosecutor decisionmaking).
compare their actions to the leading national prosecutor standards—the American Bar Association (“ABA”) and the NDAA—and Supreme Court guidance on prosecutorial discretion. ABA and NDAA standards provide guidance for state prosecutors nationwide on all aspects of their duties and are the most widely accepted national standards for prosecutor behavior. Judging prosecutors by publicly accepted standards and Supreme Court precedent—though still subjective—creates a generally accepted basis by which to consider prosecutor behavior. We recognize that some prosecutors operate under internal guidelines or personal standards that may trump the standards indicated below.

This Part explores whether prosecutor behavior is aligned with governing standards and caselaw and how their decisions impact mass incarceration. In order to answer these questions, we break down the empirical findings of Part II into three categories: the decision to charge or not to charge, the severity of the charge, and the uniformity of prosecutor decisions. Section III.A discusses the national guidance on the decision to charge or not charge a crime. Section III.B reviews the guidance on severity. Section III.C discusses the guidance on uniformity. Section III.D covers the implications of these standards regarding prosecutors, the lack of transparency, and the effects of prosecutor decisions on mass incarceration, ultimately arriving at two important conclusions.

First, under Supreme Court precedent and national prosecutor guidelines, prosecutors are completely within their purview and are even arguably adhering to best practices in their charging decisions. There are not even loose recommendations against the severity or disparity in charging we witnessed in our study. Second, and most importantly, prosecutor’s decisions are critical to mass incarceration. Given the lack of data or transparency in charging, prosecutors are likely unaware that their individual decisions are collectively contributing to mass incarceration in America.

182. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS’N 2017); NAT’L PROSECUTION STANDARDS § 4-2.1 (NAT’L DIST. ATT’YS ASS’N 2009).

183. The ABA is the oldest and largest organization of attorneys in the United States and sets forth prosecution guidelines. See supra note 182. The NDAA, a nationwide association of prosecutors formed in 1950, has more than 5,000 members and “represents state and local prosecutors’ offices from both urban and rural districts, as well as large and small jurisdictions.” About NDAA, NAT’L DIST. ATT’YS ASS’N, https://ndaa.org/about/aboutndaa [https://perma.cc/RT6J-9LUL]; see also NAT’L PROSECUTION STANDARDS § 4-2.1 (NAT’L DIST. ATT’YS ASS’N 2009).

184. We intend to address the issues surrounding prosecutors’ internal guidelines in a forthcoming piece (on file with authors).
A. THE CHARGING DECISION

The first question is what guidance Supreme Court precedent and prosecutor standards give prosecutors on charging or declining to charge in a given case. National prosecutorial standards seem to expect much more of prosecutors than average attorneys yet expand their discretion. The ABA and NDAA make clear that their standards are “aspirational” or “best practices” and are not intended to serve as a basis of imposing “professional discipline” or serving as a “predicate for a motion to . . . dismiss a charge.” 185 The NDAA recognizes that the decision to charge is arguably the “most important” made by prosecutors in the exercise of their discretion. 186 NDAA recognizes that the decision may put into play a prosecutor’s amorphous “beliefs regarding the criminal justice system.” 187 The ABA states that a prosecutor should exercise “sound discretion” in performing her function. 188

The ABA affirms that the primary duty of a prosecutor is “to seek justice within the bounds of the law, not merely to convict.” 189 Likewise, the NDAA states that the primary responsibility of a prosecutor is to “seek justice.” 190 Scholars have recognized that prosecutors have very little guidance as to what it means to “seek justice.” 191 This phrase is purposely vague and has been interpreted differently by different scholars and prosecutors. 192 For some prosecutors, obtaining convictions has been the

185. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b) (AM. BAR ASS’N 2017). The NDAA similarly points out that if someone does not follow the guidelines, it “may or may not constitute an unacceptable lack of professionalism.” NAT’L PROSECUTION STANDARDS § 1 (NAT’L DIST. ATT’YS ASS’N 2009). “These standards are not intended to: (a) be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; (b) be used by disciplinary agencies when passing upon allegations of violations of rules of ethical conduct; (c) create any right of action in any person; or (d) alter existing law in any respect.” Id. § 4-1 cmt.
186. Id. § 4-1 cmt.
187. Id.
188. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS’N 2017).
189. Id. § 3-1.2(b).
190. NAT’L PROSECUTION STANDARDS § 1-1.1 (NAT’L DIST. ATT’YS ASS’N 2009).
192. Green, Seek Justice, supra note 26, at 608 (describing the duty to “seek justice” as ill-defined, protean, and vague); Ross Galin, Note, Above the Law: The Prosecutor’s Duty to Seek Justice and the Performance of Substantial Assistance Agreements, 68 FORDHAM L. REV. 1245, 1266 (2000) (“ ‘[S]eek justice,’ however, is vague and leaves a great deal of latitude for individual interpretation.”); Fred C. Zacharias, supra note 191, at 48 (“The ‘do justice’ standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct.”); David Aaron, Note, Ethics, Law Enforcement, and Fair Dealing: A Prosecutor’s Duty to Disclose
definition of seeking justice. As Bellin argues, “seeking justice” is an “analytical dead end” because justice is not concrete enough to create rules for how discretion should be used.

The Supreme Court has been very deferential to prosecutor discretion and has affirmed the “seek justice” principles of prosecutor guidelines. In Berger v. United States, the Court described a prosecutor as a “servant of the law” whose interest is not to “win a case, but that justice shall be done.” The Supreme Court has made very clear that the number of charges, “[w]hether to prosecute and what charge to file or bring . . . are decisions that generally rest in the prosecutor’s discretion.” The Court explained in McClesky v. Kemp that “discretion is essential to the criminal justice process” and that “clear proof” would be required to infer that a prosecutor has abused this discretion. The Supreme Court has always supported a prosecutor’s decision to refuse to prosecute in a given case. Courts, as well as prosecutor guidelines, have described prosecutors as representatives of an impartial government and have assumed that they are held to a higher standard than other attorneys. This higher standard is accompanied by a much higher level of discretion.

When it comes to declining cases, national prosecution standards are somewhat agnostic. ABA standards make clear that a prosecutor “is not obliged to file or maintain all criminal charges which the evidence might support.” It also makes clear that the prosecutor’s discretion includes the

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Nonevidentiary Information, 67 FORDHAM L. REV. 3005, 3027 (1999) (noting that the ethical standards provide very few specific duties of prosecutors).


194. Bellin, supra note 17, at 1210; see also Griffin, supra note 27, at 307; Nugent-Borakove, supra note 27. One scholar argues the ABA standards do not provide any limits. Melilli, supra note 17, at 681 (“The recommended threshold of the ABA Prosecution Standards—sufficient admissible evidence to support a conviction—is likewise far too easily satisfied to provide any real limitation upon, or incentive to exercise, case-specific evaluation by the prosecutor.”).


197. Id. at 124.


199. See Wayte v. United States, 470 U.S. 598, 607–08 (1985) (discussing the judiciary’s hesitancy to review prosecutorial decisionmaking); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”).

200. Criminal Justice Standards for the Prosecution Function § 3-4.4(a) (AM. BAR ASS’N 2017). The ABA lists factors to consider in charging decisions as:
ability to “initiate, decline, or dismiss a criminal charge.” The ABA, while acknowledging that declination might occur within a prosecutor’s discretion, does not encourage it. The ABA standards certainly go further than the NDAA standards. NDAA states that the prosecutor should decide whether initial charges should be pursued, and encourages a prosecutor’s office to “retain a record of the reasons for declining a prosecution” where permitted by law. However, when discussing charges, the NDAA standards typically consider what charges would be appropriate for the offense or to “serve the interests of justice.” Neither standard ever points out that declining to charge may help reduce unnecessary cases, costs, pretrial detention, or collateral consequences that cause mass incarceration. As a whole, neither approach views declination of charges as a positive move for prosecutor offices, defendants, or the public.

While some scholars have recognized declination as an important step to reducing prison rates, many argue that declination presents a wide variety of problems. “Declinations . . . , hidden from all traditional legal

(i) the strength of the case; (ii) the prosecutor’s doubt that the accused is in fact guilty; (iii) the extent or absence of harm caused by the offense; (iv) the impact of prosecution or non-prosecution on the public welfare; (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation; (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender; (vii) the views and motives of the victim or complainant; (viii) any improper conduct by law enforcement; (ix) unwarranted disparate treatment of similarly situated persons; (x) potential collateral impact on third parties, including witnesses or victims; (xi) cooperation of the offender in the apprehension or conviction of others; (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases; (xiii) changes in law or policy; (xiv) the fair and efficient distribution of limited prosecutorial resources; (xv) the likelihood of prosecution by another jurisdiction; and (xvi) whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

Id. 201. See id. § 3-1.2(e), (f). The ABA only goes so far as encouraging prosecutors to develop “alternatives to prosecution or conviction” to solve broader criminal justice problems. Id. § 3-1.2(e).

202. See id. § 4-1.1 (NAT’L DIST. ATT’YS ASS’N 2009) (noting that if state law allows law enforcement or other persons to initiate criminal charges, the prosecutor should still “decide whether the charges should be pursued”).

203. Id. § 4-1.7.

204. Id. § 4-2 cmt. (“The charging decision entails determination of the following issues: What possible charges are appropriate to the offense or offenses; and What charge or charges would best serve the interests of justice?”).

205. O’Neill, supra note 124, at 236 (“[D]eclination policies have both pragmatic, as well as aspirational, components.”). The closest the NDAA Standards come to these considerations is their recognition that “undue hardship . . . to the accused” is one factor that may be considering screening decisions. NAT’L PROSECUTION STANDARDS § 4-1.3 (NAT’L DIST. ATT’YS ASS’N 2009).


207. Murray, supra note 27 (describing nonenforcement as a means to nullify opposed laws); Roger
review”—yet fundamental to the operation of the American criminal justice system—provide the ultimate test of whether “reasoned judgments . . . or random choices” best describe “the day-to-day work of criminal prosecutors.”

Some scholars see declination as a potential reversal of the rule of law and worry that it may be happening often. Indeed, some have argued that declinations are on the rise in recent years. While there is little evidence of this being a problem, there may be fear that prosecutors will refuse to enforce the law and protect the public. Scholars see the power prosecutors have in declining cases, and it seems to be viewed negatively.


Miller & Wright, supra note 30, at 130. Miller and Wright studied a database from New Orleans between 1988–99 that covered “430,000 charges and about 280,000 cases (including 145,000 defendants), filed or adjudicated between 1988 and 1999.” Wright & Miller, supra note 30, at 60 n.109. There were a total of 217,267 charge declinations. Miller & Wright, supra note 30, at 136 tbl.1. We have to look at this number very carefully. Of these charges, 37.8% (85,091 charges) were declined because prosecutors opted to prosecute other charges, 18.4% (41,520 charges) were declined because the victim would not testify or could not be located, 10.5% (23,606 charges) were declined because testimony was insufficient to support the charge, 9.8% (21,961 charges) were declined because they were not suitable for prosecution, and other miscellaneous reasons supported the rest of the 18% or so of declinations. Id. There are very practical reasons prosecutors decided not to move forward with these cases. Even considering the legitimate reasons above, only 45,000 cases or so remain and are covered by other legitimate reasons like an insufficient nexus, faulty evidence, an unlawful search, aggregated charges, a good defense, and so on. Id. The point of all of this is that cases were not declined for other reasons a prosecutor might consider, like deciding that the law was unfair or because the defendant was poor or sympathetic in some other way. It is difficult to figure out the declination rate in the Miller study. However, given that there were 145,000 defendants and around 132,000 declined charges (meaning the remaining 298,000 charges were presumably acted on), the overall declination rate seems quite low but is unclear from the study, so no conclusions can be drawn on this point.

See Murray, supra note 27, at 176 (“[N]o one doubts that prosecutors sometimes may thwart the law’s application where, by its letter, it would govern.”).


Murray has asked how often prosecutors nullify the law and discusses some problems with this scenario. Murray supra note 27, at 176 (“The question is how far ‘sometimes’ goes. . . . [P]rosecutors are beginning to stretch their power beyond mine-run resource-driven nonenforcement and one-off ex post declinations in ‘anomalous cases’ of factual guilt.”).

Id.
Our study results track national guidance on declination and contradict the perception among scholars that declinations are common or on the rise. The prosecutors in our study rarely chose to decline to prosecute cases. Our declination rate was only 3% (97% of prosecutors charged at least one crime). Previous localized work on prosecutor declination estimated that prosecutors decline to prosecute anywhere from 25% to 52% of cases. But all previous studies of declination are retrospective; that is, previous studies lack the ability to see what the prosecutor would charge initially, rather than whether a prosecutor ultimately charges the case. Our study, in contrast, tracks the initial charging decision. We were able to consider whether a prosecutor would like to charge a case before the realities of poor evidence or uncooperative witnesses come to bare. This provides an insight into the preference of a prosecutor, which according to our study, is to charge a defendant in almost every instance. This is not to say that our prosecutors did not envision that charges would be dropped or sentences suspended, but it does demonstrate that prosecutors saw it as their duty to charge a crime when they were presented with evidence of one. Prosecutors were thus in line with charging-focused national standards.

B. SEVERITY IN CHARGING

The Supreme Court and national prosecutor guidelines are surprisingly silent on prosecutor severity. We have heard very little from any of these sources on what constitutes inappropriate harshness when it comes to charging decisions. In recent years, however, the Supreme Court has finally demonstrated that there is some bar against severe charging.

Starting with national prosecutor standards, there is very little guidance on charging severity. While NDAA standards encourage prosecutors to “screen potential charges to eliminate from the criminal justice system those

214. Wright and Miller’s New Orleans study found that prosecutors rejected “for prosecution in state felony court 52% of all cases and 63% of all charges.” Wright & Miller, supra note 30, at 74. According to Wright and Miller, New Orleans prosecutors said they declined an “exceptional” number of cases and acknowledged that New Orleans is a unique jurisdiction in other ways, including that they plea bargained less than 10% of cases and went to trial much more than other jurisdictions. Id. at 65; see also supra discussion in Section I.A; VERA INST. OF JUST., supra note 125; Donald M. McIntyre & David Lippmann, Prosecutors and Early Disposition of Felony Cases, 56 AM. BAR ASS’N J. 1154, 115657 (1970).

215. See supra notes 207–14 for discussion of Wright and Miller study and other declination articles.

216. Indeed, some prosecutors indicated that they were planning to drop charges as part of the plea-bargaining process. See Wright et al., supra note 156; see also supra notes 22–24; Robertson et al., supra note 35, at 823 tbl.1.

cases where prosecution is not justified or not in the public interest,
they put little emphasis on encouraging prosecutors to consider the severity of the
punishment as compared to the harm caused.\textsuperscript{218} When it comes to severity
and declinations, the ABA standards declare that “[t]he prosecutor serves the
public interest and should act with integrity and balanced judgment to
increase public safety both by pursuing appropriate criminal charges of
appropriate severity, and by exercising discretion to not pursue criminal
charges in appropriate circumstances.”\textsuperscript{220} Unfortunately these standards do
not clarify what “appropriate severity” means.\textsuperscript{221}

None of the standards encourage prosecutors to charge just one crime
when multiple charges could be considered.\textsuperscript{222} Nowhere in the standards
does it ask prosecutors to place a higher bar on charges in certain
circumstances, particularly when considering an individual without a
criminal record. Nowhere in the standards are prosecutors advised not to
charge the most severe charge possible. Nowhere do the standards give
substantial emphasis to the careful consideration a prosecutor should make
due to the impact of even a short prison stint on an individual’s life. While
scholars have emphasized the importance of prosecutors not charging the
hardest punishment possible for a particular crime,\textsuperscript{223} national prosecutor
standards have not determined the bar for severity in punishment.

The Supreme Court’s limits on sentence severity originate from the

\textsuperscript{218} Nat’l Prosecution Standards § 4-2.3 (Nat’l Dist. Att’ys Ass’n 2009).

\textsuperscript{219} At most, these standards encourage the prosecutor to consider available civil remedies or
whether the punishment is “disproportionate.” Id. § 4-1.3(d); Criminal Justice Standards for the
Prosecution Function § 3-4.4(a) (Am. Bar Ass’n 2017).

\textsuperscript{220} Criminal Justice Standards for the Prosecution Function § 3-1.2(b) (Am. Bar Ass’n
2017). For a discussion of appropriate severity, see generally Jeffrey Bellin, Defending Progressive
(laying out policy-based prosecutor lenience).

\textsuperscript{221} Green, Prosecutorial Discretion, supra note 26, at 606 (“[T]here is no established vocabulary
for judging prosecutors’ exercise of discretion . . . .”); Thomas, supra note 26, at 1057–58 (comparing
the more strict and hierarchical prosecutorial system of Germany to that of the United States); Gershman,
supra note 26, at 152 (noting other scholarship often cited for “the need for drafters of codes of
professional responsibility to write meaningful rules”); Green, Seek Justice, supra note 26, at 619 (noting
what qualifies as an “abuse of discretion” has not been “squarely answered”); Medwed, supra note 26, at
42 (relying on “justice” as prosecutor’s main guiding principle is “problematic because of the term’s
inherent vagueness”); Bresler, supra note 26, at 1301 (arguing that ABA language used in establishing
ethical standards “degenerates into malarkey upon closer examination”); Green & Levine, supra note 26,
at 151 (describing the ABA ethics rules as “non-enforceable guidelines”).

\textsuperscript{222} See Nat’l Prosecution Standards § 4-1.3 (Nat’l Dist. Att’ys Ass’n 2009) (referencing
factors prosecutors consider when making charging decisions but not encouraging prosecutors to limit
charges to just one crime).

\textsuperscript{223} Green, Prosecutorial Discretion, supra note 26, at 599 (arguing the theory that people should
not be punished as harshly as the law permits is essential to the U.S. system); Mary D. Fan, Beyond
(advocating for proportionality review with respect to penal severity).
dictates of the Magna Carta and Eighth Amendment. According to the Supreme Court, the Eighth Amendment prohibits punishments that are “grossly disproportionate.” To determine disproportionality, the Court measures “the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender,” although the Supreme Court has made clear that the Eighth Amendment’s Cruel and Unusual Punishments Clause applies only a “narrow proportionality principle” when it comes to noncapital sentences.

The Supreme Court has rarely struck down a sentence for severity. For instance, in Rummel v. Estelle, the Court held that prosecutors did not violate the Eighth Amendment for charging and sentencing a three-time criminal offender to life in prison without parole. The Supreme Court has also upheld a defendant’s sentence to forty years in prison for possession with intent to distribute nine ounces of marijuana. Though members of the Court have mentioned, in a dissenting opinion, that even if punishment does not serve a utilitarian function, it is important to consider whether the person “deserves such punishment.” The example the dissenters gave of grossly disproportionate punishment is a “mandatory life sentence for overtime parking.” A life sentence for a parking violation seems to demonstrate the limit of a prosecutor’s charging power—showing that it is nearly unlimited as far as severity.

The Supreme Court has made clear that harsh charges are not a problem and that only illegal or inappropriate charges are prohibited. For instance, the Supreme Court has clarified that prosecutors “may exercise their discretion” to charge a felony or misdemeanor, when either charge is permissible. Indeed, it has gone further to state that the Court is a not a

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226. Id. at 288.
232. Id.
“superlegislature” with a duty to “second-guess [legislative] policy choices.” Berger v. United States also states that a prosecutor may “prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.” The Court arguably envisions a prosecutor being tough. Maybe charging several crimes when one charge is possible constitutes a “hard blow,” which is permissible. Overall, the Supreme Court has historically approved of severe sentences as long as they are not grossly disproportionate, which seems to be a very low bar.

However, in a 2015 case, the Supreme Court hinted that the status quo of charging the most severe sentence possible may not be acceptable anymore. While the language relied on here is certainly dicta and some may not interpret it as pushing back on prosecutors’ charging power, we argue that these cases suggest that the Court is open to challenging the validity of charging the most severe sentence possible. In Yates v. United States, during oral arguments, the government attorney argued that his understanding of the guidance provided by the U.S. Attorney’s Manual is that “the prosecutor should charge . . . the offense that’s the most severe under the law. That’s not a hard and fast rule, but that’s kind of the default principle.” Justice Scalia responded, “Well, if that’s going to be the Justice Department’s position, then we’re going to have to be much more careful about how extensive statutes are. I mean, if you’re saying we’re always going to prosecute the most severe, I’m going to be very careful about how severe I make statutes.” The government then backtracked and argued that the government is “not always going to prosecute every case, and obviously

“wobbler[s]” as either a felony or misdemeanor based on defendant’s record).

236. In Bond v. United States, in a rare move, the Court second-guessed federal prosecutors in using their discretion. The Supreme Court questioned a specific prison sentence against Bond for a chemical weapons offense, which demonstrated a displacement of “public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign.” 572 U.S. 844, 865 (2014). Since this is a case about a federal prosecutor and invokes federalism concerns, it could be an exception, and the Court may have been more concerned about the federalism perspective than the prosecutor’s decision to bring federal charges. However, this case may also signify a move towards greater judicial oversight of prosecutors in general.

238. Transcript of Oral Argument at 29, Yates v. United States, 574 U.S. 528 (2015) (No. 13-7451). During oral arguments in Bond v. United States, Justice Alito said, “If you told ordinary people that you were going to prosecute Ms. Bond for using a chemical weapon, they would be flabbergasted. It’s—it—it’s so far outside of the ordinary meaning of the word.” Transcript of Oral Argument at 37, Bond, 572 U.S. 844 (No. 12-158). Justice Kennedy also questioned the prosecutor bringing this charge: “It also seems unimaginable that you would bring this prosecution. But let’s leave that.” Id.
239. Transcript of Oral Argument at 29, Yates, 574 U.S. 528 (No. 13-7451); see also Transcript of Oral Argument at 36, Bond, 572 U.S. 844 (No. 12-158).
we’re going to exercise our discretion.”240 Earlier, Justice Scalia had lamented the extreme charge: “What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?”241 The Supreme Court ultimately reversed the sentence, interpreting the criminal statute differently than the government.242

This exchange in Yates illustrates a few important points. The government seems to acknowledge that the rule of federal prosecutors is to charge the most severe crime possible, and this is supported clearly by the U.S. Attorney’s Manual.243 But the Supreme Court seems to indicate that at least in that instance, it was not supportive of this general rule. Although this is the Court opining on a federal statute charged by federal prosecutors, this could signal a trend among courts that charging the most severe statute will not be acceptable—even for state prosecutors.244

If one were to apply Supreme Court and national guidelines, the prosecutors who participated in our study would likely be deemed to have used their discretion appropriately and even arguably within best practices of prosecutors. Although, there was great heterogeneity that makes it difficult to generalize. As a reminder, 30% of the study prosecutors recommended jail time for an individual with no criminal record and who seemed to need short-term therapy or a cooling-down period. The average prosecutor recommending confinement charged three crimes and sought thirty days in jail, which would likely result in this individual losing his job, housing, and family life. The severity in fines we witnessed from prosecutors also did not contradict national guidelines. Recall that $500 was the most common fine imposed for this situation, in which no victim was physically injured and no property was damaged. Broad surveys of the U.S. population show that six out of ten Americans do not have $500 in savings, which suggests that this fine amount may be onerous.245 It would certainly be an amount an average fast-food worker would be unable to pay, which could lead to other serious criminal justice implications for an arguably minor offense.246

It is compelling that a national sample of prosecutors almost universally

241 Id. at 28.
243 U.S. DEP’T OF JUST., JUSTICE MANUAL § 9-27.300 (2018) (“Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses.”).
244 Reviewing state court limits on prosecution would be helpful to determine what differences exist in state severity limits.
245 See supra note 178.
246 In one of our conditions, the defendant was a fast-food worker. See supra Part II.
charged, and in some instances recommended a significant jail term for an individual who certainly made a serious mistake but did not cause any physical harm or property damage and did not have the risk factors of future violence. 247 Aside from the effects on defendants and their families, such incarceration also imposes onerous financial costs on the government, amounting to over $65,000 per year in some jurisdictions. 248 Indeed, 8% of the prosecutors in our study wrote qualitative comments justifying their punishment recommendations along the lines of a “few days in jail would do good” for the accused. This contradicts evidence showing the opposite effect of even short stints in jail. 249 The costs borne by the prosecutor for these sentences is nothing, and in fact, some scholars would argue that prosecutors are “rewarded” for creating more prisoners and are harmed in their career by being too lenient. 250 But the cost to the defendant may be devastating. 251

Even though our prosecutors recognized that the crime was minor, they did not consider the devastating effect of criminal charges. One fifty-five-year-old respondent’s entire reasoning for their recommended sentence and fine summarizes it best: “no big deal.” 252 Yes, the crime may be truly “no big deal,” but the consequences the defendant is left with are life-altering. Any criminal charges and a few days in jail can even have devastating effects on an individual’s life. Overall, prosecutors in our study did not indicate through their written comments that they were sensitive to the potential severity of their decisions and recommendations, and they had little reason to be, given the national guidance they operate under. Unlike federal prosecutors, who are encouraged to charge the most severe charges possible, state prosecutors are not necessarily acting under similar guidance, but their actions seem to indicate that this is their unwritten rule.

Overall, in examining Supreme Court precedent and major prosecutor guidelines, our study demonstrated that prosecutors are completely within their purview in charging and even arguably applying best practices. In other words, there are not even loose recommendations against such severity in

247. Shima Baradaran & Frank L. McIntyre, Predicting Violence, 90 Tex. L. Rev. 497, 530 (2012) (demonstrating empirically that individuals who have three or more convictions for violent crimes are at a high risk for future violent crimes).


249. See Shima Baradaran Baughman, Dividing Bail Reform, 105 Iowa L. Rev. 947, 954 (2020) (“Any jail time even for a less serious crime leads to loss of a job, increased recidivism risk, and other devastating effects on defendants’ lives.”).

250. BARKOW, supra note 10, at 8–9; see also infra note 282 and accompanying text.

251. See supra notes 177–79.

252. This prosecutor was born in 1965 and works in Region 6 (Alabama, Kentucky, Mississippi or Tennessee).
sentencing. The fact that there are no standards prohibiting the type of prosecutor charging revealed in our study may demonstrate the real problem. And given the lack of data or transparency in charging, prosecutors are likely unaware that their individual decisions are collectively contributing to increasing mass incarceration. Indeed, ABA, NDAA, and Supreme Court precedent say nothing about exercising restraint in prosecutorial charging, though they do emphasize even-handedly applying punishments. Though the Supreme Court has cast a doubt on the unlimited nature of prosecutorial discretion in the last ten years,\textsuperscript{253} there has been no guidance that would prohibit prosecutors from charging more crimes than they need to. And only the application of criminal sentences brought by federal statutes have been questioned for severity, not state statutes, which are likely to receive more deference.\textsuperscript{254} Federal guidelines actually encourage charging the most serious crime possible. In order to reduce mass incarceration, it is necessary to reexamine guidance for prosecutors to determine if the current level of severity is appropriate.

C. UNIFORMITY IN CHARGING

The Supreme Court and national prosecutor guidelines make it clear that uniformity is an important principle. Indeed, similarly situated defendants should be treated the same. Our study, however, demonstrated remarkable variability in sentencing.

The Supreme Court has expressed the importance of uniformity of treatment of defendants but made clear that prosecutors are not necessarily abusing their discretion when defendants receive disparate charges. The Supreme Court has reiterated that the Constitution “requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.”\textsuperscript{255} Indeed, in recent years, the Supreme Court has shown a slightly less deferential view towards prosecutorial discretion. It has specifically

\begin{itemize}
\item \textsuperscript{254} Due to federalism dictates, it is likely that state prosecutors applying state criminal codes will receive more deference in the criminal context than federal prosecutors applying federal laws.
\item \textsuperscript{255} Hayes v. Missouri, 120 U.S. 68, 71–72 (1887).
\end{itemize}
expressed concerns about uniformity of prosecutor power. The Court in *McDonnell v. United States* and *Marinello v. United States* made clear that statutes that provide prosecutors too much power through “abstract, general” language are not permitted. This risks a prosecutor “pursu[ing] their personal predilections,” which could result in the nonuniform execution of that power across time and geographic location.

The Supreme Court—at least generally—is in support of uniform execution of prosecutorial power, though mere claims of disparate treatment are generally not actionable, even where the disparate treatment tracks a protected class such as race.

Both the ABA and NDAA prosecution standards make clear that uniformity is important in prosecutorial charging. NDAA standards specifically warn against an accused “receiving substantially different treatment because the case was assigned to one individual in the office and not to another.” Among NDAA factors prosecutors are to consider in screening potential charges are the “charging decisions made for similarly-situated defendants.” One of the ABA standards considering charging specifically recommends avoiding “unwarranted disparate treatment of similarly situated persons.” While ABA standards mention a “reasonable” amount of training for prosecutors with periodic review of office policies, there is no mention of training or review to ensure uniformity of charging.

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258. See ALEXANDER, supra note 5, at 37.

259. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3.4.4(a)(ix) (AM. BAR ASS’N 2017); NAT’L PROSECUTION STANDARDS § 1-5 cmt. (NAT’L DIST. ATT’YS ASS’N 2009). Standard 4.1.2 of the NDAA prosecution standards encourages the chief prosecutor to recognize the importance of the initial charging decision and provide “appropriate training and guidance to prosecutors regarding the exercise of their discretion.” Id. § 4-1.2.

260. See NAT’L PROSECUTION STANDARDS § 1-5 cmt (NAT’L DIST. ATT’YS ASS’N 2009).

261. See id. § 4-1.3(i).


263. See id. § 3-1.13(a)(d). The ABA standards provide the scope of recommended prosecutor training:

In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor’s core training curriculum should address the overall mission of the criminal justice system. A core training curriculum should also seek to address: investigation, negotiation, and litigation skills; compliance with applicable discovery procedures; knowledge of the development, use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry, effective conditions of probation, and collateral consequences; civility; and a commitment to professionalism; relevant office, court, and defense policies and procedures and their proper application; exercises in the use of prosecutorial discretion; civility and professionalism;
While the Supreme Court and prosecutor standards make clear that charging and sentencing of defendants should be uniform, we recognize that some scholars do not necessarily believe that uniformity of punishment is an important or achievable goal.\textsuperscript{264}

When we compare these standards to our study findings, however, we find hardly any uniformity of charging. Prosecutors charged the same defendant to varying terms ranging from five years of prison time to thirty days of jail time or community service. Similarly, some prosecutors charged the defendant hefty fines of up to \$5,000, while others charged as little as \$250. The range was very large across our national sample, even within geographic regions, and seemed very random.\textsuperscript{265} These findings demonstrate that prosecutorial discretion is indeed broad, largely unsupervised, highly variable, and inconsistent. Most of this variation was inexplicable. This study demonstrates that for the same crime, individuals could receive disparate sentences depending on the prosecutor they interact with. Furthermore, there is no change in sight, as national guidelines and Supreme Court standards prefer uniformity but do not give any details on what this looks like or create actionable mechanisms to challenge disuniformity, and prosecutors do not seem concerned with national guidelines.\textsuperscript{266} This seems to be left to individual states and offices. There is also no leading guidance on the importance of maintaining uniformity of punishment for similar defendants. Thus, the final limit on a prosecutor’s discretion is misconduct.\textsuperscript{267}

 Prosecution is a local function and lacks the centralization or uniformity that

\begin{quote}
appreciation of diversity and elimination of improper bias; and available technology and the
ability to use it.
\end{quote}

\textit{Id.} § 3-1.13(b).

\textsuperscript{264} See generally Michael Davis, \textit{Sentencing: Must Justice Be Even-Handed?}, 1 L. & Phil. 77 (1982); Kay L. Levine, \textit{Should Consistency Be Part of the Reform Prosecutor’s Playbook?}, 1 Hastings J. Crim. & Punishment 169 (2020) (arguing that prosecutorial consistency of process is more important than consistency of outcomes for defendants). James Q. Whitman believes that other Western countries that are concerned with pre-conviction equality, while the United States is only concerned with post-conviction equality. James Q. Whitman, \textit{Equality in Criminal Law: The Two Divergent Western Roads}, 1 J. Legal Analysis 119, 121 (2009). “Continental law worries most that accused and suspected persons may suffer disparate treatment, while American law worries that convicted persons may suffer disparate treatment. This is a striking contrast indeed, which deserves more attention . . . .” Whitman notes. \textit{Id.}

“Contemporary American law has generally chosen to pursue equality by limiting discretion during the latter phases of the criminal justice process,” he continues, arguing this is especially true at the sentencing, infliction of punishment, and termination of punishment stages of the criminal justice process. \textit{Id.} at 127.

\textsuperscript{265} We did however observe some correlations that merit further study. White and Hispanic prosecutors recommended higher amounts of confinement than Black prosecutors. It is also interesting that Mountain division prosecutors were harsher when it came to monetary penalties compared to New England, Middle Atlantic, and West North Central prosecutors. Further exploration into the causes of variability are required.

\textsuperscript{266} Uniformity can certainly also come from internal guidelines. This aspect of the study will be discussed in a future paper.

\textsuperscript{267} Green, \textit{Prosecutorial Discretion, supra} note 26, at 596.
other state or federal actors may have. In sum, even though uniformity is an important objective for prosecutors, our study demonstrates that it is not often achieved. While uniformity is certainly valued, there is currently no way to implement it nationally.

D. MITIGATING A PROSECUTOR’S ROLE IN MASS INCARCERATION

In considering how to mitigate prosecutorial impacts on mass incarceration, it is enlightening to consider what prosecutors believe guide their decisions. When asked how they approach cases, some prosecutors in our study wrote a version of the national prosecutor guidelines: “do justice,” for example. One prosecutor wrote, “Just do the right thing. Everything else will take care of itself.” And one particularly honest response was, “Use discretion, don’t embarrass the office.” While prosecutors seem to say the right thing as far as their overall goal, the vague national (and likely local) guidance they receive may encourage them to believe that they are acting appropriately. In fact, under national guidelines, there is no indication that our study prosecutors were not completely within their discretion in charging three crimes in a minor case and imposing thirty days of incarceration. There is no indication that granting a five-year sentence for an assault violates any Supreme Court principles of proportionality or uniformity. And if embarrassing the office is a concern underlying prosecutor decisions, it will likely be more embarrassing to charge less and appear soft on crime. What is more, given that avoiding severity and ensuring uniformity is not circumscribed by any national standard, it may be expected that some prosecutors would let a defendant off with community service while some would charge a year of confinement. Because discretion is still valuable—due to the alternative being a rigid charging scheme—we consider how to maintain prosecutor discretion while pushing prosecutors to consider their impact on mass incarceration.

While current national guidelines for prosecutors seem appropriate, examining them in light of prosecutor charging may demonstrate that something is missing. We learned in Section I.B that prosecutors have not reduced charging commensurate to police arrest rates in the last ten years and that this may be impacting mass incarceration. Our study also demonstrates that prosecutors would like to charge more than we might have.

268. See id. at 619–20.

269. While this is by no means conclusive, in our study, prosecutors generally did not refer to prosecutor standards when determining whether to charge. Indeed only 0.9% (5) of respondents mentioned NDAA standards by name, and only one prosecutor mentioned ABA standards. Only 2.5% (14) of prosecutors listed standards as important without providing a name for the national standards that applied.
expected, decline to prosecute many fewer cases at the outset, and are not uniform in their decisions. Examining national prosecutor guidelines and Supreme Court guidance also demonstrates that prosecutors are acting appropriately in charging three crimes for a simple assault and imposing a year or more of incarceration, as prosecutors are advised to be zealous advocates and severity is not limited. All of this might support an argument that we should impose strict charging guidelines for prosecutors. On the other side, some prosecutors using their discretion will always interpret guidelines differently than others. Is removing discretion the answer? For the reasons articulated below, we do not advocate removing prosecutor charging discretion despite the negative impacts individual charging decisions may have. We do believe, however, that at a minimum, national and local guidelines should explicitly advise prosecutors not to presumptively charge the most serious crime possible and to consider the effects of their charging decisions on mass incarceration. The Supreme Court has moved in this direction, and more explicit guidance to this effect is welcome.

Indeed, the first reform we suggest is making national guidance explicit that prosecutors should limit their impact on mass incarceration. In order for prosecutor offices to effectively track their impact, data collection by office and region is critical. While prosecutors seek justice, they have had no meaningful guidance to consider the broader implications of their actions on incarceration. Before our study, it was unclear whether prosecutor charging rates were out of step with the national reduction in crime and arrests. We now see that prosecutors may have room to reduce criminal charges, given the reduction of crime and arrests. Arming prosecutors with this kind of information may influence individual and office level prosecutor decisions. Requiring prosecutor offices to consider the costs of incarceration to their jurisdiction and to the accused would also be helpful. Data on charging and costs of charging decisions should be available to prosecutor offices so that they may consider the broader impacts their decisions have on mass incarceration.

The typical response to prosecutorial problems—reduced discretion—may not provide the hoped for reductions in mass incarceration. As it

270. Baughman, supra note 49, at 1125 (“If success [for prosecutors] includes cutting costs, . . . prosecutors may be praised for seeking more community service sentences, more restitution and fines, and less incarceration for less serious crimes.”).

271. See Ronald F. Wright, Prosecutorial Guidelines and the New Terrain in New Jersey, 109 PENN ST. L. REV. 1087, 1104 (2005) (“Perhaps the only way to remove some of the severity [of the existing system] is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently.”); PFAFF, LOCKED IN, supra note 12, at 149–50 (explaining that New Jersey plea bargaining guidelines increases sentencing disparity and harshness); Bellin, supra note 58, at 837 (noting as Bellin astutely points out, “[t]he prosecutorial charging guidelines and enhanced transparency Locked
currently stands, most states are much less punitive with crimes than the federal government. The federal sentencing guidelines removed much discretion from prosecutors with the intended goal of creating an “effective, fair sentencing system.” Indeed the guidelines aimed to “achieve reasonable uniformity in sentencing by narrowing the range of sentences that could be imposed for similar offenses committed by similar offenders” and to “seek proportionality in sentencing by imposing different sentences.”

Unfortunately, the goals of uniformity and proportionality were not met by federal sentencing guidelines without a commensurate (and unintended) increase in incarceration. Some have argued that the criminal justice system is a “hydraulic system . . . like a water balloon: If you squeeze it at one decision point in the effort to control discretion, it will bulge at another.”

In other words, if we demand charging equality, will it be more difficult to obtain sentence equality? This is the worry. Moving towards state charging guidelines similar to the federal sentencing guidelines may actually worsen mass incarceration in the way the federal guidelines have.

Rather than strict guidelines, providing simple principles could help prosecutor charging. Some principles to consider are: (1) do not charge more than one crime when one will do; (2) do not automatically charge the most severe charge; and (3) consider avoiding the creation of a new criminal record. Additionally, before charging, always consider if an alternative exists

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*In champions will not reduce incarceration*.


273. See U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 1.A.3 (2018). Sentencing guidelines apply to judges, but it is important to note that prosecutors still hold a large amount of discretion as to the initial charging decision, which could trigger mandatory sentencing ranges.


276. United States v. Angelos, 345 F. Supp. 2d 1227, 1263 (D. Utah 2004), aff’d, 433 F.3d 738 (10th Cir. 2006), (concluding that the “55-year sentence mandated by [the federal sentencing requirements] in this case appears to be unjust, cruel, and irrational”); Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005) (concluding that “the federal sentencing guidelines system has failed” because it produces bad outcomes too often); MAUER & KING, supra note 5, at 7–8 (arguing federal sentencing guidelines result in more people incarcerated for longer periods of time).
to charging a crime, such as referral to mental health services, drug addiction support, mediation, or other social services, options which some respondents in our study wrote that they would pursue. This focus would require a system in which a prosecutor’s job advancement does not rely on their increasing punishment but on creatively solving community problems, sometimes without a day in jail. There are certainly other principles that might be considered for improved prosecutor charging and other solutions that may involve removing or drastically altering the role of prosecutors and police in criminal justice.

Instead of removing discretion through national charging guidelines, an independent local and state review of prosecutorial charging practices and data on local practices might improve uniformity and reduce severity in charging. Indeed, one of us has argued elsewhere that prosecutors need a constitutional check, like a regular independent internal review. This could come through an internal review board under the purview of the governor and attorney general or an independent, disinterested body that reviews prosecutor charging decisions and plea-bargaining agreements. A quarterly or biannual review could help with uniformity and severity between prosecutors in an office or within a particular region. Similar cases could be compared to consider charging uniformity and overall severity and incarceration rates in a region, and these decisions could be analyzed in the context of jail space and community goals.

277. See supra note 26–27.
279. Baughman, supra note 49, at 1123 (arguing for “quarterly internal review procedures to determine whether individual prosecutors are meeting office goals”).
280. Id. at 1138–39. Jennifer Lee noted the potential benefits of mandating prosecutorial data collection:

Mandating the collection of various procedural data on matters such as arrests, prison time, and plea bargains creates a valuable metric by which to assess ethics and help voters make informed decisions during prosecutorial elections. Tracking behavior and placing prosecutors under the care of the Attorney General also instills a heightened sense of professional accountability. By placing the responsibility of creating internal discovery policies upon the attorney general, states gain the ability to conduct a centralized system of control and maintain uniformity and fairness in criminal matters. Independent prosecutorial review panels expedite the complaint process because panel members are able to focus exclusively on prosecutors, unlike state bar associations tasked with investigating and disciplining every licensed attorney in the state.

Lee, supra note 60, at 1.
281. Bellin, supra note 58.
282. Broad public transparency on prosecutorial charging factors might not improve incarceration. Some scholars argue that prosecutors should inform the public of what factors they consider when making charging decisions. Green, Prosecutorial Discretion, supra note 26, at 622; Sawyer, supra note 17, at 621 (noting prosecutors feel compelled to hide their motivations for prosecuting from the public, which “reduces the availability of information that voters need to make informed choices, limits the control the
changing the current incentives prosecutors have to overcharge because their success is too often based on increasing punishment whenever possible. Larger structural changes could also be considered to improve prosecutorial charging. Such independent review maintains prosecutor discretion while potentially leading to broader discussions among prosecutors on the right way to balance competing interests of justice to victims and society and impacts on mass incarceration.

Improving our understanding of how prosecutors are charging nationally is critical to stopping the growth of mass incarceration. Prosecutors need to be made aware of their role in mass incarceration and held responsible through independent review of their collective actions. It is unclear from our data, but it could be that prosecutors are routinely charging individuals with several crimes. It appears harsh to charge crimes in almost every case, even minor ones. But a prosecutor may impose these charges, knowing that they can be used for leverage in plea bargaining and that some of them will be dropped. Individual prosecutors are rewarded for winning cases, holding defendants accountable, and making the office “look good.” However, what may go unnoticed is that often during plea negotiations—where many if not all of these charges are dropped—an individual is in pretrial detention, which is the greatest contributor to jail overcrowding.
and adds to the mass incarceration problem by sheer volume of minor cases. The defendant spends time in jail, even if the case is later dismissed. A prosecutor starting a case by bringing several charges for a minor crime ends up costing both the state and the defendant for their harsh charging choices when the defendant spends time in jail. Without data collection at office, regional, and national levels, an individual prosecutor has no idea what the overall effects of their charging decisions are. Prosecutor offices face no consequences for the costs of incarceration they impose and do not have to deal with the collateral consequences they impose on defendants, like the loss of employment and housing that frequently accompany a short stint in jail. Simple awareness by prosecutor offices of these collective costs, accompanied by increased accountability through independent review, could lead to new thinking on prosecutor charging practices and eventually a shift in mass incarceration.

CONCLUSION

Prosecutors unknowingly contribute to mass incarceration through individual charging decisions. Previous work argues that prosecutors increased crimes charged from 1980 to 2007. However, during the last ten to fifteen years, crime rates have dropped, and arrest rates have gone down. But the findings in our study demonstrate that during this same time period, prosecutors have actually increased the ratio of criminal court filings per arrest. That is to say, police are helping decrease mass incarceration, but prosecutors are not doing their part, possibly because they are not aware of the problem. There is very little data or transparency for individual prosecutors to know how other prosecutors are charging nationally.

The study relied upon here demonstrates why this trend of excessive charging may be a national issue. In our study with a sample of prosecutors from across the nation, depicting a minor, assault-based crime with no physical injury, respondents consistently charged crimes in almost every instance. Our study demonstrates the lowest rate of declinations ever found in a national study, with only 3% of prosecutors refusing to charge a crime. We also observed surprising severity and wild variability in charging. Indeed, prosecutors most commonly charged three crimes, and some charged

287. See Baughman, supra note 23.
289. See Bazelon, supra note 12; PFAFF, LOCKED IN, supra note 12.
290. See Baughman, supra note 49.
291. See Bazelon, supra note 12; PFAFF, LOCKED IN, supra note 12. But see Reilly, supra note 55 (providing an example of limits on prosecutor’s ability to file or dismiss charges).
up to eleven. While less than 30% of prosecutors recommended jail time and 40% recommended a fine, those who did so recommended incarceration ranging from five years to thirty days and fines from $5,000 to $500. Our review of national guidelines from the Supreme Court and prosecutor standards demonstrate that national guidelines do not stand in the way of any of these decisions and may even encourage severe charging practices.

We do not prescribe a single solution for reducing severity or improving uniformity of prosecutor charging. We do not recommend removing discretion, but we do believe that collecting prosecutor charging data and requiring a regular independent review of prosecutorial decisions could help prosecutors consider the impact of their charging decisions. Our hope is that informing prosecutors of the scale of the charging problem and its effects on mass incarceration will lead to a more careful approach to prosecutorial charging nationwide.
APPENDIX

FIGURE 1. National Estimates of State Criminal Filings and Arrests, 2006–2018

![Graph showing estimated number of criminal filings and arrests from 2006 to 2018]

Notes: The difference in arrests and filings could be due to a number of factors, including that the additional filings are for parole or probation revocation cases, meaning there was no new arrest, but there was a new filing. Parole violation filings have decreased in the last ten years, though not as much as arrest or overall filings, which include new cases, reopened cases—which count parole violations—and reactivated cases. It is unclear how much of a factor parole violations play in the decrease in criminal filings.

- 2006: STATE COURTS 2007, supra note 100; SNYDER, supra note 107.

2011: NCSC did not collect data.


2018: CASELOAD DIGEST 2018, supra note 95, at 7; CRIME IN THE UNITED STATES 2018, supra note 106.

Calculation for Change in Criminal Filings:

\[
\left( \frac{17,000,000 - 21,600,000}{21,600,000} \right) \times 100 = -21.3\%
\]

Calculation for Change in Criminal Arrestrain:

\[
\left( \frac{10,310,960 - 14,382,852}{14,382,852} \right) \times 100 = -28.31\%
\]
Figure 2. Estimated Criminal Filings per Arrest, 2003–2018

Notes:
- 2006–2018: See supra Appendix, Figure 1 for sources.

Calculation of Filings or Arrest:
- 2003: \( \frac{20,600,000}{13,646,642} = 1.51 \) filings / arrest (same process for each year)
TABLE 1. Descriptive Statistics

<table>
<thead>
<tr>
<th>Recommended Disposition of Case</th>
<th>Percentage of Sample or Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Felony Charge</td>
<td>15.85%</td>
</tr>
<tr>
<td>Monetary Penalty</td>
<td>41.50%</td>
</tr>
<tr>
<td>Average Amount of Monetary Penalty</td>
<td>$242.75</td>
</tr>
<tr>
<td>Confinement</td>
<td>27.05%</td>
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<tr>
<td>Average Minimum Days of Confinement</td>
<td>21.40 days</td>
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</table>

<table>
<thead>
<tr>
<th>Jurisdiction Characteristics</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Size of Office</td>
</tr>
<tr>
<td>31.60 prosecutors</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Size of Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Over 2,000,000 people</td>
</tr>
<tr>
<td>7.54%</td>
</tr>
<tr>
<td>1,000,000–2,000,000 people</td>
</tr>
<tr>
<td>10.56%</td>
</tr>
<tr>
<td>500,000–1,000,000 people</td>
</tr>
<tr>
<td>10.13%</td>
</tr>
<tr>
<td>100,000–500,000 people</td>
</tr>
<tr>
<td>28.23%</td>
</tr>
<tr>
<td>Less than 100,000 people</td>
</tr>
<tr>
<td>43.53%</td>
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<thead>
<tr>
<th>Region</th>
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<tr>
<td>New England</td>
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<td>4.30%</td>
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<tr>
<td>Middle Atlantic</td>
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<td>South Atlantic</td>
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<td>22.80%</td>
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<tr>
<td>Pacific</td>
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<tr>
<td>11.83%</td>
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<tr>
<th>Prosecutor Characteristics</th>
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<tbody>
<tr>
<td>Average Number of Years as Prosecutor</td>
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<tr>
<td>12.70 years</td>
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<tr>
<td>Head Prosecutor</td>
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<tr>
<td>22.96%</td>
</tr>
<tr>
<td>Average Age</td>
</tr>
<tr>
<td>46.18 years</td>
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<table>
<thead>
<tr>
<th>Gender</th>
</tr>
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<tbody>
<tr>
<td>Male</td>
</tr>
<tr>
<td>65.52%</td>
</tr>
<tr>
<td>Female</td>
</tr>
<tr>
<td>34.48%</td>
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### Race

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<tr>
<th>Category</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>White</td>
<td>90.41%</td>
</tr>
<tr>
<td>Black/African American</td>
<td>4.14%</td>
</tr>
<tr>
<td>American Indian/Alaska Native</td>
<td>0.65%</td>
</tr>
<tr>
<td>Asian</td>
<td>0.65%</td>
</tr>
<tr>
<td>Native Hawaiian/Pacific Islander</td>
<td>0.22%</td>
</tr>
<tr>
<td>Other</td>
<td>3.92%</td>
</tr>
</tbody>
</table>

### Hispanic

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
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</thead>
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<tr>
<td>No</td>
<td>96.09%</td>
</tr>
<tr>
<td>Mexican/Mexican American/Chicano</td>
<td>1.30%</td>
</tr>
<tr>
<td>Puerto Rican</td>
<td>0.22%</td>
</tr>
<tr>
<td>Cuban</td>
<td>1.09%</td>
</tr>
<tr>
<td>Other Spanish/Hispanic/Latino</td>
<td>1.30%</td>
</tr>
</tbody>
</table>

*Notes: Robertson et al., supra note 35, at 808 tbl.1.*