Inside the Black Box of Prosecutor Discretion

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In their charging and bargaining decisions, prosecutors have unparalleled and nearly-unchecked discretion that leads to incarceration or freedom for millions of Americans each year. More than courts, legislators, or any other justice system player, in the aggregate prosecutors' choices are

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the key drivers of outcomes, whether the rates of mass incarceration or the degree of racial disparities in justice. To date, there is precious little empirical research on how prosecutors exercise their breathtaking discretion. We do not know whether they consistently charge like cases alike or whether crime is in the eye of the beholder. We do not know what sorts of limits, supervision, or guidelines prosecutors work within. And we do not know what types of information prosecutors rely upon when making their decisions. Prosecutors' decisions have accordingly been called a "black box" for their inscrutability.

Until now. We recruited over 500 prosecutors nationwide, and had them charge an identical case given identical substantive law, specify the plea bargain terms they would seek, and explain their decisions. We also learned about their internal office guidelines and procedures, and the information they rely upon when making charging and bargaining decisions.

Our study tells a story of surprising severity in how prosecutors dispose of a relatively mild case with no harm to victims, creating potentially devastating consequences for an offender suffering from apparent mental illness. Taking advantage of our vignette-survey design, which presents the exact same case to hundreds of prosecutors, we also document wild heterogeneity in prosecutor charging practices, with some dismissing the case out of hand and others demanding months or years of incarceration. We also find that many prosecutors lack meaningful guidelines or supervision. Nonetheless, in our review of their qualitative explanations, we also find prosecutors aspiring to do justice, concerned about harm to victims and the rehabilitation of offenders, and considering the offender's mental health and financial wherewithal. From these findings, we shed light in an otherwise theoretically rich but empirically lacking area of criminal scholarship.

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INTRODUCTION

Prosecutors have extensive power and what guides their decisions is largely unknown and inscrutable.[1] There is an ongoing national conversation about the role of prosecutors in increasing and potentially reducing national incarceration rates,[2] as well as their role in

[1] *See* Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 690 (2020) ("[T]he power and discretion of prosecutors . . . could be wielded either for harsh justice or for mercy and leniency."); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 825 (2020) ("[A] prosecutor's declination policy is a matter of debate with the prosecutor's office, among other lawyers, and with the larger voting public.").

[2] *See, e.g.*, Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 707-09 (2020) (describing how societal pressures have led to the rise of progressive prosecutors to address the failings of mass incarceration and recidivism).

contributing to incarceration disparities that harm people of color.[3] Some scholars have focused on the rise of newly-elected prosecutors articulating progressive visions,[4] intimating that progressive prosecution has swept a wave over the nation.[5] However, it is unclear whether isolated progressive statements from head prosecutors translate into meaningful leniency from line prosecutors. Indeed, prosecutor decision making, including what factors they consider in charging and plea bargaining, has been referred to as the "black box."[6] This is protected information that is not discoverable by defendants and has been difficult to examine empirically.[7]

[3] *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 752 (2020) ("[Progressive prosecutors] attempt to minimize racial and economic injustice, exemplified by high rates of incarceration, particularly of poor people and minorities.").

[4] *See, e.g.*, Bellin, *supra* note 2, at 707-11 (attributing the rise of progressive prosecutors to increased public recognition that mass incarceration is a problem, a "gradual downward trend in crime," and the unique role district attorneys play in the criminal justice system); Flanders & Galoob, *supra* note 1, at 688-94 (describing progressive prosecutors' focus on reducing mass incarceration, using alternative institutions such as specialty courts, and emphasizing treating all actors with respect); *see also* Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1375 (2021) (highlighting that progressive prosecutors face challenges to getting elected, even in urban, liberal areas).

[5] Kim Foxx was elected State's Attorney for Cook County, Illinois (Chicago) in 2016; Larry Krasner was elected District Attorney of Philadelphia, Pennsylvania in 2017; Rachael Rollins was elected District Attorney of Suffolk County, Massachusetts (Boston) in 2018. *See* Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, THE CONVERSATION (Nov. 18, 2020, 8:22 AM EST), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322 [https://perma.cc/ATX4-S7ZF]; *see also* Cara Bayles, *A New Class of Prosecutors: Reformers Win Races Nationwide*, LAW360 (Nov. 8, 2020, 8:02 PM EST), https://www.law360.com/access-to-justice/articles/1326594/a-new-class-of-prosecutors-reformers-win-races-nationwide [https://perma.cc/ZX6Y-KQLL] ("Progressive newcomers were elected to top prosecutor posts in Los Angeles; Austin, Texas; Orlando, Florida; Detroit; Aurora, Colorado; and Columbus, Ohio; as well as what were considered local presidential battlegrounds, like Michigan's Oakland County, a suburb of Detroit.").

[6] Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) ("[T]he black box: the inner workings of prosecutors' offices. . . . [T]he absence of controlling statutes or case law makes it possible for prosecutors to do their daily work without explaining their choices to the public.").

[7] *See* Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 101, 124-32 (2022) (noting the lack of up-to-date empirical research on prosecutorial decisions).

Prosecutors play a key role in the administration of criminal justice.[8] Prosecutors decide whether to initiate criminal proceedings,[9] what charges to bring,[10] what penalties to seek,[11] whether to agree to a plea

[8] *See* Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 475 (2007); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 776 (1996); George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1043 (2005); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521 (1981).

[9] *See generally* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1700 (2010) ("Once police have made arrests, it falls to prosecutors to . . . determine equitably in which cases to decline prosecution."); 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, 4-5 (2017) (concluding that determining whether or not to bring charges is the most significant aspect of a prosecutor's discretion); 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.").

[10] *See generally* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 84 (2011) (noting that because prosecutors do not have sufficient resources to raise all possible charges, they must exercise discretion in choosing what charges to bring); Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 710 (2014) (describing critiques of prosecutors' ability to decide what charges to bring in the over- or disproportionate charging context); Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 67 (2015) (describing prosecutors' abilities to file charges and add unlimited enhancements after the initial charge is filed); Craig H. Solomon, *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.").

[11] *See generally* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 53 (2012) ("The number and seriousness of convictions and the amount of punishment are the basic standards by which the success of prosecutors is measured."); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 490 (2017) ("Prosecutorial discretion is most commonly conceived of in the criminal context, wherein prosecutors routinely make determinations about . . . how vigorously to pursue [cases] . . . .").

bargain,[12] and what sentencing recommendations to advise.[13] The prosecutor may be the government official with the most unreviewable power and discretion.[14] Since the vast majority of cases are resolved short of trial, a second key point of attention is plea bargaining, which prosecutors also control.

[12] *See generally* 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, 599 (2014) ("Prosecutors also have the power to decide not to make a plea offer."); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 425-26 (2008) (describing the significant leverage prosecutors have when making plea bargains); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472 (1993) (noting the "substantial power" prosecutors have "to overwhelm criminal defendants in the plea bargaining process"); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33 (2002) ("Negotiated pleas are currently the rule.").

[13] *See generally* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1091 (2017) ("[I]ndividual prosecutors retain a wide degree of discretion and little accountability to fulfill broader executive directives or guidance."); Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 399 (2009) (noting that prosecutors hold significant sentencing power both in jurisdictions with determinate sentencing schemes and jurisdictions with indeterminate sentencing schemes); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) ("Recent increases in prosecutorial discretion in the sentencing arena represent the latest expansion of this discretion."); O'Hear, *supra* note 12, at 425 ("[T]he proliferation of sentencing guidelines . . . has given prosecutors even greater leverage over defendants than they have traditionally enjoyed.); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1470 (2008) (describing how prosecutors have discretion to interpret federal sentencing guidelines); Vorenberg, *supra* note 8, at 1521 ("The decisions [prosecutors] make determine in large part . . . what punishment will be imposed."); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011 (2005) (describing how prosecutors have more sentencing power than judges); Nicole T. Amsler, Note, *Leveling the Playing Field: Applying Federal Corporate Charging Considerations to Individuals*, 66 DUKE L.J. 169, 173 (2016) (describing how the implementation of the Federal Sentencing Guidelines gave federal prosecutors more discretion in criminal sentencing).

[14] Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009); *cf.* Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 35 (1994) (arguing that the Racial Justice Act should curb prosecutorial discretion in seeking the death penalty).

Prosecutors' wide discretion creates opportunity for racial and gender bias,[15] overcharging,[16] vindictiveness,[17] plea bargaining abuses,[18] and wrongful convictions.[19] However, prosecutorial discretion allows prosecutors to adapt to different scenarios involving unique facts and defendants, and provides a way for prosecutors to manage their ever-growing caseloads through plea-bargaining.[20] Arguably, prosecutorial discretion puts decision making in the hands of those with institutional knowledge of the criminal justice system. As the Supreme Court has explained, "[b]ecause discretion is essential to the criminal justice process, [we would demand] exceptionally clear proof before [we] w[ould] infer that the discretion has been abused."[21]

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[15] *See* State v. Monday, 257 P.3d 551, 556 (Wash. 2011) ("Prosecutor Konat injected racial prejudice into the trial proceedings by asserting that [B]lack witnesses are unreliable . . . ."); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1588-92 (2006); The Mo. Task Force on Gender & Just., *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 506 (1993) (explaining that prosecutors may not prioritize domestic violence cases because prosecutors "lack understanding, sensitivity, and training" and "may not believe female victims"); *see also* United States v. Saccoccia, 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) ("[R]acially-skewed outcomes . . . cannot occur without prosecutorial support.").

[16] *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968); *see also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 72 (2011) (applying game theory to overcharging); Wright & Miller, *supra* note 12, at 32 (arguing for a hard screening system to prevent prosecutorial overcharging).

[17] *See* United States v. Goodwin, 457 U.S. 368, 384 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978).

[18] *See* North Carolina v. Alford, 400 U.S. 25, 39 (1970) (holding that threatening the death penalty to force defendant to plead guilty to a lesser murder charge was not coercive); United States v. Speed Joyeros, S.A., 204 F. Supp. 2d 412, 444 (E.D.N.Y. 2002) (holding that, though extended pre-trial incarceration caused defendant's physical and mental health to deteriorate, a plea bargain was acceptable despite the danger of due process violations by the intensive pressure on defendant to plead guilty).

[19] *See, e.g.*, Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 403 (discussing one study showing that, out of 62 persons exonerated by DNA evidence, prosecutorial misconduct played a role in twenty-six of those wrongful convictions); *see also* Baughman, *supra* note 13, at 1110-11; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 291 (2006).

[20] George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865 (2000) (arguing that a crushing workload and increased caseloads explain why prosecutors began to choose to plea bargain and why they continue to do so today).

[21] McCleskey v. Kemp, 481 U.S. 279, 280 (1987).

Nonetheless, many legal scholars argue that the unchecked power of prosecutorial discretion is too broad.[22] Legal commentators have characterized prosecutorial discretion as a "dangerous"[23] and "tyrannical"[24] decision-making process because it is "unreviewed and its justifications unarticulated."[25] Others have claimed that prosecutorial discretion is the single largest cause of mass incarceration and is responsible for the expansive growth in felony convictions since the 1970s.[26]

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[22] 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."); 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."); *see* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 869 (2009) ("There are currently no effective legal checks in place . . . . 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) (similar); Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1130 (2014) ("[U]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.").

[23] Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940); *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.").

[24] Henderson v. United States, 349 F.2d 712, 714 (D.C. Cir. 1965) (Bazelon, C.J., dissenting); *see also* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 399 (2001) ("The current constitutional design is dysfunctional as a check on prosecutorial power.").

[25] Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1073 (1972); *see also* Leonetti, *supra* note 11, at 55 ("[U]nreviewed prosecutorial discretion makes a nasty cocktail when mixed with invidious forms of prosecutorial conduct.").

[26] *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127 (2017) ("Recall that over the 1990s and 2000s . . . even as the number of arrests declined, the number of felony cases filed in state courts rose sharply. In the end, the probability that a prosecutor would file felony charges against an arrestee basically doubled, and that change pushed prison populations up even as crime dropped."); Barkow, *supra* note 4, at 1393 ("Mass incarceration is driven by two factors: the number of cases coming into the system (admissions) and the length of sentences. Prosecutors have discretion to change the rate of admissions, and for cases going forward, they can also influence sentences based on the charges they bring and the sentences they request (or accept in pleas)."); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237, 1240 (2012) (concluding that

One troubling aspect of unbridled prosecutorial discretion is that it renders inconsistent results with defendants receiving widely varying treatment for similar crimes.[27] As a result, the public is unsure if the prosecutor has a reasonable explanation for the apparent inconsistent decision or if she is abusing her power or demonstrating bias.[28] Questions about the consistency and fairness of prosecutorial decisions motivate this study.

There is currently no experimental evidence in the field comparing how prosecutors nationally charge a case with similar facts. While this evidence does not yet exist, this Article provides the next best thing: insight into how prosecutors wish they could charge a case. It also provides insight into what limits a prosecutor in charging, what guidelines they are required to follow, and what prosecutors claim they consider when charging a case.

This Article explores prosecutors' discretion, specifically their discretion in the initial charging decision. The first point of contact with a prosecutor is the decision to charge a defendant with a crime. Prosecutor discretion in the charging decision is important to study because it may reduce the efficacy of downstream policy reforms, such as sentencing guidelines, which have been enacted to reduce disparities in outcomes.[29]

In this Article, we present results from an original empirical study of prosecutor decision making in order to better understand the "black box" of prosecutor discretion. We surveyed hundreds of prosecutors about how they make charging decisions, and we also presented them with a hypothetical case and asked for their charging and punishment recommendations. Our results demonstrate significant variability in

prosecutors are the "who" behind prison growth in the United States due to the number of felony filings per arrest).

[27] Vorenberg, *supra* note 8, at 1537; *see* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423, 1423 (2001); *cf.* Bibas, *supra* note 14, at 978 ("Moreover, legislatures have strong incentives to err on the side of overbroad statutes, rather than risk hobbling prosecutors . . . .").

[28] *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 945-46 (2006).

[29] *See* 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 . . . [b]ecause some amount of prosecutorial discretion is necessary and inevitable."); *see also* Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 483 (2016); 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).

prosecutor decision making, especially by geographic region, perhaps because many of our respondents work in offices that do not have internal guidelines or standards that constrain discretion. Our results also illuminate the process of prosecutor decision making, including factors they claim are important to their decision.

The Article proceeds as follows. Part I reviews prior research on prosecutor decision making, including variability in charging, severity in charging, national and local guidance, and the factors that prosecutors rely upon in making decisions. Part II describes our empirical approach, including the methods for recruiting prosecutors, collecting data, and analyzing the data. Part III lays out our findings, including the heterogeneity in charges and penalties assessed, the prosecutors' reasons for their decisions, the use of guidelines or standards, and the information they relied upon. Part IV provides a discussion, identifying directions for reform and further research.

I. REVIEW OF PRIOR RESEARCH ON PROSECUTOR DECISION MAKING

While fairness and justice critiques of prosecutors are plentiful,[30] there has not been a focus in the scholarship on the variability of prosecutor charging or concerns about severity of charging by prosecutors. One of the reasons for this is because we lack national data on how prosecutors' charging varies across the country. While individual prosecutors have been critiqued for severity,[31] there has not been national evidence to study whether prosecutors as a group are charging appropriately. This Part reviews the literature on variability and severity in prosecutor charging decisions and sentencing recommendations. It then explains the constraints on prosecutor discretion, namely the role of professional or office level guidelines. And finally, it reviews the literature discussing the factors relevant to prosecutors' decisions.

[30] *See* Bibas, *supra* note 14, at 978 ("The deeper problem is that systemic patterns of charging and plea bargaining, influenced by self-interest, bias, and other considerations, may undercut equality and equity."); Leonetti, *supra* note 11, at 55 ("[U]nreviewed prosecutorial discretion makes a nasty cocktail when mixed with invidious forms of prosecutorial conduct."); Vorenberg, *supra* note 8, at 1537 ("[P]rosecutors' actions can determine who gets twenty years and who gets a year or two or probation for essentially the same conduct.").

[31] *See, e.g.*, Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES (Dec. 5, 2013), https://www.nytimes.com/2013/12/06/us/federal-prosecutors-assailed-in-outcry-over-sentencing.html [https://perma.cc/87YZ-658D] (describing how prosecutors offered defendant either life without parole if found guilty of "trafficking one kilogram of heroin" or "sentence of 10 years" with guilty plea).

A. Variability in Prosecutor Charging

There are few explicit bars to prosecutor variability in charging, including from the Constitution, statutes, or national prosecutor bodies. Some scholars have even argued that consistency across prosecutorial decisions should not be the goal; rather, we should strive towards a system where there are "roughly equivalent *probabilities* of receiving some favorable result."[32] As compared to criminal justice systems in Europe, uniformity is a less articulated priority in the U.S. criminal justice system.[33] However there are some articulated standards warning against variability in prosecutor charging. The Constitution limits variability on prosecutor charging only where concerns of race, religion, or another arbitrary classification are raised.[34] The American Bar Association ("ABA") cautions against "unwarranted disparate treatment of similarly situated persons," but does so by listing it as only one of many factors to be considered in any case.[35] Likewise, the commentary to the National District Attorneys Association ("NDAA") standards highlight the importance of "uniformity," stating that "the goal of uniformity protects a victim or accused from receiving substantially different treatment because the case was assigned to one individual in the office and not to another."[36] In addition, when considering charges, the NDAA standards list "charging decisions made for similarly-situated defendants" as one factor that "may be considered."[37]

Robust studies of prosecutor variability in charging do not exist, although one survey of forty-three Wisconsin district attorneys showed significant variability in charging decisions.[38] Variability in charging decisions is difficult to study in part because "courts have limited authority to review [charging and plea bargaining] decisions and

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[32] Bowers, *supra* note 9, at 1677.

[33] *See* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1346 (1993) (citing the variability in jury decisions as one example).

[34] U.S. CONST. amend. XIV; Oyler v. Boles, 368 U.S. 448, 456 (1962) (noting that prosecutor charging variability presents a problem where deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification).

[35] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(a)(ix) (AM. BAR ASS'N 2017).

[36] NAT'L PROSECUTION STANDARDS § 1-5.4 (NAT'L DIST. ATT'YS ASS'N 2009).

[37] *Id.* § 4-1.3(i).

[38] Kim Banks Mayer, Comment, *Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?*, 1996 WIS. L. REV. 295, 299.

identify and remedy abuses."[39] Experts have recognized that "[i]n practice . . . the exercise of discretion varies considerably among offices."[40]

Office structure may play a role in charging variability, and overall the more centralized charging practices, the less variability between prosecutors. For example, Ron Wright and Marc Miller examined the actions taken in New Orleans to "ensure reasonable uniformity in screening decisions."[41] In another study, Ron Wright and Kay Levine conducted interviews with forty-two misdemeanor and drug prosecutors in the Southeast, finding one recurring theme: "the need for consistency among different prosecutors who work in the same office."[42] Wright and Levine theorized that there was a "correlation between social architecture and consistency": the more hierarchical the office, the greater emphasis on consistency.[43] Stephanos Bibas has also asserted that "hierarchy and centralization improve consistent, accountable application of rules."[44] Specifically, creating "[c]entralized

[39] Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 58-59 (2016) (citing United States v. Redondo-Lemos, 955 F.2d 1296, 1299-300 (9th Cir. 1991)).

[40] Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor* 11 (Harv. Kennedy Sch., Working Paper #00-02-04, 2000), https://biblioteca.cejamericas.org/bitstream/handle/2015/1545/community_prosecutioncolles2000.pdf [https://perma.cc/SEK2-HC5X].

[41] Wright & Miller, *supra* note 12, at 62-66. Wright and Miller discuss numerous structural changes aimed at achieving more uniformity, including assigning the role of screening to senior trial attorneys, tracking data on the reasons for each decision in the process to try to ensure consistency even with the high staff turnover, assigning some types of cases "to screeners with special expertise" (for example, grouping by drug cases, ordinary cases, homicides, and rapes), and having the screener interview key witnesses and victims and sometimes the officer as well. *Id.* at 62-63, 66. There were also some procedural changes made through office policies: "charg[ing] the most serious crime the facts will support at trial," requiring that "the charges chosen for the information . . . stay in place through the trial" to address overcharging, supervisory review of all refusals to charge, discouraging refusal to charge specific types of crime (like domestic violence), requiring that "[a] supervisor . . . approve any decision to drop or change charges after the information is filed," and creating "a 'stigma' . . . in reducing charges." *Id.* at 63-64. Wright and Miller also note that the New Orleans office also declines to prosecute a large number of cases to encourage "police officers to investigate more thoroughly." *Id.* at 65.

[42] Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1171 (2012).

[43] *Id.*

[44] Bibas, *supra* note 14, at 1005 (citing Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2062-73 (2006)). In the plea bargaining context, offices with less hierarchical structures had greater variability between prosecutors' decisions within the office than in offices that placed greater emphasis on

charging units" has been theorized to decrease variability by reducing the temptation to "overcharge[] weak cases so that they can later charge-bargain them away."[45] Others have theorized that variability may be a result of a lack of office-wide policies or reliance on "unit-specific policy making."[46] When chief prosecutors "rel[y] on unit managers to translate their philosophy into policies," managers may vary in their approaches, "creating opportunities for inconsistencies across units and over time."[47] Overall the lack of office policies in charging or a centralized charging unit has been theorized to cause variability in prosecutor charging.

Most of the controls on prosecutor charging are imposed informally due to social norms, although prosecutors maintain considerable discretion. According to Marc Miller and Ron Wright, outside of formal rules, social norms can create rules within a prosecutor's office that constrain and regulate the discretion of individual prosecutors.[48] These norms are in no way articulated in any organized manner.[49] Some experts have recommended that prosecutors should have some informal controls that ensure consistency in charging and plea bargaining within an office.[50] Though without written standards, "it is only natural that there will be a lack of uniformity in filing decisions and a breakdown in the implementation of prosecutor's decisions."[51] Josh Bowers has recognized that discretion will always seep into prosecutor enforcement

"professionalism" and enforcement of clear policies. *See* JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 85-86, 116-17, 146-54 (1977) (comparing plea bargaining discretion and organizational structures in Baltimore, Chicago, and Detroit).

[45] Bibas, *supra* note 14, at 1001; *see also* Wright & Miller, *supra* note 12, at 61-82 (finding that plea bargaining in New Orleans was reduced when centralized screening processes were implemented).

[46] Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 72 (2013).

[47] *Id.* at 71-72 (2013) ("Allowing unit-specific policies and norms to develop may result in simple differences in attitudes about the appropriate sentence recommended in a plea offer or it may result in major, fundamental differences in the overall approach to evaluating cases.").

[48] Miller & Wright, *supra* note 6, at 178; *see also* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840 ("[P]rosecutors should make decisions based on articulable principles or subprinciples that command broad societal acceptance.").

[49] Green & Zacharias, *supra* note 48, at 840 ("[P]rosecutors have never, either individually or collectively, undertaken the task of identifying workable norms for the array of discretionary decisions that their offices make each day.").

[50] Pizzi, *supra* note 33, at 1345.

[51] Norman Maleng, *Charging and Sentencing: Where Prosecutors' Guidelines Help Both Sides*, 1 CRIM. JUST. 6, 41 (1987).

of the law, despite the desire to reach consistency.[52] But greater transparency may provide more motivation toward consistency in decision making and "can help stakeholders to monitor prosecutors' performance and to push for more concrete policies."[53] While uniformity in charging is not a requirement for prosecutors, some scholars have argued that greater transparency in prosecutor decisions or centralized decision making may help reduce variability or improper prosecutor motives.

B. Severity in Charging Decisions

There is little in the way of national or local guidance on the severity of charges prosecutors bring for any particular set of alleged facts. ABA guidance on the severity of charges is limited to encouraging prosecutors to "act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity," and by using their "discretion to not pursue criminal charges in appropriate circumstances."[54] NDAA guidance is similarly abstract, encouraging prosecutors to file charges that the prosecutor "believes adequately encompass the accused's criminal activity" and that they "reasonably believe[] can be substantiated by admissible evidence at trial."[55] There is no national admonition to limit prosecutor charging when there is discretion to do so. Indeed, there are some obvious examples of explicit guidance or informal rules advocating for charging the most serious crimes available. For example, the U.S. Attorney Manual states that a Federal prosecutor should initially charge "the *most serious*, readily provable offenses" consistent with the defendant's conduct.[56] Some members of the Supreme Court in recent years indicated that a Justice Department policy of charging

[52] *See* Bowers, *supra* note 9, at 1676.

[53] Bibas, *supra* note 14, at 1007.

[54] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017).

[55] NAT'L PROSECUTION STANDARDS § 4-2.2 (NAT'L DIST. ATT'YS ASS'N 2009).

[56] JUST. MANUAL § 9-27.300 (U.S. DEP'T OF JUST. 2020), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution [https://perma.cc/B66B-7EBE]; *see also* Memorandum from Jeff Sessions, Off. of the Att'y Gen., Department Charging and Sentencing Policy (May 10, 2017), https://www.justice.gov/opa/press-release/file/965896/download [https://perma.cc/DK5A-BJJ5] ("[I]t is a core principle that prosecutors should charge and pursue the most serious, readily provable offense."). *But see* Memorandum from John Ashcroft, Regarding Policy on Charging of Criminal Defendants, to all federal prosecutors (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm [https://perma.cc/H43A-M8C3] ("[C]harges should not be filed simply to exert leverage to induce a plea.").

the most severe offense as a general rule raises serious concerns.[57] Still, this federal policy has not been overturned.

Research has suggested that junior prosecutors are more likely to bring the most severe charges, for a variety of reasons. One public defender argues that the decision by new prosecutors to pursue the maximum charges "comes from a fear of mistakes, of making the wrong judgment call about a stranger, of granting leniency when the recipient may disappoint by committing another crime[,] . . . of being made a fool by some sly defendant, or duped by some defense attorney, or being called soft on crime."[58] Wright and Levine have found in their studies of prosecutors that young prosecutors may consider themselves "superheroes, ready to try any case on the docket" while more seasoned prosecutors think of themselves as "arbitrators, negotiators, 'BS meters,' and advocates."[59] Their research has found that 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."[60] As such, inexperience made prosecutors less likely to dismiss charges and more likely to closely follow the most obvious charges available in statutes.[61] In addition, in interviews, "[e]ntry-level and junior prosecutors were more likely than their experienced colleagues to say that it is important to stick with the most serious charges during plea negotiations."[62]

The plea-bargaining process may also play a role in the severity of initial charging decisions. Some evidence exists that prosecutors charge aggressively to allow for a lesser plea.[63] For instance, in Alafair Burke's

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[57] *See* Transcript of Oral Argument at 28-32, Yates v. United States, 354 U.S. 298 (2015) (No. 13-7451). Justice Scalia stated, in response to such a rule, "I'm going to be very careful about how severe I make statutes . . . or how much coverage I give to severe statutes." *Id.* at 29. Chief Justice Roberts also stated that such a policy could give "extraordinary leverage . . . [to] Federal prosecutors" if the statute were to cover the alleged criminal behavior in that particular case. *Id.* at 31.

[58] Fan Li, *Youthful Indiscretion: The Structural Challenge of Inexperienced Prosecutors*, *in* CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 1, 115 (Melba V. Pearson ed., 2020).

[59] Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1126 (2014).

[60] *Id.* at 1084.

[61] *See id.* at 1084-85.

[62] *Id.* at 1087-88.

[63] *See, e.g.*, Alschuler, *supra* note 16, at 98 (arguing that more severe charging decisions are incentivized by plea bargaining); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 201-02 (2007) (describing how prosecutors can "anchor" on preliminary decisions and then "inadequately adjust" from that initial anchor); Robert E. Scott & William J. Stuntz, *Plea-Bargaining as a Social*

study, one prosecutor stated that he would "charge aggressively to allow for a plea to a lesser offense."[64] The charging decision is closely tied to plea bargaining, which may begin even before formal charges are filed.[65] Notably, NDAA's "National Prosecution Standards do not include any restriction on filing charges to obtain plea bargaining leverage."[66]

The line between overcharging and proper severity is unclear. Charging the highest provable offense may be seen as overcharging by some while considered fair by others. Jeffrey Bellin is in the latter camp as he recently argued that overcharging should be defined as charging a defendant with an offense that is not "readily provable" or an offense for which the jury should not convict."[67] But on the other side, Bruce Green argues "that people who commit crimes should not necessarily be punished as harshly as the law permits."[68] The recent scholarly focus on progressive prosecution has discouraged severe charging,[69] often focusing on declination as one way to limit severity.[70]

Like with variability, there is no explicit guidance for prosecutors not to seek the most serious charge they can prove. Scholars and federal prosecutor guidebooks have supported this position, though the tide is turning towards advising prosecutors to decline to charge when possible to reduce the carceral state.[71] Our study presents respondents

Contract, 101 YALE L.J. 1909, 1965 (1992) ("[Broad criminal statutes give prosecutors] an unchecked opportunity to overcharge and generate easy pleas . . . .").

64 Burke, *supra* note 63, at 202.

65 Pizzi, *supra* note 33, at 1355.

66 Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1225 (2020) (citing NAT'L PROSECUTION STANDARDS § 4-2.3 (NAT'L DIST. ATT'YS ASS'N 2009)).

67 *Id.*

68 Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 599, 612 (2019) (noting that inequitable results may occur because "one victim may wish to pursue charges and a harsh sentence and yet the other victim [in a similar case] may not want charges filed.").

69 *See* Bellin, *supra* note 66, at 1248 (identifying "the progressive intuition that prosecutors should not charge a more severe offense to obtain plea bargaining leverage."); *see also* Maura Ewing, *America's Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, SLATE (Dec. 4, 2018, 3:40 PM), https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html [https://perma.cc/4PLW-78XC] (quoting Larry Krasner, "The era of trying to get away with the highest charge regardless of the facts is over.").

70 *See, e.g.*, Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1445 (2021) ("[T]he anti-carceral prosecutor seeks to enact policies of declination."); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 176 (2021) (discussing prosecutorial nullification as a populist response to severe criminal codes).

71 *See Unlocking the Black Box of Prosecution*, VERA, https://www.vera.org/unlocking-the-black-box-of-prosecution/for-prosecutors (last visited Jan. 14, 2022) [https://perma.cc/

with a hypothetical, relatively minor crime to explore both the variability and severity of punishment prosecutors recommend for the same crime.

C. National and Local Guidance for Prosecutors

Notwithstanding their broad discretion, prosecutors are subject to rules of professional conduct in their jurisdiction, ABA and NDAA guidance, and possibly internal office guidelines on prosecutor charging. While these standards may technically apply, there is little accountability if prosecutors refuse to comply[72] and little assurance that prosecutors are even aware of these guidelines.

1. Rules of Professional Conduct

Prosecutors are governed by standards of professional conduct in their jurisdiction, and through the ABA.[73] However, as Bruce Green points out, the idea that prosecutors have "higher ethical obligations than other lawyers . . . is largely absent from the ethics rules."[74] While the comments to ABA Rule 3.8 state that prosecutors have "the responsibility of a minister of justice,"[75] this charge is ill-defined.[76]

QTP7-W6WL] ("Based on this information, they are training line prosecutors to decline or divert more cases and to aggressively pursue alternatives to incarceration.").

[72] Corn & Gershowitz, *supra* note 13, at 396.

[73] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(c) (AM. BAR ASS'N 2017). The NDAA has challenged the legitimacy of ABA guidance. Brief for National District Attorneys Association as Amici Curiae Supporting Petitioner at 3, 5, Smith v. Cain, 565 U.S. 73 (2012) (No. 10-8145) (referring to the ABA as "a private organization that does not speak for prosecutors" and stating, "[T]he ABA has become captive to the narrow adversarial interests of the criminal defense bar").

[74] 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, 149 (2016); *see also* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About A Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 691 (2006) (arguing that Model Rule 3.8's emphasis on the "responsibility" of prosecutors to seek justice "is obscured" both by "minimum conduct rules within Rule 3.8" and "burying the 'justice' exhortation in a later comment to the Rule").

[75] MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2018).

[76] Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301 (1996) ("When the ABA advises prosecutors to act as 'ministers of justice' or 'administrators of justice,' it is using juris-babble that is practically meaningless to prosecutors and to the ABA itself."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) (arguing that the vagueness of the charge to "do

Some jurisdictions "have revised or supplemented [ABA] Rule 3.8(a) to further regulate prosecutors' charging decisions."[77] But even if these guidelines have been supplemented, "[b]y and large . . . bar authorities have proven to be ineffectual" when it comes to accountability.[78] Indeed, when prosecutors act inappropriately in violation of the rules of professional conduct, discipline is rare.[79] The conventional wisdom in this area is that "disciplinary authorities do not effectively regulate prosecutors."[80] Sanctions — if they exist — are typically minimal,[81] and overall prosecutors are rarely disciplined relative to other lawyers.[82] It is certainly possible that broader ethics rules could be applied to prosecutors in some instances, but these rules may not extend to "reach abuses of prosecutorial charging discretion[.]"[83] As a whole, while rules of professional conduct exist for prosecutors, they do not regulate prosecutor charging discretion.

2. ABA and NDAA Guidance

National guidelines — from the ABA and NDAA — do not seek to limit prosecutor charging beyond what the evidence supports for a conviction. The ABA offers some guidance in the form of Criminal Justice Standards, but there is little specificity or limitations for prosecutors in these recommendations. For example, the ABA cautions that "[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support

justice" "has significant costs" and "undermines professional discipline of prosecutorial misconduct").

77 Green & Levine, *supra* note 74, at 152.

78 Bibas, *supra* note 14, at 976.

79 Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 874 (2012); *see also* Mark C. Niles, *A New Balance of Evils: Prosecutorial Misconduct, IQBAL, and the End of Absolute Immunity*, 13 STAN. J. C.R. & C.L. 137, 148-54 (2017) ("Criminal culpability and/or professional sanction . . . have little if any impact on the actual practice of law in this country."); *see also* KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 54-61 (2010), http://digitalcommons.law.scu.edu/ncippubs/2 [https://perma.cc/M556-C6UP] (finding a significant lack of State Bar discipline for prosecutorial misconduct in California).

80 Green & Levine, *supra* note 74, at 151 ("[P]roportionately fewer prosecutors are publicly disciplined when compared with private practitioners.").

81 Bibas, *supra* note 14, at 977.

82 Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 755 (2001).

83 Green & Levine, *supra* note 74, at 153.

conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[84] Critics have claimed that this probable cause requirement is "essentially meaningless" and the "sufficient admissible evidence to support a conviction [standard] is likewise far too easily satisfied to provide any real limitation upon, or incentive to exercise, case-specific evaluation by the prosecutor."[85] The ABA standards make clear they are purely "aspirational" and "are not intended to serve as the basis for . . . professional discipline[.]"[86] Similarly, the NDAA standards are "aspirational" and "are not intended to . . . be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; [or] be used by disciplinary agencies when passing upon allegations of violations of rules of ethical conduct[.]"[87] The NDAA has expressed disagreement with the Rules of Professional Conduct on at least one occasion.[88] The NDAA's position seems to be that "prosecutors . . . should be exempt from state-court rules of professional conduct that do more than mirror preexisting legal obligations."[89] Neither national body seeks to limit prosecutor discretion in charging.

3. Internal Standards of Individual Prosecutor Offices

With a gap in national regulation,[90] there is an argument that internal standards and regulations could serve an important role in limiting

[84] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (Am. Bar Ass'n 2017).

[85] Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 680-81 (1992); *see also* CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(d) (AM. BAR ASS'N 2017) ("The ABA also encourages prosecutors to make use of ethical guidance offered by existing organizations, and . . . to establish and make use of an ethics advisory group . . . ."); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 268 (2001) ("If probable cause is the only restriction on prosecutorial charging discretion, then it is a very broad power indeed.").

[86] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b) (AM. BAR ASS'N 2017) ("These Standards . . . are aspirational or describe 'best practices,' and are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for accused or convicted persons, to create a standard of care for civil liability, or to serve as a predicate for a motion to suppress evidence or dismiss a charge.").

[87] NAT'L PROSECUTION STANDARDS, at Introduction (NAT'L DIST. ATT'YS ASS'N 2009).

[88] Brief for National District Attorneys Association as Amici Curiae Supporting Petitioner, *supra* note 73, at 13 (taking issue with the obligation that Model Rule 3.8(d) places on prosecutors in the states in which it has been adopted).

[89] Green, *supra* note 79, at 886.

[90] *See* Bibas, *supra* note 14, at 1016 ("Conventional external regulation has failed to guide prosecutors.").

prosecutorial discretion.[91] In most jurisdictions, chief prosecutors are elected, and are therefore thought to be accountable to the public. "[H]ead prosecutors can align their subordinates' actions with principals' interests by writing down and enforcing procedural and substantive office policies."[92] Both the ABA and NDAA stress the importance of policies in individual prosecutor's offices. According to the ABA, "[e]ach prosecutor's office should seek to develop general policies to guide the exercise of prosecutorial discretion[.]"[93] The NDAA standards clarify that "[i]nitial standards or guidelines for charging will be established by the chief prosecutor only[.]"[94]

Despite guidance to formulate internal policies for prosecutors, there is little incentive to promulgate or follow such internal rules.[95] One study indicated that prosecutors' offices lacked effective policies or structures for proper accountability.[96] Prosecutor offices may also lack clear standards guiding charging decisions.[97] Prosecutorial guidelines governing charging and bargaining discretion "should be specific enough to provide genuine guidance when applied to a particular set of facts."[98] On a federal level, the United States Attorneys' Manual "does contain some general standards for the exercise of prosecutorial discretion, but they are written so broadly that they provide little guidance."[99] Prosecutors may not want internal rules to be too specific. Courts have "consistently . . . ruled that a prosecutor's failure to follow

[91] *See* Miller & Wright, *supra* note 6, at 161-65 (arguing that internal policies and regulations can be effective).

[92] Bibas, *supra* note 14, at 1003.

[93] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-2.4(a) (AM. BAR ASS'N 2017).

[94] NAT'L PROSECUTION STANDARDS § 4-2.4 (NAT'L DIST. ATT'YS ASS'N 2009).

[95] *See* Vorenberg, *supra* note 8, at 1564-65 ("Few prosecutors' offices, if left to their own devices, will promulgate guidelines that limit their freedom in a significant way, and courts are unlikely to require standards in the absence of legislative direction.").

[96] Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 539 (2011) (presenting case studies from "three New York City District Attorneys' Offices," and finding that the offices failed to discipline prosecutors and lacked codes of conduct).

[97] *See* Levine & Wright, *supra* note 42, at 1174 (finding that none of the offices studied in two Southeast metropolitan areas used "a charging or sentencing grid").

[98] Vorenberg, *supra* note 8, at 1562-63.

[99] Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L. J. 979, 999 (1995); *see also* Amsler, *supra* note 13, at 186 (noting that, aside from prosecution "on the basis of race, religion, or any other 'arbitrary classification' or protected right," charging decisions are "largely subject to nonmandatory guidelines").

applicable written criteria cannot serve as a defense or cause of action."[100] But fear of litigation or public review might prevent more specific written charging guidelines.[101] One motivation that might lead prosecutors to "be reluctant to adopt [charging] polic[ies] is the fact that prosecutors have to run for election and any policy that might be seen as 'soft' on crime can raise a political issue that might put the prosecutor on the defensive."[102] Thus, formal and public guidelines "may result in guidelines that are considerably harsher than those policies that an office would be willing to live with on an informal basis."[103] Fear of public oversight and litigation may encourage prosecutors not to promulgate specific charging guidelines.

Even when guidelines or charging grids exist, they may not be used. One study of forty-two misdemeanor and drug prosecutors in the Southeast found that none of the sites studied "employe[d] a charging or sentencing grid that prosecutors are supposed to follow[.]"[104] In addition, a survey of prosecutors in 2018 found that although many prosecutors (sixty-five percent of those surveyed) used data to set guidelines, they often did not use the data to track compliance with office guidance.[105] Some scholars have noted that even when charging policies exist, they tend to have little impact on individual case evaluations by line prosecutors.[106]

Charging guidelines, while an important step, may be limited in their efficacy.[107] Our study questions prosecutors about whether they have internal standards or guidelines that guide their decision making and limit their charging ability.

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100 Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 654 (2002); *see* Pizzi, *supra* note 33, at 1366-67.

101 Even when prosecutors offices have internal guidelines, they may oppose public transparency or review of such guidelines. *See* Pizzi, *supra* note 33, at 1364-67.

102 *Id.* at 1365.

103 *Id.*

104 Levine & Wright, *supra* note 42, at 1174.

105 ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIA SAMUELS, URB. INST. FOR JUST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING 11-12 (2018), https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf [https://perma.cc/T52C-6RBT].

106 Melilli, *supra* note 85, at 683.

107 Pizzi, *supra* note 33, at 1346 n.95 ("[G]uidelines are oversold as a remedy for limiting prosecutorial discretion.").

D. Factors Relevant to Prosecutors in Charging Decisions

There are no universal factors prosecutors must consider in charging decisions, except avoiding suspect classifications such as defendants' race or national origin.[108] The ABA standards include a laundry list of potential factors prosecutors "may" consider when deciding whether to bring charges.[109] For instance, the ABA standards encourage consideration of "the strength of the case," "the extent . . . of harm caused," and "the views and motives of the victim or complainant."[110] The NDAA standards include a similar lengthy list of factors that "may" be considered when screening potential charges.[111] These NDAA

[108] Green, *supra* note 68, at 614 ("[O]nce one gets beyond the obvious suspect classifications, there is no agreement on which considerations are or are not legitimate.").

[109] CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4(a) (AM. BAR ASS'N 2017) ("Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge . . . are: (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.").

[110] *Id.*

[111] NAT'L PROSECUTION STANDARDS § 4-1.3 (NAT'L DIST. ATT'YS ASS'N 2009) ("Factors that may be considered in [the charging] decision include: a. Doubt about the accused's guilt; b. Insufficiency of admissible evidence to support a conviction; c. The negative impact of a prosecution on a victim; d. The availability of adequate civil remedies; e. The availability of suitable diversion and rehabilitative programs; f. Provisions for restitution; g. Likelihood of prosecution by another criminal justice authority; h. Whether non-prosecution would assist in achieving other legitimate goals, such as the investigation or prosecution of more serious offenses; i. The charging decisions made for similarly-situated defendants; j. The attitude and mental status of the accused; k. Undue hardship that would be caused to the accused by the prosecution; l. A history of non-enforcement of the applicable law; m. Failure of law enforcement to perform necessary duties or investigations; n. The expressed desire of an accused to release potential civil claims against victims, witnesses, law enforcement agencies and their personnel, or the prosecutor and his personnel, where such desire is expressed after having the opportunity to obtain advice of counsel and is knowing and voluntary; o.

standards allow consideration of "insufficiency of admissible evidence," "availability of suitable diversion or rehabilitation programs," and "[w]hether the size of the loss or the extent of the harm caused . . . is too small to warrant a criminal sanction."[112] In addition, the NDAA standards list factors "that may be relevant" to whether the specific charges "are consistent with the interests of justice."[113] A Washington State Supreme Court case specifically identified "the public interest as well as the strength of the case which could be proven" as relevant to a prosecutor's decision "whether to charge suspects with criminal offenses."[114] Determining what factors prosecutors consider and how they are balanced is difficult, as prosecutors have resisted pleas to publish charging guidelines.[115]

Prior research indicates that some common factors and considerations are important for prosecutor charging decisions. These include "the seriousness of the offense, the defendant's prior criminal record, the victim's interest in prosecution, the strength of the evidence, the likelihood of conviction, and the availability of alternative dispositions."[116] Other factors traditionally considered by prosecutors in deciding whether to press charges include "the citizen's education, vocational skills, employment record, family ties and responsibilities,

Whether the alleged crime represents a substantial departure from the accused's history of living a law-abiding life; p. Whether the accused has already suffered substantial loss in connection with the alleged crime; q. Whether the size of the loss or the extent of the harm caused by the alleged crime is too small to warrant a criminal sanction . . . .").

[112] *Id.*

[113] *Id.* at 4-2.4 ("[Relevant factors may include:] a. The nature of the offense, including whether the crime involves violence or bodily injury; b. The probability of conviction; c. The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused's criminal history; d. Potential deterrent value of incapacitating the accused in the event of a conviction; e. The value to society of incapacitating the accused in the event of a conviction; f. The willingness of the offender to cooperate with law enforcement; g. The defendant's relative level of culpability in the criminal activity; h. The status of the victim, including the victim's age or special vulnerability; i. Whether the accused held a position of trust at the time of the offense; j. Excessive costs of prosecution in relation to the seriousness of the offense; k. Recommendation of the involved law enforcement personnel; l. The impact of the crime on the community; m. Any other aggravating or mitigating circumstances.").

[114] State v. Judge, 675 P.2d 219, 223 (Wash. 1984).

[115] Misner, *supra* note 8, at 744 ("Attempts to convince prosecutors to publish the guidelines for making prosecutorial charging decisions . . . have generally gone unheeded.").

[116] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 34-35 (1998).

community ties, and the socioeconomic status of the offender."[117] Some of these factors are arguably not permissible, including education or socioeconomic status since they criminalize poverty and are associated with race.[118] Other unstated factors for prosecutor charging include "internal rules, external resource constraints, and a balancing of interdependent relationships."[119] Office funding levels are also a factor in charging decisions, as limited resources require prioritization.[120] And a progressive prosecutor may consider "whether [a defendant] 'deserve[s],' or the community benefits from" bringing charges.[121] Our study will explore factors prosecutors claim are important to their charging decisions.

E. Declination

Whether to bring charges, or decline, is entirely up to the prosecutor's discretion.[122] Indeed, the prosecutor's decision not to charge a case is largely unreviewable.[123] The ABA standards clarify that there are some situations where charges may not be appropriate but fail to clarify when such a situation exists, only stating that "[t]he prosecutor should . . . consider, and where appropriate develop or assist in developing alternatives to prosecution[.]"[124] The Model Rules of Professional Conduct clarify that a prosecutor should not bring a charge if the "prosecutor knows [the charge] is not supported by probable cause."[125] The NDAA standards do not include significant guidance covering

117 Pizzi, *supra* note 33, at 1368-69.

118 *See* Christopher Robertson, Shima Baradaran Baughman & Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIRICAL LEGAL STUD. 807, 808, 816-18 (2019) (describing how consideration of socioeconomic status and education may be one cause of racial disparities in the criminal justice system).

119 Stemen & Frederick, *supra* note 46, at 83.

120 Vorenberg, *supra* note 8, at 1542-43 ("Funding levels determine how many cases can be brought and inevitably force prosecutors' offices to give little or no attention to many chargeable crimes.").

121 Jeffrey Bellin, *Defending Progressive Prosecution: A Review of* Charged *by Emily Bazelon*, 39 YALE L. & POL'Y REV. 218, 244 (2020).

122 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

123 Misner, *supra* note 8, at 743.

124 ABA CRIM. JUST. STANDARDS § 3-1.2(e) ("The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction . . . .").

125 MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2018).

when declination is appropriate. However, they do specify that prosecutors' offices should maintain "a record of the reasons for declining a prosecution" where such record is "permitted by law."[126]

Common reasons for declination of charges include practical considerations or broader considerations of fairness. According to Angela Davis, "[t]he decision to forego charges may be based on practical considerations such as the triviality of the offense and/or the victim's lack of interest in prosecution.[127] This decision may also be based on considerations of fairness and justice in a particular case."[128] Richard Frase indicates that the declination decision is closely related to the offense in the case.[129] A study of federal declination decisions in the Northern District of Illinois found that "the most common specific reason for declination was the state-prosecution alternative. In order, the next most frequently cited reasons were: small amount of loss by the victims; prior record of the defendant; small amount of contraband, such as drugs or guns; the isolated nature of the defendant's act; and insufficient evidence of a criminal act."[130] However, there was a wide variety in reasons cited for declination.[131] Categorizing these reasons into ten groups, "[m]inor offense appears most frequently, followed by state prosecution, insufficient evidence, and defendant characteristics."[132] A similar study of causes for prosecutor declination has not been conducted using a national sample of prosecutors. Our study will explore reasons why state prosecutors decline to bring cases.

II. NATIONAL PROSECUTOR STUDY DATA AND METHODS

The data for this study of prosecutors comes from an experimental survey instrument administered to state and local prosecutors in 2016 and 2017. The survey contained questions about how the respondents made charging decisions and demographic questions. The survey also contained a vignette, which consisted of fictional police reports describing a minor crime, and questions about what charging decision

126 NAT'L PROSECUTION STANDARDS § 4-1.7 (NAT'L DIST. ATT'YS ASS'N 2009).

127 Davis, *supra* note 24, at 409.

128 *Id.*

129 Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 257 (1980) ("[I]mportation of marijuana[,] . . . theft of government property, theft from interstate shipment, miscellaneous frauds, civil rights cases, and simple assaults [were almost never prosecuted].").

130 *Id.* at 262.

131 *Id.* ("[A] total of forty-three different reasons were cited in sample declinations.").

132 *Id.* at 262-64.

respondents would make based on the facts presented and stipulated laws of the jurisdiction. The vignette manipulated the race and social class of the defendant so that we could assess the impact of these status characteristics on prosecutors' charging decisions. The findings from the experiment portion of the study, showing no evidence of race or class bias on prosecutors' charging decisions, have been previously published.[133]

This Article presents additional findings from responses to the vignette questions as well as quantitative findings from the survey questions about how prosecutors make decisions in other cases. Additionally, this study presents findings from qualitative analysis of prosecutors' responses to open-ended survey questions about decision making.

A. Sample

We were interested in how state and local (not federal) prosecutors make charging decisions, but unfortunately, there is no list of all such prosecutors. We had hoped to be able to partner with professional associations to which prosecutors belong to obtain the names and contact information of affiliated prosecutors, but those groups declined to cooperate. We thus created our own sample of state and local prosecutors.

To ensure our sample contained prosecutors from across the country, we selected one to two states from each of the nine U.S. Census Bureau regions and conducted web searches for state and local prosecutors' names and email addresses. Some state websites list all state employees, including prosecutors. More often, however, if a government website listed the names and contact information for prosecutors, this information was available on county websites. Many counties opt only to list the name of the head prosecutor, however, so we also used state bar association websites to collect names and contact information for members who indicated they were or had been state or local prosecutors. Finally, we submitted Freedom of Information Act requests to states for lists of their prosecutors and email addresses. Our final sample included 4,484 state and local prosecutors.[134]

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[133] Robertson et al., *supra* note 118, at 822-43.

[134] This is not a representative sample, and there is bias in who opted or declined to participate in this study. Some head prosecutors opted out on behalf of their entire office.

We then emailed those prosecutors inviting them to participate in the study,[135] which we hosted on Qualtrics. Upon completion of the study, respondents could request a gift card to Amazon for five dollars. Ultimately, 542 prosecutors completed the survey for a response rate of 12.09%.

A detailed description of the sample can be seen in Table 1.[136] Most respondents were men (65.85%), white (90.26%), and not Hispanic (96.07%). The average age of respondents was forty-six years, and respondents averaged about twelve and a half years as a prosecutor. 22.55% of respondents were the head prosecutor in their office. The average office size was about thirty-five prosecutors. Most respondents were from the Mountain (24.07%), Midwest (21.3%), and South Atlantic (14.63%) regions.[137] Many respondents were prosecutors in jurisdictions containing less than 100,000 people (42.49%) or between 100,000 and 500,000 people (28.58%).

Table 1 — Descriptive Statistics

	Percent of Sample or Mean
Recommended Disposition of Case	
Felony Charge	16.05%
Monetary Penalty	41.68%
Average Amount of Monetary Penalty	$247.21
Confinement	27.83%

[135] This study was approved by the University of Utah Institutional Review Board.

[136] A similar table appears in Robertson et al., *supra* note 118, at 823. The sample description reported here differs slightly because, in our prior work, we eliminated some responses based on the time a respondent spent on the study as a quality control mechanism to ensure the integrity of the experimental portion of the study. For a description, see *id.* at 819.

[137] The regional breakdown is as follows:

New England: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, or Vermont.

Middle Atlantic: New Jersey, New York, or Pennsylvania.

Midwest: Illinois, Indiana, Michigan, Ohio, or Wisconsin.

West North Central: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, or South Dakota.

South Atlantic: Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, South Carolina, Virginia, or West Virginia.

East South Central: Alabama, Kentucky, Mississippi, or Tennessee.

West South Central: Arkansas, Louisiana, Texas, or Oklahoma.

Mountain: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, or Wyoming.

Pacific: Alaska, California, Hawaii, Oregon, or Washington.

Average Minimum Days of Confinement	25.73 days
Jurisdiction Characteristics	
Average Size of Office	34.83 prosecutors
Size of Jurisdiction	
Over 2,000,000 people	7.42%
1,000,000-2,000,000 people	10.76%
500,000-1,000,000 people	10.76%
100,000-500,000 people	28.58%
Less than 100,000 people	42.49%
Region	
New England	4.44%
Middle Atlantic	3.52%
Midwest	21.30%
West North Central	10.93%
South Atlantic	14.63%
East South Central	8.52%
West South Central	0.93%
Mountain	24.07%
Pacific	11.67%
Prosecutor Characteristics	
Average Number of Years as Prosecutor	12.52 years
Head Prosecutor	22.55%
Average Age	46.02 years
Gender	
Male	65.86%
Female	34.14%
Race	
White	90.26%
Black/African American	3.93%
American Indian/Alaska Native	0.56%
Asian	1.12%
Native Hawaiian/Pacific Islander	0.19%
Other	3.93%
Hispanic	
No	96.07%
Mexican/Mexican American/Chicano	1.50%
Puerto Rican	0.19%
Cuban	0.94%
Other Spanish/Hispanic/Latino	1.31%

B. Instrument

Our survey contained twenty-three questions with some follow-up probes. The survey asked prosecutors some screening questions to ensure that they were or had been prosecutors. They then were asked to read two fictional police reports about a relatively minor crime for which prosecutors could have recommended various charges or no charges at all. In the vignette, a man at a train station was arrested for, in the words of one arresting officer, "yelling obscenities, stopping patrons for money, and brandishing a knife." The man was emotionally distressed from a recent breakup with his girlfriend and needed money for a train ride, but when no one gave him any money, he became more upset. One witness reported that the man, while holding a knife, had grabbed a woman's arm after she refused to give him money, but did not hurt or threaten her. Although people at the train station were scared, no one was physically hurt. The man submitted to an arrest without incident.

We then provided sample criminal statutes and sentencing guidelines and asked prosecutors what charges they would bring, if any. We also asked respondents what monetary penalty or term of confinement they would recommend, if any, and the reasoning for their recommendation. These were open-ended questions, and a text box was provided for respondents to write their penalty recommendations and reasoning.

We then asked a series of five close-ended questions about how respondents make charging and plea-bargaining decisions in their office and provided space for respondents to provide additional explanations if they desired. The survey concluded with eleven questions about respondents' office, jurisdiction, and demographic characteristics. We designed the study to take approximately fifteen minutes to complete and piloted it with prosecutors in Salt Lake City.[138]

C. Method

As noted above, we have previously reported some findings from the experimental portion of the study. In this paper, we report additional quantitative and qualitative analysis of respondents' punishment recommendations for the defendant described in the vignette, as well as descriptions of respondents' prosecutorial decision-making process. We present descriptive results from frequency distributions using the data

[138] *See* Megan S. Wright, Shima Baradaran Baughman & Christopher T. Robertson, *Supplemental Materials: National Prosecutory Survey*, 55 UC DAVIS L. REV. (forthcoming 2022).

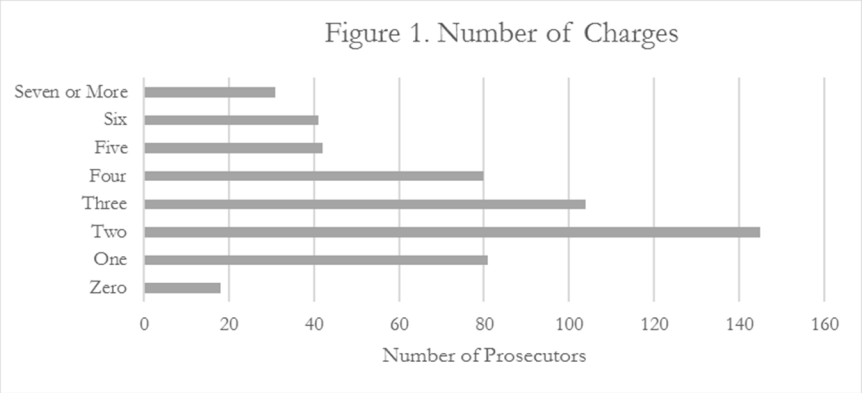
from the close-ended survey questions. The study also yielded qualitative data from the text that respondents provided to the survey questions, which we transformed into quantitative data for purposes of reporting descriptive statistics. We also coded qualitative data from the survey questions and the experimental portion of the study inductively based on themes that emerged from the data.

III. RESULTS OF NATIONAL PROSECUTOR STUDY

This Part explains the results of our national prosecutor study. Part III.A reviews the recommended charges and penalties imposed by respondents for the hypothetical crime they reviewed. Part III.B reviews the various reasons respondents provided to support their decisions. Some of these reasons include that respondents believed punishment is necessary despite the fact that this is a minor crime. Others note financial or mental health condition of the defendant, and others specifically note that a little jail time could teach the defendant a lesson. After the respondents answered questions about the vignette, we then asked respondents about how prosecutors in their office make charging decisions. We asked who makes the charging decision, whether the crime is a felony or misdemeanor changes the decision-making process, who prosecutes the case after decisions are made about charging, and whether their office has internal guidelines or standards governing charging decisions. The prosecutor responses about the general process for making charging decisions is recounted in Part III.C.

A. Recommended Charges and Penalties

Respondents could choose from a range of charges to bring in response to the arrest described in the vignette or to bring no charges at all. The below figure shows that just eighteen respondents declined to bring charges and that almost eighty percent of respondents brought multiple charges. The mean number of charges recommended was 3.15 [CI 2.99, 3.31], and the maximum number of charges recommended was eleven (the maximum number of charges that could be recommended was sixteen).

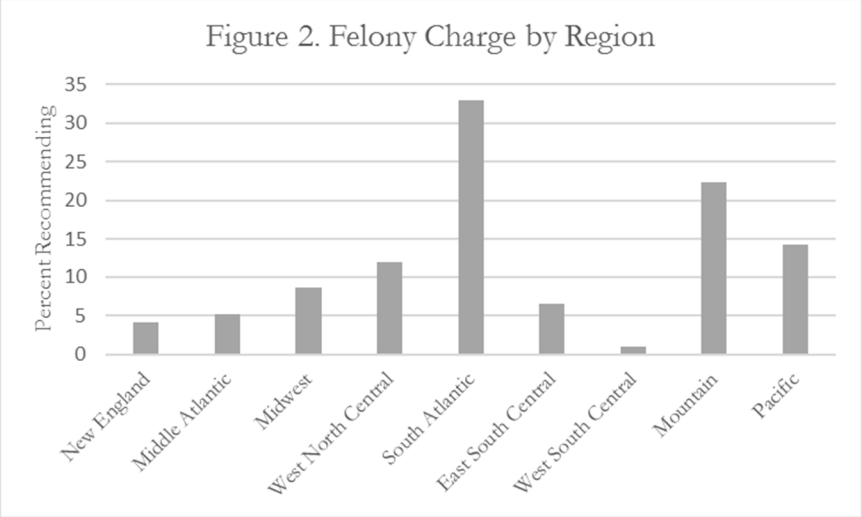


There was variation in the number of charges recommended by region in which the respondent worked as a prosecutor. See Table 2 for the mean number of charges recommended by region, as well as the range of charges recommended by region.

Table 2 — Number of Charges by Region

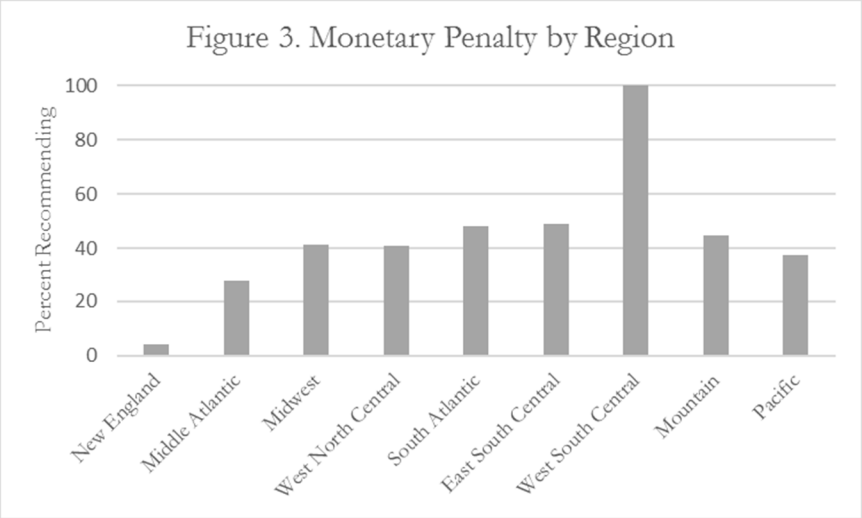
Region	Mean Number Charges	Minimum Number Charges	Maximum Number Charges
New England	2.88	0	8
Middle Atlantic	4.37	1	10
Midwest	2.45	0	10
West North Central	3.39	0	8
South Atlantic	3.82	0	11
East South Central	2.83	0	6
West South Central	3.2	2	6
Mountain	3.25	0	10
Pacific	3.11	1	8

There was one felony charge that respondents could select, and sixteen percent opted to charge the defendant with a felony.[139] There was variation in whether a felony was charged by region in which the respondent worked as a prosecutor. See Figure 2 below for the percentage of respondents who recommended a felony charge by region. Notably, the South Atlantic region prosecutors were most likely to recommend a felony charge, followed by the Mountain region prosecutors.



While the vast majority of respondents would bring multiple charges, far fewer recommended a monetary penalty. Almost sixty percent of respondents recommended no monetary penalty in this instance, although there was significant variation by region. All West South Central prosecutors recommended a monetary penalty.

[139] *See* Table 1. Similar results for outcome variables of interest appeared in Robertson et al., *supra* note 118. The results reported here differ slightly because, in our prior work, we eliminated some responses based on the time a respondent spent on the study as a quality control mechanism to ensure the integrity of the experimental portion of the study. For a description, *see* Robertson et al., *supra* note 118, at 819.



Of those who did recommend a monetary penalty, the recommended amount tended to be less than $500 (mean recommended monetary penalty was $247.21 [CI $200.05, $294.37].[140] It is important to note, however, that some respondents did recommend amounts up to $5,000. See below figure for distribution of recommended monetary penalty.

The amount of monetary penalty recommended also varied by region, shown in the below table. The minimum monetary penalty in all regions

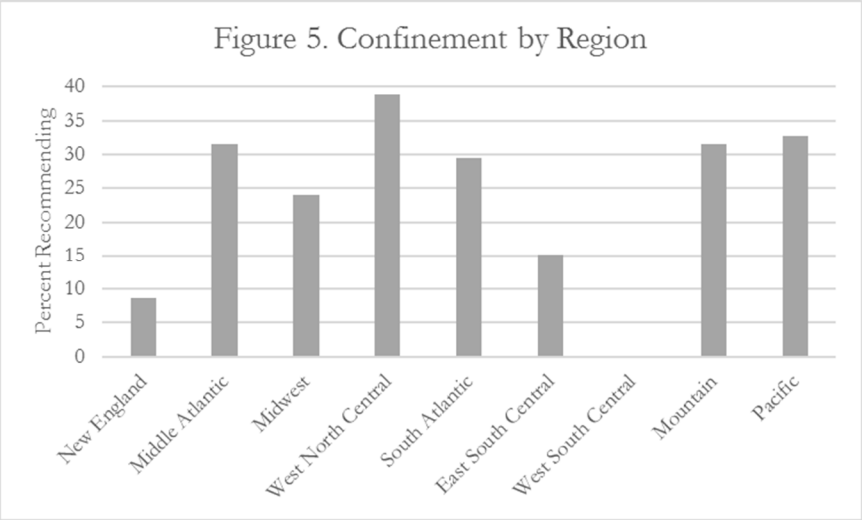
[140] *See* Table 1.

was zero, except in West South Central, where the minimum monetary penalty was $500.

Table 3 — Amount of Monetary Penalty by Region

Region	Mean Monetary Penalty	Maximum Monetary Penalty
New England	$10.87	$250
Middle Atlantic	$88.89	$750
Midwest	$191.83	$5,000
West North Central	$138.46	$1,000
South Atlantic	$355.84	$2,500
East South Central	$202.22	$1,000
West South Central	$500	$500
Mountain	$359.17	$5,000
Pacific	$215.74	$2,500

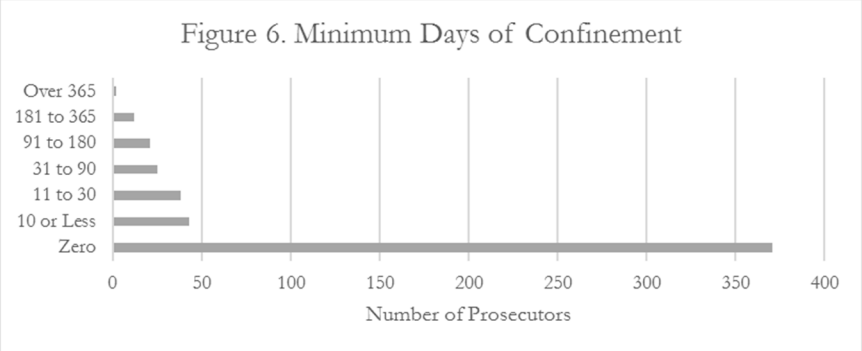
Respondents were even less likely to recommend confinement. Over seventy percent of respondents recommended no term of confinement, although this varied by region. See Figure 5.



Of those who did recommend confinement, the recommendation tended to be less than thirty days in jail (mean recommended days of confinement was 25.73 days [CI 17.37, 34.10].[141] See Figure 6 below

[141] *See* Table 1. Some respondents recommended a year in jail (eleven), and two respondents recommended longer than two years in jail.

for the distribution of recommendations for minimum days of confinement.



The days of confinement recommended varied by region in which the prosecutor worked. The minimum number of days of confinement recommended was zero in each region. See Table 4 below.

Table 4 — Minimum Days of Confinement by Region

Region	Mean Days	Maximum Days
New England	5.22	90
Middle Atlantic	22.94	180
Midwest	17.81	365
West North Central	17.37	365
South Atlantic	53.81	1500
East South Central	18.93	365
West South Central	0	0
Mountain	26.01	720
Pacific	25.69	365

As indicated by the above figures, we found extremely wide heterogeneity in how respondents resolved the exact same case. Although eighteen respondents resolved the case without pressing any charges, the modal respondent imposed two charges, and some sought seven or more. Similarly, although many respondents sought no monetary penalty at all, and the modal respondent who sought a monetary penalty sought $500 or less, some demanded as much as $5,000. Most strikingly, we saw many respondents resolving the case

without any jail time, but others demanding a month, or even up to two years in one case. And there was significant variability in the number of charges and recommended punishment by respondents' region.

B. Reasons for Recommendations

Beyond asking prosecutors to charge the hypothetical case, we were also interested in why prosecutors decided to make specific recommendations. We thus asked respondents to explain their reasoning for their charging and penalty recommendations.[142] This question was not mandatory, but many respondents chose to explain their reasoning, and we coded the responses for common themes, presented below. The five common themes provided for prosecutors' recommendations are described in Part III.B.1 necessity of punishment despite a minor crime; Part III.B.2 the financial state of offender; Part III.B.3 the mental state of offender; Part III.B.4 the benefit of jail time for offender; and Part III.B.5 plea bargaining considerations.

1. Necessity of Punishment, Despite Minor Crime

A large group of prosecutors recommended punishment for the defendant, despite their recognition that this was a minor crime. Nearly half of respondents (230) observed that the crime was relatively minor. Many respondents described the conduct using phrases like "No big deal," "Relatively minor offenses," and "The crime is de minimus, and no one was harmed." Such respondents framed the offender's conduct as part of a "bad day" that resulted in no consequential harm and did not view the defendant as a threat to public safety or likely to reoffend.

Despite understanding the crime to be minor, half of these respondents (115) still recommended some sort of penalty. Respondents who felt that some punishment was warranted despite the lack of harm tended to use a monetary penalty instead of confinement (eighty-two recommended imposing a fine or court costs, and of this group, eight mentioned that community service could be used to pay the monetary penalty).[143]

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[142] Respondents were directed to "Please write a couple of sentences explaining your decision in the scenario that you reviewed."

[143] Seven respondents chose to recommend only a term of confinement, and 26 recommended both a term of confinement and a monetary penalty. One respondent who recommended two days in jail and a $500 fine plus court costs wrote, "People make mistakes. No one was hurt, and this man doesn't appear to need to be locked away for life based on one bad day. The goal is to make it sting a bit, and give him the tools to

Respondents who only imposed a monetary penalty focused on wanting to deter future bad conduct, but noted that jail was not warranted given that there was no public threat and that incarceration would be harmful to the offender. A junior prosecutor in the Mountain region who recommended a $600 monetary penalty and no jail time wrote, "While some punishment may be necessary, such as a fine, in order to deter the Defendant from committing the same acts under similar circumstances, I don't think jail would be beneficial for anyone in this case."[144] Similarly, a junior prosecutor from the Pacific region who recommended a $100 fine explained: "I believe in this case a minimal monetary sanction with a suspended sentence would get the point across . . . that his behavior is not appropriate, but would also not blow the situation/incident out of proportion."[145] A midcareer prosecutor from the South Atlantic region respondent who recommended probation and a fine between $350 and $500 wrote, "I want something that takes it seriously that a person is possibly drunk and wielding a weapon but also an opportunity to take responsibility without facing the worst sentence."[146]

Some monetary penalty recommendations were more severe, however. A prosecutor from the Pacific region with twenty years experience who recommended a $2,500 fine wrote, "There needs to be some accountability, but no one was actually injured and I think the negative impact of a felony or a jail sentence is disproportionate to the harm imposed by the defendant's actions in this case. I think a large fine and suspended sentence are appropriate."[147]

Some respondents appeared to impose a fine to further different criminal justice purposes, such as increasing funding for law enforcement. A junior prosecutor from the Mountain region who recommended only a $100 fine wrote, "I don't believe he needs to be incarcerated. The fines go towards furthering police work and programs that help people with behavioral health issues."[148]

make that behavior obsolete so he doesn't re-offend." *See supra* Part II.A (quoting anonymous respondent identified as "7YCgT0SiaW44Hn").

[144] *See supra* Part II.A (quoting anonymous respondent identified as "2mkZw3uPnXe2nWV").

[145] *See supra* Part II.A (quoting anonymous respondent identified as "2sRdHxjA12tdf3a").

[146] *See supra* Part II.A (quoting anonymous respondent identified as "1dnUmYZZr1R5LZi").

[147] *See supra* Part II.A (quoting anonymous respondent identified as "2anJFJKuqey4l2e").

[148] *See supra* Part II.A (quoting anonymous respondent identified as "3G2DRgFXl7oPsdz").

Some respondents offered evidence-based reasons for recommending a monetary penalty instead of jail time. A junior prosecutor from the Midwest who recommended a $500 fine plus court costs argued, "Additionally studies show that jail for someone who is low risk like this defendant could actually do more damage by exposing him to high risk individuals or jeopardizing his career through the period of incarceration."[149] A Midwest prosecutor with almost thirty years of experience who recommended only a $100 fine plus court costs observed, "Evidence-based decision-making informs us that low risk offenders tend to be self correcting and that placing them on probation and/or incarcerating them will do more harm than good. I prefer to defer him in a First Offender program if possible, and if not a monetary fine should be sufficient retribution."[150]

Many did not view any punishment as necessary, however. A midcareer prosecutor from the Mountain region wrote, "I would decline to prosecute . . . because I do not feel that he is a danger to the community, nor do I believe this would be a good use of resources. Just because acts fit the definition of a crime does not mandate that a person be prosecuted. This is why prosecutors have discretion."[151] A midcareer New England prosecutor wrote, "I do believe that this conduct is properly classified as criminal, but it is pretty minor, and he has no record, so the proverbial 'slap on the wrist' is appropriate."[152] An experienced prosecutor from the Mountain region described their reasoning for no punitive sanctions as follows: "I considered the social harm (low) of the offense and the ascertainable risk of future crime (low). I also considered the seriousness of the crime category (low). I concluded that the suspect would be a good candidate for a diversion or deferred prosecution."[153] A midcareer prosecutor from the South Atlantic region similarly noted, "First time offender, there's nothing that incarceration can do on this case that probation can't."[154]

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[149] *See supra* Part II.A (quoting anonymous respondent identified as "2dhhuJeue60lqX9").

[150] *See supra* Part II.A (quoting anonymous respondent identified as "2atQZRNL0mVKhHA").

[151] *See supra* Part II.A (quoting anonymous respondent identified as "ebOKc7b4o9jGwkV").

[152] *See supra* Part II.A (quoting anonymous respondent identified as "2wREsUkzVDhejxP").

[153] *See supra* Part II.A (quoting anonymous respondent identified as "1opqG1nUHb0YFei").

[154] *See supra* Part II.A (quoting anonymous respondent identified as "SQc9Ih39JLhyipr").

Several respondents mentioned rehabilitation as a motivation for not imposing punishment and wanted to connect the offender to additional resources like anger management counseling, conflict resolution courses, substance abuse treatment, and mental health treatment. Still mindful of the negative impact on the victim of the crime, a junior prosecutor in the Mountain region who recommended no punishment wrote, "I included the letter of apology to give [Defendant] an opportunity to express any remorse he has over his behavior as well as to provide a way for the named victim to feel her distress was acknowledged and also so she is aware the judicial system responded to this situation."[155]

Overall, a large number of prosecutors deemed this crime to be a minor one, although at least half of them still imposed a monetary penalty or jail time.

2. Considering the Financial State of Offender

A subset of prosecutors specifically noted the financial state of the offender and considered this in their decision to charge and recommend sanctions. Many respondents (fifty-eight) explicitly considered the financial state of the offender when recommending punishment. Often, monetary penalties were not imposed because, given the scenario presented, respondents did not believe that the offender would be able to pay. Some still felt that some sort of community restitution was necessary, and so recommended community service in lieu of a monetary penalty. As a junior prosecutor from the South Atlantic region observed, "I would not ask for a monetary penalty because if he cannot afford a train ticket, he likely cannot afford a monetary penalty."[156] This respondent recommended ten hours of community service in lieu of a fine. A junior prosecutor from the Mountain region who also recommended community service in lieu of a monetary penalty because of the defendant's inability to pay wrote, "Given that he was asking for money, it did not seem practical, or indeed useful to require a fine. Instead, I would ask for something that would benefit the community — that being community service."[157]

[155] *See supra* Part II.A (quoting anonymous respondent identified as "1lcx0uWXrC2mT2E").

[156] *See supra* Part II.A (quoting anonymous respondent identified as "2i6snRsjFtcJOJH").

[157] *See supra* Part II.A (quoting anonymous respondent identified as "264HS9URKlCKf2u").

Given the offender's perceived inability to pay a monetary penalty, several respondents thought imposing one may be too burdensome. One such respondent, a head prosecutor in the Mountain region with three years of experience, wrote that they would not impose a monetary penalty because "[h]e would just be back in jail for not paying fines which exceeds the scope of conduct that we should be punishing here."[158]

Some who thought the monetary penalty would be too burdensome recommended connecting the offender to social services. A Midwest junior prosecutor noted that given that "[h]e was desperate for money, [monetary penalties] would not seem to do any good, but to make the problem worse"[159] and recommended probation and treatment. A midcareer prosecutor from the Mountain region recommended connecting the offender to "housing support and job skills along with possible substance abuse counseling and treatment"[160] combined with supervision in lieu of a monetary penalty given the offender's perceived lack of means to pay.

Some respondents who recognized that a monetary penalty would be too burdensome for the offender instead opted for imposing a term of confinement; that is, they substituted jail for a fine. One South Atlantic prosecutor with over twenty years of experience observed that "[a] fine would be onerous"[161] given that the offender had no money. To address the fact that the alleged conduct upset the public, however, this respondent recommended ten days of confinement. This prosecutor failed to recognize the costs of ten days of confinement would likely be more than a monetary penalty given that defendant was employed.[162]

Other respondents who recognized that the offender might not be able to afford a fine still imposed a monetary penalty but seemed to reduce the amount they would normally recommend. One such respondent, a Midwest head prosecutor with three years of experience, stated, "I only asked for $500.00 because from the fact scenario it sounded like money is an issue for this person. I utilize the phrase 'You

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158 *See supra* Part II.A (quoting anonymous respondent identified as "tLrbRR86gRqGzJL").

159 *See supra* Part II.A (quoting anonymous respondent identified as "3TP7gh4qmk7qo5r").

160 *See supra* Part II.A (quoting anonymous respondent identified as "1eLTmKILcmNPXq9").

161 *See supra* Part II.A (quoting anonymous respondent identified as "3JrTfWnt7VwWc9K").

162 *See* Shima Baradaran Baughman, *Costs of Pretrial Detention*, 97 B.U. L. REV. 1, 5-6 (2017) ("[T]he value of lost freedom to pretrial detainees may be as high as $6,770 for the least dangerous defendants.").

can't squeeze blood from a turnip' in cases like this."[163] A midcareer prosecutor from the Mountain region observed, "It does not seem like he has much money which is why a $350 fine will still be a stiff penalty without being unfairly burdensome."[164] A junior Midwest prosecutor who recommended a fine of up to $500 wrote, "It seems like this is a mental health/poverty issue rather than there being any real criminal intent."[165]

Some respondents also focused on the offender's employment status to justify the imposition of a monetary penalty. One midcareer Midwest prosecutor recommended a $500 monetary penalty and wrote, "The defendant is gainfully employed with no prior record and can afford to pay a fine."[166] Another respondent similarly justified a $1,000 fine.

One respondent wanted more information about the offender's financial state prior to making a recommendation about imposing a monetary penalty. This experienced prosecutor from the South Atlantic region wrote, "I would actually want more information about his. Is he employed? Would a fine set him up for a violation because of an inability to pay? I think that it is reasonable to levy a monetary sanction but inability to pay cannot be ignored in my evaluation."[167]

In sum, there was significant variability amongst respondents considering the financial state of the offender in terms of what they recommended. Overall, prosecutors seemed to try to tailor their punishments to what they deemed was affordable for defendant, although some imposed jail time even though that could be much more costly in the long run.

3. Mental Health Considerations

It was common for prosecutors to consider the defendant's mental or emotional health, as well as potential substance abuse. Many respondents, assuming no prior criminal history, recommended mental health assessments because they viewed this as the cause of the alleged behavior, and several mentioned diversion to mental health court.

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[163] *See supra* Part II.A (quoting anonymous respondent identified as "vcLDkIKoBMTx1Ul").

[164] *See supra* Part II.A (quoting anonymous respondent identified as "2P8cmmpaP52cpPt").

[165] *See supra* Part II.A (quoting anonymous respondent identified as "3NIdqqtlR4pULvT").

[166] *See supra* Part II.A (quoting anonymous respondent identified as "1pus25jdUprulqI").

[167] *See supra* Part II.A (quoting anonymous respondent identified as "2fuMrAvhdIYjxpU").

When explaining their reasoning for imposing (or not imposing) a monetary penalty or term of confinement, 147 respondents (27.12%) mentioned mental health, forty-six respondents (8.49%) mentioned counseling or treatment, and twenty-nine respondents (4.06%) mentioned anger management. In all, 222 respondents (40.96%) considered the defendant's mental health or emotional needs.

Many respondents concerned about the offender's mental health opted for no punishment. As one head prosecutor with three years of experience in the West North Central region wrote, "While the defendant's behavior meets the technical requirements of the crimes marked, it appears that his behavior may be resulting from either a mental health or anger management issue. Therefore, my primary motivation is [to] correct the problem, rather than to simply seek punishment. This is especially true of a first-time offender. If the defendant is willing to participate in a mental health screening and any treatment recommended by the screening, that will most likely do more to ensure the safety of the community than will a fine or a jail sentence."[168]

The lack of physical harm was also often paired with concerns about the offender's mental health to justify no negative sanctions. One head prosecutor with ten years of experience in the Mountain region conveyed, "[Defendant]'s behavior appears to be the result an acute mental disorder or emotional disturbance. It makes sense to me to provide him with an incentive to address the underlying issues. Had anyone been injured by his behavior my analysis would be different."[169]

Several respondents who did not impose a term of confinement or a monetary penalty recognized that the offender needed additional help. One head prosecutor with almost thirty years of experience in the West North Central region observed, "This appears to be a troubled person with needs beyond the criminal justice system."[170]

Others who recommended no punishment wanted to connect the offender to services necessary for rehabilitation. One head prosecutor with five years of experience in the West North Central region who sought no punishment recommended "drug/alcohol examination and/or a mental health examination with follow-up treatment as

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[168] *See supra* Part II.A (quoting anonymous respondent identified as "2QVW25BiyciTFug").

[169] *See supra* Part II.A (quoting anonymous respondent identified as "2tsATdOdSiOWfnY").

[170] *See supra* Part II.A (quoting anonymous respondent identified as "3Dwp2QVgyaYgKGt").

recommended, as that seems to be the root cause of the situation."[171] An experienced Midwest prosecutor who likewise did not recommend a term of confinement or a monetary penalty wrote, "If the man has no criminal history, it would appear that this is a mental health issue. I would like to put him on probation and order treatment."[172]

Sometimes respondents thought that the prospect of future punishment was necessary to facilitate mental health treatment. One head prosecutor in the Midwest region with sixteen years of experience who recommended no punishment wrote, "Appears to be a mental health incident. I would be satisfied with a stick (or carrot) to coerce him to receive some mental health services." [173] A midcareer Midwest prosecutor who recommended suspended confinement and a fine wrote, "I would recommended probation (suspended sentence) based on the apparent rehabilitative needs; specifically alcohol treatment, mental health treatment, and anger management. It is premature to impose jail, however, should he fail on probation or reject probation, I would recommend a jail sentence."[174] A head prosecutor with three years of experience in the Pacific region who recommended a suspended jail sentence wrote, "Best thing for community safety is for him to get the help he needs. Jail hanging over his head provides an incentive for him to get into treatment."[175]

Some respondents focused on balancing the need for mental health treatment with punishment. A junior prosecutor in the South Atlantic region who recommended a suspended sentence of 200 days in jail wrote, "To me, justice in this situation is a balance between punishing the defendant for the disruption of peace and preventing the defendant from reoffending by ensuring that he receives the substance abuse treatment and potential mental health treatment that he needs."[176]

Despite the mental health issues latent in the vignette, not all respondents who recognized that the incident could have been caused

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[171] The same prosecutor also noted that "[i]f the defendant had a long history of this sort of behavior, my recommendation would be different." *See supra* Part II.A (quoting anonymous respondent identified as "1nTIOa3iaMSln9X").

[172] *See supra* Part II.A (quoting anonymous respondent identified as "2A0hIPf7Fe9JXFs").

[173] *See supra* Part II.A (quoting anonymous respondent identified as "3RxaKI5QlSMOqp2").

[174] *See supra* Part II.A (quoting anonymous respondent identified as "3WWbNCckXjcNoGJ").

[175] *See supra* Part II.A (quoting anonymous respondent identified as "3oKE8dV9z6cMcj7").

[176] *See supra* Part II.A (quoting anonymous respondent identified as "3PcyY7T617bSUMk").

by mental health problems opted not to impose a punishment. Of these 222 respondents, twelve recommended a term of confinement, 10 recommended a monetary penalty, and six recommended both.[177] Some respondents concerned about the mental health status of the offender recommended only a fine. One very junior prosecutor in the South Atlantic region recommended a $750 fine and wrote, "They were not in danger of being injured. This is more than likely a mental health issue or a one time occurrence triggered by the issue with his girlfriend."[178] Another junior South Atlantic prosecutor recommended a $500 fine and wrote, "This sounds likely to be a mental health related or possibly substance abuse related. A 29 year old with no previous criminal history exhibiting this kind of behavior would likely benefit from some kind of treatment significantly more than confinement or excessive fines."[179] A midcareer South Atlantic prosecutor recommended diverting the offender to mental health court and imposing a $250 to $500 fine, writing, "[E]vidence that this episode may have been exacerbated by alcohol and/or mental health issues which would be treatable, preventing future violence and obviating the need for incarceration to keep the community safe."[180]

Some respondents thought that a term of confinement was appropriate despite evidence of mental health issues, focusing on the need for accountability. An experienced South Atlantic prosecutor who recommended ten days in jail and a $750 fine wrote, "It sounds like a mental health issue. The sentence will have conditions that require a mental health evaluation. His lack of criminal history played into my decision to go low on confinement, but because he did pose a threat to the woman, he should be punished with some period of incarceration."[181] A Middle Atlantic prosecutor with over twenty-five years of experience who recommended up to four months in jail and a $750 fine wrote, "I would seek 4 months in jail. However, if the defendant sought counseling etc., and had no further arrests while the case is pending, I'd consider a lesser jail sentence. While the defendant

[177] Five respondents recommended community service in lieu of confinement or a monetary penalty, and two recommended the offender be mandated to receive counseling in lieu of punishment.

[178] *See supra* Part II.A (quoting anonymous respondent identified as "1r1SGZSR9EduVwZ").

[179] *See supra* Part II.A (quoting anonymous respondent identified as "ONfAJ9mo394BPfH").

[180] *See supra* Part II.A (quoting anonymous respondent identified as "1Gv1DBSu5pkIpv6").

[181] *See supra* Part II.A (quoting anonymous respondent identified as "2S2cZcgxBZuZMJu").

might have mental health issues, he also created a dangerous situation in which the public felt obliged to flee from a public place for their own safety."[182] An experienced Midwest prosecutor who recommended four days in jail along with a $500 fine wrote, "My main concern with this scenario is to make sure there was some accountability for the suspect's actions but it appears there may be some underlying emotional or mental health issues that need to be addressed. I would see if there could be a referral for a mental health exam."[183]

Other respondents seeking a term of confinement focused on the presence of a knife. A junior prosecutor in the South Atlantic region who recommended a year in jail stated, "But for the knife he would have likely received a term of probation with a condition of seeking mental health treatment."[184] An experienced Midwest prosecutor recommended a sixty-five day term of confinement in a psychiatric facility, five years of probation, and a $500 fine and asserted, "He needs evaluation and treatment, but needs to learn consequences of actions, he caused public fear to several people and was willing to touch another and brandish a knife."[185]

Some only recommended a short period of confinement in order to ensure that there was sufficient time to conduct a mental health assessment. A midcareer Midwest prosecutor who recommended two days in jail along with a $200 fine wrote, "The 2 day time period is really just to ensure that the person can be assessed by community mental health to see if treatment is necessary before release."[186]

Further, some respondents considered the offender's mental health and concluded that there was no mental illness and that punishment was thus appropriate. An experienced head prosecutor in the Mountain region recommended 180 days in jail and noted, "This person does not appear to suffer from a cognizable mental illness to further mitigate or offer a basis for some kind of diversion. Therefor some incarceration

[182] *See supra* Part II.A (quoting anonymous respondent identified as "3HhV0iKZTQ1pENE").

[183] *See supra* Part II.A (quoting anonymous respondent identified as "1gi3bL7DMPuNlSW").

[184] *See supra* Part II.A (quoting anonymous respondent identified as "3IQZivaXZgbtSEC").

[185] *See supra* Part II.A (quoting anonymous respondent identified as "2PsRAqMXBEWW9ES").

[186] *See supra* Part II.A (quoting anonymous respondent identified as "1M0uK0fZrWhYZy0").

would be appropriate followed by a probationary period to ensure the defendant's continued lawfulness."[187]

Respondents who considered mental health varied not only in what types of punishment they recommended, but also in their perception of the offender's danger to the community. A midcareer prosecutor in the West North Central region who recommended only a mental health evaluation wrote, "There is nothing to indicate he would need to be incarcerated for . . . the safety of the community."[188] While an experienced head prosecutor from the South Atlantic region who imposed a $500 fine and two years of probation wrote, "He needs mental help but he's clearly a danger to society." Some viewed the offender as more of a danger to himself than society. A junior prosecutor in the East South Central region recommended that "[Defendant has] an opportunity to rehabilitate himself, eg participate in AA or some other court approved drug and alcohol program, and any psychiatric referral" because "[d]ue to any lack of intent to harm others (I saw him more likely to harm himself), I would much rather see someone given a chance and assistance than pop them with a charge even a misdemeanor who is employed and allow him to be contributing society member."[189]

Overall, a large number of prosecutors noted mental health concerns in their charging decisions, and those who noted such concerns largely decided not to impose jail time or a fine, instead seeking mental health treatment or other social and behavioral services. However, some prosecutors imposed jail time and monetary penalties despite recognizing potential mental health issues.

4. Using Jail to Teach a Lesson

The vast majority of respondents did not think confinement was appropriate, and those who did recommend a term of confinement tended to recommend under thirty days in jail, with most opting to impose fewer than ten days. When explaining their recommendations for seeking a term of confinement, many respondents (45/145)

[187] *See supra* Part II.A (quoting anonymous respondent identified as "1mmIkQ2vidxSzfU").

[188] *See supra* Part II.A (quoting anonymous respondent identified as "2uJ5LJuhdb3PHVf").

[189] *See supra* Part II.A (quoting anonymous respondent identified as "9BSZ1ByWG202ckp").

explicitly indicated that a short stay in jail was warranted to teach the defendant a lesson.[190]

Some respondents focused on using jail to teach a lesson. One head prosecutor with over thirty years of experience in the West North Central region who recommended the offender serve two days in jail and pay a $1,000 fine wrote, "Potentially serious consequences of his stupidity but lucky this time - no one hurt - and no record; 2 days in jail lets him see what jail is like and why he needs a smarter game plan in the future to avoid getting in trouble."[191] A midcareer prosecutor in the Midwest who recommended two days in jail along with a $200 fine wrote that they wanted to "impress upon the suspect the inappropriateness of the conduct, without unduly penalizing the individual."[192] An experienced head prosecutor from the West South Central region recommended up to three days in jail and a $500 fine and observed, "People make mistakes. No one was hurt, and this man doesn't appear to need to be locked away for life based on one bad day. The goal is to make it sting a bit, and give him the tools to make that behavior obsolete so he doesn't re-offend."[193]

An experienced prosecutor in the West North Central region who recommended four days in jail along with a $200 monetary penalty noted, "The four days is to remind him that he really screwed up and scared people."[194] A prosecutor in the Pacific region with twenty years of experience recommended five days in jail and stated that, "While the action alarmed people, no physical harm was done. Def[endant] has no record, and was upset. I would treat this as a first time offense with 5 days to hold him accountable for people alarmed."[195] A junior prosecutor in the South Atlantic region who recommended ten days in jail along with a $500 fine justified their decision as follows: "However, displaying a knife in a crowded public place could have lead to disastrous results. If someone in the station had a gun they could have started shooting and people could have been seriously injured; so some

[190] Others thought lengthier jail sentences were warranted given that a knife was present, which posed a significant danger to the public.

[191] *See supra* Part II.A (quoting anonymous respondent identified as "1dppadxVwNC87y4").

[192] *See supra* Part II.A (quoting anonymous respondent identified as "1M0uK0fZrWhYZy0").

[193] *See supra* Part II.A (quoting anonymous respondent identified as "37YCgT0SiaW44Hn").

[194] *See supra* Part II.A (quoting anonymous respondent identified as "3ffs4br7zUlfhjM").

[195] *See supra* Part II.A (quoting anonymous respondent identified as "cU7oPuA7D1FidVL").

jail time is necessary to make him understand the seriousness of his actions. However, given that he cooperated with police, immediately handing over the knife, and never actually brandished the knife at anyone, I do not feel that an excessive amount of jail time is necessary. Just enough time to make him think."[196]

Some respondents who thought a short stay in jail would teach the defendant a lesson recommended a term of confinement that was more severe than others. A junior prosecutor in the Pacific region recommended sixty days in jail and wrote, "As for consequences, I find this serious as he used a deadly weapon to scare multiple people and even went so far to grab a woman's arm. . . . But, these facts are mitigated by no criminal history even after being [over] 18 for 10 years, cooperative with police officers, no physical injuries, and no pointing the knife at any person. So, some actual jail time to impart seriousness of his conduct but minimal with hope that those 60 days will scare him straight."[197]

Other respondents seemed to use jail as a lesson both for the defendant and others in hopes of a deterrent effect. A head prosecutor with 1.5 years of experience in the Mountain region who recommended ten days of confinement and a $1,000 monetary penalty asserted that, "The knife and assault are both significant factors to me. People were literally endangered by the actions of Mr. [Johnson] and that kind of behavior, though apparently the first time Mr. Johnson exhibited such behavior, deserves a strong message: If you commit a felony that literally endangers the lives of others, the State takes those actions seriously."[198] Similarly, a midcareer head prosecutor in the West North Central region who recommended thirty days in jail plus a $500 fine reasoned, "I don't believe a severe penalty is warranted . . . [but] there needs to be sufficient response to deter others from committing similar acts and for the public to have confidence that people who cause these kinds of disturbances will be dealt with appropriately."[199] A junior prosecutor in the Mountain region who recommended thirty days of confinement plus an unspecified fine wrote, "This case presents a public safety issue that I believe would require a jail sentence to send a message to the

[196] *See supra* Part II.A (quoting anonymous respondent identified as "9nkNyDE62rjUAdb").

[197] *See supra* Part II.A (quoting anonymous respondent identified as "ZJftIjn7BzTv9dL").

[198] *See supra* Part II.A (quoting anonymous respondent identified as "QcfpDrnJ04HuA49").

[199] *See supra* Part II.A (quoting anonymous respondent identified as "sC1vbGhD4L0heoN").

community that this is the type of behavior we as a society will not tolerate."[200] Others, however, thought that confinement was inappropriate given no evidence of a prior criminal record and the cost of confinement. An experienced head prosecutor in the South Atlantic region wrote, "A sentence of confinement also does not serve justice as this defendant has no prior record and the taxpayer would be bearing the ultimate burden."[201]

Overall, a surprisingly large number of prosecutors opted to choose jail time as a tool to teach the defendant a lesson, although some did this to deter others from similar behavior.

5. Plea Bargaining Motivations and Strategies

Plea negotiations were mentioned by seventy-one respondents when explaining their charging decisions and punishment recommendations. Respondents were thinking about a variety of factors when discussing pleas, including dropping charges as a plea negotiation tool, building a criminal history, leaving room for victim input, or pressing charges to incentivize mental health or other treatment.

Some were considering the defendant's possible future criminal offenses and building a history. A head prosecutor with five years of experience in the West North Central region who recommended a suspended sentence and no monetary penalty stated, "I would . . . try to get a plea to the felony (at the expense of dismissing the misdemeanors), as that would enhance the criminal history score in the future were there to be another incident."[202]

Other respondents who were considering possible future criminal offenses were willing to offer a plea to a lesser charge if the defendant could stay out of trouble for a period of time. One prosecutor in the Mountain region with twenty years of experience who recommended a suspended sentence and a year of probation commented, "I would charge the disorderly conduct, one count, for the disruption of the train station's activity and for frightening people, and offer him a misdemeanor resolution if he can stay out of trouble for 12 months."[203]

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[200] *See supra* Part II.A (quoting anonymous respondent identified as "bIyMMvYjaRaC1ep").

[201] *See supra* Part II.A (quoting anonymous respondent identified as "2wT4KYf3nMJwxzE").

[202] *See supra* Part II.A (quoting anonymous respondent identified as "1nTIOa3iaMSln9X").

[203] *See supra* Part II.A (quoting anonymous respondent identified as "WeqgwEZgoxJ3h61").

Other respondents were oriented more toward the defendant's past (lack of) criminal history when considering plea deals. A junior prosecutor from the West North Central region who would charge disorderly conduct and assault and recommended a suspended sentence and no fine wrote, "I'd probably dismiss one through plea negotiations due to the defendant's lack of history."[204]

Several respondents wanted to make plea decisions based on the victim's input. An experienced prosecutor in the South Atlantic region who recommended a $1,000 penalty wrote, "I would charge the felony but, if the victim consents, be willing to let the defendant plea to a misdemeanor."[205] Another prosecutor in the South Atlantic region with over 30 years of experience who recommended a $500 fine wrote, "I would also consult with the woman he grabbed . . . to get her input and explain both my charging decision and recommendation on a plea."[206] A Midwest prosecutor with over twenty-five years of experience who recommended no confinement and a suspended fine wrote, "This is merely a charging decision fitting the facts. I'd certainly be willing to bargain it down (depending on what the victim says)."[207] And an experienced head prosecutor in the Mountain region who recommended ten to twenty days of confinement emphasized that the victim's consent was necessary to offering a plea to lesser charges, remarking, "The knife is the most concerning part of this episode, so we start with the felonies, probably plead it to matching misdemeanors due to his criminal history IF victim agrees."[208]

Some respondents who would charge a felony but later reduce the charge through plea negotiations focused on what type of charge they could prove. A midcareer prosecutor in the South Atlantic region who recommended a suspended sentence observed, "Of all the permissible charges, I found the most appropriate to be Disorderly Conduct, RCS 101(A)(3). Although this is a felony with a 6-month minimum, the defendant's conduct in brandishing is the most easily provable charge given the provable evidence. I felt there was insufficient evidence to

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[204] *See supra* Part II.A (quoting anonymous respondent identified as "1OZcZYZAjcr0REl").

[205] *See supra* Part II.A (quoting anonymous respondent identified as "1hYKWoxomAlba6D").

[206] *See supra* Part II.A (quoting anonymous respondent identified as "3vXprex7ZdGAkXn").

[207] *See supra* Part II.A (quoting anonymous respondent identified as "2TTAkTG008EY2SZ").

[208] *See supra* Part II.A (quoting anonymous respondent identified as "2UhfeWdt5hFarHS").

prove Harassment, Endangerment, Criminal Nuisance, Aggravated Assault, and Loitering. In fact, I believe Assault would even be difficult to prove in light of the intent required, and I did not believe that there would be sufficient witnesses for Public Nuisance. Thus, I would charge the felony Disorderly Conduct and likely reduce it to the misdemeanor Disorderly Conduct with a suspended jail and monetary sentence."[209]

Some respondents used plea bargaining as an incentive for the offender to obtain necessary social and behavioral services. A junior New England prosecutor who recommended a suspended sentence stated, "This is an individual who, under an emotional circumstance, made a bad decision that scared individuals around him. I would charge him with disorderly conduct, with the intent that he comply with treatment--either anger management or other therapy. Depending on his demeanor and level of remorse, I may also require him to complete some community service. If compliant, I would likely drop the case."[210]

Others noted that flexibility in the plea negotiation process best served justice. Many respondents would bring multiple charges or charge a felony in order to get the offender to plea to fewer or lesser charges in the process of negotiating a plea.[211] One midcareer prosecutor in the South Atlantic region who recommended a fine between $250 and $500 observed, "By bringing three charges of varying degrees, we can ultimately make the plea recommendation/offer that best serves the interests of justice in a particular case. For instance, we can later dismiss the felony and proceed on the two misdemeanors if that's what is appropriate. Or plea to the felony and merge in the misdemeanors if that's appropriate."[212] A junior prosecutor in the Mountain region who recommended a suspended sentence and $500 fine stated, "When I screen for charges, I usually charge the maximum

[209] *See supra* Part II.A (quoting anonymous respondent identified as "3e2EUSnam1S1pNM").

[210] *See supra* Part II.A (quoting anonymous respondent identified as "1pPrJAcwuMfmx7n").

[211] Several respondents specifically mentioned charging with the intent of dropping some charges or reducing the severity of the charges in negotiation with the defendant and the defense attorney. Twenty-nine respondents stated that they would charge a felony but allow the defendant to plead to a misdemeanor. Three respondents would select multiple charges but offer a plea to one felony charge in favor of dropping additional misdemeanor charges. Five respondents would charge multiple misdemeanors but allow the defendant to plead to a single misdemeanor charge. Ten respondents indicated that they would charge multiple counts at various levels in order to expand plea options.

[212] *See supra* Part II.A (quoting anonymous respondent identified as "1Gv1DBSu5pkIpv6").

charges that I can and then in resolving the case a lot of it will depend [on] input from the victim and also how the defendant willingness to accept responsibility in regards to his actions and whether or not they have taken any steps before hand to address the issue."[213] And a New England head prosecutor with over thirty years of experience who recommended ninety days in jail noted, "Despite being able to articulate a felony would work to get a misdemeanor plea as that represents the best balance of the public interest--a sanction which both punishes and has specific and general deterrence and a means of responding to further bad conduct (suspended sentences). No monetary fine. Not a fan of financial penalties--for those with means-largely meaningless--for those without means do not pay and ends up being largely meaningless."[214]

Some respondents felt that prosecutors should bring more serious charges first to provide flexibility later, although they often noted that they did not think felony charges were warranted. An experienced prosecutor in the Pacific region who recommended a suspended sentence and no fine wrote, "In general, find the most serious charge for which there is evidence beyond a reasonable doubt. It is far easier to plea bargain down to reach a result consistent with justice than it is to seek higher charges down the road."[215] Similarly, a prosecutor with over twenty years of experience in the East South Central region who recommended a suspended sentence and a $500 fine per charge asserted, "A person should generally be charged with the most serious offense possible under the applicable laws and fact scenario. A part of being a good prosecutor, in my opinion, is having the wisdom and good judgment to know when to be harsh and when to be lenient. It is much easier to allow a plea to a lesser offense and more lenient sentence than the other way. Bottom line . . . you can always come down when warranted but you can't go up."[216] An experienced prosecutor in the West North Central region who did not recommend any punishment wrote, "Filing felony gives room to negotiate down to misdemeanor."[217] A midcareer South Atlantic prosecutor who recommended two years of

[213] *See supra* Part II.A (quoting anonymous respondent identified as "Pv5NlSSORbxgo6d").

[214] *See supra* Part II.A (quoting anonymous respondent identified as "DtKKOTQKW2jqYrT").

[215] *See supra* Part II.A (quoting anonymous respondent identified as "22LnvkbHZ23SO8j").

[216] *See supra* Part II.A (quoting anonymous respondent identified as "1FLrbaCBhwntCR0").

[217] *See supra* Part II.A (quoting anonymous respondent identified as "2eUUV96m9DbvQ4B").

probation and a $1,000 fine wrote, "I would charge all if not several of the offenses in order to have charges to dismiss in the negotiation of the plea. I also tend to overcharge, because I can't add charges later, but I can dismiss charges any time."[218]

Others thought that bringing multiple charges was a waste of time, however. One junior Midwest prosecutor who recommended a year in jail wrote, "I am charging the felonious assault and the lesser included misdemeanor assault. It is a waste of time to charge the nonassaultive charges because they would likely be dismissed anyway as part of a plea deal."[219]

Still, other respondents felt that more serious charges should only be brought if the defendant was uncooperative in the process of plea negotiations. An experienced Midwest prosecutor who recommended a suspended sentence and suspended fine wrote, "I would charge the minimum charge necessary to get the goal desired, that being probation (or suspended sentence). If the defendant would not accept that plea and sentence, then I would most likely dismiss the case and reissue it with all the charges that apply, including the felony for recklessly displaying the knife."[220] A midcareer prosecutor in the Midwest region who recommended a suspended sentence and probation wrote, "I would charge him with disorderly conduct, a misdemeanor level. In making that decision, although noting that his conduct could properly fit a felony disorderly conduct (while armed with a dangerous weapon), I also take into consideration his lack of prior record, his cooperation and de-escalation of the situation when law enforcement arrived, and his motivation for conducting himself in this manner. . . . I would be seeking probation (a suspended sentence) to determine if any mental health or substance abuse issues existed. . . . Should this defendant choose to take this case to trial, however, I would likely re-file the case with at least one felony count, as it would indicate to me that he has no interest in taking accountability for his actions and is not likely to self-correct in the future."[221] A junior Midwest prosecutor who recommended a suspended sentence wrote, "Only charging Assault and Battery would be my initial charge, but if defendant was not willing to

[218] *See supra* Part II.A (quoting anonymous respondent identified as "1Ebb2k2zfpVExqE").

[219] *See supra* Part II.A (quoting anonymous respondent identified as "em70J75SKNIj1jH").

[220] *See supra* Part II.A (quoting anonymous respondent identified as "OAVTkT3Y9YHKjkJ").

[221] *See supra* Part II.A (quoting anonymous respondent identified as "OdsAgLolLBZChAl").

plea on that count and insisted on a trial, there would likely be more charges at trial - any charges supported by the evidence necessarily presented regarding the Assault and Battery."[222]

Overall, many prosecutors reported filing charges against the defendant without the desire to have the defendant serve the time associated with the charges, but to instead use charges as a negotiation tool or to build a criminal history.

C. General Decision-Making Process

After the respondents answered questions about the vignette, we then asked respondents about how prosecutors in their office make charging decisions. We asked who makes the charging decision, whether the crime is a felony or misdemeanor changes the decision-making process, who prosecutes the case after decisions are made about charging, and whether their office has internal guidelines or standards governing charging decisions. We present their responses to these survey questions as well as qualitative analysis of any additional comments they provided below. Notably, the vast majority of prosecutors (seventy-two percent) made charging and plea bargaining decisions alone, and the majority (fifty-seven percent) even prosecuted the cases without any input from another prosecutor.

1. Responsibility for Charging/Plea Bargaining Decisions and Prosecution

We were interested in knowing about prosecutors' charging and plea-bargaining process. We asked respondents about how "the decision as to charging and plea bargaining [would] be made in [their] office." The vast majority of respondents (392, or 72.46%), indicated that a front-line prosecutor would make the decision alone. Sixty-five respondents (12.01%) indicated that a front-line prosecutor would decide after consulting with a superior. Seven respondents (1.29%) indicated that a front-line prosecutor would advise a superior and he or she would make the decision. One respondent (.18% of respondents) indicated that a committee or board of prosecutors would make a collective decision without the front-line prosecutor involved. Two respondents (.37% of respondents) indicated that a committee or board of prosecutors would make a collective decision with the front-line prosecutor involved.

[222] *See supra* Part II.A (quoting anonymous respondent identified as "23WB53au1jQynSK").

Seventy-four respondents (13.68%) selected "other,"[223] of which fifteen respondents indicated that the police make the initial charging decision in their jurisdiction, and six respondents were the only prosecutor in their office.

We next asked respondents whether "the screening process change[s] if the crime is a felony rather than a misdemeanor?" One hundred and sixty (29.63% of respondents) said yes, and 380 (70.37% of respondents) said no.

Finally, we asked respondents "After the initial charging decision is made, what happens to the case?" One hundred and forty-seven respondents (27.22%) indicated that the case is assigned to another attorney who has discretion to change the charges. Nine respondents (1.67%) indicated that the case is assigned to another attorney who does not have discretion to change the charges. Three hundred and nine respondents (57.22%) indicated that the attorney who makes the charging decision prosecutes the case. Seventy-five respondents

[223] We asked respondents who selected "other" to explain the charging and plea bargaining process for their office. Twenty-five respondents reported that one person handles charges while another person handles sentencing recommendations or plea negotiations. Eleven respondents reported that charges and plea negotiations may be managed differently depending on the case specifics or the prosecutor's experience. Eleven respondents reported that the front-line prosecutor has discretion but *may* consult others. Nine respondents reported charging decisions are made by a screening department or warrant writer. Six respondents reported that they are in a one-prosecutor office and that all decisions are handled by that prosecutor. Six respondents reported that they are in a small office where each individual manages their own cases independently but has the option to consult. Six respondents reported that a prosecutor makes the final charging decision after consulting a superior, police, or any victims. Four respondents reported that police make the charging decisions but that they may consult or be reviewed. Three respondents reported that a prosecutor would propose charges that would be approved by a supervisor before being considered official. Three respondents reported that a supervisor or more experienced prosecutor would make the charging decision. Two respondents reported that the front-line prosecutor handles the case from beginning to end. Two respondents reported that a front-line prosecutor *usually* makes decisions alone. One respondent reported that a prosecutor would make the charging decision alone but would then staff the case with coworkers and maybe supervisors. One respondent reported that a prosecutor makes the charging decision based on supervisor's guidelines and priorities. One respondent reported that they would recommend deferred prosecution in this particular case, which is typically approved by a judge. One respondent reported that a prosecutor would decide after consulting peers. One respondent reported that prosecutors only need supervisor approval when negotiating to drop charges in a case with a formal indictment. One respondent reported that all plea bargain offers must be approved by a supervisor. One respondent reported that the final charging decision is made by a committee. Twenty-one of these respondents are included in multiple of the above categories.

(13.89%) selected other.[224] Of the respondents who selected other, thirty-three explained that the case is reassigned to a prosecutor who has at least partial discretion over the charges.[225]

In sum, our study revealed that prosecutors typically acted alone in charging and prosecuting the cases that came before them.

2. Internal Guidelines or Standards

Slightly over half of prosecutors we surveyed had internal guidelines they were able to follow in making charging decisions. Specifically, we asked respondents whether their "office [has] internal guidelines or standards that dictate how prosecutors make charging decisions?" Forty-seven respondents (8.74%) indicated that their office has

[224] We asked respondents who selected "other" to explain. Fifteen respondents reported that some cases are reassigned, and some are not. Eleven reported that what happens next depends on the case. Six respondents reported that the prosecution process is fluid and that cases are not assigned. Five respondents reported that a supervisor would assign the case and that some decisions require supervisor approval. Five respondents reported that misdemeanors are reassigned, but felonies are not. Five respondents reported that an attorney is assigned to a courtroom rather than a case. Four respondents reported that police usually handle the charging, and then the case moves to a prosecutor. Three respondents reported that they are in a one-person office. Three respondents reported that case assignment varies based on prosecutors' caseload. Two respondents reported that misdemeanors are not reassigned. Two respondents reported that what happens next depends on the experience level of the prosecutor. Two respondents reported that cases are assigned randomly. Two respondents reported that the case is handled by any prosecutor until assigned for trial. Two respondents reported that the case is assigned to someone in the designated unit/team. Two respondents reported that an assigned attorney must consult to make changes. Two respondents reported that all cases go to a docket where prosecutors can make offers to take the cases they want. One respondent reported that usually the charging attorney prosecutes the case, but not always. One respondent reported that the screening prosecutor is a rotating position, and the screener may or may not continue with any given case. One respondent reported that the office reviews felony charges together and the supervisor has the final say. One respondent reported that what happens next depends on the office prosecution model. One respondent reported that the case is reassigned to a prosecutor who reviews with a panel. One respondent reported that the case is continued to allow the defendant to apply for a program. One respondent reported that the assigned attorney makes charging decisions except for cases with in-custody defendants. One respondent reported that they use "horizontal prosecution," and one reported, "Pros at PE handles case."

[225] Five respondents reported that a second prosecutor may need to secure additional approval. Three respondents reported that while the police choose initial charges, the assigned prosecutor does have some discretion. Two respondents reported that there would need to be a review with a panel. One respondent clarified that discretion is for misdemeanor charges only. One respondent indicated that charges must be clearly noted in the filing documents. One respondent clarified that charges cannot be directly changed, but that the prosecutor does have discretion to offer plea deals.

mandatory internal guidelines or standards that prosecutors must follow when making charging decisions. Two hundred and twenty-four respondents (45.35%) indicated that their office has internal guidelines or standards that prosecutors should consider when making charging decisions, but following them is not necessary. Two hundred and forty-seven respondents (45.91%) indicated that their office does not have internal guidelines or standards and each prosecutor decides based on their best judgment. Overall, most prosecutors had some guidelines, (though 45.9% had no guidelines at all) and those who did, only a small number (8.7%) indicated that they were mandatory.

We then asked respondents, "If your office has internal guidelines or standards, what do they state in regards to charging?" Thirty respondents referenced ABA standards (either explicitly or by listing the standards), twenty referenced NDAA standards (either explicitly or by listing the standards), forty-four referenced "reasonable likelihood of success at trial/reasonable likelihood of conviction," forty-nine referenced "beyond a reasonable doubt," and 18 mentioned "probable cause."

Some respondents conveyed that they had office policies but declined to provide them. For some who declined to provide their office guidelines, the reason was that it was impracticable to do so because of length. One representative comment from a head prosecutor with three years of experience in the Pacific region was, "Too long to summarize here."[226] Others offered only generalities about their office policies because they were proprietary. One experienced Midwest prosecutor stated, "Proprietary. Generally, we make these decisions considering the history, mental health, prior criminal justice contacts, wishes of the victims (if any), whether there was use of the dangerous weapon, any injuries."[227]

In sum, although internal guidance exists for prosecutors it was rarely mandatory, nor did the majority of offices provide specific guidance on severity or uniformity of charging. The remainder of this Part will describe common themes from responses about what guidelines and standards govern prosecutor decision making.

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[226] *See supra* Part II.A (quoting anonymous respondent identified as "3oKE8dV9z6cMcj7").

[227] *See supra* Part II.A (quoting anonymous respondent identified as "x90A01qQcVzPBhD").

a. Guidelines and Discretion

Several respondents mentioned that their guidelines varied by type of crime. One midcareer prosecutor in the South Atlantic region noted that their office has "a grid that determines charging and punishment."[228] A head prosecutor with one year of experience in the Mountain region wrote, "Our standards are specific to types of crimes. For example, domestic violence, sexual assault and child endangerment are always charged as initially reported by the victim or witness. Nonviolent felonies may be considered for deferral prior to charging. The charging decision on most misdemeanors and infractions are left to the discretion of the law enforcement officer who handled the report or investigation."[229] An experienced Midwest prosecutor stated, "We only have policies/guidelines related to certain types of cases when certain facts are present that dictate how we should charge. Otherwise, charging is up to each individual prosecutor based on each individual case and facts."[230] Other respondents gave very detailed descriptions of their standards and how they varied by crimes.[231]

Others noted that while they did have guidelines for some types of crimes, they did not have guidelines for every type of crime. For example, a midcareer prosecutor in the Pacific region conveyed, "We do not have policies for every single crime, and I believe it would be

[228] *See supra* Part II.A (quoting anonymous respondent identified as "2ygdO54RqothmzR").

[229] *See supra* Part II.A (quoting anonymous respondent identified as "2PbQ5POBrZDWUEZ").

[230] *See supra* Part II.A (quoting anonymous respondent identified as "1GKA1oBnEhWLD5z").

[231] For example, one respondent conveyed, "Parameters are in place for charging drunk driving cases, plea bargaining those cases. Above a .17 BAC is charged as a "super drunk driving case" no reductions if .20 BAC or higher. No reductions for drunk driving 4th or greater offenses. No reductions if a police officer is injured by a defendant that resists. No plea bargaining when an officer is the victim unless the officer has been consulted. All intimate partner crimes are charged as a domestic violence crime. Victims are always to be consulted with on all crimes of violence, and their input considered on how to go forward on the case. All sexual assault crimes should result in sex offender registry. All sexual assault crimes against children should result in a significant prison sentence absent extraordinary circumstances (e.g., the child is unable to testify, or testimony would cause more harm to the child). All felony habitual offenders are to be charged as habitual offenders - the habitual offender enhancement can be used as part of the plea bargaining process. All serious felony charges with penalties greater than 10 years are reviewed and considered collaboratively with the assistant prosecutor reviewing and charging and either myself (the elected prosecuting attorney) or my Chief Assistant Prosecuting Attorney." *See supra* Part II.A (quoting anonymous respondent identified as "1cV4mes3i9GlAec").

impossible to establish rigid guidelines for all charging decisions given all of the factors involved in a criminal case. But we do have guidelines regarding certain types of cases. For example, certain types of felony drug possession cases are generally charged as misdemeanors if an individual has a clean record."[232] A junior prosecutor in the Mountain region stated, "There are few such guidelines. They mostly are tied to specific types of cases i.e., domestic violence or DUI. However, we have an open door policy and you must be able to defend your decisions and are expected to get feedback when in doubt."[233] An experienced Midwest prosecutor wrote, "Standards are in place for particular crimes such as assaults, drunk driving and sexual offenses involving children. Otherwise the charging attorney has discretion to decide as to the appropriate charge and possible plea resolution."[234]

Others noted that while they have guidelines, prosecutors have discretion to vary from them. A head prosecutor with thirty years of experience in the Mountain region commented, "We have a charging manual, but most of our prosecutors are aware of how we do things and the younger prosecutors are trained by the more experienced prosecutors and often go to the more experienced attorneys for advice. We give our prosecutors a lot of discretion."[235] An experienced Midwest prosecutor wrote, "They are charge specific and just guidelines."[236] A head New England prosecutor with over thirty years of experience stated, "There is a prosecutor desk book that essentially affords prosecutors discretion in charging that varies with the offense, history of the defendant, victim's input, cooperation and willingness of the defendant to cooperate with programs and services offered. We try to distinguish between those who are dangerous and/or have victimized others and are likely to do so again and those who need services and direction."[237] A junior prosecutor in the South Atlantic region

[232] *See supra* Part II.A (quoting anonymous respondent identified as "1cTCrl3cCHb3v7U").

[233] *See supra* Part II.A (quoting anonymous respondent identified as "3pl3nr41h0seVLa").

[234] *See supra* Part II.A (quoting anonymous respondent identified as "1l06TsfOk2sCZg6").

[235] *See supra* Part II.A (quoting anonymous respondent identified as "003A5Y3MaA50FGN").

[236] *See supra* Part II.A (quoting anonymous respondent identified as "3IVQKjTjDG3uvA5").

[237] *See supra* Part II.A (quoting anonymous respondent identified as "3fK9cOcsv1ziWOw").

characterized their office guidelines as "more of a tool and benchmark to go off of on the average case."[238]

Others noted that their only guideline was to follow relevant state statutes, and beyond this, they had discretion in charging decisions. An experienced Midwest prosecutor commented, "It is discretionary for the charging prosecutor unless mandated by statute."[239] Similarly, a Midwest prosecutor with over twenty-five years of experience stated, "We are to comply with statutory victim rights."[240] A head prosecutor with twenty-five years of experience in the South Atlantic region stated, "There are certain offenses for which a minimum sentence is statutorily mandated. The prosecutor must, of course, follow the law, but can work around mandatory minimums by agreeing to reduce the charges."[241] And one experienced Midwest prosecutor stated that their "standards mimic those in the State ethics guidelines for prosecutors."[242]

In sum, prosecutors noted that guidelines were distinct for separate crimes and that they could depart from them as long as they followed state statutes.

b. Standards and Discretion

Some respondents described their general office policy for making charging decisions.[243] One junior prosecutor in the Mountain region stated, "Screen conservatively, prosecute aggressively. Consult with victims prior to charging. Run potentially controversial cases by a

[238] *See supra* Part II.A (quoting anonymous respondent identified as "3jdPL9lSBtFGYcI").

[239] *See supra* Part II.A (quoting anonymous respondent identified as "1gi3bL7DMPuNlSW").

[240] *See supra* Part II.A (quoting anonymous respondent identified as "6yWsvpetDU9xdm1").

[241] *See supra* Part II.A (quoting anonymous respondent identified as "1GJLZzYkrYhj1Us").

[242] *See supra* Part II.A (quoting anonymous respondent identified as "1kOJFjJaCivn9Cc").

[243] Other respondents offered their personal philosophy on making charging decisions, and it was not clear if this was dictated by office policy. For example, one respondent wrote: "Usually, I look at the big picture, meaning I look at the person, where they are in life, criminal history, if any, if I think this is an isolated incident or just next in a pattern of established behaviors. I check to see if anyone was hurt, because that changes the analysis immediately. If I believe this person will respond well to the county committing resources to help them get help and address the behaviors exhibited. Stuff like that." *See supra* Part II.A (quoting anonymous respondent identified as "37YCgT0SiaW44Hn").

superior."[244] Another Mountain region prosecutor with almost 30 years of experience wrote, "We have guidelines that are a loose set of charging objectives in place to make ad hoc decisions. / We must consider a person's criminal history. / Is he a frequent flyer or is this his first entry into the criminal justice system. / Is he a 1%er, someone from whom society needs protection, or a knucklehead exercising poor judgment, bad decision making, or drug/alcohol induced poor decision making. / Sometimes a crime may be a felony but we can achieve all out objectives by charging and prosecuting a misdemeanor. / These are illustrative not exhaustive."[245]

Many noted that their standards were not in writing. One midcareer prosecutor in the South Atlantic region noted, "The guidelines and standards are not written and are otherwise informal. [B]asically we are to charge what is appropriate and not overcharge. We are to keep in mind that any plea negotiations begin, meaning the maximum, is what is charged and goes down from there."[246] A junior prosecutor in the South Atlantic region mentioned that the lack of a formal, written standard did not result in inconsistency because of strong informal standards. They wrote, "We do not have any formal standards but do often consult with other prosecutors and the District Attorney in sensitive, unique, or high profile cases. Due to this, although we don't have any kind of sentencing grid, broadly speaking, charging decisions are consistent from ADA to ADA."[247]

Several respondents offered standards that were directions to charge based on the crime committed or the strength of the evidence. One prosecutor with over thirty years of experience in the Pacific region stated their office policy was to "Charge the most serious charges legally supported by the evidence."[248] Similarly, one Midwest prosecutor with over thirty years of experience stated, "Nothing specified. The prosecutors are told to charge the offenses they think are appropriate, given the facts of the case."[249] A head prosecutor with ten years of

[244] *See supra* Part II.A (quoting anonymous respondent identified as "2rNPtxgBCYyTVCy").

[245] *See supra* Part II.A (quoting anonymous respondent identified as "piy4wNGg1fxxCX7").

[246] *See supra* Part II.A (quoting anonymous respondent identified as "1Ebb2k2zfpVExqE").

[247] *See supra* Part II.A (quoting anonymous respondent identified as "ONfAJ9mo394BPfH").

[248] *See supra* Part II.A.Sample (quoting anonymous respondent identified as "1Fy4wM0BXBb9sIL").

[249] *See supra* Part II.A (quoting anonymous respondent identified as "6spx6z1v46eC2MV").

experience in the Mountain region wrote, "We charge the crimes committed."[250] A junior prosecutor in the South Atlantic region commented, "[M]ake charging decisions based off of warrants unless frivolous charges appear that cannot be proven."[251] An experienced South Atlantic prosecutor stated, "generally, all charges supported by the facts should be charged, however, there is more discretion in serious cases where the question is about lesser-included counts."[252] A head prosecutor with ten years of experience in the Mountain region wrote, "Charge conservatively, taking into account any obvious defenses and suppression issues."[253]

Some respondents reported guidance to avoid felony charges when possible, however. One Midwest head prosecutor with over twenty years of experience stated, "We try to avoid felony charges if possible based upon youth, lack of prior record, etc. We also choose misdemeanors over felonies when the circumstances of the crime simply do not arise to level of what are classified as "serious" crimes (felony)."[254]

Some respondents connected their charging guidance to the plea process. Several respondents had office policies against overcharging. An experienced prosecutor in the Mountain region stated, "We do not charge counts just to use them for plea negotiations. we charge based on the facts."[255] A midcareer Mountain prosecutor noted that "[c]harging should be done based off of the criminal statutes and charges should not be stacked for the purposes of pleas or early disposition."[256] An experienced Midwest prosecutor stated, "Never overcharge a defendant with the idea of plea bargaining later. Consult victim and police in making a charging decision. Charge defendant

[250] *See supra* Part II.A (quoting anonymous respondent identified as "RLjdGodNjRrbNYd").

[251] *See supra* Part II.A (quoting anonymous respondent identified as "2wSTRnUGha7OmYb").

[252] *See supra* Part II.A (quoting anonymous respondent identified as "2fuMrAvhdIYjxpU").

[253] *See supra* Part II.A (quoting anonymous respondent identified as "2tsATdOdSiOWfnY").

[254] *See supra* Part II.A (quoting anonymous respondent identified as "2cwSapyYo0BVvRm").

[255] *See supra* Part II.A (quoting anonymous respondent identified as "1FkAV3ofh5Zhywz").

[256] *See supra* Part II.A (quoting anonymous respondent identified as "2uvTIKvSDsF1etw").

fairly."[257] Another midcareer Midwest prosecutor commented, "In general, our office has a policy that if a felony is charged, then the prosecutor must seek a felony conviction. There are exceptions, of course, but in general the idea is that we do not want to charge high just to get misdemeanor convictions and bully our way into convictions."[258]

Not all standards were against overcharging, however. Some respondents noted the need for flexibility in the plea-bargaining process. One junior prosecutor in the South Atlantic region wrote, "My office's policy is to take a good look at the evidence, evaluate its strengths and weaknesses, then to reach out to witnesses to seek any clarifications necessary. Once that is done, only the most pertinent charges are brought. For instance, if a Defendant is charged with a serious felony offense and multiple misdemeanors, our policy is to evaluate whether those additional misdemeanors need to be charged in light of the substantial penalty a Defendant may face due to the felony. However, sometimes misdemeanor offenses will also be charged to leave room for compromise resolutions, whether that be after trial or during the plea negotiation stage."[259]

Several respondents indicated that their office standards were based on fairness and equality considerations. An experienced Midwest prosecutor noted that in their office, "we try to treat all cases equally,"[260] and a midcareer Mountain prosecutor stated a similar principle: "There are ethical considerations-- ensure that Defendants are treated equally if they are similarly situated. No hard and fast rules, but common sense."[261] A midcareer prosecutor in the Mountain region stated, "That we should be consistent in our approach to types of cases, so as to discourage prosecutor-shopping."[262] Another midcareer Mountain prosecutor wrote, "The general standard is to prosecute from the end result we are seeking. In other words, we look at a case and determine what a fair outcome would be for all the parties involved and then we

[257] *See supra* Part II.A (quoting anonymous respondent identified as "D2A6SFg8jypwfgB").

[258] *See supra* Part II.A (quoting anonymous respondent identified as "OdsAgLolLBZChAl").

[259] *See supra* Part II.A (quoting anonymous respondent identified as "2tn5rzJYkR7XZi9").

[260] *See supra* Part II.A (quoting anonymous respondent identified as "24O9B10bmlHw1EE").

[261] *See supra* Part II.A (quoting anonymous respondent identified as "2dNgXnBxUUXSYF2").

[262] *See supra* Part II.A (quoting anonymous respondent identified as "w74IJ0Ny7LSxLm9").

make a decision of what charges to file."[263] An experienced prosecutor in the West North Central region wrote that, "Generally, case must be supported by evidence and not based on gender or race etc."[264] A prosecutor with twenty years of experience in the Middle Atlantic region stated their office policy was, "Do not overcharge. Do not consider race, sex, national origin, "political" connections, etc. Decision should be fact-driven only."[265]

Others indicated that their standards were based on public safety and criminal history considerations. A head prosecutor with seven years of experience in the West North Central region commented, "Public safety is the highest priority. Consideration should be given to the level of threat to public safety, followed by criminal history."[266] An experienced Midwest prosecutor noted, "We should charge the repeater if the defendant qualifies, add the enhancers if they are available, etc."[267] A junior prosecutor in the South Atlantic region stated, "It greatly depends on the person['s] criminal history. If the person is a convicted felon, our office will as[k] for some confinement time depending on the charges and the facts. If the person does not have criminal history we can justify a lesser sentence or reduction in criminal charges."[268]

Others who did not list standards or guidelines in the above categories summarized a succinct, overarching standard or philosophy their office used. These were varied. One midcareer prosecutor in the Mountain region offered the following standard: "Do the right thing. Do the smart thing. Remember who you are fighting for."[269] A head prosecutor with over forty years of experience in the South Atlantic region said their standard was, "Just do the right thing. Everything else will take care of itself."[270] A Midwest prosecutor with almost thirty years of experience

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[263] *See supra* Part II.A (quoting anonymous respondent identified as "1DTQACcZXRf7kIA").

[264] *See supra* Part II.A (quoting anonymous respondent identified as "3L523va4yWJiK0Y").

[265] *See supra* Part II.A (quoting anonymous respondent identified as "3sbLDcTJvacgrk9").

[266] *See supra* Part II.A (quoting anonymous respondent identified as "3j6izMimI0astZ3").

[267] *See supra* Part II.A (quoting anonymous respondent identified as "1MRPoGOb3j9HOsr").

[268] *See supra* Part II.A (quoting anonymous respondent identified as "3CC4Kr7OlPAyEhC").

[269] *See supra* Part II.A (quoting anonymous respondent identified as "ebOKc7b4o9jGwkV").

[270] *See supra* Part II.A (quoting anonymous respondent identified as "3kAphSI2HN019pT").

said, "Use best judgment and do what is best for all. As a misdemeanor, it would be a quick decision, and rarely subject to review."[271] A New England head prosecutor with over thirty years of experience wrote, "Use discretion, don't embarrass the office."[272]

Other respondents provided a list of standards that do not fit neatly into the above-described categories. One head prosecutor with three years of experience in the Mountain region wrote the following: "-defendants are citizens / -overcriminalization is a problem / -criminal justice overlap with juvenile justice deserves special concern so the state's aims do not conflict / -marijuana possession (no kids, not in school zones, not for delivery) is NOT a major concern / -protect the public -- especially crimes of violence / -prosecute elder abuse."[273]

Prosecutors listed various standards like conservatively screening cases, consulting with victims, and running controversial cases by superiors, and some also noted that standards were not in writing. Many prosecutors focused on public safety and criminal history considerations, along with fairness and equality. Others were focused on flexibility in charging, and some noted overcharging as a problem.

c. Supervision and Discretion

Several respondents reported needing to consult with a supervisor, and one junior prosecutor in the South Atlantic region reported that "[i]f a newer ADA, charging decisions would be verified/approved by the intake supervising ADA."[274] A midcareer Mountain prosecutor reported, "Any case that is or has the potential to be in the news must be cleared with administration first."[275]

One elected West North Central prosecutor with over thirty years of experience wrote that their judgment was the office's standard. "Our office is relatively small, with six prosecutors. As the elected District Attorney, I closely monitor charging decisions and let my Assistants know if I disapprove of them. I guess you might say I am the internal guideline and standard. I give my Assistants broad discretion and try

[271] *See supra* Part II.A (quoting anonymous respondent identified as "3hA9R0UrOuys94H").

[272] *See supra* Part II.A (quoting anonymous respondent identified as "2pRJx02M7GC0NmW").

[273] *See supra* Part II.A (quoting anonymous respondent identified as "2X6bIzrmMPY4uyW").

[274] *See supra* Part II.A (quoting anonymous respondent identified as "Dr86WH64oyIJzDX").

[275] *See supra* Part II.A (quoting anonymous respondent identified as "26nWN6eRL3ENpGW").

not to micro-manage them. But I do let them know if I want a certain situation handled in a particular manner, and if they undercharged or overcharged a criminal situation."[276]

3. Information Important for Decision Making

We also asked prosecutors about what information is necessary for them to make charging decisions. We asked, "Which of the following pieces of information do you need in order to make a charging decision?" and provided respondents twenty-eight pieces of information. See Figure 7 to see what pieces of information were important to respondents. The most commonly selected answers (at least seventy-five percent of respondents selected) included: severity of personal injuries, use of weapons, severity of property damage, suspect's behavior, number of victims, presence of weapons, suspect's prior convictions, age of victims, presence of illegal drugs, and use of illegal drugs.[277]

[276] *See supra* Part II.A (quoting anonymous respondent identified as "1NfbKTl5Y1vHq0p").

[277] Twenty-four respondents (4.43 percent) said that they needed to know the suspect's race prior to making a charging decision. When respondents selected this, we asked them to "[p]lease explain why you consider the suspect's race when making a charging decision." There were three reasons respondents listed for needing the suspect's race.

First, prosecutors (thirteen) indicated that they needed this information to determine whether there was a potential hate crime. One junior Midwest prosecutor wrote, "If the suspect's race is different from the victim's I would evaluate whether there was any element of it being some type of hate crime." *See supra* Part II.A (quoting anonymous respondent identified as "AFE8q1FuQ1jp9Rf"). A head prosecutor with over twenty years of experience in the West North Central region noted, "Because depending on the crime committed, the motive of the crime and/or the race, gender, sexuality, religious affiliation, ethnicity of the victim, the offender can be charged with committing a Hate Crime under [state] Law. If there is no evidence of a hate crime then the suspect's race is completely immaterial and never considered in any way shape or form." *See supra* Part II.A. (quoting anonymous respondent identified as "24dTHmFe2aDnMRs").

Second, prosecutors (twelve) indicated that this information is standard biographical and identifying information. As one experienced prosecutor in the Pacific region noted, "We're required to input demographic information for identity purposes. That is the only reason." *See supra* Part II.A. (quoting anonymous respondent identified as "a5iODAu8fchBROV"). An experienced prosecutor in the South Atlantic region commented that "we don't consider it in making charging decisions, but we do mandate that the screening attorney note it in our case management system." *Id.* (quoting anonymous respondent identified as "2fuMrAvhdIYjxpU"). Other respondents noted that knowing the suspect's race served multiple purposes. A Midwest prosecutor with twenty-five years of experience wrote that "[i]t's a required field for reporting purposes; otherwise, it's of no consequence in most cases; the sole exception would be for a charge of ethnic intimidation (where the race of both the suspect and the victim would be

We also provided space for respondents to write up to four additional pieces of information relevant to their decision making. The most common piece of information needed was input or information from the victim (thirty-six respondents) followed by input or information from witnesses (thirty).[278] Other respondents (nineteen) reported that the information they need is case-specific. Fifteen respondents reported that they needed facts of the case, and fourteen needed more information about the evidence (e.g., strength, quality). Twelve respondents wrote that they need information about the suspect's mental health and psychiatric history, eleven need demographic information to determine whether there is a hate crime or domestic violence, eleven need information on the relationship between the suspect and victim, ten need any known substance use/drug testing results, and nine need the suspect's criminal history and domestic violence history. Eight report needing the suspect's personal information (for example, job, address, socioeconomic status, and veteran status).[279]

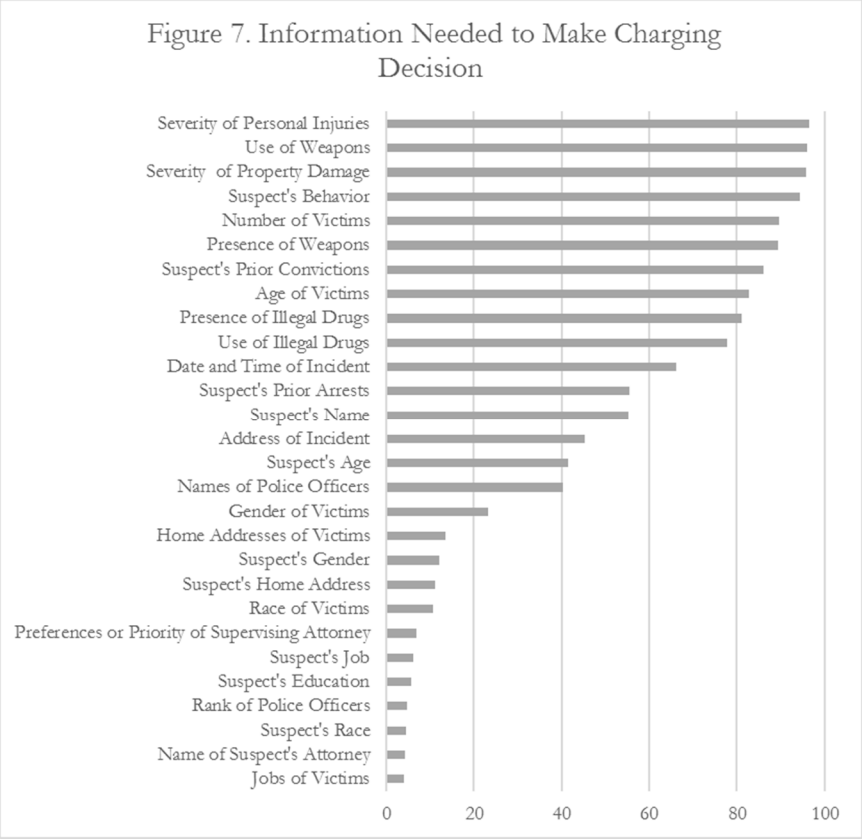
noted)." *See supra* Part II.A. (quoting anonymous respondent identified as "2RQGGKkKarI2xGl"). An experienced prosecutor in the Pacific region commented, "We must consider everything. Race can be relevant in certain cases—identification and racially motivated crimes are obvious examples." *See supra* Part II.A. (quoting anonymous respondent identified as "2BmJbHin4JYQwxU").

Third, prosecutors (two) reported needing to know the suspect's race because of the potential for police misconduct. One midcareer prosecutor in the South Atlantic region noted, "There are racial inequities and I have dismissed cases because the only "suspicious behavior"' has been the race of the person (i.e. a Hispanic male walking across a park. He is stopped and searched. He has marijuana on him.) I dismiss cases where the reason for the investigation is racially motivated. Also, law enforcement is more likely to arrest a child of color than a white child. I am cognizant of these aspects when evaluating the response of the adults as well as the children." *See supra* Part II.A. (quoting anonymous respondent identified as "1dnUmYZZr1R5LZi").

[278] A total of ninety-seven respondents indicated that they would consider the victim's input, which includes the thirty-six who supplied this information as part of this question. And another sixty-one respondents noted victim's input when explaining their decision making for the case vignette or how their office makes decisions.

[279] Seven report needing audio or video recordings of the incident, 911 call audio, or news media reports. Seven report needing to know the defendant's statement, intent, or justification. Six need to know about the victim or witness reliability and criminal history. Six need information on the search and seizure, Miranda issues, police behavior, and investigation efforts. Three report needing information about mitigating/aggravating factors. Three report needing information about pending/current charges and whether the defendant is on probation. Three need medical records and reports, and three need information about the cost of damage/theft. Two need probable cause information, two need confidential informant status, and two need a risk assessment (meaning an assessment of risk to the community). Each of the following pieces of information was listed by one respondent: name of/information about suspect's

In sum, the most important information the vast majority (seventy-five percent) of respondents wanted included the severity of injury/damage/weapons used, suspect's behavior, number and age of victims, prior criminal history and presence/use of drugs.



IV. DISCUSSION

This Section considers our results in light of questions of interest about prosecutorial discretion and its effects — variability and severity of charging, the relevance of internal and national guidance on

girlfriend, suspect's status in the sex offender registry, "beyond a reasonable doubt," whether minors were present, whether there is corroboration, whether the defendant is cooperating with law enforcement, whether there are accomplices/suspect's degree of participation in the crime, whether there is insurance coverage, and "reasonable likelihood of success at trial."

prosecutorial discretion, and factors considered by prosecutors in making a decision.

A. Severity and Variability

To understand disparities in criminal justice outcomes, it is key to understand whether and how prosecutors' decisions are driving those outcomes. This study's vignette design solves one of the key problems with observational research — omitted variable bias. In particular, this study held constant every aspect of the criminal behavior and police conduct, including geographic differences and differences in conduct and background. Prosecutorial discretion exists for a reason: each case is distinctive and requires individualized attention. Yet, prior social science work may fail to detect subtle variations in case factors, which the study's method holds constant. By holding all those other factors constant, we can observe prosecutorial discretion itself.

We found remarkable severity in penalties imposed by some prosecutors. [280] Recall that $500 was the most common fine imposed for this situation, where no victim was 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. It would certainly be an amount an average fast-food worker (the occupation of the hypothetical defendant in some of our vignettes) would be unlikely to pay, leading to other serious criminal justice implications for an arguably minor offense. These serious criminal charges can have devastating effects on an individual's life.

Even more, recall that almost thirty percent of prosecutors recommended jail time for an individual with no criminal record and who seems to need short-term therapy or a cooling-down period. The modal response was thirty days in jail, which would likely result in this individual losing his job, and likely stable housing and family life (a very small number of prosecutors did note a willingness to allow confinement to be on weekends, however). This is a compelling finding that a sample of prosecutors would recommend such a long jail term for an individual who has certainly made a mistake but has not caused any physical harm or property damage and does not have the risk factors of being dangerous. Even aside from the effects on defendants and their families, such incarceration also imposes onerous financial costs on the government — amounting to $45,000 per year in some jurisdictions.[281]

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[280] Robertson et al., *supra* note 118, at 834.

[281] *See, e.g.*, Annual Determination of Average Cost of Incarceration Fee, 84 Fed. Reg. 63,891, 63,891-92 (Nov. 19, 2019) ("Based on [Fiscal Year] 2018 data, [Fiscal

Some of this severity may be due to plea bargaining strategies. Recall that many respondents were unwilling to impose punishment given the lack of harm to people or property and in light of the offender's perceived mental health issues. But several respondents noted in their qualitative comments that they would bring multiple charges or more severe charges in order to induce the defendant to plea guilty to fewer or less severe charges or to accept mental health or substance abuse treatment.[282] Some respondents reported opposition to overcharging, however, and reported only bringing charges they felt they could prove. Future research should systematically study variation in prosecutors' views on plea bargaining strategies.

Aside from the severity of sentences, the variability is also striking. 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."[283] Prosecutors nationally charged similarly situated defendants who allegedly committed the same crime to varying terms of two years of prison time, six months of jail time, down to thirty days of jail time, or community service. Similarly, some prosecutors charged defendants hefty fines of up to $5,000 and others $500 or much lesser amounts of $250. All of this demonstrates that prosecutorial discretion is indeed broad, largely unsupervised, and highly variable and inconsistent. This is an important finding for those studying prosecutors to consider as far as potential interventions.

Most of this variation was inexplicable. We did, however, observe some correlations that merit further study. Prosecutors in some regions of the country appear to be harsher than others — specifically prosecutors in the West South Central and the Mountain regions. Further exploration into the causes of variability are required.

Year] 2018 [Cost of Incarceration Fee] was $37,449.00 ($102.60 per day) for Federal inmates in Bureau facilities."); *How Much Does it Cost to Incarcerate an Inmate?: California's Annual Costs to Incarcerate an Inmate in Prison*, LEGIS. ANALYST'S OFF., https://lao.ca.gov/PolicyAreas/CJ/6_cj_inmatecost (last updated Jan. 2019) [https://perma.cc/DHB2-EB5U] ("It costs an average of about $81,000 per year to incarcerate an inmate in prison in California."); Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration#:~:text=The%20Bureau%20of%20Justice%20Statistics,2.3%20million%20people%20behind%20bars [https://perma.cc/XK5S-KR36] ("The Bureau of Justice Statistics reckons that the United States spends more than $80 billion each year to keep roughly 2.3 million people behind bars.").

[282] The outcome for prosecutors who overcharge may thus be similar to the outcome of prosecutors who initially recommend no punishment.

[283] Hayes v. Missouri, 120 U.S. 68, 71-72 (1887).

B. Guidelines and Standards

This wide variability in prosecutor decisions is consistent with a lack of meaningful supervision or guidance within prosecutor charging. Prosecutors' offices have been called "black boxes" for the lack of transparency about how charging decisions are made, but our study sheds light.[284] Our data show the general unimportance of supervisors and office guidelines to prosecutors making charging decisions. In our survey, nearly three-quarters of prosecutors reported that they decided alone; their supervisors provided no direction into the initial charging decisions. Although somewhat more than half of respondents said they typically relied on mandatory or precatory guidelines, nearly half indicated that they had no such direction. For those respondents who did have direction, their guidelines often afforded them significant discretion to deviate or were only an internal office standard such as "do justice." And although some prosecutors reported having charging manuals or grids, many prosecutors reported that guidelines or standards were not in writing. And some noted that their guidelines and standards were "proprietary," which raises questions about transparency. These findings suggest avenues for reform, both within prosecutors' offices and beyond.

A first step may be to simply require prosecutors to note their reasons for making discretionary decisions.[285] Richard Frase argued that this approach could be successful as "reasons evolve into factors, and factors evolve into rules."[286] Frase goes on to explain that "the use of written reasons for prosecution decisions, which are routinely reviewed by supervising attorneys, seems the minimum requirement for effective control of prosecution decisions."[287] Judge Stephanos Bibas has also claimed that "[s]imply having to explain and justify one's decisions disciplines prosecutors, much as writing reasoned decisions disciplines judges."[288] Prosecutors' offices might consider requiring prosecutors to articulate the reasons for the charges they impose, with internal quarterly or bi-annual review of decisions to determine whether they match the objectives of the office.

Overall, our data demonstrate — as theorized — that individual prosecutors have the utmost discretion to charge defendants as they see fit. We see stark severity in sanctioning some defendants, but this study

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284 *See* Miller & Wright, *supra* note 6.

285 *See* Frase, *supra* note 129, at 292-96.

286 *Id.* at 294.

287 *Id.*

288 Bibas, *supra* note 14, at 1006.

also demonstrates that for the same crime, defendants receive largely varying and harsh or lenient sentences, depending on the prosecutor they interact with. Structural changes must be made if more consistency and decreased severity are desired in prosecutorial charging.[289]

C. Factors Relevant to Decision Making

Our study also highlights factors relevant to prosecutor decision making. When presented with a list of factors important to make a charging decision, respondents unsurprisingly reported needing to know about the harm to persons and property, the number and age of victims, the criminal history of the offender, and the presence and use of weapons. Several also reported needing the victim's input and information from witnesses, a finding that was also present in their responses to the vignette. Knowing whether the offender had mental health or substance abuse issues was also important to many prosecutors, although this was clearer in their responses to the vignette than in response to the survey question. It was unclear whether knowing about drug use was important in charging for purposes of greater leniency, more severe charges, or for diversionary purposes. Finally, while very few reported needing to know about the offender's education or job to make a charging decision, the qualitative responses to the vignette demonstrate that many prosecutors do consider the offender's socioeconomic status when deciding whether a fine or a term of confinement is important. It is important to acknowledge that while prosecutors claim that these factors are the most important, it is unclear that that is the case. Prosecutors could be making subconscious decisions based on factors in our vignette that they are unaware influenced them.[290] However, having a list of factors important to the majority of prosecutors provides an important insight into the black box of prosecutor discretion. We hope it will spark future research on the factors considered by prosecutors in charging decisions.

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[289] *See* Barkow, *supra* note 4, at 1388 ("We need structural changes to do more than chip away at the edge of mass incarceration."); *see also* Baughman, *supra* note 13, at 1139 ("Rather than trying to address the individual failing branches . . . instituting subconstitutional checks—stopgaps adopted by the three branches of government to effectuate the rights in the Constitution when the system is stalled in dysfunction—could create meaningful change.").

[290] *See generally* LEONARD MLODINOW, SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR (2012) (demonstrating the influential role of the subconscious).

D. Limitations

As with any empirical study, our study has several limitations. First, while our study is national in scope, it is not representative. That is, we recruited respondents from every region in the United States, but the sample does not represent prosecutors in the U.S. For example, we have an overrepresentation of prosecutors in the Mountain region in our study (likely because two of the three authors were professors at universities in the Mountain region at the time the study was conducted). We also had a relatively low response rate of twelve percent, and there may be significant differences between respondents and nonrespondents in how they make decisions and use discretion. Moreover, respondents were not required to answer all of the survey questions or write in responses when prompted. Thus, there may be differences within the sample between respondents who offered additional information and respondents who did not.

Additionally, we designed the study to be short and include just a few questions. The study's primary objective was to test the effects of race and class on prosecutor decision making in a vignette-based experiment,[291] and a few survey questions were added to obtain more information about prosecutor decision making generally. The responses to the open-ended questions offered an opportunity to acquire further insight into prosecutor decision making but cannot provide the rich data that a semi-structured interview with prosecutors would. With respect to the qualitative analysis, however, our sample size is very large, and so while there is not the depth of typical qualitative studies, there is significant breadth. We were thus able to quantify some of the qualitative data.

It is likely, however, that our study underestimates the importance of some of the themes we identified in the qualitative analysis. For example, we only asked respondents to recommend a monetary penalty or term of confinement, and did not ask them whether they would recommend mental health treatment. While many respondents brought up mental health concerns, it is likely that more prosecutors would recommend treatment if we had explicitly asked them to reflect on this.

Furthermore, we only provided one hypothetical crime to prosecutors, and it was relatively minor. Prosecutors see a wide range of criminal activity, including severe criminal activity, and so the vignette results may not be applicable to other types of crime. Future research may want to present prosecutors with multiple different crimes.

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[291] Robertson et al., *supra* note 118, at 820-22.

In brief, our study should be understood as exploratory. The results presented in this Article can give rise to hypotheses to be tested in future quantitative studies or to develop questions to be used in in-depth qualitative interviews.

CONCLUSION

Much remains unknown about how prosecutors make decisions. Our national study was designed to illuminate the role of discretion in prosecutor decision making as well as the effects of such discretion. Our study best tracks what prosecutors wish they could charge defendants with when resource constraints are removed, which provides insight into the mind of prosecutors practicing in various jurisdictions across the country. As seen from the responses to the vignette we provided, different prosecutors evaluating the *same* case recommend vastly different charges and punitive sanctions. Additionally, we described a relatively minor crime, but a subset of respondents recommended harsh sanctions. This may be due, in part, to the absence of internal or national guidelines prosecutors report needing to follow. The findings from our exploratory study provide a starting point for future research assessing the variability and severity of prosecutors' decisions, as well as the role of standards and guidelines in constraining discretion.

APPENDIX: VIGNETTES, OMITTED RACE AND OCCUPATION

Incident Report: 2014-23B-N459
Date/Time Reported: 07/08/2014 21:25:00 Location: 8th Ave. and Pine St.
Reporting Officer: King, Jerry (394) Approving Officer: Wilson, Joe (213)

OFFENDERS

Status	Name	Sex	Age	Address
Defendant	Johnson, Michael	Male	29	203 Duggard St.

VEHICLES

N/A

PROPERTY

N/A

NARRATIVE

On Friday evening, March 12, 2013, Michael Johnson, age 29, was placed under arrest at 8th Avenue and Pine Street train station for exhibiting loud, offensive, tumultuous, and somewhat violent behavior in a public place. Johnson's actions caused citizens passing by to stop, take notice, become alarmed and afraid, and to eventually flee the station.

At the above time and date, I was on uniformed duty on Pine St. between 7th and 8th avenue, working the 8:00 P.M. to 3:00 A.M. shift. At approximately 9:25 P.M., two citizens approached me to report an unstable male of moderate height and build in the 8th Avenue and Pine St. station. The man was reportedly yelling obscenities, stopping patrons for money, and brandishing a knife. I immediately traveled north on Pine St. toward the intersection and radioed Officer Crandall for backup. Crandall and I arrived at the scene within seconds of each other and, upon entering, I saw approximately a dozen citizens running or walking quickly to exit the station. Once we entered the station, I immediately identified the unstable man, Johnson. Johnson was yelling obscenities, including the F-word, and banging on the station turnstiles with the metal bottom of a buck knife. He appeared angry and slightly intoxicated.

When Johnson noticed our presence, he became noticeably less incensed and ceased yelling and banging on the turnstiles. He explained to us that his girlfriend had just broken up with him that afternoon, and he did not have money for the train. Johnson then said that he had asked other train patrons to spot him change for a ride, but nobody would help. He therefore became very frustrated. After hearing Johnson out for a few minutes, I directed him to slide the knife in our direction and submit to an arrest. He complied without protest.

After Officer Crandall and I took Johnson into custody, Officer Crandall exited the station and interviewed witnesses to Johnson's disorderly conduct, and I transported Johnson to the 254 Spruce St. police station.

Incident Report: 2014-23B-N460
Date/Time Reported: 07/09/2014 22:59:00 Location: 8th Ave. and Pine St.
Reporting Officer: Crandall, Ron (204) Approving Officer: Wilson, Joe (213)

OFFENDERS

Status	Name	Sex	Age	Address
Defendant	Johnson, Michael	M	29	203 Duggard St.

VEHICLES

N/A

PROPERTY

N/A

NARRATIVE

On Friday evening, March 12, 2013, I responded as a uniformed officer to a backup request from Officer King to assist in a possible violent incident reportedly taking place in the 8th Avenue and Pine St. train station. I arrived at the station approximately the same time as Officer King. Upon entering the station, I saw a male suspect of medium build and height yelling obscenities and brandishing a knife. Officer King then spoke to the man and convinced him to relinquish the knife and submit to an arrest. After we took the man later identified as Michael Johnson into custody, I exited the station and proceeded to interview witnesses to determine whether anyone was injured and what might have caused Johnson's outburst.

According to witnesses, Johnson entered the station around 9:10 P.M. and began begging for change to purchase a train ride. After repeated denials from patrons, Johnson started shouting obscenities, including "F**k all you!" and "F**k this damn city!" At one point, Johnson reportedly grabbed a woman's arm when she refused his repeated requests for money. Although Johnson did not threaten the woman, he did dangle a knife by his side with his other hand.

After interviewing approximately six witnesses, I concluded that nobody was physically injured from the incident, but that most all who were present became very afraid once Johnson started yelling with his knife in hand.