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PROSECUTORS AND MASS INCARCERATION

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Shima Baradaran Baughman* and Megan S. Wright**

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

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It is now rote to say that the U.S. incarcerates too many people.¹ The U.S. has been the world leader in incarceration for decades,² and will likely be for years to come.³ Even though many are aware of the problem, mass incarceration is not

¹ Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (“[The U.S.] keep[s] more people behind bars than the top thirty-five European countries combined, and our rate of incarceration dwarfs not only other Western allies but also countries like Russia and Iran.”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (“The sheer scale and acceleration of U.S. prison growth has no parallel in western society.”); Ian F. Haney López, *Post Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1029 (2010) (presenting numerical data establishing the U.S. incarceration rates as “the highest in the world, exceeding the highest rate in Europe by 500 percent”); Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORD. L. REV. 2999, 3000–01 (2015) (identifying mass incarceration, as “one of the most significant social problems” in the U.S.); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803–04 (2012) (“[T]here has been an increase in both the rate of imprisonment and the absolute number of people in prison. That increase has been called unprecedented in the history of liberal democracy.”).

² The US incarceration rate quintupled from 1972 to its peak in 2007 (760 per 100,000). NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis et al. eds., 2014); The 2017 incarceration rate declined slightly to 698 per 100,000, with the U.S. still maintaining the highest incarceration rate in the world. *Id.* See also Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (2018).

³ Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 627 (2006) (providing a brief articulation of the “exploding incarceration levels over the past two decades” within the U.S.); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L. REV. 423, 428 (2013) (noting the daily incarceration rate in the U.S. at 750 persons per 100,000).

improving any time soon.⁴ The oft-repeated story is that the war on drugs,⁵ legislative sentencing practices,⁶ or the growth of prisons has caused mass

⁴ Haney López, *supra* note 2, at 1029 (“The invisibility of significant facets of continued nonwhite poverty and unemployment leads to false comfort . . . about social reform.”); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1695–97 (2006) (identifying several significant hurdles to carceral reform); Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967 (2019) (articulating possible frameworks for criminal law reform that require sweeping cultural or systemic change subject to inconsistent factors such as voter approval, political approval, and the cultural climate); Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1183–85 (2006) (noting the significant differences in approach and opinion regarding reform); Sonja B. Starr, *Evidenced-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 870 (discussing a “politically palatable way to cut back on the United States’ sprawling system of mass incarceration”); Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) (“Contemporary reformist approaches to addressing the apparent overreach and scandalous excesses of the carceral state—characterized by calls to end ‘police brutality’ and ‘mass incarceration’—fail to recognize that the very logics of the overlapping criminal justice and policing regimes *systemically* perpetuate racial, sexual, gender, colonial, and class violence through carceral power.”); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 41–44 (2018) (discussing the four fold increase in number of arrests for misdemeanors during Broken Windows Policing that did not increase convictions but rather, court congestion); HEATHER SCHOENFELD, BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION (2018) (discussing the “embrace of incarceration” that was politically incentivized).

⁵ Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, SENT’G PROJECT 2 (2007) (identifying the carceral impact of the war on drugs); Rodriguez, *supra* note 4 (attributing the “2.3 million held captive by the state” as an unintended consequence of the war on drugs); JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 37, 39, 143 (2017) (discussing draconian drug sentences that disproportionately impacted minority defendants); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 60 (2012) (arguing that the war on drugs fueled by racism drove mass incarceration); MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT (demonstrating how the Sentencing Reform Act of 1984 gave increased power to prosecutors to plea bargain in the federal context, increasing sentence lengths and the numbers of individuals prosecuted).

⁶ Mauer & King, *supra* note 5, at 7–8 (describing how harsh sentencing laws from the 1980s affected the federal Sentencing Guidelines resulting in more people incarcerated for longer periods of time); Kara Gotsch & Vinay Basti, *Capitalization on Mass Incarceration U.S. Growth in Private Prisons*, SENT’G PROJECT 5 (Aug. 2, 2018) (“The War on Drugs and harsher sentencing policies, including mandatory minimum sentences, fueled a rapid expansion in the nation’s prison population beginning in the 1980s.”); MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025, at vii (“No one admires American sentencing systems. They are arbitrary and unjust, they are much too severe, they

incarceration.⁷ These are all contributing causes. However, in the last ten years or more the number of crimes committed have decreased,⁸ the number of arrests per year have decreased consistently,⁹ and while people are still serving long sentences,¹⁰ some federal sentences have been reduced.¹¹

An alternative explanation for the persistence of mass incarceration is prosecutor felony filing decisions since the 1980s.¹² This explanation relies on an

ruin countless lives, and they have produced a shameful system of mass incarceration.”). Also, those convicted of felonies in the United States are far more likely to be sentenced to prison and are sentenced to longer terms than similarly situated defendants in other countries. *Id.* at 12.

⁷ SCHOENFELD, *supra* note 4, at 22 (“Prison capacity fueled the politics of crime not vice versa.”); Gotsch & Vinay, *supra* note 6, at 5–9 (illustrating the trend toward privatization of prisons in the U.S. through data); *Private Prisons in the United States*, SENT’G PROJECT (Oct. 24, 2019) (providing a brief two-page overview of the privatization of prisons in the U.S.); Adam Gopnik, *How We Misunderstand Mass Incarceration*, THE NEW YORKER (April 3, 2017) (The prevailing theory of mass incarceration “insists that, first, the root cause of incarceration is the racist persecution of young black men for drug crimes, which overpopulates the prisons with nonviolent offenders. Then mandatory-sentencing laws leave offenders serving long prison sentences for relatively minor crimes. This hugely expanded prison population, one that tracks in reverse the decline of actual crime, has led to a commerce in caged men—private-prison contractors, and a specialized lobby in favor of prison construction, which in turn demands men to feed into the system.”).

⁸ Shima B. Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 1 ALA. L. REV. __ (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3566383 (providing data demonstrating that crime has gone down in America over the last thirty years).

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

¹⁰ ALLEN J. BECK & ALFRED BLUMSTEIN, TRENDS IN U.S. INCARCERATION RATES: 1980–2010 28 (2012) (finding that longer sentences increased prison admissions in the 1980s to 2010); see *infra* note 83 discussing Beckett and other studies; RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 17–18 (2019) (discussing the problem of long sentences, lack of support for rehabilitation and harsh collateral consequences).

¹¹ The First Step Act, S. 374, 115th Congress (2018); John F. Pfaff, *The Myths and Realities of Correctional Severity: Evidence from the National Corrections Reporting Program on Sentencing Practices*, FORDHAM LAW LEGAL STUDIES RESEARCH PAPER NO. 1338365, at 4, available at <https://ssrn.com/abstract=1338365> (articulating the largely accepted view that prisoners are serving longer sentences while providing data demonstrating that “in many states, the median time served has declined over much of the 1990’s”).

¹² JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (Pfaff argues that in his 35-state sample, in 1994 about one of every three arrests turned into a felony case, and by the end of the 2000s, it was two out of every three arrests); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1106 (2013) (“At least since 1994, it appears that almost all the growth in prison populations has come from prosecutors’

increase in number of felony filings by prosecutors.¹³ Misdemeanor filings have gone largely unnoticed from explanations of mass incarceration,¹⁴ and no one has analyzed data to see what impact these filings have had on mass incarceration. According to our analysis of national data, since 2003, prosecutor charging per arrest has actually gone up every year.¹⁵ In the face of both falling crime and public pressure to stop mass incarceration, prosecutors are not responding as readily as police, a point almost completely unnoticed by commentators.¹⁶

Throughout criminal justice and maybe even across the law generally, the prosecutor may be the government official with the most unreviewable discretion.¹⁷

decisions to file felony charges.”); John F. Pfaff, *The Causes of Growth in Prison Admissions and Population*, 1 (Jan. 23, 2012), <https://ssrn.com/abstract=1990508> (“[T]he growth in prison populations has been driven almost entirely by increases in felony filings per arrest.”). See also EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019) (discussing prosecutors’ contributions to mass incarceration since the 1980s due to their “unfettered power” in charging bail, and claiming they are “not the only ones at fault” but “their decisions are the ones that matter most”).

¹³ PFAFF, *LOCKED IN*, *supra* note 12 (following data starting in the 1990s through 2007 demonstrating that increases in prosecutor charges filed track the growth in prison admissions); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (comparing the 2.3 million felony cases filed every year in the U.S. to the 10 million misdemeanor cases filed every year); KOHLER-HAUSMANN, *supra* note 4, at 69 (2018) (describing that in NY “Police made 251,000 misdemeanor arrests in 2010, up from the 65,000 misdemeanor arrests in 1980”; misdemeanor arrests nationwide increased four-fold from 1980 to 2010) *Id.* at 42.

¹⁴ By the 2010s, roughly half of all misdemeanor cases resulted in dismissal. Kohler-Hausman points out that there are “more police, more arrests, and higher racial concentration, but lower conviction rates and jail sentences.” KOHLER-HAUSMANN, *supra* note 4. Lower courts then decide to “manage” individuals, rather than decide whether they committed the crime. *Id.* at 70–72. See also ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* (2018) (arguing people are punished for misdemeanors long before they are convicted).

¹⁵ See Part I.B.

¹⁶ One regional news article comments on the trend of reduced crime but increased felony filings in Colorado, blaming drug addiction rather than a broader problem with prosecutors, see Allison Sherry, *Prosecutors File a Record Number of Felonies Even as Colorado’s Crime Remains Flat*, CPR NEWS (February 4, 2019).

¹⁷ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA L. REV. 959, 959 (2009) (“No government official has as much unreviewable power or discretion as the prosecutor.”); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 101, (forthcoming 2020) (noting that “[s]cholars view prosecutors as “the most powerful officials in the criminal justice system,” and blame them for “[m]uch of what is wrong with American criminal justice.”); Angela Davis, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 678 (2016) (“No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”); Kenneth J. Melilli, *Prosecutorial Discretion*

Currently, the U.S. criminal legal system processes around 5 million felony and 12 million misdemeanor cases each year.¹⁸ These cases are all in the hands of one criminal justice actor: a prosecutor. None of these arrests become cases unless a prosecutor makes a decision. Prosecutors decide whether to initiate criminal proceedings, what charges to bring, what penalties to seek, and when a plea bargain is appropriate.¹⁹ And since 94% of criminal cases are resolved by plea bargain, prosecutors, not judges, are determining a defendant's fate the vast majority of the time.²⁰

Prosecutors can decide not to bring any charges at all,²¹ or drop any or all of the charges at any time.²² For instance, with misdemeanor cases, prosecutors decide to drop charges up to 80% of the time.²³ However once a prosecutor charges a crime,

in an Adversary System, BYU L. REV. 669, 672 (1992) (explaining that “[i]n exercising the charging function, the prosecutor enjoys broad, indeed virtually unlimited, discretion.”); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 610–11 (2020) (noting that “there is very little formal oversight of the decisions prosecutors make outside of the courtroom—where their most important decisions are made.”); Kay Levine, *The New Prosecution*, WAKE FOREST L. REV. 1125, 1126 (2005) (Prosecutors have “near total control over the decision of when and what to charge in a potential criminal case.”).

¹⁸ There were 17.4 million cases filed in 2017. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD DIGEST 2 (2017) (In 2017, based on data from 26 states, there were 3.5 misdemeanor cases to every 1 felony case, or about 28.5% of cases are felonies and 71.5% are misdemeanors. *Id.* Therefore, we are likely to see 5 million felonies filed and about 12.4 misdemeanors. *Cf.* Natapoff, Misdemeanor, *supra* note 13 at 1063 (estimating that misdemeanors comprise approximately 80 percent of most state dockets); KOHLER-HAUSMANN, *supra* note 4, at 69 (estimating 13 million misdemeanor cases filed each year); NATAPOFF, PUNISHMENT, *supra* note 14, at 251 (estimating the “total size of the 2015 US misdemeanor docket” at 13,240,034 criminal filings).

¹⁹ See *infra* notes 94–104.

²⁰ See Felony Sentences in State Courts, *Statistical Tables*, BUREAU OF JUSTICE STATISTICS (2006).

²¹ Steven W. Perry & Duren Banks, *Prosecutors in State Courts (2007) – Statistical Tables*, BUREAU OF JUSTICE STATISTICS NCJ 234211, 8 tbl. 10, 9 fig. 3 (Dec. 2011) (relying on the 2007 Census of State Court Prosecutors, 47% of all state prosecutor office's reported a declination to prosecute).

²² Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 4 (2017) (“[T]hrough the decision whether or not to file charges, the prosecutor determines if a particular individual will face the machinery of the criminal justice system, while other discretionary decisions, such as those relating to what charges to file and the terms of a plea bargain, have a substantial—and often determinative—effect on the outcome of a case.”); Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 399 (2009) (“Prosecutors can charge bargain, add, or subtract offenses in order to reach the prison sentence they desire.”).

²³ Shima B. Baughman, *History of Misdemeanor Bail*, 98 BOSTON U. L. REV. 837, 872 (2018) (noting that misdemeanor violations are dismissed eighty percent of the time and ultimately result in no legal consequences).

the damage for a defendant is often done—even if charges are later dropped.²⁴ A defendant with criminal charges often is detained pretrial and then has a criminal record, which may cause collateral consequences for life.²⁵ Understanding how prosecutors make charging decisions is essential in determining the impact of charging on defendants as well as the underlying causes of mass incarceration.

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

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

²⁵ “The impacts of mass incarceration are not just prison numbers and families split apart, but increased numbers of people who cannot be productive members of society because they have a charge on their record. Even those who are not incarcerated (or leave jail after a short stint) are permanently excluded from much of public life because of their “record.” See SHIMA B. BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* (2017); Michael Pinar, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459 (2010) (demonstrating the “various collateral consequences that attach to criminal convictions”); NATAPOFF, *PUNISHMENT* *supra* note 14, n.168 (noting “over forty-five thousand collateral consequences of criminal conviction and infractions”).

²⁶ See e.g., *supra* note 17 and *infra* note 27–30; Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2, 6 (2013) (“The modern criminal justice process is prosecutor-dominated. Prosecutors have broad charging and plea-bargaining discretion, and their choices have a huge impact on sentences.”); Benjamin Levin, *Imagining the Progressive Prosecutor*, MINNESOTA L.J. 3 (forthcoming 2020) (describing different types of progressive prosecutors and their various areas of focus); Bellin, *Theories*, *supra* note 17, at 101 (articulating an alternative “servant-of-the-law” theory to govern prosecutors). See also Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 606 (2019) (“there is no established vocabulary for judging prosecutors’ exercise of discretion . . .”); George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1058 (2005) (arguing that discretion is inevitable but that some kinds are more acceptable than others); Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151 (2011); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORD. URB. L. J. 607 (1999); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301 (1996); Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016).

²⁷ W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. ___, 3 (2020) (discussing prosecutors who refuse to charge cases in effect “nullifying” the law); Levin, *supra* note 26, at 3 (describing different types of progressive prosecutors and their various areas of focus); Bellin, *Theories*, *supra* note 17, at 103–04 (providing examples of

theoretical frameworks to understand prosecutors.²⁸ What has been lacking is empirical data to narrow the field of theories. The existing empirical data is localized, often dated, and not nationally representative.²⁹ Even worse, the archival data does not include the key variables of interest, which would be the granular facts of the cases, as presented to prosecutors. Accordingly, we cannot understand what

prosecutors across the nation whose acts depict them as “representatives of a national movement to leverage prosecutorial power to achieve criminal justice reform”); Levine, *supra* note 17, at 1127–29 (Prosecutor as head “problem solver” involves counseling of defendants, not just acting as an advocate, and working on crime reduction and other nontraditional tasks to improve criminal justice); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 307 (2001) (concluding that “prosecutorial discretion requires public moral judgement” over theories of legal or personal moral judgment); M. ELAINE NUGENT-BORAKOVE, *Performance Measures and Accountability*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 93–94 (2008) (outlining some prosecutorial theories as well as five types of prosecutors and their respective goals/objectives); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, J. OF CRIM. L. AND CRIMIN. 2 (forthcoming 2020), <https://ssrn.com/abstract=3596249> (comparing “the new progressive prosecutors to the Progressive Era criminal justice reformers in order to identify the benefits and concerns that accompany a prosecutorial reform movement linked to popular politics”).

²⁸ See e.g., William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1891–93 (2000) (arguing that the reason for the difference between the public and prosecutorial interest is that individual prosecutors do not reflect on the impact of their decisions); R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 4, 101 (2014) (“[O]ther authors have explored the tensions between a prosecutor’s adversarial duties and ‘minister of justice’ role . . . few have explored what it means to be an ‘administer of justice’ in the wider political arena”); Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 906 (2012) (highlighting the “smart on crime” movement for prosecutors focusing on fairness and accuracy, reducing recidivism, crime prevention, transition out of prison, and cost); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 287 (2014) (“[C]all[ing] upon prosecutors to exercise their discretion to decline to prosecute minor offenses where arrest patterns show a disparate impact on racial minorities . . .”).

²⁹ See *infra* note 135, 137. But see J. Mark Ramseyer et al., *Convictions Versus Conviction Rates: The Prosecutor’s Choice*, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series Paper 611, 23–26 (Feb. 21, 2008) (studying the effects of prosecutors’ case selection and conviction rates using SCPS 1990–2002 felony defendants in large urban counties; and testing two models of prosecutorial behavior, one that balances the social planning goal against personal objectives and a goal of high conviction rates. The study revealed that conviction rates rise with budgets and are higher where prosecutors are elected rather than appointed. However, the study also revealed that overall prosecution rates do not have a clear correlation with budget increases, and that conviction rates are slightly lower in high-crime districts where the prosecution rate is higher).

might be happening with prosecutor charging—otherwise known as the “black box” of criminal justice.³⁰

Despite the importance of understanding prosecutor decisions, we have the answers to so few of the basic questions about how prosecutors make decisions. For instance, how many charges on average does a prosecutor charge for a single incident?³¹ How often do prosecutors decline to charge when they have evidence to do so?³² When do they impose a fine or incarcerate an individual? Under what circumstances, does a prosecutor charge a felony or misdemeanor? These are all basic charging questions every prosecutor answers every day. Without an understanding of how prosecutors make decisions, it is difficult to create a cogent theory to understand prosecutors or mass incarceration.

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

This Article studies prosecutor charging decisions both empirically and theoretically. The empirical backbone of this Article—our study about prosecutor decision making using a national sample of state prosecutors—questions the conventional wisdom of the root causes of mass incarceration.³⁵ Of particular interest is the prosecutors’ discretion in the initial charging decision, since this discretion may reduce the efficacy of upstream reforms such as reduced arrests or downstream policy changes like sentencing reform.³⁶ This Article is able to explore

³⁰ Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (discussing the reasons for declinations by prosecutors in New Orleans).

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

³² We have national estimates on declination but we do not have information on whether a prosecutor declined to charge when they lacked appropriate evidence or because they felt that the crime did not warrant a charge. We also lack details on cases prosecutors declined to charge to learn about their thinking on declination. *See infra* notes 197-207.

³³ *See infra* Part I.B.

³⁴ *See infra* notes 134–38 for previous prosecutorial studies.

³⁵ Christopher Robertson, Shima Baradaran Baughman & Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIR. LEGAL STUD. 807, 807–847 (2019). (We completed data collection in 2017 and finished coding data in 2018.)

³⁶ Rachel E. Barkow, *Sentencing Guidelines at the Crossroads of Politics and Expertise*, 160 U. PA. L. REV. 1599, 1602 (2012) (“[Sentencing] commissions could and should do more to address the relationship between guidelines and prosecutorial power Because some amount of prosecutorial discretion is necessary and inevitable, guidelines must account for that reality.”); Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217, 221 (2005) (“[O]ver the past two decades, sentencing authority has been transferred from judges through a politically weak Commission to Congress and, in the end, to prosecutors.”);

how prosecutors use discretion in the initial charging decision and whether they decide to punish an individual, and how much they decide to punish. This analysis suggests three important conclusions that challenge our understanding of prosecutors. First, prosecutors in our study charged defendants 97% of the time—contradicting existing estimates that prosecutors decline up to 50% of cases. Second, prosecutors in our study recommended much harsher punishments than we anticipated—even though most prosecutors did not impose jail time, they charged an average of three crimes for a single incident and almost half recommended fines. Third, we found great disparity in prosecutorial decisions for the same hypothetical crime, which has important implications for defendant equity and proportionality in punishment. We compare all of these novel results with guidance from the Supreme Court and prosecutor standards. This statutory and caselaw analysis considers whether prosecutors are acting in accord with Court precedent and statutory dictates in their charging decisions. It also considers the role of prosecutorial discretion and transparency in our understanding of how prosecutors contribute to mass incarceration.

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

I. UNDERSTANDING PROSECUTOR DECISIONS

Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CAL. L. REV. 447, 483 (2016) (“When they are aware that mandatory-minimum sentencing provisions might require imposing onerous sentences even when mitigating facts exist, prosecutors might file less serious charges or drop prosecutions altogether to avoid what they consider to be unjustifiable results.”). In addition to trying to address mass incarceration, it is also important to test upstream policy remedies, such as blinding prosecutors to defendant race and class information, which may reduce biases in or increase perceived legitimacy of prosecutor decisions. Sunita Sah et al., *Blinding Prosecutors to Defendants’ Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1 BEHAV. SCI. & POL’Y 69, 72 (2015) (arguing that one way to “manage bias is to acknowledge its existence and create institutional procedures to prevent bias from influencing important decisions”); Robertson et al., *supra* note 35, at 808 (examining how prosecutors use their “very broad discretion in the initial charging decision, since this discretion may reduce the efficacy of downstream policy reforms such as sentencing guidelines, which have been enacted to reduce disparities in outcomes”).

For many years the leading theory of mass incarceration has been the war on drugs and changes in sentencing.³⁷ Later, scholars noticed the growth of prisons—both public and private and the accompanying new motivations to fill prisons, as another contributing cause to mass incarceration.³⁸ In recent years, John Pfaff and Emily Bazelon have both argued that prosecutors are primarily to blame for mass incarceration.³⁹ Relying on felony data from 1990 to 2007, Pfaff asserts that prosecutors have caused the epic mass incarceration problems by filing more felonies per prosecutor each year. This theory has been challenged prominently by two scholars.

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

A. Prosecutor Discretion

Understanding who prosecutors are and how they make decisions is important to determining their role in mass incarceration. Prosecutors are government attorneys who represent the state in criminal cases and decide whether to charge after an arrest.⁴⁰ A prosecutor investigates and prosecutes criminal cases and provides advice regarding criminal matters.⁴¹

³⁷ See PFAFF, LOCKED IN, *supra* note 12 and BAZELON *supra* note 12 for books addressing this issue.

³⁸ PFAFF, LOCKED IN, *supra* note 12.

³⁹ *Id.*

⁴⁰ AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTORIAL FUNCTION 3-1.2(a) (4th ed. 2017) (hereinafter “ABA STANDARD”) (A prosecutor is an officer of the court and “an administrator of justice,[and] a zealous advocate”); *Wayte v. U.S.*, 470 U.S. 589, 608 (1985) (“So long as the prosecutor has probable cause . . . the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

⁴¹ ABA STANDARD 3-1.1.

In their role as an advocate for the state, prosecutors have substantial discretion.⁴² What does this mean? Prosecutors decide whether to initiate criminal proceedings,⁴³ what crimes to charge,⁴⁴ or decline,⁴⁵ how and when to prosecute the

⁴² Wesley MacNeil Oliver & Rishi Batra, *Standards of Legitimacy in Criminal Negotiations*, 20 HARV. NEGOT. L. REV. 61, 67 (2015) (“Prosecutors possess extraordinary power to charge defendants.”); Thomas, *supra* note 26, at 1043 (“Discretion in enforcement and prosecution of crime is inevitable.”); Brandon K. Crase, *When Doing Justice Isn’t Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 475 (2007) (“[T]he discretion afforded prosecutors exists at every level of the criminal justice system, whether the defendant is Martha Stewart or the guy next door, and the impact on the defendant is substantially the same.”).

⁴³ Sarah Ribstein, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L. J. 857, 868 (2009) (“Prosecutors in street-crime cases have a great deal of discretion as to whether or not to indict”); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMIN. 717, 773 (1996) (“[C]urrent prosecutorial discretion is virtually unlimited”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 49–50 (2002) (“Through deliberate choices about screening, a chief prosecutor can change the place of jury trials, the pattern of convictions and dismissals, the allocation of police and correctional resources, and the public’s access to information about the system.”).

⁴⁴ NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 4-2.1 (3d Ed updated 2009) (hereinafter “NDAA Standards”) (“It is the ultimate responsibility of the prosecutor’s office to determine which criminal charges should be prosecuted and against whom.”); Nicole T. Amsler, *Leveling the Playing Field: Applying Federal Corporate Charging Considerations to Individuals*, 66 DUKE L. J. 169, 173 (2016) (“[T]he number of violations a federal prosecutor can choose from when charging someone with a crime is so enormous that it is essentially countless.”); Craig H. Solomon, *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.”).

⁴⁵ Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1700 (2010) (“And prosecutors have significant authority to decline charges for equitable reasons. . . ., but their professional position leaves them overcautious. They have power, but they may lack will and perspective.”); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 605 (2005) (describing how crimes with consistent legal definitions cause prosecutors to enforce the crimes “as written” resulting in more systematic and aggressive enforcement).

charges,⁴⁶ what penalties to seek,⁴⁷ when to offer plea bargains,⁴⁸ and what sentencing recommendations to advise.⁴⁹ Prosecutors can “freely choose” between

⁴⁶ See Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 490 (2017) (“Prosecutorial discretion . . . refers to the power . . . to determine how, when and whether to initiate and pursue enforcement proceedings.”); Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 599 (2014) (“[P]rosecutors can decide, almost without limit, to add additional charges or enhancements after the case has been filed, as long as the additions are at least arguably supported by the evidence.”).

⁴⁷ Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 84 (2011) (“Prosecutors exercise sovereign authority when they determine who may be punished for legal transgressions and who will not.”); Shima B. Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1091 (2017) (“...prosecutors have the latitude to charge a wide range of crimes and to seek a wide range of penalties as long as the prosecutor believes the charges and sought-after penalties are ‘consistent with the nature of the defendant’s conduct’ or the likelihood of success at trial is high, without regard to the incarceration effect of the charges.”).

⁴⁸ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1470 (2008) (“Since prosecutorial discretion and plea bargains control most outcomes, the system as it actually operates relies on both the priorities and the judgments of prosecutors. The default is the plea bargain (or sentence bargain), with the adversarial jury trial serving as a kind of judicial review for defendants who are not content with administrative adjudication by the prosecutor.”); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1472 (1993) (“As the sole ‘purchasers’ of criminal defendants’ convictions and incriminating information, prosecutors . . . possess substantial power to overwhelm criminal defendants in the plea bargaining process.”); Alkon, *supra* note 46, at 599 (“Prosecutors also have the power to decide not to make a plea offer. In effect, the prosecutors hold all the cards; defendants only have the power to throw a monkey wrench into the system by demanding a jury trial.”); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GEO. L. REV. 407, 420–25 (2008) (“Prosecutors can reassure defendants of their neutrality and trustworthiness by employing objective criteria in making plea bargaining decisions, explaining their decisions, and demonstrating consideration of defense arguments in favor of lenience”); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) (“The prosecutor may engage in plea negotiations with the defendant and may threaten increased charges should a defendant fail to accept the prosecutor’s plea offer.”).

⁴⁹ James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521 (1981) (“The decisions [prosecutors] make determine in large part who will be convicted and what punishment will be imposed.”); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1011 (2005) (“Prosecutors have become more powerful through the potent combination of far-reaching and duplicative criminal codes, relatively few resources available for trial, and nondiscretionary sentencing laws. While judges now find themselves increasingly accountable to the law of sentencing, prosecutors have accumulated new powers and encounter no new regulation of their authority.”).

charging options, and defendants are generally stuck with these choices.⁵⁰ Prosecutors' discretionary power is not unlimited as the scope of the power depends on statutes passed by legislatures.⁵¹ However, in most states criminal statutes are numerous and there are often more than enough options for criminal charging in every area.⁵²

The prosecutor may have more discretion than any government official.⁵³ Most profoundly, when deciding whether to charge a case, the prosecutor brings the ultimate weight of the state down on the defendant.⁵⁴ The constitutional checks that could exist on prosecutors do not typically exist.⁵⁵ Judges and the public could pose

⁵⁰ Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 178–9, 184 (2019). (“Those who say prosecutors have a lot of power mean that prosecutors have the ability to freely choose between different options (i.e., discretion.)”); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME. & JUSTICE 5 (2012) (“Discretionary prosecutorial decisions are for all practical purposes immune from judicial review.”); see also Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840, 904 (noting that “prosecutors should make decisions based on articulable principles or subprinciples that command broad societal acceptance.” This idea poses a challenge because prosecutors have never attempted to identify workable norms for the array of discretionary decisions that prosecutors’ offices make every day. “This, then, is our main prescriptive point: each prosecutor’s office should attempt to articulate standards. Specific rules or criteria constraining prosecutorial decision-making cannot be formulated without first identifying fundamental governing norms. Although these norms need not be universally accepted, they should have some claim to public support).

⁵¹ Bellin, *Power*, *supra* note 50, at 184 (finding that “all prosecutors’ . . . powers depend on an enforceable statute enacted by the legislature”) Federal prosecutors also have very little power over the vast number of criminal defendants who are adjudicated by state statutes.

⁵² Baughman, *Subconstitutional*, *supra* note 47 (discussion of overcriminalization—too many statutes to choose from and more every year); see also Wright, *supra* note 49.

⁵³ Bibas, *supra* note 17 (“No government official has as much unreviewable power or discretion as the prosecutor.”).

⁵⁴ Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) (noting the many facets of a prosecutor’s power to charge an individual, acknowledging this power as “arguably the most important power”). The United States has never ascribed to “mandatory prosecution,” which theoretically allows prosecutors the ability to decline to charge. Albert W. Alschuler, *A Teetering Palladium?*, 79 JUDICATURE 200, 201 (1996) (“[T]he discretion of prosecutors . . . not to enforce the law is not only tolerated but applauded[.]”); Vorenberg, *supra* note 49, at 1551 (“[S]ome nonenforcement of the law will occur[.]”).

⁵⁵ Baughman, *Subconstitutional*, *supra* note 47, at 1071 (arguing that the lack of constitutional checks on prosecutors has had negative impacts on criminal law including increased filings and excessive plea bargaining, among others). There are some minimal constitutional limits. For example, prosecutors cannot engage in selective prosecution or vindictive prosecution. See, e.g., *Wayte v. U.S.*, 470 U.S. 598, 608 (1985); *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974).

a check on prosecutors, but this is often not the case in the vast majority of cases.⁵⁶ Judges are usually unable to intervene on behalf of criminal defendants when it comes to severe or disparate charging.⁵⁷ About 94% of criminal cases are resolved through plea-bargaining, which often takes place in private meetings, which the public cannot monitor.⁵⁸ Accordingly, elections are not the check that the constitution envisioned for prosecutors.⁵⁹

⁵⁶ Jeffery Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 849 (2018) (asserting that judges act as a check on prosecutors because they have the final say on sentencing decisions). *But see* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199–267 (arguing that judges are merely “passive verifier[s]” and have a minimal role in the plea bargain process); *see also* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WILLIAM & MARY L. REV. 102 (2016) (discussing the diminished role of judges in plea bargaining).

⁵⁷ Lee, *supra* note 48, at 164 (“[C]ourts are reluctant to intervene when their own notions of what constitutes a proper charging decision conflict with the prosecutor's charging decision because they believe the nature of the decision is one that the prosecutor is equipped to make competently and independently.”); Standen, *supra* note 48, at 1510 (“In the world of the sentencing guidelines, the judge has little power to check prosecutorial charging decisions.”).

⁵⁸ Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912, 923 (2006). Bellin argues that judges can act as a check on prosecutorial decisions, claiming that “[a]ll prosecutors can do by themselves is let people off—a tactic that does not lend itself to filling prisons.” Bellin, *Reassessing*, *supra* note 56, 837, 857. However, this is far from the reality. Prosecutors can charge as many crimes as they want and basically plea bargain without any checks. There are laws that prevent prosecutorial accountability and while lawyers and judges should report misconduct this rarely occurs. Jennifer Lee, *Justice for All: The Necessity of New Prosecutorial Accountability Measures* 90 MISS. L. REV. at 2 (forthcoming 2020) (“Defense attorneys remain reluctant to report prosecutors for unethical conduct for fear of hindering professional working relationships, and judges are reluctant to report prosecutors because they wish to appear “tough on crime” to voters. Thus, the accountability system is inherently flawed: state bar associations rely on judges and practitioners to report misconduct, but there is no mechanism to compel such complaints.”). Judges and juries often rubberstamp a prosecutor’s charging decision and plea bargain, with little intervention or check.

⁵⁹ Carissa Byrne Hessick, *National Study of Prosecutor Elections*, THE PROSECUTORS AND POL. PROJECT (Feb. 2020) (considering whether elections are a check on prosecutors by analyzing data collected from the most recent election cycles for all states that elect their prosecutors).

This wide discretion may lead to unchecked power, which creates opportunity for prosecutorial abuse including racial and gender bias,⁶⁰ overcharging,⁶¹ vindictiveness,⁶² plea bargaining abuses,⁶³ and wrongful convictions.⁶⁴ On the other side, prosecutorial discretion allows prosecutors to adapt to different scenarios involving unique facts and defendants and provides a way for prosecutors to manage their expansive caseloads through plea-bargaining,⁶⁵ which some argue is necessary

⁶⁰ See *State v. Monday*, 257 P.3d 551, 556 (Wash. 2011) (“Prosecutor Konat injected racial prejudice into the trial proceedings by asserting that black witnesses are unreliable.”); see also *United States v. 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) (arguing that “racially-skewed outcomes . . . cannot occur without prosecutorial support”); The Mo. Task Force on Gend. & Justice, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 506 (1993) (explaining that prosecutors may assign low priority to domestic violence cases because they lack understanding, sensitivity, and may not believe female victims). *But see* Robertson et al., *supra* note 35, at 808, 844 (showing “insignificant findings of race or class bias” among prosecutors).

⁶¹ Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 140 (1968) (arguing the rise of plea bargaining incentivizes prosecutors to overcharge); see also Wright & Miller, *supra* note 43, at 29, 32 (arguing for a hard screening system to prevent prosecutorial overcharging); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 72 (2011) (arguing that game theory sheds light on prosecutors’ incentives and motivations in overcharging defendants).

⁶² See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Goodwin*, 457 U.S. 368 (1982).

⁶³ See *Mabry v. Johnson*, 467 U.S. 504, 506 (1984) (withdrawal of plea offer after acceptance but before execution of plea not violative of due process); *North Carolina v. Alford*, 400 U.S. 25, 40 (1970) (threat of death penalty to force a defendant to plead guilty to a lesser murder charge is not coercive); *United States v. Kennard*, 46 F. App’x. 426, 428 (9th Cir. 2002) (a prosecutor’s promise to treat a third party leniently during plea bargaining is not coercive per se); *United States v. Speed Joyeros*, 204 F. Supp. 2d 412, 444 (E.D.N.Y. 2002) (extended pre-trial incarceration caused defendant’s physical and mental health to deteriorate, but the plea bargain was acceptable despite the danger of due process violations by the intensive pressure on defendant to plead guilty).

⁶⁴ See generally Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 WIS. L. REV. 399, 403 (2006) (discussing one study showing that, out of sixty-two persons exonerated by DNA evidence, prosecutorial misconduct played a role in twenty-six of those wrongful convictions); see also Baughman, *Subconstitutional*, *supra* note 47, 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) (discussing how wrongful conviction cases “challenge[] the traditional assumption that the criminal justice system does all it can to accurately determine guilt”).

⁶⁵ 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 plea bargaining and why they continue to do so today).

for the administration of justice.⁶⁶ Arguably, prosecutorial discretion puts decision making in the hands of those with in-depth institutional knowledge of the criminal justice system. Despite these benefits, many legal scholars assert prosecutorial discretion is too broad and gives prosecutors unchecked power.⁶⁷

Whether wide discretion is positive or not is difficult to assess due to a lack of transparency.⁶⁸ Legal commentators have characterized the “black box,”⁶⁹ of

⁶⁶ See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORD. L. REV.* 2011, 2023 (2000) (“The [Supreme] Court has . . . reemphasized . . . that [plea bargaining] is an essential part of the [criminal] process, but has failed to articulate any principled justification for the practice of allowing criminal defendants to lose their most fundamental rights.”); Doug Lieb, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 *YALE L. REV.* 1014, n.12 (2014) (discussing the debate about the necessity of plea bargaining within the criminal justice system).

⁶⁷ 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 to police the manner in which prosecutors exercise their discretion. . . . In a government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception.”); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 1049 (2006) (“A system where upwards of ninety-five percent of all convictions result from pleas and where prosecutors make all the key judgments does not fit comfortably with the separation of powers.”); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 *YALE L. J.* 2150, 2150 (2013) (“The U.S. criminal system is not truly adversarial because prosecutors possess broad, unchecked power and therefore determine results in criminal cases with little or no input from the defense.”); Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 *VAND. L. REV.* 1099, 1130 (2014) (“[U]nfettered 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.”); 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.”).

⁶⁸ Murray, *supra* note 27, at 38 (“Much of the prosecutorial accountability gap stems from the difficulty of evaluating performance . . . [and to an extent] stems from community unawareness ‘about the prosecutorial function’”); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 *OHIO ST. J. CRIM. L.* 647, 671 (arguing the public lacks the ability to evaluate prosecutorial function due to the “lack of transparency”); see Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, *THE ATLANTIC*, May 18, 2016 (discussing the difficulty of procuring prosecutor charging decisions and giving Manhattan as an example of the only office giving outside access to study its files).

⁶⁹ Ronald F. Wright, Kay L. Levine & Marc L. Miller, *The Many Faces of Prosecution*, *EMORY LEGAL STUDIES RESEARCH PAPER* 28, 30 (Feb. 2020). (“When one considers the overall body of academic work about prosecutors, this one approach—theoretical work grounded in anecdote, analyzed based on insights borrowed from other disciplines that require a certain level of abstraction—swamps the field.”)

prosecutorial discretion as a “dangerous”⁷⁰ and “tyrannical”⁷¹ because it is “unreviewed and its justifications are unarticulated.”⁷² From previous work, we know that “many decisions and actions of a prosecutor are never recorded, or are recorded in documents that are difficult to obtain.”⁷³ And prosecutors have no reason to open up their decisions for review.

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

B. Debates about Prosecutors’ Role in Mass Incarceration

John Pfaff claims that prosecutorial discretion is the single largest cause of mass incarceration and is responsible for the expansive growth in felony convictions since the 1970s.⁷⁴ Pfaff points out that violent crime increased by a hundred percent between 1970 and 1990 and the number of prosecutors rose by 17%.⁷⁵ According to Pfaff, when crime rates fell from 1990 to 2007, “the number of prosecutors went up by 50%” and the number of prisoners also “rose with it.”⁷⁶ Unlike the volume of arrest that somewhat fluctuated during this period,⁷⁷ “felony case filings tracks the

⁷⁰ Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMIN. 3, 5 (1940) (“Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”); see also Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 408–09 (1992) (“Uncontrolled discretion . . . has the potential for abuse. In the hands of prosecutors, this potential is now a reality.”).

⁷¹ *Henderson v. United States*, 349 F.2d 712, 714 (D.C. Cir. 1965) (Bazelon, C.J., dissenting); see also Davis, *supra* note 54 at 393, 399 (noting that “[t]he current constitutional design is dysfunctional as a check on prosecutorial power”).

⁷² Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1073 (1972); Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Politics and Conflicts of Interest in Prosecutors’ Offices*, 22 CORNELL J. L. & PUB. POL’Y 53, 55 (2012) (“[U]nreviewed prosecutorial discretion makes a nasty cocktail when mixed with invidious forms of prosecutorial conduct.”).

⁷³ Wright, Levine & Miller, *supra* note 69 at 45.

⁷⁴ John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U.L. REV. 1239, 1240 (2012) (concluding that prosecutors are the “who” behind prison growth in the United States due to number of felony filings per arrest); PFAFF, LOCKED IN, *supra* note 12 (“Recall that over the 1990s and 2000s crime fell, arrests, fell, and time spent in prison remained fairly steady. But 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 and arrestee basically doubled, and that change pushed prison populations up even as crime dropped.”).

⁷⁵ PFAFF, LOCKED IN, *supra* note 12.

⁷⁶ Gopnik, *supra* note 7

⁷⁷ During this same time period, arrests went down from 1990-1993, went up from 1994-1998 and then dropped again until 2005, and then increased until 2006, and then

number of [prison] admissions quite closely.”⁷⁸ Pfaff demonstrates that in his thirty-four state sample, between 1994 and 2008, filings grew 34% and admissions grew 40%.⁷⁹ Pfaff claims that the prosecutor’s decision to file charges “appears to be at the heart of prison growth.”⁸⁰ Pfaff claims that particularly with violent crimes, prosecutors were especially tough.⁸¹ Pfaff argues that this may explain the “central paradox of mass incarceration: fewer crimes, more criminals; less wrongdoing to imprison people for, more people imprisoned.”⁸² Put simply, Pfaff blames prosecutors over any other leading causes for mass incarceration.

While Pfaff’s claims are provocative, two scholars provide serious challenges to his empirical analysis—Jeffery Bellin and Katherine Beckett.⁸³ Jeffrey Bellin challenges Pfaff’s assertion that prosecutors are the reason for mass incarceration, stating that “few can persuasively explain how the phenomenon arose or what can be done to make it go away.”⁸⁴ Bellin and Beckett both dispute Pfaff’s assertion that more felonies were filed but sentence lengths did not increase between 1980 and 2010.⁸⁵ Indeed, other researchers have found dramatic increases in sentences between 1980 and 2010.⁸⁶ Bellin also claims that the increase in felonies reported

dropped every year from 2006-2018. See FBI, *Criminal Justice Information Services, UNIFORM CRIME REPORTING* (full arrest data for various years).

⁷⁸ PFAFF, LOCKED IN, *supra* note 12.

⁷⁹ “In my thirty-four state sample, between 1994 and 2008 filings grow by 37.4% (from 1,392,418 to 1,913,405) while admissions grow by an almost-identical 40% (from 359,359 to 504,715).” PFAFF, LOCKED IN, *supra* note 12.

⁸⁰ PFAFF, LOCKED IN, *supra* note 12 at 6, 74.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 AM. SOCIOLOGICAL ASSOC. 1, 20 (2018) (“[I]t is difficult, perhaps impossible, to assess the reliability of Pfaff’s findings regarding the apparent increase in the filing-to-arrest ratio.” And “available evidence thus suggests that the share of felony filings that resulted in a felony conviction did increase and therefore that prosecutors’ filing decisions were not the only cause of the increase in the arrest-to-admission ratio.”)

⁸⁴ Bellin, *Reassessing*, *supra* note 56 at 837 (“Americans increasingly recognize that “mass incarceration”—unprecedented incarceration levels well beyond those necessary to protect society—is a problem”).

⁸⁵ Bellin, *Reassessing*, *supra* note 56, at 844; see STEVEN RAPHAEL & MICHAEL A. STOLL, *WHY ARE SO MANY AMERICANS IN PRISON?* 36 (2013); Beckett, *supra* note 83 at 6 (“Studies that adopt these and other methodological precautions consistently find that time served did increase notably in recent decades, especially in the 1990s.”).

⁸⁶ See JEREMY TRAVIS, BRUCE WESTERN, & STEVEN REDBURN, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014) (The estimated increase in time served for individual categories are as follows – Murder: 238% (1981-2000), Sexual assault: 94% (1981-2009); Drugs: 19% (1981-2000); Aggravated assault: 83% (1980-2000); Burglary: 41% (1980-2000); Robbery: 79% (1980-2000) and (finding that “the [increase in incarceration rates] can be attributed about equally to the two policy factors of prison commitments per arrest and increases in time served.”); RAPHAEL & STOLL, *supra* note 85, Table 2.4, p. 51 (2013) (finding that the average time served for

by Pfaff are questionable when State Court Processing Statistics Data (SCPS) is considered alongside National Center for State Courts data (NCSC).⁸⁷ However, Pfaff defends his data claiming that the state felony filings did in fact go up during

murder and negligent manslaughter increased by 55 percent, 44 percent for robbery, and 20 percent for burglary between 1984 and 2004); Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME JUSTICE 17, 35–36 (1999) (“There seem also to be upward trends [in time served] for other offenses, each rising steadily in the 1990s.” See URBAN INSTITUTE: JUSTICE POLICY CENTER, A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA’S PRISONS (2012), <https://apps.urban.org/features/long-prison-terms/trends.html> (“Since 2000, the average time served has risen in all 44 states (including the District of Columbia) that reported complete data to the National Corrections Reporting Program.”) The increase in time served for six offenses is as follows – Murder: 120% (1980-1996); Sexual assault: 60% (1987-1996); Assault: 50% (1990-1996); Robbery: 45% (1989-1996); Drugs: 76.9% (1987-1996) and “Given that sentence lengths for serious crimes have increased greatly since 1980, the full impact of lengthy sentences on the level of incarceration has yet to be felt.” The estimated increase in time served for individual categories are as follows – Murder: 238% (1981-2000), Sexual assault: 94% (1981-2009); Drugs: 19% (1981-2000); Aggravated assault: 83% (1980-2000); Burglary: 41% (1980-2000); Robbery: 79% (1980-2000)). See also LEIGH COURTNEY ET AL., TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 3 (2017) (finding time served between 1990 and 2009 increased by about one-third for people convicted of all offense types. Violent: 37%, Property: 24%, Drug: 36%).

⁸⁷ Jeffery Bellin points out that it may be helpful to crosscheck NCSC data with SCPS data on felony filings (see Bellin, Reassessing, *supra* note 56 (“[T]he trends in filings in the SCPS do not track those in the NCSC data as closely as one might wish. Between 1990 and 2004, filings in the SCPS rise by 1.7%, and by only 8.8% between 1994 and 2004 (the data’s trough and peak for filings). Conversely, filings in the NCSC data rise by 34.2% between 1994 and 2004.”)). However, the comparison would be difficult. SCPS data looks at the number of felony defendants in May of a certain year in 75 of the largest counties (see BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS 2009). With NCSC, states voluntarily send in the caseload numbers and some states report how many are felonies and how many are misdemeanors, (see *supra* note 79). NCSC felony numbers are not a statistically designed survey but rather self-reported numbers that NCSC brings together. In some years, 28 states report felony filings, other years 40 report. It would be difficult to use the states provided by NCSC in a year SCPS also collected data and make them represent similar jurisdictions to allow for comparison. In addition, Pfaff points out that comparing data across the years 1994 to 2008 is appropriate given the data and argues that SCPC is the more “quirky” dataset that is the only BJS dataset that does not allow for using its data for “causal analysis.” Pfaff also counters that “[r]einforcing my concerns with trusting the SCPS over the NCSC data is that the BJS gathers a second dataset on felony case outcomes in state courts, the National Judicial Reporting Program (NJRP), that produces results almost identical to those I find using NCSC data.” And “The core claim in my book is that both total felony filings as well as felony filings per arrest rise sharply, and the NJRP trends for both track those I derived from the NCSC data.” See John Pfaff, *Prosecutors Matter: A Response to Bellin’s Review of Locked In*, 116 MICH. L. REV. ON. 165 (2019).

this period and that the data he relies on is the most representative.⁸⁸ During a similar period, Bellin asserts that a study of federal prosecutors did not find any increase in felony charging.⁸⁹ And according to Bellin, California reports no increase in felony filings during this period.⁹⁰ Given this criticism, there is some dispute as to whether prosecutors increased felony filings over the time period alleged, and whether they are the largest contributor to mass incarceration.

We do not insert ourselves in this empirical debate of whether historically prosecutors are a bigger cause of mass incarceration than other criminal justice actors like police, judges or legislators. But we are interested in current dynamics. Instead of just examining felony data, we examine total criminal filings—meaning both felony and misdemeanor filings—to see what trends we can observe with prosecutor charging.⁹¹ As a frame of reference, among states that report felony and

⁸⁸ Pfaff, *Prosecutors Matter*, *supra* note 87 (“Moreover, it should be highlighted that at no point in his review does Bellin *show* that my results are compromised by the problem he believes he has identified; he simply *suggests* it.” Given that the NCSC data is publicly available, Bellin could have verified that this problem existed, or asked me to share the NCSC data I had with him so he could have checked it himself. He makes an easily-testable critique without actually testing it, but then frames it as showing that my results are *in fact* driven by what he purports to have uncovered.”)

⁸⁹ Bellin, *Reassessing* *supra* note 56, at 843 (“Raphael and Stoll examined federal charging behavior between 1985 and 2009 and found “little evidence of systematic change in the rate at which U.S. attorneys prosecuted criminal suspects.”); RAPHAEL & STOLL, *supra* note 85, at 62.

⁹⁰ Bellin, *Reassessing*, *supra* note 56, at 844.

⁹¹ NCSC numbers are the best nationally representative numbers we have on felony and misdemeanor filings. *See* STATE COURT GUIDE TO STATISTICAL REPORTING, NATIONAL CENTER FOR STATE COURTS 1 (2020) http://www.courtstatistics.org/_data/assets/pdf_file/0026/23984/state-court-guide-to-statistical-reporting.pdf (“Comparable data from the state courts allows the CSP to publish national trends and analyze caseload statistics for use by state court leaders, policy makers, and local court managers.”) Criminal caseload filings are cases filed in trial court. CSP does not combine trial and appellate caseloads. *See* Correspondence with NSCS Program Specialist Alice Allred on May 28, 2020 (“The national totals reported here may include estimates for states that were unable to report caseload data in time for publication or whose data do not strictly conform to the reporting guidelines set forth in the State Court Guide to Statistical Reporting. States for whom estimates were used will not appear in any state-level tables in this document or any displays available on the CSP DataViewer. While the CSP statistical reports endeavor to provide the authoritative source for national caseload statistics, the official version of any state’s data can only be provided by that state. The underlying data can be found on the CSP DataViewer at [courtstatistics.org](http://www.courtstatistics.org).”) STATE COURT CASELOAD DIGEST, NATIONAL CENTER FOR STATE COURTS 4 (2018) http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf. Note that the national numbers in this section are referred to by NCSC as the “Number of Incoming Cases” in their reports but this paper uses the term “filings.” NCSC defines incoming cases as “the sum of new filings plus reopened and reactivated cases. This figure provides for a more complete assessment of the work of state courts.” *See* EXAMINING THE WORK OF STATE

misdemeanor data, around 70% of criminal cases are misdemeanor while 30% are felony cases.⁹² Today any meaningful analysis of mass incarceration must consider the role of misdemeanors.⁹³

Some elementary analysis shows that the trend for filings by prosecutors has reversed from what Pfaff argues. Starting in 1990, the NCSC reported that there were an estimated 13 million criminal case filings—both felony and misdemeanor—and by 2002, case filings went up to 15.4 million.⁹⁴ While historical comparisons before and after 2003 are discouraged due to methodology changes by the NCSC,⁹⁵ we can look at the period beginning in 2003. In 2003, the criminal caseload was at

COURTS, 2004, NATIONAL CENTER FOR STATE COURTS 42, <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/607>, see also 39–49 for more details (for instance the three state example that NCSC provides that new filings are the vast majority of “filings” as we refer to them). According to NCSC’s Guide to Statistical Reporting, *filing* is the original charging document (complaint, information, or indictment) and marks the beginning of the case. *Id.* at 14. *Reopened* cases are those “in which a judgment has previously been entered, but which have been restored to the court’s active pending caseload due to the filing of a request to modify or enforce that existing judgment” *Id.* at 17. Finally, for reactivated cases, “[c]ases that are administratively classified as inactive should be reported in the Caseload Summary Matrix as Placed on Inactive Status. When the case is *reactivated*, report it in the Reactivated column.” *Id.* See STATE COURT GUIDE TO STATISTICAL REPORTING, NATIONAL CENTER FOR STATE COURTS, V. 2.2, 14–17 (February 4, 2019), http://www.courtstatistics.org/_data/assets/pdf_file/0026/23984/state-court-guide-to-statistical-reporting.pdf.

⁹² This refers to reporting to NCSC. In the case of felony filings, only some states break down their reporting into felony and misdemeanor cases, meaning the breakdown of the felony or misdemeanor numbers may not be accurate as a national number from year to year. See Correspondence with NSCS analyst, Alice Allred on May 28, 2020. However, while there is not a national felony filing number, the NCSC does publish information on those states that do report felony numbers, such as the percent of cases that are felonies. For example, in 2016 between 70% - 74% of cases were misdemeanors and 24%-28% were felonies among 31 states, see STATEWIDE CRIMINAL CASELOAD COMPOSITION IN 31 STATES (2016), http://www.courtstatistics.org/_data/assets/pdf_file/0013/24052/ewsc-2016-crim-page-3-comp-by-state.pdf. In 2018, looking at the aggregate of 32 states, 77% of cases were misdemeanors while 23% were felonies. STATE COURT CASELOAD DIGEST, NATIONAL CENTER FOR STATE COURTS 13 (2018). http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf.

⁹³ NATAPOFF, *supra* note 14 and KOHLER-HAUSMANN, *supra* note 4.

⁹⁴ For 1990 data see STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1990, NATIONAL CENTER FOR STATE COURTS 25, <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/615>; For 2002 data see EXAMINING THE WORK OF THE COURTS, NATIONAL CENTER FOR STATE COURTS 11 (2003), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/606>.

⁹⁵ “The introduction or reallocation of case types as defined in the Guide has had a subtle but discernable effect on the time-series data reported by the CSP. For this reason, caseload trends in this year’s Examining the Work of State Courts are not necessarily comparable to those published previously.” EXAMINING THE WORK OF STATE COURTS, 2004, NATIONAL CENTER FOR STATE COURTS 9, <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/607>.

20.6 million and increased to 21.6 million cases at the height of mass incarceration in 2006.⁹⁶ Since 2006, total criminal caseload filings have steadily decreased, falling to 17 million in 2018.⁹⁷ From 2006 until 2018 prosecutors charged less felonies and misdemeanors each year than the year before, resulting in a decline in filings of 21.3%.⁹⁸ What this tells us is that unlike what Pfaff found in the previous period, after 2006, prosecutors reduced charges filed each year.⁹⁹ In other words, prosecutors have reduced their footprint on mass incarceration between 2006 and 2018. As such, the larger Pfaff mass incarceration claim of prosecutors increasing filings—if true—ends in 2006. However, the story of prosecutors is not finished until we consider arrest rates.

In addition to prosecutor charging, we also consider how police arrests impact mass incarceration in roughly the last ten to fifteen years. We remember that in the last ten to fifteen years prosecutors filed less cases each year than in previous years. However, when considering arrests, we realize that police arrests went down even more in the same period. Indeed, the decrease in prosecutor filings is not commensurate with the decrease in arrest, meaning that while prosecutors have decreased in filing, they have not decreased proportionately to what we would expect given the sharp decline in police arrests. In 2003, there were an estimated 13.6 million arrests in the United States,¹⁰⁰ and arrests increase to 14.4 million in 2006.¹⁰¹ After 2006, arrests began to decrease steadily until 2018 when they drop to 10.3 million.¹⁰² Overall, from 2006 to 2018, there was a decrease of 28.3% in the number

⁹⁶ For 2003 data see EXAMINING THE WORK OF STATE COURTS, 2004, NATIONAL CENTER FOR STATE COURTS 41 (2004), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/607> and for 2006 data see EXAMINING THE WORK OF STATE COURTS, 2007, NATIONAL CENTER FOR STATE COURTS 12, <https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/1278>.

⁹⁷ For 2018 data see STATE COURT CASELOAD DIGEST: 2018, NATIONAL CENTER FOR STATE COURTS 7, http://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf.

⁹⁸ For 2006 data see EXAMINING THE WORK OF STATE COURTS, *supra* note 96 at 12; for 2018 data see STATE COURT CASELOAD DIGEST *supra* note 97 at 7, Calculation $[(7,000,000 - 21,600,000) / 21,600,000] * 100 = -21.3\%$

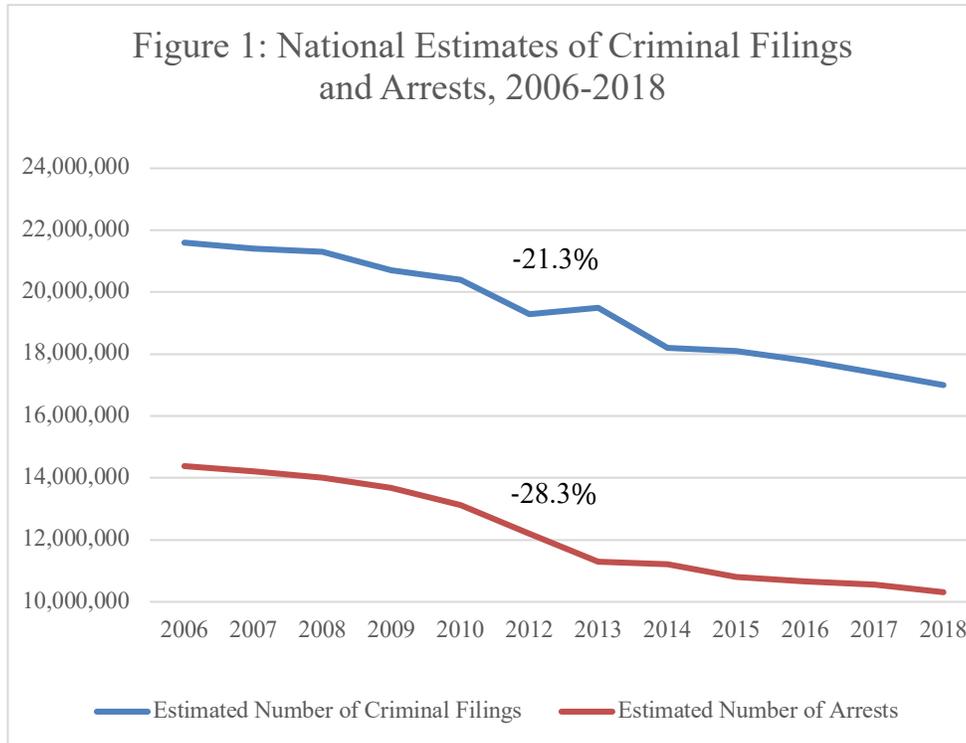
⁹⁹ There were an estimated 21.6 million criminal filings in 2006, with the estimated number of filings trending down each year. In 2018 there were 17 million estimated criminal case filings. See EXAMINING THE WORK OF STATE COURTS, *supra* note 96 at 12; STATE COURT CASELOAD DIGEST, *supra* note 97 at 7.

¹⁰⁰ FBI, UNIFORM CRIME REPORT, 2003, 270, <https://ucr.fbi.gov/crime-in-the-u.s/2003/03sec4.pdf>. This was down from 1994 arrest numbers of 14 million arrests. Sourcebook of Criminal Justice Statistics – 1994, Bureau of Justice Statistics 374 (Tbl 4.1), <https://bjs.gov/content/pub/pdf/scjs94.pdf>.

¹⁰¹ FBI, *Estimated Number of Arrests (Table 29)*, CRIME IN THE UNITED STATES 2006, <https://ucr.fbi.gov/crime-in-the-u.s/2006>.)

¹⁰² FBI, *Estimated Number of Arrests (Table 29)*, CRIME IN THE UNITED STATES 2018, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-29>.

of arrests nationally.¹⁰³ Figure 1 shows the decline in arrests and cases filed since 2006.¹⁰⁴



In the last ten years or so, prosecutors have increased charging rates per arrest. Comparing prosecutor filings and police arrests rates in the last decade—police cut arrests much more than prosecutors reduced charging rates. In the most recent years where data is available (2006-2018), arrests went down 28.3%.¹⁰⁵ Prosecutors converted arrests into more criminal case filings (felony and misdemeanor), but their rate went down somewhat to 21.3%.¹⁰⁶ This means that prosecutors are actually

¹⁰³ FBI, *supra* note 101; FBI, *supra* note 102. Calculation $[(10,310,960 - 14,380,370) / 14,380,370] * 100 = -28.3\%$ This trend of decreasing arrest numbers had been going on for years, but less dramatically. From 1990-2010 there was a decrease of 8% in estimated arrest numbers (14.2 million in 1990 to 13.1 million in 2010), see Howard N. Snyder, *Arrest in the United States, 1990-2010*, BUREAU OF JUSTICE STATISTICS, 16 (Table 2) (Oct. 2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf>. This of course includes the last ten years for which we have data as the latest state criminal filings for 2018 were published in 2020.

¹⁰⁴ For sources and calculations see Appendix

¹⁰⁵ See FBI *supra* note 102.

¹⁰⁶ See EXAMINING THE WORK OF STATE COURTS *supra* note 96. STATE COURT CASELOAD DIGEST: 2017 DATA, NATIONAL CENTER FOR STATE COURTS 9, http://www.courtstatistics.org/_data/assets/pdf_file/0011/24014/csp-2017-data-spreads-

filing more per arrest in 2018 than previously. As shown in Figure 2, in 2003 there were 1.51 filings per arrest,¹⁰⁷ which rose to 1.73 in 2013,¹⁰⁸ before plateauing in 2018.¹⁰⁹ We acknowledge that FBI estimates are nowhere near perfect given gaps in data collection.¹¹⁰ However, what national trends show is that police have decreased arrests but prosecutors have not shown a commensurate decrease in felony and misdemeanor case filings. In other words, prosecutors are charging more cases proportionately than police are, and taking the next step, are contributing more to mass incarceration than police.¹¹¹

for-viewing.pdf. From 2008-2017, criminal caseloads have dropped a total of 18%. “Criminal caseloads comprise person cases (including homicide), property cases, drug cases, weapons cases, DUI/DWI cases, and others. The U.S. has seen state trial court Criminal caseloads drop at an average annual rate of about 2 percent for the last 9 years. There was a slight increase reported in 2013 but caseloads continued the decline in the following year.”

¹⁰⁷ EXAMINING THE WORK OF STATE COURTS, 2003, NATIONAL CENTER FOR STATE COURTS 14, <https://nsc.contentdm.oclc.org/digital/collection/ctadmin/id/606>; See Snyder, *supra* note 103. Calculation: 20,600,000 million (Incoming Cases) / 13,646,642 (Number of Arrests) = 1.51 filings / arrest.

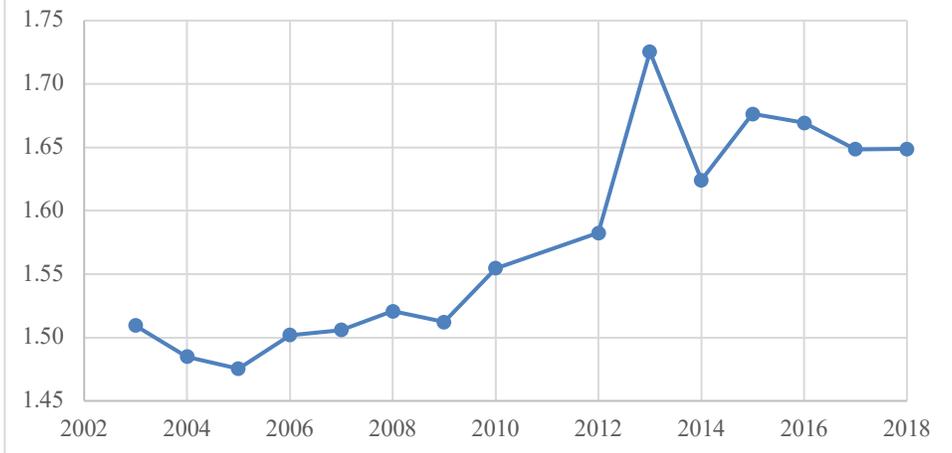
¹⁰⁸ EXAMINING THE WORK OF STATE COURTS, AN OVERVIEW OF 2013 STATE COURT CASELOADS, NATIONAL CENTER FOR STATE COURTS, pg. 7; FBI, *Estimated Number of Arrests (Table 29)*, CRIME IN THE UNITED STATES 2013, https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls Calculation: 19,500,000 million (Incoming Cases) / 11,302,102 (Number of Arrests) = 1.73 filings / arrest.

¹⁰⁹ FBI, *supra*, note 102; State Court Caseload Digest, *supra* note 92 at 7 Calculation: 17,000,000 million (Incoming Cases) / 10,310,960 (Number of Arrests) = 1.65 filings / arrest.

¹¹⁰ Snyder, *supra* note 103 (showing reported arrests and estimated arrests differing by 2-4 million per year between 1990 and 2010, due to the percentage of agencies reporting ranging from 75-83%). While arrest numbers are not perfect, given the best national estimated number of arrests, the percent change in arrests has gone down between 2006 and 2018 by 28%.

¹¹¹ See *supra* note 91 for discussion of NCSC data usage.

Figure 2: Estimated Criminal Filings per Arrest, 2003-2018



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

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

C. Limitations of Prior Research of Prosecutorial Decisions

Existing research on prosecutors has significant limitations and fails to answer basic questions about prosecutor charging. How many crimes does a prosecutor charge based on a single incident? How often do prosecutors decline to charge a case when they have evidence to charge? When does a prosecutor charge a felony when a misdemeanor will do? These basic questions are left unanswered.

Many existing studies are outdated or lack empirical rigor.¹¹² For example, some prior work is based on important—though anecdotal—experience of a single

¹¹² Ronald F. Wright, Kay L. Levine & Marc L. Miller, *The Many Faces of Prosecution*, 1 STANFORD L. AND CRIM. POL'Y 27, 45–47 (2014).

prosecutor.¹¹³ And while several experiments have studied prosecutorial decisions, including plea bargaining,¹¹⁴ most of these have relied on lay persons as the subjects, rather than actual prosecutors.¹¹⁵ Some have treated prosecutors as economic actors—using game theory or other economic theories to model hypothetical

¹¹³ See, e.g., PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2010) (describing the challenges with race and police corruption in his experience as a prosecutor in Washington D.C.); ALEXANDER, *supra* note 5 (describing the problems of mass incarceration and the “new racial caste system” based on her experience as a civil rights lawyer).

¹¹⁴ Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in The “Shadow of the Trial”*, 52 *CRIMINOLOGY* 723 (2014) (demonstrating in an experiment with 378 prosecutors that prosecutors offer and defendants accept plea bargains “in the shadow” of the likely trial outcomes for the given case; such that severity of the agreed punishment tracks the ease of proving guilt and the heinousness of the crime) Wright, Levine & Miller, *supra* note 112, at 35 (referencing Milton Heumann’s studies interviewing prosecutors concluding that “prosecutors started out their criminal justice careers in a highly adversarial, trial-oriented mode, but slowly drifted into plea bargaining”); Wright & Miller, *supra* note 43, at 74 (testing the “screening/[plea] bargaining tradeoff” within the New Orleans District Attorney’s Office noting higher rates of open pleas and lower rates of charge bargains and dismissals than other jurisdictions); Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 *J. CRIM. L. & CRIMIN.* 52, 79-81 (1981); See also *infra* note 126.

¹¹⁵ Lucian E. Dervan & Vanessa Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 *J. CRIM. L. & CRIMIN.* 1 (2013) (studying college students to demonstrate that they would falsely admit guilt for something in return); Christopher Engel & Alicja Katarzyna Pluta, *The People’s Hired Guns? Experimentally Testing the Inclination of Prosecutors to Abuse the Vague Definition of Crimes* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885425 (using students as hypothetical prosecutors and studying in a game theory experiment whether prosecutors risk taking a case to court and following their duty); DAN SIMON ET AL., *PARTISANSHIP AND PROSECUTORIAL DECISION MAKING: AN EXPERIMENT* (2009) (determining with a study of lay people that anger likely plays a role in prosecutorial decisions in a case); Barbara O’Brien, *Recipe for Bias: An Empirical Look at the Interplay between Institutional Incentives and Bounded Rationality in Prosecutor Decision Making*, 74 *MO. L. REV.* 999 (2009) (studying lay participants and hypothesizing based on psychological research that “when people are judged primarily for their ability to persuade others of their position, they are susceptible to defensive bolstering at the expense of objectivity” and arguing that prosecutors are “particularly susceptible to biases that undermine their ability to honor obligations that require some objectivity on their part”).

prosecutorial decisions.¹¹⁶ Others have looked at the organization of prosecutor offices to determine whether group dynamics impact decisions.¹¹⁷

Prior research has examined how to predict factors prosecutors consider when deciding to file criminal charges in particular cases,¹¹⁸ and their decision to dismiss or decline to pursue a case after charges have been filed.¹¹⁹ Much of this prior work

¹¹⁶ Scott Baker & Claudio Mezzetti, *Prosecutorial Resources, Plea Bargaining, and the Decision to Go to Trial*, 17 J.L. ECON. & ORG. 149 (2001) (using game theory to model prosecutorial plea bargaining and other decisions); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2007) (modeling plea bargaining and arguing that quick pleas are preferred and do not harm innocent defendants); Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713 (1988) (relying on game theory to understand plea bargaining and model prosecutorial discretion); Oren Gazal-Ayal & Limor Riza, *Economic Analysis of Plea-Bargaining and Prosecution*, in CRIMINAL LAW AND ECONOMICS 145 (Nuno Garoupa, ed. 2009) (conducting a law and economics approach to prosecutorial decisions, including plea bargaining).

¹¹⁷ Mellon, Jacoby & Brewer, *supra* note 114 at 52, 79–81 (discussing how office set up and community differences affect prosecutor charging and other decision patterns in a large study of prosecutor offices in urban areas). Wright, Levine, & Miller, *supra* note 112, at 40–41 (finding that prosecutors’ offices with pyramidal organizational structures had “the greatest sense of team membership as well as a strong staff loyalty to, and respect for, the administration” whereas offices with flat organizational structures “expressed low levels of regard for the administration and tended to conceive of themselves and their coworkers in independent terms”).

¹¹⁸ See Celesta A. Albonetti, *Criminality, Prosecutorial Screening, and Uncertainty: Toward a Theory of Discretionary Decision Making in Felony Case Processing*, 24 CRIMIN. 623–44 (1986) (“case information that decreases uncertainty concerning victim/witness management will increase the probability of continued prosecution. . . . In addition, the data indicate that prosecuting attorneys are less likely to continue prosecution of cases involving female defendants and are more likely to continue prosecution of defendants whose bail outcome includes financial conditions for release”); Eric P. Baumer, Steven F. Messner & Richard B. Felson, *The Role of Victim Characteristics in the Disposition of Murder Cases*, 17 JUSTICE Q. 281–307 (2000) (finding that “victim characteristics affect the processing of murder cases” and that “disreputable or stigmatized victims tend to be treated more leniently by the criminal justice system”); Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL’Y REV. 461–98 (2005) (examining various victim factors as predictors of a prosecutor’s decision to file charges comparing a Kansas City sex crimes unit to a nonspecialized Miami unit finding “very few differences” between the two with 49% resulting in prosecution in Kansas city and 47% in Miami); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUSTICE Q. 651–88 (2001) (“[V]ictim characteristics influenced the decision to charge or not in cases in which the victim and the suspect were acquaintances, relatives, or intimate partners.”).

¹¹⁹ VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY’S COURTS (1977); Richard Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 251 (1980) (“[L]ess than one-fourth of the complaints received by the ninety-four

deals with sexual assault and murder cases where findings are limited to those cases.¹²⁰

Prior studies conflict on how often prosecutors decline to charge case. Based on local data from 1978, Leonard Mellon, Joan Jacoby, and Marion Brewer demonstrate that the declination rate of prosecutors in three cities ranges from 43% in New Orleans to 4% in Brooklyn.¹²¹ A national study from the 1980s, asserts prosecutors dismiss around 50% of felony cases.¹²² Yet a 1998 national study of state prosecutors and some of the latest nationwide surveys found that they dismissed cases 25% of the time.¹²³ A recent declination study by Miller et al,

U.S. Attorneys appear to result in the filing of formal charges.”); Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV 1439, 1445, 1497 (2004) (finding that “as federal criminal justice resources have expanded, declinations have fallen” from 36% in 1994 to 26% in 2000) Kenneth Adams & Charles R. Cutshall, *Refusing to Prosecute Minor Offenses: The Relative Influence of Legal and Extralegal Factors*, 4 JUSTICE Q. 595-609, 600–01 (1987)(indicating that variables such as number of charges, priors arrests, number or witnesses, value of stolen merchandise, gender, race, residence, and age “have a statistically significant relationship” with the decision to prosecute.); Carole W. Barnes & Rodney Kingsnorth, 24 J. CRIM. JUST. 39–55, 46 tbl 5 (1996) (indicating that the percentage of cases rejected at the outset is 16.4% for African Americans, 14.2% for Latinos, and 10.4% for Caucasians”); Carl E. Pope, *The Influence of Social and Legal Factors on Sentencing Dispositions: A Preliminary Analysis of Offender-Based Transaction Statistics*, 4 J. CRIM. JUST. 203-21 (1976) (The age, race, sex, and previous criminal histories of felony defendants are considered with regard to sentence outcomes and the length of both jail and probation commitments.”).

¹²⁰ See Albonetti, *supra* note 118, at 623–44.

¹²¹ Mellon, Jacoby & Brewer, *supra* note 114, at 79 Table A (Also in Salt Lake City in 1978, prosecutors declined to charge in 11.9% of cases). Mellon et al. blame the differences in charging on different make ups of offices.

¹²² Bellin, *Reassessing*, *supra* note 56 at 846 citing Barbara Boland et al., Bureau of Justice Statistics, Dep’t of Justice, THE PROSECUTION OF FELONY ARRESTS, 1979, at 2 (1983) (looking at felony arrests between 1979 and 1988 and finding that prosecutors “carried forward” 50% of all felony arrests recommended for prosecution). He also relies on a federal study, which is less applicable. Frase, *supra* note 119, at 246, 278 (filing in less than 1/5 of cases).

¹²³ See Travis Franklin, *Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors*, 38 J. OF CRIM. JUST. 693–701 (2010) (using 1998 national SCPS data for over 15,000 state felony defendants in 75 counties to find that on “average prosecutors dismissed approximately 25 percent of cases” and that dismissals increased in some situations with minority or poor defendants, and that politically conservative communities tended to be less likely to dismiss cases). A study of federal prosecutors found that declinations went down from 36% in 1994 to 26% in 2000. Michael E. O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003). See *Felonies in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS 2009, at 39 t31 (2010) (“These reports reveal a postfiling felony dismissal rate of 29 percent in 1990, 27 percent in 1998, and 25 percent in 2009.”); see also Brian A. Reaves, *Felonies in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS, 1998, at 24 tlb 21, tbl 23 (2001) and Pheny Z. Smith, *Felonies in Large Urban Counties*, BUREAU OF JUSTICE STATISTICS, 1990 at 13 tbl 15 (1993) (56,616 filings).

demonstrates high declination rates at about 51% in New Orleans over a period of ten years.¹²⁴ However, a careful look at the Miller study shows that when prosecutors decline to charge, it is because they are charging some other crime, they lack evidence or victim cooperation or for some other legitimate reason.¹²⁵ It is not clear in the study when the prosecutor declined the charges, but given the reasons for declining being largely witness or evidence based, it seems like maybe the prosecutors charged initially and then dropped charges as they got further into the evidence.¹²⁶

Importantly, most of the prior work is based on federal charging decisions that differ meaningfully from state charging decisions, which constitute the vast majority of the criminal caseload.¹²⁷ Despite the relative importance of state prosecutors, many studies rely on federal criminal cases and study federal prosecutors.¹²⁸ While there are 93 U.S. attorneys, there are about 2,400 chief state-level prosecutors, most

¹²⁴ Miller & Wright, *supra* note 30, at 74 (“[Prosecutors declined . . . 52% of all charges”])

¹²⁵ Miller & Wright, *supra* note 30, Table 1.

¹²⁶ *Id.* at Table 1.

¹²⁷ Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J.-1077 (2001) (“[federal] RCRA prosecutions are based not on a single isolated act, like disposing of a solvent-laden rag, but on a course of conduct that more often than not involves multiple violations of several criminal statutes.”); Frase, *supra* note 119, at 246, 274 (noting that “state offenses for which [] defendants were to be charged were not always direct counterparts of the federal charges”); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 539 (1992) (“[Certain] sentences are much higher for offenders convicted in state court than under the federal guidelines. However, agents prefer to bring cases in federal court to avoid the discovery required under state rules of criminal procedure. Defendants are willing to plead to the guideline sentence in order to receive a shorter sentence than they would in state court and avoid the state prison system”); Rabin, *supra* note 72, at 1058 (describing the guidance contained within the U.S. Attorney’s Manual with regard to “state criminal penalties ‘overlapping’ federal penalties”); Stephen J. Schulhofer & Ilene H. Nagel, *Ten Years Later: Plea Negotiations under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1287 (1997) (examining how the United States Sentencing Commission’s 1987 sentencing guidelines impacted state systems); Michael A. Simons, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 895 (2000) (demonstrating that “crimes that have been traditionally been prosecuted in state court” have been federalized while articulating the concerns and objections of such federalization).

¹²⁸ O’Neill, *Understanding*, *supra* note 119, at 1439; Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CAL. L. REV. 1573 (2012); Cheryl X. Long & Richard T. Boylan, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005); Frase, *supra* note 119, at 246; O’Neill, *Understanding*, *supra* note 119, at 1439; Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in Federal Courts*, 89 HARV. L. REV. 293 (1975); Starr & Rehavi, *supra* note 26.

of whom are elected locally.¹²⁹ The federal criminal docket is largely made up of drug crimes, firearms and immigration cases.¹³⁰ State prosecutors handle the violent felonies like murder, rape, and robbery. These are the crimes that make Americans feel unsafe in their communities—and constitute the biggest contributors to the U.S. prison population.¹³¹ Also, given the larger volume of misdemeanors they handle, state prosecutors could hypothetically decline to prosecute more cases than federal prosecutors. In order to adequately understand incarceration in the U.S., it is critical to study state prosecutors.¹³²

While state charging practices have been studied empirically, these studies rarely can explain why prosecutors make the decisions that they do.¹³³ Instead, the

¹²⁹ Lantigua-Williams, *supra* note 68 (almost 2400 prosecutors); THE PROSECUTORS AND POLITICS PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS 10 (2020). In contrast, there are only around 90 federal U.S. Attorneys (or head federal prosecutors) nationally. Perry & Banks, *supra* note 21.

¹³⁰ *Federal Judicial Caseload Statistics 2018*, U.S. COURTS, (2018) available at <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> (reporting that for 2018 the U.S. district court filings for immigration crimes and firearms accounted for 29 and 13 percent respectively of all criminal defendant filings).

¹³¹ Pfaff, *Micro and Macro*, *supra* note 74, at 1239, 1245–46 (arguing that after analyzing violent crime, “increase in crime thus does not inexorably lead to an increase in prisoners”); *But see* Beckett, *supra* note 83, at 18 (“[B]y 1998, more than two-thirds of people admitted to U.S. state prisons for a violent offense had been sentenced under a TIS law that required that they serve at least 85 percent of their sentence and there is evidence that these statutes increased both time served and prison populations.”)

¹³² Wright, Levine, & Miller, *supra* note 112, at 31 (Wright, Levine and Miller articulate the importance of studying state cases—these prosecutors handle “larger volumes of cases” including misdemeanors, have a more “varied docket,” and indeed, “understanding of the true impact and variety of criminal prosecution in the United States, therefore, must give the state prosecutor a starring role rather than a bit part.”)

¹³³ Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 N.W. U. L. REV. 261, 265 (2011) (relying on “caseloads of prosecutors in some of the largest district attorneys’ offices in the nation”); Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115, 121 (1997) (examining three units within the Wisconsin Department of Justice responsible for prosecuting white-collar crime); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 844 (1980) (This study includes a sample of 881 suspects charged with forcible sex offenses in a large Midwestern city, between 1970 and 1975.); Cassia Spohn, D. Beichner & E. Davis-Frenzel, *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the “Gateway to Justice,”* 48 SOC. PROBS. 206, 208 (2001) (“Our study focuses explicitly on prosecutors’ charging decisions in sexual assault cases”); Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors’ Screening Decisions: The Case of the New York County District Attorney’s Office*, 16 LAW & SOC’Y REV. 225, 226 (1981) (“The setting of this study is a bureau within the New York County (Manhattan) prosecutor’s office that is devoted solely to the screening of felon”); Wright & Miller, *supra* note 43 at 29, 36 (relying on charging and bargaining decisions within New

studies are focused on particular jurisdictions or types of crime and lack many details because their source of data is based on court records, written files and budget data. None of these get to the qualitative questions of what the prosecutor is thinking, or why they do what they do.¹³⁴

Orleans from 1988 to 1998). See also JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 3 (1980) (Prosecutors' offices typically rely on "local representation applying local standards to the enforcement of essentially local laws.").

¹³⁴ Wright, Levine, & Miller, *supra* note 112, at 34 (Wright, Levine and Miller state this problem best: "Nevertheless, archival research must live with critical blind spots. Countless important moments in the criminal process are never recorded. The players record many other moments for themselves, but only in paper files that remain unconnected to one another and out of reach for all but the most persuasive and persistent researchers.) *see also* Nicholas Petersen & Mona Lynch, *Prosecutorial Discretion, Hidden Costs, and the Death Penalty: The Case of Los Angeles County*, 102 J. CRIM. L. & CRIMIN. 1233 (2012).

Still, there are many foundational qualitative studies of prosecutorial discretion.¹³⁵ Except for a few,¹³⁶ they are somewhat outdated or localized.¹³⁷ And

¹³⁵ Alschuler, *supra* note 61, at 50, 52 (interviewing prosecutors, defense attorneys, trial judges, and other officials in ten urban jurisdictions and arguing that plea bargaining should be abolished.); FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969) (Field study of cities and rural areas in Wisconsin, Kansas, and Michigan from 1955 through 1957, finding that the role of the executive and the judiciary in charging need to be observed and re-evaluated); Donald Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. CRIMIN. & POLICE SCI. 780, 781, 788 (1956) (Study interviewed a sample of 97 who had been convicted in one Wisconsin court district, finding that the majority of the felony convictions in the district were compromise convictions, the result of bargaining between defense and prosecution in an informal process.); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS 11–14 (1978) (Seventy-one interviews with judges, prosecutors, and defense attorneys in six courts in Connecticut about plea bargaining post Supreme Court’s *Santobello* decision, finding a willingness among court participants to discuss plea bargaining, unlike earlier studies.); PAMELA J. UTZ, SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT, xi-xiv (1978) (conducting 15 months of field work in two California jurisdictions – San Diego and Alameda Counties, and finding that “while the inner dynamics of negotiation push each side to objectively consider the other side, there are often pressures – such as public apprehensiveness about crime, severe penal code, and illegitimacy of prosecutorial policy making – that bind participants to rigid institutional roles”); Mellon, Jacoby & Brewer, *supra* note 114 at 52-53) (Examining state prosecutorial styles, through quantitative and qualitative data, in America’s urban areas by looking at ten geographically dispersed prosecutors’ offices and finding that American prosecutors cannot be discussed in universal terms, and differences in prosecution policy are often mandated by environmental factors that individual prosecutors have no control over); PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS (1988) (studying decisions of the head prosecutor in nine different offices in a multi-year study and analyzing the nature and disparity in the guilty plea system by looking at nine jurisdictions, finding that plea negotiations are influenced by various elements including charging practices, prosecutorial screening, centralization of plea offers, judge shopping, and the frequency of sentence (as opposed to charge) bargaining); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW AND SOC’Y REV. 531, 534 (1997) (observing case processing and interviewed prosecutors and detectives in the sexual assault unit of a prosecutor’s office in a major metropolitan area on the West Coast, finding that organizational concern about the ability to convict in “discordant locales” was a frequent unofficial justification for case rejection).

¹³⁶ One recent study relies on extensive prosecutor interviews to determine how they view themselves and their roles. See Wright, Levine, & Miller, *supra* note 112, at 38 (interviewing 267 prosecutors via interviews in two regions—American Southeast and Southwest between the years of 2010-2013; these prosecutors handle misdemeanors or felonies and some handle both cases, argues that using a mixed-methodology approach will allow researchers to understand prosecution culture better and better map prosecution behavior); see also an earlier paper based on these same interviews Kay Levine & Ronald Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMIN. 1119, 1122–23 (2012) (focusing on

even if they were current, they fail to answer the basic questions we want to know about prosecutor charging.¹³⁸

Several surveys have tried to gain some insight into prosecutor decisions.¹³⁹ But surveys may not allow for causal inference. The gold standard is a field study

a subset of forty-two interviews—those of the misdemeanor prosecutors and the drug prosecutors—from two metropolitan areas in the Southeast during 2010 and suggesting that “a prosecutor’s professional identity might affect, or be reflected in, the outcomes she achieves in criminal cases and the consistency of those outcomes.” Other recent studies rely on surveys as well as interviews and some interviews and either observation or court data to fill in the gaps. Deidre Bowen, *Calling Your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization*, 26 JUST. Q. 2, 6–7 & 25–6 (2009) (Observed forty-two plea negotiations and conducted formal and informal interviews with attorneys in Seattle in 2000 and found that in this reformed plea bargaining system, neutrality did not materialize, prosecutors had more power than under the traditional plea bargain model, and while there was greater efficiency, it is not clear that justice was achieved); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L. J. 691, 706–09, 745–46 (2006) (interviews with California deputy district attorneys from 1999–2002, finding that prosecutors operate in organizational settings, responds to collective understandings about which cases are prosecution worthy and why, and construct typologies of offenders to manage large caseloads of similar events); Levine, *supra* note 17, at 1125, 1127, & 1211–14 (mailing surveys to all statutory rape prosecutors in California and following up with interviews with 30 district attorneys’ offices, finding that while “the ‘new prosecution’ model—where prosecutors take on roles such as counselor, legislature, and investigator—building on decades of increased prosecutorial power and moves to make the system more responsible to community concerns, may be more of a problem, than a solution”); Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913, 916–17, 941–42 (2012) (qualitative research conducted through interviews from 2011–2012 with New Orleans First District prosecutors and other criminal justice actors on disclosure obligations with increase in caseloads).

¹³⁷ Wright, Levine, & Miller, *supra* note 112, at 34 (discussing outdated studies); *See supra* 136 for localized studies.

¹³⁸ *See* intro text accompanying notes 32 to 33 for basic questions.

¹³⁹ *See* BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING* (2012) at iii, <http://www.vera.org/sites/default/files/resources/downloads/anatomy-of-discretionsummary-report.pdf>, archived at <http://perma.cc/NAW6-ESKB> (relying on surveys, focus group discussions, and some analysis of court data from two jurisdictions and finding that “prosecutors’ decisions were guided by two basic questions: ‘Can I prove the case?’ and ‘Should I prove the case?’”); Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 83 (2013) (finding that prosecutor decisions were shaped by internal rules, external resource constraints and interdependent relationships); Kim Banks Mayer, *Comment, Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?* 1996 WIS. L. REV. 295 (relying on a survey of Wisconsin prosecutors finding that they prosecutorial guidelines should not be open to the public).

or randomized controlled trial.¹⁴⁰ But thus far there have not been any randomized controlled trials of prosecutor decisionmaking, and few experiments at all.¹⁴¹ As Wright, Levine and Miller have astutely pointed out, prosecutors will be tempted to offer a more flattering picture of their decisionmaking that may not match up with their decisions in a real case.¹⁴² Indeed, some qualitative research has failed to offer a “reliable portrait of the actual job performance of the prosecutor.”¹⁴³ As Wright et al. point out: “The best research settings are those that allow researchers to confirm a prosecutor’s claims about performance with a statistical record of that performance.”¹⁴⁴ This is important because individual prosecutors differ in demographics, career goals, work quality, and in experience.¹⁴⁵ It is also important, as others have recognized, to study a variety of regional offices, different sizes of offices, and possibly question defense attorneys as well “for an alternative take on the work of prosecutors in the jurisdiction.”¹⁴⁶ Our study below attempts to avoid some previous limitations with a mixed methods study, and is the first national study attempted of its kind.

II. NATIONAL PROSECUTOR STUDY

We designed a mixed methods study of prosecutor decisionmaking that contained a web-administered questionnaire embedded with experimental vignettes, close-ended questions, and open-ended questions. The vignettes contained police reports describing an incident that ends in an arrest, and the reports varied the race and class of the defendant. After reviewing the reports, the prosecutor participating in our study was then asked to decide whether to charge the individual with a crime (a felony or misdemeanor or both), whether to pursue a fine or imprisonment, and the amounts thereof.¹⁴⁷ As part of the study, the prosecutors also were provided the

¹⁴⁰ Shima Baradaran et al., *Funding Terror*, 162 U. PA. L. REV. 477 (2014).

¹⁴¹ See this study that uses randomization in assigning cases: CARLY W. SLOAN, RACIAL BIAS BY PROSECUTORS: EVIDENCE FROM RANDOM ASSIGNMENT (June 14, 2019), and this international study from Colombia: *Strengthening Prosecutors’ Capacities for Sexual Crime Investigations: Evidence from Colombia*, AMERICAN ECONOMICS ASSOCIATION REGISTRY FOR RANDOMIZED CONTROLLED TRIALS (Sept. 27, 2018).

¹⁴² Wright, Levine, & Miller, *supra* note 112, at 44. (“Qualitative research centered on semi-structured interviews of prosecutors has one significant drawback that is particularly relevant to this research: it does not offer a reliable portrait of the actual job performance of the prosecutor. The interviewee might talk about how she selects charges or decides whether to take a case to trial, but that self-portrayal might not prove accurate if the full statistical record were available.”) (“We recognize that many people are inclined to paint themselves in the best light when talking to interviewers.”)

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 45.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Robertson et al., *supra* note 35. The vignettes contained different race and social class descriptions of this individual to determine whether race and social class affect prosecutor decision making. We found no such effect.

opportunity to write comments justifying all their charging and punishment decisions, and also to describe how charging decisions are usually made in their local offices.

This section summarizes the descriptive quantitative and qualitative results of our mixed methods study. Some results from the experiment have been published,¹⁴⁸ but the normative implications of our survey results and the qualitative analyses have until now, not been published.

A. Sample

We sought to study real prosecutors. However, no comprehensive database of U.S. prosecutors is available for research purposes, and initial discussions with prosecutor organizations were unfruitful for research collaboration. We reached out to the National District Attorneys Association (NDAA) and the American Bar Association Prosecutors Section about our study of prosecutors. The NDAA seemed open to cooperation until we showed them our study; they were concerned that our study could reveal that prosecutors are biased on the basis of race.¹⁴⁹ Without access to any national prosecutor lists, we constructed a sample of state prosecutors by selecting one to two states from each of the nine United States Census regional divisions. Non-federal prosecutor names and email addresses were collected from prosecutor office websites and state bar associations. To identify more prosecutors, we sent FOIA requests to states to obtain additional prosecutor names and contact information. Information was obtained for at least one respondent from most states.

After collecting contact information for 4,484 prosecutors, we emailed them an invitation to participate in the study.¹⁵⁰ Respondents were told that, “the purpose of this research study is to understand how prosecutors make decisions.”¹⁵¹ In total, 541 prosecutors completed the study for a 12.09% response rate.¹⁵²

¹⁴⁸ The first paper discussing this 2017 experiment discusses the lack of racial or socioeconomic bias observed by prosecutors in their charging decisions. *See* Robertson et al., *supra* note 35. Others will be forthcoming discussing other aspects of prosecutorial decision-making. Some of the descriptions in Part II A-D of the experiment are taken from the Robertson et al. piece.

¹⁴⁹ We did not find racial or socioeconomic bias, however. Robertson et al., *supra* note 35.

¹⁵⁰ Respondents received a link to the study hosted on Qualtrics and an offer of a \$5 Amazon gift card in 2017 and 2018. *See* DON DILLMAN, MAIL AND INTERNET SURVEYS: THE TAILORED DESIGN METHOD (2000) (offering nominal compensation improves response rates).

¹⁵¹ The protocol was approved by the University of Utah Institutional Review Board.

¹⁵² In our prior work, we report experimental results from 468 prosecutors based on the experimental portion of this study. So, for example, in the prior study, if a prosecutor did not answer the question on their recommended punishment, they were excluded from analysis because that question was the outcome of interest. We report on the full sample in this study given that we are mostly focused on their qualitative responses, and so if a prosecutor didn't answer all questions, they may still have written valuable information on their decision-making process. *See* Robertson et al., *supra* note 35.

Although we did not conduct a random sample of prosecutors, the profile of the respondents is representative of state prosecutors in several ways.¹⁵³ Nearly a quarter, 23%, of respondents were lead prosecutors, and 79% worked in the felony division. The length of time respondents served as prosecutors ranged from less than a year to 45 years with a median length of service of 10 years. Approximately 65% of the sample were men. Respondents ranged in age from 26 to 77, with a median age of 45. Ninety-six percent of respondents were non-Hispanic, 90% were white, 4% were black, 4% were “other,” and the remainder were Native American or Asian. Few respondents came from highly populous jurisdictions. Only 8% of respondents were in a jurisdiction of over 2 million, 11% in a jurisdiction of between 1-2 million, 10% in a jurisdiction of 500,000-1 million, 28% in a jurisdiction of 100,000-500,000, and 43% in a jurisdiction of less than 100,000. Due to differences in data availability and response rates, the sample primarily consists of prosecutors from the Mountain (23%), East North Central (21%), South Atlantic (16%), Pacific (12%), West North Central (11%), and East South Central (9%) regions. Relatively few respondents were from New England, Mid-Atlantic, and West South Central states. Additional information on the sample can be accessed in our other publications.¹⁵⁴

B. *Mixed Methods Study Design*

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

The reports describe circumstances that can be viewed as assault, or potential aggravated assault, depending on how the prosecutor understands the situation and individual. The vignette is designed to allow for maximum discretion of the prosecutor, for optimal study of discretion. We also chose assault as the crime because we are especially interested in how state prosecutors charge in violent crime cases.¹⁵⁵ Given the data-backed argument that violent crimes fuel mass incarceration,¹⁵⁶ we thought a violent crime—though one that was marginal—would be helpful in determining how prosecutors use their discretion. Nonetheless, we hypothesized that maximal prosecutor discretion might be in a situation where no

¹⁵³ Robertson et al., *supra* note 35.

¹⁵⁴ *Id.* at Table 1. See also Megan Wright et al., *Inside the Black Box of Prosecutor Decisions* (working paper).

¹⁵⁵ See *supra* Pfaff discussion of violent crime note 175 and accompanying text.

¹⁵⁶ See *supra* note 38–40 (“[V]iolent crime increased by a hundred percent between 1970 and 1990 . . . and number of prisoners ‘rose with it’”).

victim is physically harmed.¹⁵⁷ We anticipated that some prosecutors would charge defendant, and many would refuse to charge given the lack of injury. Prosecutors were also provided with an abbreviated two-page (623 word) statutory code and sentencing guidelines based on the laws of a real state, defining these crimes and specifying the punishment ranges for each.¹⁵⁸ The study was designed to take participants about 15 minutes to complete.¹⁵⁹

Respondents were first asked which charges they would apply, with choices ranging from no charges to aggravated assault. Respondents then indicated if they would press multiple charges. Next, respondents were asked to “indicate which confinement term and/or monetary penalty, if any, you would most likely seek in a plea deal with the suspect (i.e., the term and/or penalty that would ultimately satisfy your pursuit of justice). In answering this question, you may refer to the sentencing guidelines if you wish.” Respondents had separate blanks for confinement and monetary penalty and were also able to note suspension of these penalties. Most respondents also provided additional comments justifying their charging decisions that we studied and coded separately. The vignettes manipulated the race and social class of the defendant in order to assess whether these status characteristics affect prosecutors’ decisions. We found no such effect, and the findings from the experimental part of the study have been previously published.¹⁶⁰

We also collected information regarding how prosecutors make charging decisions, information respondents need to make a charging decision, information about respondents’ career as a prosecutor, and demographic information, using both close-ended and open-ended questions, and responses to the latter lend themselves to the qualitative analysis. We coded the written responses both deductively (based on the type of questions we asked) and inductively (based on themes that emerged from the data). We do not discuss strengths and limitation of our study design in this paper, as some of this has been covered by prior work and will be covered by future work.¹⁶¹

C. Study Findings

¹⁵⁷ We certainly appreciate that the fact scenario we devised may cause emotional harm or trauma to the victim.

¹⁵⁸ We relied on the Utah criminal code.

¹⁵⁹ The case-vignettes were manipulated between-subjects in five conditions, a 2x2 factorial + control design to test effects of defendants’ race, white versus black, and defendants’ social class, higher-status accountant versus working-class fast food worker. In the control condition, race and class are redacted altogether in order to assess differences from the baseline. Moreover, a control allows us to pilot-test a potential blinding reform to be used in the field, in which real prosecutors would make charging decisions without knowledge of these extraneous factors of race and class. The results of this aspect of the randomized controlled experiment are discussed in Robertson et al, *supra* note 35.

¹⁶⁰ Robertson et al., *supra* note 35.

¹⁶¹ An in-depth discussion of study strengths and weaknesses can be found in our forthcoming piece, Wright et al., Inside, *supra* note 155.

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

Our study revealed several important findings, which we preview here and describe in detail below. First, while the vast majority of respondents did not opt to charge the most severe charge or impose incarceration or a fine, prosecutors often filed multiple charges, which is indicative of severity. With the vignette we presented, 84% of prosecutors chose to charge misdemeanors and only 16% clearly chose to file felonies.¹⁶²

Second, the results from the number of charges and specifically the lack of declination was unexpected. Based on prior research we thought,¹⁶³ that more prosecutors would impose no charges at all. We purposely provided a minor crime with little harm actually caused but with a potential for serious crime to be caused, by someone with no criminal record and obvious circumstantial difficulties. Yet 97% of prosecutors in our study chose to charge him, and they charged him on average with three separate crimes. In contrast to our observed 3% declination rate, prior studies have estimated 25-50% declination rates.¹⁶⁴ This is probably the most significant finding that could help explain the filing increases we are seeing with prosecutors in Part I.B.

Third, prosecutors imposed nonuniform punishments. Some prosecutors in the same region fined a defendant \$5,000 dollars and others imposed no fine. Some recommended over a year in jail or five years and others imposed community service. A few prosecutors recommended no charge, and some recommended up to eleven. Overall, the lack of consistency or oversight of prosecutors nationally is disturbing.

This section will discuss the results in more detail.¹⁶⁵ Figures 3-5 illustrate the results discussed below.

1. Number of Charges

¹⁶² Some of the options for charges were clearly misdemeanors and others were felonies. The only clear felony was "aggravated assault." 16% of prosecutors chose to charge this crime. However, there were other crimes that prosecutors chose that could have been intended as felonies including felony harassment. So, of the 84%, other prosecutors likely were choosing to charge misdemeanors, but we cannot be sure. We did not consider these charges felonies in a choice to be conservative in the face of uncertainty. *See also* Robertson et al., *supra* note 35.

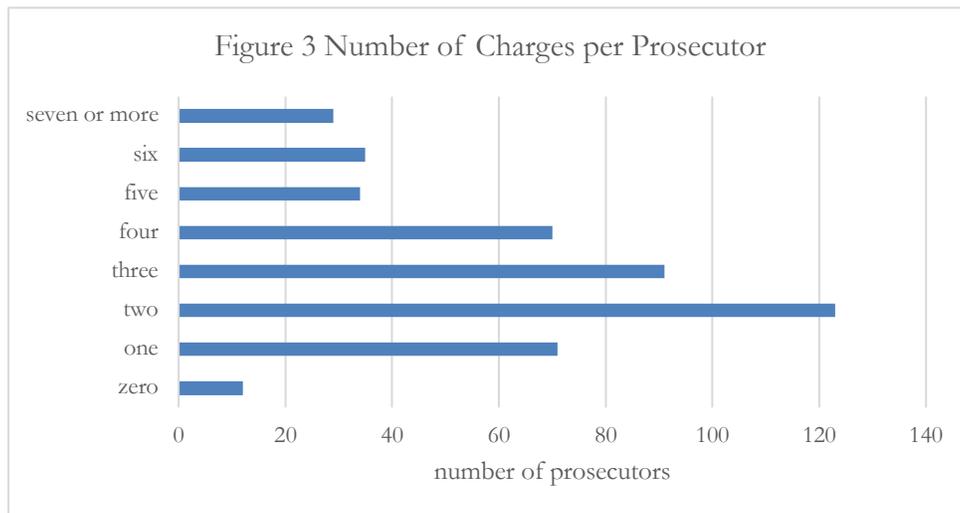
¹⁶³ *See supra* notes 119 to 124 and *infra* 199 to 205 discussing previous studies on declination.

¹⁶⁴ *See infra* notes 208 to 222.

¹⁶⁵ *See* Robertson et al., *supra* note 35 where some key results are published.

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

We also found extremely wide heterogeneity in how prosecutors resolved the exact same case. See Figure 3. Although 15 prosecutors resolved the case without pressing any charges, the modal respondent imposed two charges, and some prosecutors sought seven or more up to 11.



2. Felony or Misdemeanor Charge

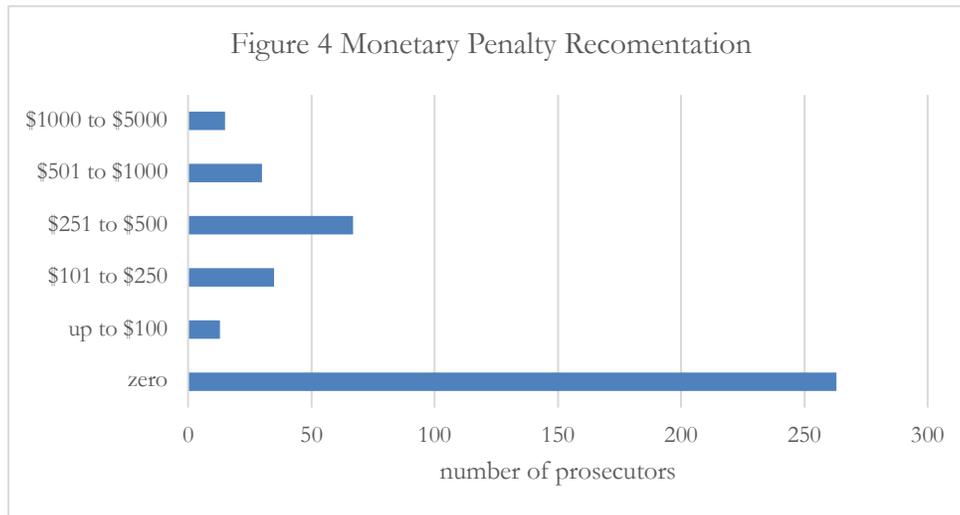
We examined whether a prosecutor would charge the defendant with a felony versus a misdemeanor (or no charge at all).¹⁶⁶ Only 16% of prosecutors opted to charge the defendant with aggravated assault (the clear felony available), whereas 84% opted for charges that were a misdemeanor only (or could be either a felony or a misdemeanor). So, even though the option was there for prosecutors to charge a felony, most chose not to.¹⁶⁷

3. Monetary Penalty Recommendation

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

¹⁶⁶ We also studied whether the charges were dependent on race or socioeconomic status of defendant. *See* Robertson et al, *supra* note 35 for findings.

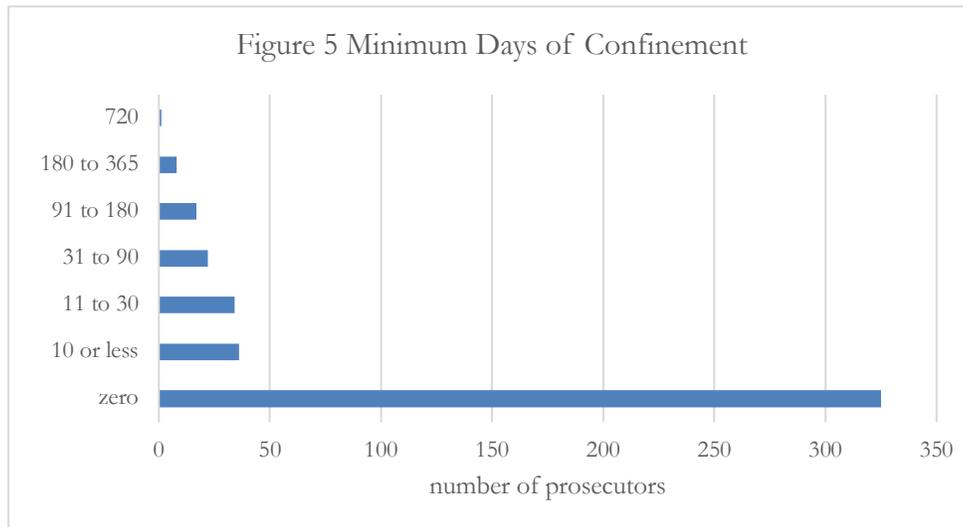
¹⁶⁷ One advantage of our study design is that respondents were able to explain the reasons for their charging decisions. Many prosecutors took advantage of this opportunity. Of these respondents, thirty-five prosecutors said that they might increase or decrease charges depending on defendant cooperation. Also, twenty-nine respondents would charge a felony but allow 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 defendant to plead to a single misdemeanor charge, and ten respondents would charge multiple counts at various levels in order to expand plea options.



4. Confinement Recommendation

Next the study examined whether a prosecutor would recommend a term of confinement, and if so, the minimum days of confinement. About 27% of prosecutors recommended confinement, whereas 73% opted for no confinement. The mean recommended minimum days of confinement, including prosecutors who recommended no confinement, was just over 21 (21.40, CI [15.02, 27.79]), or when excluding prosecutors who did not recommend confinement, 80.17 days [CI 59.51, 100.83].¹⁶⁸ Of those prosecutors that recommended confinement, the minimum number of days of confinement recommended ranged from two to 720 days, and the most common recommended amount was 30 days (31/122 prosecutors recommended) with common recommendations of 10, 90, and 180 days. Confinement results are shown in Figure 5 below. Most strikingly, we saw many prosecutors resolving the case without any jail time, but others demanding a month, or even up to five years in one case. Some of the qualitative responses on confinement will be discussed later.

¹⁶⁸ *Id.* If nine extreme values are recoded to a maximum value of 95% percentile of the distribution, or 180 days, when prosecutors recommend confinement, the mean minimum number of days recommended becomes 63.05 [CI 51.15, 74.95].



D. Discussion of Findings

Our national study of prosecutor decisionmaking illuminates a few key findings. Prosecutors charged a crime more often than expected, rarely declined to charge, and were harsher with confinement and fines than may be warranted. While it might be reassuring that prosecutors only charged the most serious crime 16% of the time, given the absence of physical harm and the defendant’s lack of criminal history, we were surprised that 97% of prosecutors charged any crime in this scenario. And the majority of prosecutors charged between two to four charges.

It is not just the number of charges that indicate severity. While about 70% of prosecutors in our study indicated that confinement was not appropriate, those who did recommend confinement most commonly suggested 30 days. To put these findings into perspective, thirty days of confinement has the average cost to defendant of \$11,400 and means a loss of job, family and often housing.¹⁶⁹ Of all of the prosecutors, 41% recommended a monetary penalty, with the most common fine imposed being \$500 dollars. The fine of \$500 dollars, which is a nice round number and may not seem draconian to a white collar professional, is more than the average American has in savings.¹⁷⁰ These findings could demonstrate that our prosecutors may be out of touch with the life circumstances for an average defendant.

¹⁶⁹ Shima B. Baughman, *Costs of Pretrial Detention*, 97 B.U. LAW REV. 1 at Table 3 (2017) (discussing in detail economic studies tallying the costs borne by a defendant during incarceration).

¹⁷⁰ Kathryn Vasel, *6 in 10 Americans Don't Have \$500 in Savings*, CNN MONEY (Jan. 12, 2017, 8:21 AM), (“Nearly six in 10 Americans don't have enough savings to cover a \$500 or \$1,000 unplanned expense . . .”); BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2015 1 (2016) (“Forty-six percent

We purposely gave prosecutors a scenario that was borderline and potentially understandable—a younger defendant having a terrible day (a 20-something-year-old drinking after a breakup and with no criminal record). It could have involved a simple discussion with defendant and attorney and not created a record for defendant. However, only 3% of prosecutors declined to charge the defendant with any crime. Indeed, almost every prosecutor charged the defendant with a crime and the average number of crimes charged was three. What is significant about this is that the defendant in this scenario obtains a criminal record that leaves him with collateral consequences, sometimes for life (where a felony is charged) and will forever impact his job prospects even if the charge is later dropped.¹⁷¹

Another key finding is that prosecutors demonstrated little uniformity nationally as some prosecutors fined defendant \$5,000 dollars and others imposed no fine. Some recommended five years of prison time and others imposed community service. A few prosecutors recommended no charge, and some recommended up to eleven. While maintaining individual discretion may be important for prosecutors, it may be surprising to the public that their results will be so different depending on the prosecutor they happen to encounter.

Finally, and probably most importantly, the prosecutor decisions we witnessed may have parallels in the real world and may impact incarceration rates. It is possible that the dramatically low rate of declination and much higher rates of severity and punishment we witnessed in our study are also found in real cases these prosecutors are deciding. This could indeed explain the higher ratio of prosecutor charging to police arrests over the last ten years, discussed in Part I.B. The extremely low declination rate by prosecutors (3%) may also be a good indicator that the cases being dismissed are for evidentiary or witness reasons discovered later in the case. This finding indicates that prosecutors may be declining cases not due to the prosecutor's progressive desire to cut incarceration rates, or due to mercy for defendant, but because their case is simply not viable. The fact that prosecutors were harsher overall and decline to prosecute much less than anticipated nationally supports the idea that prosecutors are a leading contributor to mass incarceration. It also supports recent data that prosecutors have not eased up on charging like police have eased on arrests—and that despite the reduction in crime, prosecutors continue to charge with impunity. The implications of these findings are discussed in more detail in Part III.

of adults say they could not cover an emergency expense costing \$400.”); PEW CHARITABLE TRUSTS, WHAT RESOURCES DO FAMILIES HAVE FOR FINANCIAL EMERGENCIES? 1 (2015) (“One in 3 American families reports having no savings at all, including 1 in 10 of those with incomes of more than \$100,000 a year.”).

¹⁷¹ See discussion of collateral consequences *supra* note 25 and accompanying text.

III. PROSECUTOR IMPACT ON MASS INCARCERATION

We learned through our national study that prosecutors may be harsher, less uniform and less likely to decline cases than we might have expected. There are many ways to further understand these findings. One approach would be to reconcile prosecutor actions with anticipated behavior to understand whether prosecutors are acting appropriately given public expectations. Another approach would be to consider the typical prosecutor punishment and examine whether it is fitting for the crime, in terms of punishment theory. Yet another approach is to understand prosecutor actions and compare them to how scholars might predict prosecutors to act in this situation, given the various theories of prosecutor action. Another potential approach would be a prescriptive one—we know what is wrong with prosecutors, so how do we begin to fix it? While all of these approaches are important and should be undertaken in time, the first question we want to ask is whether prosecutors generally acted lawfully and appropriately. In essence, did prosecutors get it right?

To determine whether prosecutors were generally on the right track, we compare their actions to the leading national prosecutor standards—American Bar Association (ABA) and National District Attorneys Association (NDAA)—and Supreme Court guidance on prosecutorial discretion. ABA and NDAA standards provide guidance for state prosecutors nationwide on all aspects of their duties,¹⁷² and are the most widely accepted national standards for prosecutor behavior.¹⁷³ Judging prosecutors by publicly accepted standards and Supreme Court precedent—though still subjective—creates a generally accepted basis by which to consider prosecutor behavior. We recognize that some prosecutors operate under internal guidelines or personal standards that may trump the standards indicated below.¹⁷⁴

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

¹⁷² See ABA STANDARD, *supra* note 40.

¹⁷³ The ABA, the largest organization of attorneys and sets forth prosecution guidelines. See ABA STANDARD, *supra* note 40. The National District Attorneys Association (NDAA) is the “oldest and largest national, nonpartisan organization representing state and local prosecutors in the country. Formed in 1950, NDAA has more than 5,500 members across the nation representing state and local prosecutors’ offices from both urban and rural districts, as well as large and small jurisdictions.” See www.ndaa.org/about; see also NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 10 (3d ed. updated 2009) (hereinafter NDAA STANDARD).

¹⁷⁴ We must address these issues about prosecutors’ internal guidelines in a forthcoming piece.

and the effects of prosecutor decisions on mass incarceration and provides two important conclusions. First, in examining Supreme Court precedent and major prosecutor guidelines—prosecutors are completely within their purview and even arguably best practices in their charging decisions. In other words, there are not even loose recommendations against the severity or disparity in charging we witnessed in our study. Second, and most importantly, prosecutor’s decisions are critical to mass incarceration. Given the lack of data or transparency in charging, prosecutors are likely unaware that their individual decisions are collectively causing mass incarceration in America.

A. The Charging Decision

The first question is what guidance Supreme Court or prosecutor standards give prosecutors on charging or declining to charge in a given case. National prosecutorial standards seem to expect much more of prosecutors than average attorneys yet emphasize their discretion. The ABA and NDAA make clear that their standards are “aspirational” or “best practices” and are not intended to serve as a basis of imposing “discipline” or serving as a “predicate for a motion to . . . dismiss a charge.”¹⁷⁵ The NDAA recognizes that the decision to charge is the “most important” made by prosecutors in the exercise of their discretion.¹⁷⁶ NDAA recognizes that it may put into play the amorphous “prosecutor’s beliefs regarding the criminal justice system.”¹⁷⁷ The ABA states that a prosecutor should exercise “sound discretion” in performing her function.¹⁷⁸

The ABA affirms that the primary duty of a prosecutor is “to seek justice within the bounds of the law, not merely to convict.”¹⁷⁹ Likewise, the NDAA states that the primary responsibility of a prosecutor is to “seek justice.”¹⁸⁰ Scholars have recognized that prosecutors have very little guidance as to what it means to “seek justice.”¹⁸¹ This phrase is purposely vague, and has been interpreted differently by

¹⁷⁵ ABA STANDARD 3-1.1(b) The NDAA similarly points out that if someone does not follow the guidelines, it “may or may not constitute an unacceptable lack of professionalism.” NDAA STANDARD at 10 “These standards are not intended to: (a) be used by the judiciary in determining whether a prosecutor committed error or engaged in improper conduct; (b) be used by disciplinary agencies when passing upon allegations of violations of rules of ethical conduct; (c) create any right of action in any person; or (d) alter existing law in any respect.”

¹⁷⁶ NDAA STANDARD 4-1.8 Commentary.

¹⁷⁷ *Id.*

¹⁷⁸ ABA STANDARD 3-1.2(a).

¹⁷⁹ ABA STANDARD 3-1.2(b).

¹⁸⁰ NDAA STANDARD 1-1.1.

¹⁸¹ Bellin, *supra* note 34, at 105 (remarking that prosecutors are not told what it means to “seek justice”); 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, 637 (2006) (same); Daniel S. Medwed, *supra* note 26, at 35, 43; Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58 (1991).

different scholars, and prosecutors.¹⁸² For some prosecutors, obtaining convictions has been the definition of seeking justice.¹⁸³ As Bellin argues, “seeking justice” is an “analytical dead end” because justice is not concrete enough to create rules for how discretion should be used.¹⁸⁴

The Supreme Court has been very deferential to prosecutors in using their discretion—and has affirmed the “seek justice” principles of prosecutor guidelines. In *Berger v. United States*, the Court described a prosecutor as a “servant of the law” and made clear that in that role the prosecutor is not that it “shall win a case, but that justice shall be done.”¹⁸⁵ The Supreme Court has made very clear that the number of charges,¹⁸⁶ “[w]hether to prosecute and what charge to file or bring . . . are decisions that generally rest in the prosecutor’s discretion.”¹⁸⁷ The Court explained in *McCleskey v. Kemp* that “discretion is essential to the criminal justice process” and that “clear proof” would be required to infer that a prosecutor has abused this discretion.¹⁸⁸ The Supreme Court has always supported a decision of a prosecutor to refuse to prosecute in a given case.¹⁸⁹ Courts, as well as prosecutor guidelines, have described prosecutors as representatives of an impartial government and have

¹⁸² Green, *Seek Justice*, *supra* note 26, at 607, 608 (describing the duty to “seek justice” as ill-defined, protean, and vague); Ross Galin, *Above the Law: The Prosecutor’s Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORD. L. REV. 1245, 1266 (2000) (“‘[S]eek justice,’ however, is vague and leaves a great deal of latitude for individual interpretation.”); Fred C. Zacharias, *supra* note 181, at 45, 48 (“The ‘do justice’ standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct.”); David Aaron, *Note, Ethics, Law Enforcement, and Fair Dealing: A Prosecutor’s Duty to Disclose Nonevidentiary Information*, 67 FORD. L. REV. 3005, 3026 (1999) (noting that the ethical standards provide very few specific duties of the prosecutor).

¹⁸³ Dr. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 S.W. U. L. REV. 98, 109 (1975) (one third of prosecutors in this empirical study noted that their primary job was obtaining convictions)

¹⁸⁴ Bellin, *supra* note 34, at 108; Griffin, *supra* note 27, at 259, 307; Nugent-Borakove, *supra* note 27. One scholar argues the ABA standards do not provide any limits. Melilli, *supra* note 17, at 681 (“The recommended threshold of the ABA Prosecution Standards—sufficient admissible evidence to support a conviction—is likewise far too easily satisfied to provide any real limitation upon, or incentive to exercise, case-specific evaluation by the prosecutor.”).

¹⁸⁵ 295 U.S. 78, 88 (1935).

¹⁸⁶ *United States v. Batchelder*, 442 U.S. 114, 126 (1979).

¹⁸⁷ *Id.* at 123-24.

¹⁸⁸ *McCleskey v. Kemp*, 481 U.S. 279, 280 (1987).

¹⁸⁹ *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985) (discussing prosecutorial refusal to charge due to the judiciary’s respect for prosecutorial decisionmaking); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978) (“[Th]e decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”).

assumed that they are held to a higher standard than other attorneys.¹⁹⁰ This higher standard is accompanied by a much higher level of discretion.

When it comes to declining cases, national prosecution standards are somewhat agnostic. ABA standards make clear that a prosecutor “is not obliged to file or maintain all criminal charges which the evidence might support.”¹⁹¹ It also makes clear that the prosecutor’s discretion includes the ability to “initiate, decline, or dismiss a criminal charge.”¹⁹² The ABA, while acknowledging that declination might occur within a prosecutor’s discretion, does not encourage it.¹⁹³ The ABA standards certainly go further than the NDAA standards. NDAA states that the prosecutor should decide whether initial charges should be pursued,¹⁹⁴ and encourages a prosecutor’s office to “retain record of the reasons for declining a prosecution.”¹⁹⁵ However, when discussing charges, the NDAA standards typically consider *what* charges would be appropriate for the offense or “serve the interests of justice” rather than considering whether charges should be made at all.¹⁹⁶ Neither

¹⁹⁰ *People v. Hill*, 17 Cal. 4th 800 (overruled on other grounds); see also Galin, *supra* note 182 at 1255 (“The unmistakable message contained in these norms is that prosecutors are held to a different, and arguably higher, ethical standard than are private lawyers.”); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 214–215, 233 (1990) (prosecutors have a “distinctive role in the administrative justice” and have different responsibilities than other attorneys); Green, *Prosecutorial Discretion*, *supra* note 26 at 595–96 (Prosecutors do not have clients—but represent “the people, the state, and the government”).

¹⁹¹ ABA STANDARD 3-4.4 (listing some of the factors to consider as: (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.)

¹⁹² ABA STANDARD 3-4.4

¹⁹³ ABA STANDARD 3-1.2(f) and (e). The ABA only goes so far as encouraging prosecutors to develop “alternatives to prosecution or conviction,” to solve broader criminal justice problems.

¹⁹⁴ NDAA STANDARD 4-1.1 (2009) (if law allows law enforcement to initiate, the prosecutor should still “decide whether the charges should be pursued”).

¹⁹⁵ NDAA STANDARD 4-1.7 (where allowed by law).

¹⁹⁶ NDAA STANDARD 4-2.4 Commentary (“The charging decision entails determination of the following issues: What possible charges are appropriate to the offense or offenses; and What charge or charges would best serve the interests of justice?”)

standard ever points out that potentially declining to charge may help reduce unnecessary cases, costs, pretrial detention or collateral consequences that cause mass incarceration.¹⁹⁷ As a whole, neither approach views declination of charges as a positive move for prosecutor offices, defendants or the public.

Indeed, while some scholars have recognized declination as an important step to reducing prison rates,¹⁹⁸ many argue that declination presents a wide variety of problems.¹⁹⁹ Miller and Wright opine on declinations: “Declinations, hidden from all traditional legal review yet fundamental to the operation of American criminal justice systems, provide the ultimate test of whether reasoned judgments or random choices best describe the day-to-day work of criminal prosecutors.”²⁰⁰ Some

¹⁹⁷ O’Neill, *When Prosecutors Don’t*, *supra* note 123 (“[D]eclination policies have both pragmatic, as well as aspirational, components.”)

¹⁹⁸ Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1353 (2003) (noting a prosecutor’s “power to be lenient” permits mercy, and it avoids flooding the system”); O’Neill, *supra* note 123, at 255–59 (discussing that budget restraints may call for prosecutorial declination)

¹⁹⁹ Murray, *supra* note 27 (describing nonenforcement as a means to nullification of opposed laws); Roger Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 243, 1253 (2011); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675–78 (2014) (“categorical” nonenforcement policies presumptively invalid); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, The Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (examining executive nonenforcement decisions as “effectively repealing” laws); Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for A Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 185 (2016) (viewing prosecutorial discretion as the power to invalidate certain laws); Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX. L. REV. 73, 75–76, 131–32 (2015) (supporting prosecutorial declination in some circumstances); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999) (demonstrating disfavor for selective prosecution—or declination of the law in certain cases).

²⁰⁰ Miller & Wright, *supra* note 30, at 3 (relying on a 10-year database of detailed prosecutor declination decisions in New Orleans between “1988 and 1999 covering 430,000 charges and about 280,000 cases (involving 145,000 defendants”). There were a total of 217,267 charge declinations. We have to look at this number very carefully. Of the total of 217,267 declined charges, in around 132,000 charges the prosecutors declined to prosecute. Of these cases, prosecutors were prosecuting other charges 37.8% of the time (or 85,091 charges, 18.4% of the time the victim would not testify or could not be located (41,520 cases), the testimony was insufficient to support the charge around 10.5% of the time (23,606), it was not suitable for prosecution 9.8% of the time (21,961) and other misc. reasons supported the rest of the 18% or so of declinations. See Miller et al., *supra* note 30, at Table 1. There are very practical reasons prosecutors decided not to move forward with these cases. Even considering the legitimate reasons above, only 45,000 cases or so remain and are covered by other legitimate reasons like an insufficient nexus, faulty evidence, an unlawful search, aggregated charges, a good defense, and so on. The point of all of this is that cases were not declined for reasons someone might consider, like a prosecutor deciding that the law was unfair or because the defendant was poor or sympathetic in some other way. It is difficult to

scholars see declination as a potential reversal of the rule of law, and worry that it may be happening often.²⁰¹ Indeed some have argued that declinations are on the rise lately.²⁰² While there is little evidence of this being a problem, there may be fear that prosecutors will refuse to protect the law and public.²⁰³ Scholars see the power prosecutors have in declining cases—and it seems to be viewed negatively.²⁰⁴

Our study results track national guidance on declination and contradict the perception among scholars that declinations are common or on the rise. The prosecutors in our study rarely chose to decline to prosecute cases. Our declination rate was only 3%, as 97% of the time the prosecutors charged at least one crime. Previous localized work on prosecutor declination estimates that prosecutors decline to prosecute anywhere from 25% to 52% of cases.²⁰⁵ But all previous studies of declination are retrospective; that is, previous studies lack the ability to see what the prosecutor would charge initially, rather than whether a prosecutor ultimately charges the case.²⁰⁶ Our study, in contrast, tracks the initial charging decision. We were able to consider whether a prosecutor would like to charge a case—before the realities of poor evidence or uncooperative witnesses come to bare. This provides an insight into the preference of a prosecutor, which in our study is to charge a defendant in almost every instance. This is not to say that our prosecutors did not

figure out the percentage declination in the Miller study. However, given that there are 145,000 defendants and around 132,000 declined charges (and presumably 298,000 charges), the overall declination rate seems quite low but is unclear from the study so no conclusions can be drawn on this point.

²⁰¹ W. Kerrel Murray, *supra* note 27, at 3 (“no one doubts that prosecutors sometimes may thwart the law’s application where, by its letter, it would govern.”)

²⁰² See Murray, *supra* note 27 at 3; Jessica Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMIN. at 482; See Benjamin Weiser, *Should Prosecutors Chastise Those They Don’t Charge?*, N.Y. TIMES (Mar. 24, 2017) (claiming there is an “apparent trend” of prosecutor declination).

²⁰³ Murray has posed the question of how often prosecutors might nullify the law and discusses some problems with this scenario. Murray *supra* note 27, at 3 (“The question is how far “sometimes” goes. As the opening examples show, prosecutors are beginning to stretch their power beyond mine-run resource-driven nonenforcement and one-off ex post declinations in “anomalous cases” of factual guilt.”)

²⁰⁴ Murray, *supra* note 27, at 3.

²⁰⁵ Ronald Wright and Marc Miller find that the New Orleans District Attorney’s office over a ten-year period from 1988 to 1999 filed criminal charges in 46% of all cases recommended to them and rejected “for prosecution in state felony court 52% of all cases and 63% of all charges.” Bellin, *Reassessing*, *supra* note 56, at 846; see also Wright & Miller, *supra* note 43, at 74. Prosecutors note that they declined an “exceptional” number of cases and acknowledged that New Orleans is a unique jurisdiction in other ways, including that they plea bargain 60-70% of cases (rather than over 90%) and go to trial much more than other jurisdictions. *Id.* at 65. See also VERA INST. OF JUSTICE, *supra* note 119; Donald M. McIntyre & David Lippmann, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A. J. 1154, 1156-57 (1970). *And see* discussion in Part I.A.

²⁰⁶ Compare *supra* note 43 for discussion of Wright study.

envision that charges would be dropped, or sentences suspended,²⁰⁷ but it does demonstrate that prosecutors saw it their duty to charge a crime when they witnessed one. Prosecutors were thus in line with strict national standards on charging and declination.

B. Severity in Charging

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

Starting with national prosecutor standards, there is very little guidance on charging severity. While NDAA standards encourage prosecutors to “screen potential charges to eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest,”²⁰⁸ they do not encourage prosecutors to consider the severity of the punishment as compared to the harm caused.²⁰⁹ When it comes to severity and declinations, the ABA standards declare that “[t]he prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances.”²¹⁰ Unfortunately these standards do not clarify what “appropriate severity” means.²¹¹

None of the standards encourage prosecutors to charge just one crime when multiple charges could be considered.²¹² Nowhere in the standards does it ask prosecutors to consider no charge at all, particularly when considering an individual without a criminal record, or potentially placing a higher bar in this circumstance.

²⁰⁷ Indeed, some prosecutors indicate that they are planning to drop charges as part of the plea bargaining process. See Wright et al, *supra* note 155; see also *supra* notes 22–24 and Robertson et al., *supra* note 35 at Table 1.

²⁰⁸ NDAA Standard 4-1.3

²⁰⁹ The closest these standards get is encouraging the prosecutor to consider available civil remedies. NDAA Standard 4-1.3(d).

²¹⁰ ABA STANDARD 3-1.2(b)

²¹¹ Green, *Prosecutorial Discretion*, *supra* note 26 at 606 (2019) (“no established vocabulary for judging prosecutors’ exercise of discretion”); Thomas, *supra* note 26, at 1043, 1057–58 (theorizing about the inconsistency of charging standards across hypothetical districts); Gershman, *supra* note 26, at 151, 152 (comparing the more strict and hierarchical prosecutorial system of Germany to that of the U.S.); Green, *Seek Justice*, *supra* note 26 at 607 (noting what qualifies as an “abuse of discretion” has not been “squarely answered”); Medwed, *supra* note 26, at 35, 42 (relying on “justice” as prosecutor’s main guiding principle is “problematic because of the term’s inherent vagueness”); Bresler, *supra* note 26, at 1301 (arguing that ABA language used in establishing ethical standards “degenerates into malarkey upon closer examination”); Green & Levine, *supra* note 26, at 143, 151 (describing the ABA ethics rules as “non-enforceable guidelines”).

²¹² See generally NDAA Standards (2009)

Nowhere in the standards are prosecutors advised not to charge the most severe charge possible. Nowhere do the standards indicate the careful consideration a prosecutor should make due to the impact of even a short prison stint on an individual's life. While scholars have emphasized the importance of prosecutors not charging the harshest punishment possible for the particular crime,²¹³ national prosecutor standards have not determined the bar for severity in punishment.

The Supreme Court's limits on sentence severity originate from the dictates of the Magna Carta and Eighth Amendment.²¹⁴ According to the Supreme Court, the Eighth Amendment prohibits punishments that are "grossly disproportionate."²¹⁵ To determine disproportionality, the Court measures "the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender,"²¹⁶ although the Supreme Court has made clear that the Eighth Amendment cruel and unusual punishment clause applies only a "narrow proportionality principle" when it comes to noncapital sentences.²¹⁷

The Supreme Court has rarely struck down a sentence for severity.²¹⁸ For instance, in *Rummel v. Estelle*, the Court held that prosecutors did not violate the Eighth Amendment for charging and sentencing a three-time criminal offender to life in prison without parole.²¹⁹ Also, the Supreme Court has upheld a defendant's sentence to forty years in prison for possession with intent to distribute nine ounces of marijuana.²²⁰ Though the Court has mentioned that even if punishment does not serve a utilitarian function, it is important to consider whether the person "deserves such punishment."²²¹ The example the Court gives of "gross disproportionate" is a "mandatory life sentence for overtime parking."²²² A life sentence for a parking

²¹³ Green, *Prosecutorial Discretion*, *supra* note 26, at 589, 599 (arguing the theory that people should not be punished as harshly as the law permits is essential to the U.S. system); Mary D. Fan, *Beyond Budget-Cut Criminal Justice*, 90 N.C. L. REV. 101, 117–25 (2012) (advocating for proportionality review with respect to penal severity).

²¹⁴ Magna Carta of 1215 (The principle of proportionality derives from the Magna Carta which insures "[a] free man shall not be [fined] for a trivial offence"); *See Trop v. Dulles*, 356 U. S. 86 (1958) (opinion of Warren, C.J.) (Eighth Amendment is measured by "evolving standards of decency.")

²¹⁵ *Rummel v. Estelle*, 445 U.S. 263, 284–85 (1980).

²¹⁶ *Id.* at 288.

²¹⁷ *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991).

²¹⁸ *Green v. United States*, 355 U. S. 184, 187–88 (1957) (discussing prosecution as "an embarrassment, expense and ordeal" which causes an individual to experience "anxiety and insecurity," see also *Currier v. Virginia*, 292 Va. 737, 798 S.E. 2d 164 (2018) (affirming the ordeal of the criminal trial).

McDonnough v. Smith, 588 U. S. _ (2019) at 5, n.2; W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS §119, 870 (5th ed. 1984) ("[O]ne who is wrongfully prosecuted may suffer both in reputation and by confinement")

²¹⁹ *Rummel*, 445 U.S. at 284–85.

²²⁰ *Hutto v. Davis*, 454 U.S. 370, 379–80 (1982)

²²¹ *Rummel*, 445 U.S. at 288.

²²² *Id.*

violation seems to demonstrate the limit of a prosecutor's charging power—showing that it is nearly unlimited as far as severity.

The Supreme Court has made clear that harsh charges are not a problem and that only illegal or inappropriate charges are prohibited. For instance, the Supreme Court has made it clear that prosecutors can “may exercise their discretion” to charge a felony or misdemeanor, when either charge is permissible.²²³ Indeed, it has gone further to state that the Court is a not a “super-legislature” with a duty to “second-guess legislative policy choices.”²²⁴ *United States v. Berger* also states that a prosecutor may “prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.”²²⁵ The Court arguably envisions a prosecutor being tough. Maybe charging several crimes when one charge is possible constitutes a “hard blow”—which is permissible. Overall, the Supreme Court has historically approved of severe sentences as long as they are not grossly disproportionate—which seems to be a very low bar.²²⁶

However, in a few recent cases, the Supreme Court hinted that the status quo of charging the most severe sentence possible may not be acceptable anymore.²²⁷ In *Yates v. United States*, during oral arguments, the government attorney argued that his understanding of the guidance provided by the U.S. Attorney's Manual is that “the prosecutor should charge . . . the offense that's the most severe under the law. That's not a hard and fast rule, but that's kind of the default principle.”²²⁸ Justice Scalia then responded, “[w]ell, if that's going to be the Justice Department's position, then we're going to have to be much more careful about how extensive statutes are. I mean, if you're saying we're always going to prosecute the most

²²³ *Ewing v. California*, 538 U.S. 1, 28–291 (2003) (California prosecutors can charge “wobblers” as either a felony or misdemeanor based on defendant's record).

²²⁴ *Ewing v. California*, 538 U.S. 11, 28 (2003).

²²⁵ *Berger v. United States*, 295 U.S. at 88 (1935).

²²⁶ Additionally, in *Bond v. United States*, in a rare move, the Court second guessed federal prosecutors in using their discretion. The Supreme Court questioned a specific prison sentence against Bond for a chemical weapons offense which demonstrated a displacement of “public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign.” *Bond v. United States*, 572 U.S. 844 (2014). Since this is a case about a federal prosecutor and invokes federalism it could be an exception. However, this case can also signify a move towards greater oversight by courts of prosecutors in general.

²²⁷ *Yates v. United States*, 574 U. S. 528 (2015) (striking down a six-year sentence).

²²⁸ *Yates v. U.S. Oral Arg. Tr.*, 28-30, Nov. 5, 2014. See also *Bond v. U.S. Oral Arg. Tr.*, 37, Nov. 5, 2013 (the Court striking down a 6-year sentence for a federal “chemical weapons” charge against a woman for trying to injure her husband's mistress by putting chemicals on her doorknobs. Justice Alito said in argument “If you told ordinary people that you were going to prosecute Ms. Bond for using a chemical weapon, they would be flabbergasted. It's—it—it's so far outside of the ordinary meaning of the word.” *Bond v. U.S. Oral Arg. Tr.*, 37, Nov. 5, 2013. Justice Kennedy also questions the prosecutor bringing this charge: “It also seems unimaginable that you would bring this prosecution. But let's leave that.” *Bond v. U.S. Oral Arg. Tr.*, 28, Nov. 5, 2013.

severe, I'm going to be very careful about how severe I make statutes."²²⁹ The government then backtracks and argues that is not right and that the government is "not always going to prosecute every case, and obviously we're going to exercise our discretion."²³⁰ Later Justice Scalia laments the extreme charge: "What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?"²³¹ The Supreme Court reversed the sentence interpreting the criminal statute differently than the government.

This exchange in *Yates* illustrates a few important points. The government seems to acknowledge that the rule of federal prosecutors is to charge the most severe crime possible and this is supported clearly by the U.S. Attorney's Manual.²³² But the Supreme Court seems to indicate that at least in this instance, it is not supportive of this general rule. Although this is the Court opining on a federal statute charged by federal prosecutors, this could signal a trend among courts that charging the most severe statute will not be acceptable—even for state prosecutors.²³³

If applying Supreme Court and national guidelines, our study prosecutors would likely be deemed to have used their discretion appropriately—and even arguably be within best practices of prosecutors. Though there was great heterogeneity that makes it difficult to generalize. As a reminder, 30% of our study 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 average prosecutor recommending confinement charged three crimes and sought 30 days in jail, which would likely result in this individual losing his job, and likely stable housing and family life. The severity in fines we witnessed from prosecutors also did not contradict their national guidelines. 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.²³⁴ It would certainly be an amount an average fast food worker would be unlikely to be able to pay, leading to other serious criminal justice implications for an arguably minor offense.²³⁵

It is compelling that a national sample of prosecutors universally charged, and in some instances recommended a significant jail term for an individual who has certainly made a serious mistake, has not caused any physical harm or property

²²⁹ *Yates v. U.S.* Oral Arg. Tr., 28-30, Nov. 5. 2014. See also Justice Breyer's concern about arbitrary enforcement, *Yates v. U.S.* Oral Arg. Tr., 36, Nov. 5. 2014.

²³⁰ *Yates v. U.S.* Oral Arg. Tr., 28-30, Nov. 5. 2014.

²³¹ *Yates v. U.S.* Oral Arg. Tr., 28, Nov. 5. 2014.

²³² THE DEPARTMENT OF JUSTICE, US ATTORNEY MANUAL 9-27.300 (2020) ("As stated, a Federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct.").

²³³ Reviewing state court limits on prosecution would be helpful to determine what differences exist in state severity limits.

²³⁴ See *supra* note 170.

²³⁵ In one of our conditions, the defendant was a fast food worker. See Part II.

damage, and does not have the risk factors of future violence.²³⁶ 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.²³⁷ Indeed, 8% of prosecutors of the prosecutors in our study wrote qualitative comments justifying their punishment recommendations along the lines of a “few days in jail would do good” for the accused. This contradicts evidence showing the opposite effect of even short stints in jail.²³⁸ The costs borne by the prosecutor for these sentences is nothing, and in fact some scholars would argue that prosecutors are “rewarded” for creating more prisoners and harmed in their career by being too lenient.²³⁹ But the cost to the defendant may be devastating.²⁴⁰

Even though our prosecutors recognized that the crime was minor, they did not consider the devastating effect of criminal charges. One 55-year old respondent’s entire reasoning for their recommended sentence and fine summarizes it best: “no big deal.”²⁴¹ Yes, the crime is truly no big deal—but the consequences defendant is left with are life-altering. Any criminal charges and few days in jail can even have devastating effects on an individual’s life. Overall, prosecutors in our study did not indicate through their written comments that they were sensitive to the potential severity of their decisions and recommendations, and they had little reason to be given the national guidance they operate under. Indeed, unlike federal prosecutors who are encouraged to charge the most severe charges possible, state prosecutors are not instructed to do anything similar, but their actions seem to indicate that this is their unwritten rule.

Overall, in examining Supreme Court precedent and major prosecutor guidelines—we learn that our study prosecutors are completely within their purview in charging and even arguably applying best practices. In other words, there are not even loose recommendations against such severity in sentencing. The fact that there are not standards prohibiting the type of prosecutor charging we see in our study may demonstrate the real problem. And given the lack of data or transparency in charging, prosecutors are likely unaware that their individual decisions are collectively critical to increasing mass incarceration. Indeed, ABA, NDAA and Supreme Court precedent say nothing about exercising restraint in prosecutorial

²³⁶ Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEXAS L. REV. 497, 530 (2012) (demonstrating empirically that individuals who have three or more convictions for violent crimes are at a high risk for future violent crimes).

²³⁷ CHRIS MAI & RAM SUBRAMANIAN, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS* 8 (2017) (reporting that the cost of confinement per inmate ranges from \$14,780 (Alabama) to \$69,355 (California) with the average cost per state at \$33,274).

²³⁸ See Shima Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 950 (2019) (“Any jail time even for a less serious crime leads to loss of a job, increased recidivism risk, and other devastating effects on defendants’ lives.”).

²³⁹ BARKOW, *PRISONERS OF POLITICS*, *infra* note 271 and accompanying text.

²⁴⁰ Average cost to defendant of a criminal charge and incarceration is high. *See supra* note 170.

²⁴¹ This prosecutor was born in 1965, and works in Region 6 (Alabama, Kentucky, Mississippi or Tennessee).

charging though they do emphasize even handedly applying punishments. Though the Supreme Court has cast a doubt on the unlimited nature of prosecutorial discretion in the last ten years,²⁴² there has been no guidance that would prohibit prosecutors from charging vigorously more crimes than they need to. And only criminal sentences brought by federal statutes have been struck down for severity, not state statutes, which are likely to receive more deference.²⁴³ Federal guidelines actually encourage charging the most serious crime possible. If we are to make a dent in mass incarceration, we must examine guidance for prosecutors to determine if severity is what we really want.

The next section considers guidance on uniformity in charging and compares it to our study results.

C. Uniformity in Charging

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

The Supreme Court has expressed the importance of uniformity of treatment of defendants but made clear that prosecutors are not failing to use discretion appropriately when defendants receive disparate charges. The Supreme Court has reiterated that the Constitution “requires that all persons subjected to ... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.”²⁴⁴ Indeed, in recent years, the Supreme Court has shown a slightly less deferential view towards prosecutorial discretion. It has specifically expressed concerns about uniformity of prosecutor power. The Court in *McDonnell v. United States* and *Marinello v. United States* made clear that statutes that provide prosecutors too much power with “abstract general” language

²⁴² *Skilling v. United States*, 561 U.S. 358, 37 (2010) (disagreeing with a prosecutor’s interpretation stating “[r]ather than construing the statute in a manner that leaves its outer boundaries ambiguous’ . . . we read the statute ‘as limited in scope’”); *Bond v. United States*, 572 U.S. 844, 19 (2014) (“[I]n its zeal to prosecute [], the Federal Government has ‘displaced’ the public policy of [] Pennsylvania, [] that Bond does not belong in prison.”); *Yates v. United States*, 574 U.S. 528 (2015), 18-19 (relying on the rule of lenity to ‘strike[] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.’”); *McDonnell v. United States*, 579 U.S. ____ (2016), (“The Court in *Sun-Diamond* declined to rely on ‘the Government’s discretion’ to protect against overzealous prosecutions”).

²⁴³ Due to federalism dictates, it is likely that state prosecutors applying state criminal codes will receive more deference in the criminal context than federal prosecutors applying federal laws.

²⁴⁴ *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602 (2008).

are not permitted.²⁴⁵ This risks a prosecutor “purs[ing] their personal predilections . . . which could result in the *nonuniform* execution of that power across time and geographic location.”²⁴⁶ The Supreme Court—at least generally—is in support of uniform execution of prosecutorial power, though mere claims of disparate treatment are generally not actionable, even where the disparate treatment tracks a protected class such as race.²⁴⁷

Both the ABA and NDAA prosecution standards make clear that uniformity is important in prosecutorial charging.²⁴⁸ NDAA standards specifically warn against an accused “receiving substantially different treatment because the case was assigned to one individual in the office and not to another.”²⁴⁹ Among NDAA factors prosecutors are to consider in screening potential charges include “charging decisions made for similarly-situated defendants.”²⁵⁰ One of the ABA standards considering charging specifically notes “unwarranted disparate treatment of similarly situated persons.”²⁵¹ While ABA standards mention “reasonable” training for prosecutors with periodic review of office policies, there is no mention of a training or review to ensure uniformity of charging.²⁵² While the Supreme Court and prosecutor standards make clear that charging and sentencing of defendants should

²⁴⁵ *Marinello v. U.S.*, 584 U.S. ____ (2018), 1108 (“rely[ing] upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor”) and, *McDonnell v. United States*, 579 U.S. ____ (2016), 2372-73 (slip op., at 23) (we “cannot construe a criminal statute on the assumption that the Government will ‘use it responsibly.’”)

²⁴⁶ *Marinello v. U.S.*, 584 U.S. at 1109 (Recognizing the public fear of “arbitrary prosecution,” it undermines necessary confidence in the criminal justice system) (emphasis added).

²⁴⁷ See ALEXANDER, *supra* note 5, at 37.

²⁴⁸ NDAA STANDARD 1-5.4 Commentary (2009) (Standard 4-1.2 encourages the chief prosecutor to recognize the importance of the initial charging decision and provide “appropriate training and guidance to prosecutors regarding the exercise of their discretion”); ABA STANDARD 3-4.4 (ix).

²⁴⁹ NDAA STANDARD 1-5.4 Commentary (2009).

²⁵⁰ NDAA STANDARD 4-1.3(i) (2009)

²⁵¹ ABA STANDARD 3-4.4 (ix)

²⁵² ABA STANDARD 3-1.13 (a)-(d) (noting in (b) “In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor’s core training curriculum should address the overall mission of the criminal justice system. A core training curriculum should also seek to address: investigation, negotiation, and litigation skills; compliance with applicable discovery procedures; knowledge of the development, use, and testing of forensic evidence; available conviction and sentencing alternatives, reentry, effective conditions of probation, and collateral consequences; civility, and a commitment to professionalism; relevant office, court, and defense policies and procedures and their proper application; exercises in the use of prosecutorial discretion; civility and professionalism; appreciation of diversity and elimination of improper bias; and available technology and the ability to use it.”)

be uniform, we recognize that some scholars do not necessarily believe that uniformity of punishment is an important or achievable goal.²⁵³

When we compare these standards to our study findings, however, we find hardly any uniformity of charging. Prosecutors charged similarly situated defendants who allegedly committed the same assault to varying terms of five 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 dollars and others \$500 or much lesser amounts of \$250. The range was very large across our national sample, and even within geographic regions, and seemed very random.²⁵⁴ These findings demonstrate that prosecutorial discretion is indeed broad, largely unsupervised, highly variable, and inconsistent. Most of this variation was inexplicable. This study demonstrates that for the same crime, individuals repeatedly and uniformly receive disparate sentences depending on the prosecutor they interact with. And furthermore, there is no change in sight as national guidelines and Supreme Court standards prefer uniformity but do not give any details on what this looks like, do not make actionable mechanisms to challenge disuniformity, and prosecutors do not seem concerned with national guidelines.²⁵⁵ This seems to be left to individual states and offices. There is also no leading guidance on the importance of maintaining uniformity of punishment for similar defendants. Thus the far end of a prosecutor's discretion is misconduct.²⁵⁶ Prosecution is a local function and lacks the centralization or uniformity that other state or federal actors may have.²⁵⁷ In sum, even though uniformity is an important universal value for prosecutors, our study

²⁵³ Michael Davis, *Sentencing: Must Justice Be Even-Handed?* LAW & PHILOSOPHY Vol. 1, No. 1 (Apr. 1982) at 77–117. One scholar believes that other western countries who are concerned with pre-conviction equality, the US is not concerned about defendants between treated equally before conviction, just after. James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. OF LEGAL ANAL. 121 (2009) (“Continental law worries most that accused and suspected persons may suffer disparate treatment, while American law worries that convicted persons may suffer disparate treatment. This is a striking contrast indeed, which deserves more attention . . .” and at 127, (“Contemporary American law has generally chosen to pursue equality by limiting discretion during the latter phases of the criminal justice process—especially at decision point (8) on my chart (sentencing), but also to some extent at decision points (9) (infliction of punishment) and (10) (termination of punishment)”) See also Kay Levine, *Should Consistency Be Part of the Reform Prosecutor’s Playbook?*, 1 HASTINGS J. CRIME & PUNISH. 169 (2020) (arguing that prosecutorial consistency of process is more important than consistency of outcomes for defendants).

²⁵⁴ We did however observe some correlations that merit further study. White and Hispanic prosecutors recommended higher amounts of confinement than black prosecutors. Also interesting is that Mountain division prosecutors were harsher when it came to monetary penalties compared to New England, Middle Atlantic and West North Central prosecutors. Further exploration into the causes of variability are required.

²⁵⁵ Uniformity can certainly also come from internal guidelines. This aspect of the study will be discussed in a future paper.

²⁵⁶ Green, *Prosecutorial Discretion*, *supra* note 26, at 589, 596.

²⁵⁷ *Id.*

demonstrates that it is not achieved—as demonstrated by wildly different charging practices.²⁵⁸ While uniformity is certainly valued, there is currently no way to implement it nationally.

D. Mitigating a Prosecutor's Role in Mass Incarceration

In considering broadly how to mitigate prosecutorial impacts on mass incarceration, it is enlightening to consider what prosecutors believe guide their decisions. When asked how they approach cases, some prosecutors in our study wrote a version of the national prosecutor guidelines—“do justice.” One prosecutor wrote, “Just do the right thing. Everything else will take care of itself.” And one particularly honest response was, “[u]se discretion, don't embarrass the office.” While prosecutors seem to say the right thing as far as their overall goal, the vague national (and likely local) guidance they receive, may encourage them to believe that they are acting appropriately. In fact, there is no indication in examining national guidelines that our study prosecutors are not completely within their discretion in charging three crimes in a minor case and imposing 30 days of incarceration. There is no indication from prosecutors that granting a five year sentence for an assault violates any Supreme Court principles of proportionality or uniformity. And if embarrassing the office is a concern underlying prosecutor decisions, it will likely be more embarrassing to charge less and appear soft on crime. What is more, given that avoiding severity and ensuring uniformity is not circumscribed by any national standard, it may even be expected that some prosecutors would let a defendant off with community service while some would charge a year confinement. Because discretion is still valuable—due to the alternative being a rigid charging scheme—we consider how to maintain prosecutor discretion while pushing prosecutors to consider their impact on mass incarceration.

While current national guidelines for prosecutors seem appropriate, examining them in light of prosecutor charging may demonstrate that something is missing. We learned in Part I.B that prosecutors have not reduced charging commensurate to police arrest rates in the last ten years and that this may be impacting mass incarceration. Our study also demonstrates that prosecutors are more severe in charging, charge more than we might have expected, decline to prosecute many fewer cases at the outset, and are not uniform in their decisions. Examining national prosecutor guidelines and Supreme Court guidance to prosecutors also demonstrates that prosecutors are acting appropriately in charging three crimes for a simple assault and imposing a year or more of incarceration, as prosecutors are advised to be zealous advocates and severity is not limited. All of this might support an argument that we should impose strict charging guidelines for prosecutors. On the other side,

²⁵⁸ While this is by no means conclusive, in our study, prosecutors generally did not refer to prosecutor standards when determining whether to charge. Indeed only 0.9% (5) of respondents mentioned NDAA standards by name and only one prosecutor mentioned ABA standards. Only 2.5% (14) of prosecutors list standards as important—without providing a name for the national standards that apply.

some prosecutors using their discretion will always interpret guidelines differently than others. Is removing discretion the answer? For the reasons articulated below, we do not advocate removing prosecutor charging discretion—despite the negative impacts individual charging decisions may have. We do believe, however, that at a minimum, national and local guidelines should explicitly advise prosecutors not to charge the most serious crime possible and to consider the effects of their charging decisions on mass incarceration. The Supreme Court has moved in this direction, and more explicit guidance to this effect is welcome.

Indeed, the first reform we suggest is making national guidance explicit that prosecutors should limit their impact on mass incarceration. In order for prosecutor offices to effectively track impact, data collection by office and region is critical. While prosecutors seek justice, they have had no meaningful guidance to consider the broader implications of their actions on incarceration. Before our study, it was unclear whether prosecutor charging rates were out of step with the reduction of crime and reduction of arrests we are seeing nationally. We now see that prosecutors may have room to reduce criminal charging, given the reduction of crime and arrests. Arming prosecutors with this kind of information itself may influence individual and office level prosecutor decisions. Requiring prosecutor offices to consider the costs of incarceration to their jurisdiction and to the accused would also be helpful.²⁵⁹ Data on charging and costs of charging decisions should be available to prosecutor offices in order to consider the broader impacts on mass incarceration.

The typical response to prosecutorial problems—reduced discretion—may not provide the hoped for reductions in mass incarceration.²⁶⁰ As it currently stands, most states are much less punitive with crimes than the federal government.²⁶¹ The federal sentencing guidelines removed much discretion from prosecutors with the intent of “effective fair sentencing system.”²⁶² Indeed the guidelines aimed to

²⁵⁹ Baughman, Subconstitutional, *supra* note 47, at 1071.

²⁶⁰ Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1104 (2005) (“Perhaps the only way to remove some of the severity [of the existing system] is to allow prosecutors to operate quietly, dispensing mercy in a few cases, even if it is done inconsistently); see PFAFF, LOCKED IN, *supra* note 12, at 149-150 (explaining that New Jersey plea bargaining guidelines increases sentencing disparity and harshness); Bellin, Reassessing, *supra* note 56 at 837 (As Bellin astutely points out “[t]he prosecutorial charging guidelines and enhanced transparency *Locked In* champions will not reduce incarceration[.]”).

²⁶¹ Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1643 (noting the disparity between state and federal law for punishment of gun crimes); Christine DeMaso, *Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095, 2096 (2006) (affirming that “federal penalties are generally higher than state penalties”). Though note that state sentences have increased significantly for major crimes. *See supra* note 86.

²⁶² *See* U. S. SENTENCING GUIDELINES MANUAL § 1.A.3 (2018). Sentencing guidelines apply to judges and it is important to note that prosecutors still hold a large amount of discretion as to what to charge that would then trigger the mandatory sentencing ranges.

“achieve reasonable uniformity in sentencing by narrowing the range of sentences that could be imposed for similar offenses committed by similar offenders; and to seek proportionality in sentencing by imposing different sentences.”²⁶³ However, unfortunately the goals of uniformity and proportionality were not met by federal sentencing guidelines without a commensurate (and unintended) increase in incarceration. Some have argued that the criminal justice system is a “hydraulic system . . . like a water balloon: If you squeeze it at one decision point in the effort to control discretion, it will bulge at another.”²⁶⁴ In other words, if we demand charging equality, will it be more difficult to obtain sentence equality? This is the worry. Moving towards a state charging guidelines similar to the federal sentencing guidelines may actually worsen mass incarceration—in the way the federal guidelines have done.²⁶⁵

Rather than strict guidelines, providing simple principles could help prosecutor charging. Some principles to consider are—do not charge more than one crime when one will do. Do not charge the most severe charge and consider not creating a new criminal record. Or before charging, always consider if an alternative exists to charging a crime—like referral to mental health, drug addiction support, mediation or other social services, options which some respondents in our study wrote that they would pursue. This focus would require one where a prosecutor’s job advancement does not rely on her increasing punishment but on creatively solving community problems, sometimes without a day in jail. There are certainly other principles that might be considered for improved prosecutor charging,²⁶⁶ and other solutions that may involve removing or drastically altering the role of prosecutors and police in criminal justice.²⁶⁷

Instead of removing discretion with national charging guidelines, an independent local and state review of prosecutorial charging practices and data on local practices might improve uniformity and reduce severity in charging. Indeed, one of us has argued elsewhere that prosecutors need a constitutional check, like a

²⁶³ Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1272 (1997).

²⁶⁴ Whitman, *supra* note 253, at 123. See also Daniel Kessler & Anne Morrison Piehl, *The Role of Discretion in the Criminal Justice System*, 14 J. L. ECON & ORG. 256 (1998); MICHAEL TONRY & JOHN COFFEE, ENFORCING SENTENCING GUIDELINES; PLEA BARGAINING AND REVIEW MECHANISMS (1987); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 790–91 (2006).

²⁶⁵ Paul Cassell and Frank O. Bowman III, *The Institutional Concerns in Sentencing Regimes: The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005) (concluding that “the federal sentencing guidelines system has failed” because it produces bad outcomes too often); Mauer & King, *supra* note 5, 7–8 (Federal Sentencing Guidelines resulting in more people incarcerated for longer periods of time.); *United States v. Angelos*, F. Supp. 2d 1227, 1263 (D. Utah 2004), *aff’d*, 433 F.3d 738 (10th Cir. 2006), (concluding that the “55-year sentence mandated by [the federal sentencing requirements] in this case appears to be unjust, cruel, and irrational”).

²⁶⁶ See *supra* note 26–27.

²⁶⁷ See Shima Baughman, *Why Do We Fund the Police?*, MEDIUM (June 10, 2020).

regular independent internal review.²⁶⁸ This could come through an internal review board under the purview of the governor and attorney general or an independent disinterested body that reviews prosecutor charging decisions and plea bargaining agreements.²⁶⁹ A quarterly or biannual review could help with uniformity and severity between prosecutors in an office or within a particular region. Similar cases could be compared to consider charging uniformity and overall severity and incarceration rates in a region and be compared to jail space and community goals.²⁷⁰ This would also involve educating communities where prosecutors are elected on these issues,²⁷¹ and changing the current incentives prosecutors have to overcharge because their success is based on increasing punishment whenever possible.²⁷²

²⁶⁸ Baughman, Subconstitutional, *supra* note 47, at 1123 (arguing for “quarterly internal review procedures to determine whether individual prosecutors are meeting office goals.”)

²⁶⁹ Jennifer Lee, *supra* note 58, at 1 (“Mandating the collection of various procedural data on matters such as arrests, prison time, and plea bargains creates a valuable metric by which to assess ethics and help voters make informed decisions during prosecutorial elections. Tracking behavior and placing prosecutors under the care of the Attorney General also instills a heightened sense of professional accountability. By placing the responsibility of creating internal discovery policies upon the attorney general, states gain the ability to conduct a centralized system of control and maintain uniformity and fairness in criminal matters. Independent prosecutorial review panels expedite the complaint process because panel members are able to focus exclusively on prosecutors, unlike state bar associations tasked with investigating and disciplining every licensed attorney in the state”); Baughman, Subconstitutional, *supra* note 47, at 1138–39.

²⁷⁰ Bellin, Reassessing, *supra* note 56.

²⁷¹ Broad public transparency on prosecutorial charging factors might not improve incarceration. Some scholars argue that prosecutors should inform the public of what factors they consider when making charging decisions. Green, *Prosecutorial Discretion*, *supra* note 26, at 589, 622; Sawyer, *supra* note 17, at 621 (prosecutors feel compelled to hide their motivations for prosecuting from the public, “[i]t reduces the availability of information that voters need to make informed choices, limits the control the democratic process can exert over prosecutors,” and among others, “cuts short opportunities for fruitful debate over the best approach to criminal justice”). I agree with Barkow that the more transparency on charging, the larger the potential threat that elected prosecutors place pressure on line prosecutors to be more severe—rather than less. BARKOW, *PRISONERS OF POLITICS*, *supra*, note 10, at 8–9 (Elected leaders fear being labeled as soft on crime, so they aim to appear as tough as possible, even if there is no empirical grounding for the approaches they endorse.)

²⁷² Green, *Prosecutorial Discretion*, *supra* note 26, at 589; Leonetti, *supra* note 72, at 60–5, 74–5 (proposing a doctrinal mechanism for reigning in the incentives to overcharge within the existing system of prosecutorial discretion).

On the other side, others argue that prosecutors have no desire to maximize punishment. Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 764–66 (2016) (as political actors, prosecutions have no inherent desire to seek maximal punishment consistently and “Prosecutors do not bring every case that they could win; they do not invariably try to maximize severity of punishment”); Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV.

Larger structural changes could also be considered to improve prosecutorial charging.²⁷³ This approach maintains prosecutor discretion while potentially leading to broader discussions among prosecutors on the right way to balance competing interests of justice to victims and society and impacts on mass incarceration.

Improving our understanding of how prosecutors are charging nationally is critical to stopping the growth of mass incarceration. Prosecutors need to be made aware and held responsible through independent review of their collective actions. It unclear from our data but could be that prosecutors are routinely charging individuals with several crimes. It appears harsh to charge crimes in almost every case, even minor ones. But a prosecutor may impose these charges, knowing that they can be used for leverage in plea bargaining and some of them will be dropped.²⁷⁴ Individual prosecutors are rewarded for winning cases, holding defendants accountable, and making the office “look good.” However, what is likely not accounted for is that often while plea negotiations are happening—where many if not all of these charges are dropped—an individual is most often in pretrial detention,²⁷⁵ which is the greatest contributor to jail overcrowding and adds to the mass incarceration problem just by sheer volume of minor cases.²⁷⁶ The defendant spends time in jail while the case is dismissed most of the time. A prosecutor starting with a strong bargaining position with several charges for a minor case ends up costing the state and a defendant for harsh charging choices.²⁷⁷ Without statistics collected on an office, regional or national basis an individual prosecutor has no idea what the overall effects of their individual charging decisions are. Prosecutor offices face no consequences for the costs of incarceration they impose and do not have to deal with the collateral consequences they impose on defendants—like the loss of job and housing that accompany a short stint in jail.²⁷⁸ Simple awareness by prosecutor offices of these collective costs and independent review with accountability could lead to new thinking on prosecutor charging practices, and eventually a shift in mass incarceration.

379, 379 (2005) (“[C]onviction rates do not appear to affect the careers of U.S. attorneys.”); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 261 (2000) (“demonstrating the incentives that create “a desire [] to pursue the most dangerous criminals and a desire [] to pursue criminals who will bring them private career returns”); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966-69 (1997) (deciding that prosecutors are motivated by maximizing convictions, re-election, “not-losing,” and reputation)

²⁷³ See e.g., Barkow, Institutional, *supra* note 67, at 869, and Baughman, Subconstitutional, *supra* note 47, at 1071, 1091, which both argue that major structural changes must be made for prosecutorial motivations and decisions to change.

²⁷⁴ A few of our prosecutors indicated this exact thing in their qualitative responses.

²⁷⁵ See BAUGHMAN, THE BAIL BOOK, *supra* note 25.

²⁷⁶ See Baughman, History, *supra* note 23.

²⁷⁷ See BAZELON, *supra* note 12; see PFAFF, LOCKED IN, *supra* note 12.

²⁷⁸ See Baughman, Subconstitutional, *supra* note 47.

CONCLUSION

Prosecutors unknowingly contribute to mass incarceration through individual charging decisions.²⁷⁹ Previous work argues that prosecutors increased crimes charged from 1980 to 2007.²⁸⁰ However, during the last ten to fifteen years, crime rates have dropped, and arrest rates have gone down. But this Article demonstrates that during this same time period, prosecutors have actually increased the ratio of criminal court filings. That is to say, police are helping decrease mass incarceration, but prosecutors are not doing their part—possibly because they are not aware of the problem. There is very little data or transparency for individual prosecutors to know how other prosecutors are charging nationally.

The study relied upon here demonstrates why this trend of excessive charging may be a national issue. In our study with a sample of prosecutors from across the nation, depicting a minor assault based crime with no physical injury, respondents consistently charged crimes in almost every instance. Our study demonstrates the lowest rate of declinations ever found in a national study—demonstrating only 3% of prosecutors refusing to charge a crime. We also observed surprising severity and wild variability in charging. Indeed, prosecutors most commonly charged three crimes, and some charged up to 11. While less than 30% of prosecutors recommended jail time and 40% a fine, those who did recommend incarceration and fine recommendations ranged from five years to 30 days and fines from \$5000 dollars to \$500. Our review of national guidelines from the Supreme Court and prosecutor standards demonstrate that national guidelines do not stand in the way of any of these decisions—and may even encourage severe charging practices.

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

²⁷⁹ Even with the looming Corona virus, district attorneys are being blamed for not responding appropriately. One inmate said publicly to the Orleans District attorney, “I want to thank you for getting me out of the dog cage,” she said. “But, Lord, there are other things for you to worry about right now, instead of harassing people for petty-ass shit.” Sarah Stillman, *Will the Coronavirus Make Us Rethink Mass Incarceration*, THE NEW YORKER (May 18, 2020). Also noting “In bail hearings, when public defenders raised the threat of COVID-19, the district attorney’s office accused them of trying to ‘exploit’ the coronavirus to benefit their clients.”

²⁸⁰ See BAZELON, *supra* note 12; see PFAFF, LOCKED IN, *supra* note 12.