

University at Albany, State University of New York

Scholars Archive

Criminal Justice

Honors College

4-2018

Prosecutorial Discretion: Charging & Plea Bargaining

Wyatt Greth

University at Albany, State University of New York

Follow this and additional works at: https://scholarsarchive.library.albany.edu/honorscollege_cj



Part of the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Greth, Wyatt, "Prosecutorial Discretion: Charging & Plea Bargaining" (2018). *Criminal Justice*. 17.
https://scholarsarchive.library.albany.edu/honorscollege_cj/17

This Honors Thesis is brought to you for free and open access by the Honors College at Scholars Archive. It has been accepted for inclusion in Criminal Justice by an authorized administrator of Scholars Archive. For more information, please contact scholarsarchive@albany.edu.

**Prosecutorial Discretion:
Charging & Plea Bargaining**

School of Criminal Justice

Wyatt Greth

Research Advisor: Alan Lizotte, Ph.D

April 2018

Acknowledgements

I'd like to thank my professor and thesis advisor, Dr. Alan Lizotte, for his knowledge and guidance through this long journey. I'd also like to thank the others in my thesis group for joining me on this ride and who's collective humor and perseverance kept me going. A special thank you to the interviewed prosecutors, who gave me their unlimited time, candor, and life lessons. I would also like to thank Sriraga Dasari for her endless encouragement and motivation throughout it all. Finally, I would like to thank my mom for all the support along the way and for being my most devoted editor.

Table of Contents

Acknowledgements..... 2
Introduction..... 4
Literature Review..... 4
Methods..... 11
Results..... 13
 Survey..... 14
 Open-ended 25
Discussion..... 31
Conclusion 35
References..... 37

Introduction

The criminal justice system consists of many independent yet intersecting pieces. Each of these cogs affect the entire criminal justice process. This process begins when an individual is arrested by the police. The police can either let the individual go or continue onto the next phase of the criminal justice system, the prosecutor. The prosecutor deals with the relevant legal proceedings involving the individual's conviction. In order to ensure that a prosecutor can aptly perform the tasks expected of a prosecutor, they are awarded a great deal of power and freedom (Balisacari 383). How a prosecutor uses this power and freedom is up to each individual prosecutor's *discretion*. Before prosecutorial discretion can be thoroughly analyzed, some questions must be answered; namely what powers do prosecutors have, how are the powers utilized, and most importantly, what are the benefits and potential dangers of awarding prosecutors these powers? A prosecutor has two major powers; charging and plea bargaining. What the powers of "charging" and "plea bargaining" truly entail, and how these powers can be used together, are at the crux of how prosecutorial discretion is wielded.

Literature Review

Charging is the act of choosing what legal offense to accuse the defendant of. Prosecutors decide both whether to charge and what to charge. Whether to charge is one of the simpler powers, the prosecutor either charges the defendant with a crime or does not. If the defendant is not charged with a crime, the prosecutor stops pursuing the case and the defendant is free to go. The other form of a prosecutor's charging power, what to charge, comes in two forms- vertical and horizontal. Vertical charging is when a prosecutor charges a defendant with the same crime more than once, but with different degrees. An example would be if a man is involved in a bar

fight and is charged with Assault 2nd and Assault 3rd. These are two different classifications of crimes (felony and misdemeanor) that stemmed from the same offense. If a prosecutor fails to meet the burden of proof to convict the defendant of Assault 2nd, the prosecutor can attempt to meet the lesser standard of proof required by an Assault 3rd charge. Horizontal charging is when a prosecutor charges a defendant with multiple distinct crimes for the same offense, an example being charging the man in the above example with Assault 2nd as well as Disorderly Conduct. A prosecutor can only use vertical and horizontal charging powers if each individual charge has probable cause to believe that the defendant committed the crime(s) (Work 478). The power of charging carries the explicit powers of whether to charge and what to charge and built on top of the explicit charging power is the implicit power of overcharging. Overcharging is when a prosecutor charges the defendant with a greater crime than the prosecutor could realistically prove. The higher charge exerts a form of pressure onto the defendant that stems from the implications of being convicted of the more serious charge. By obtaining leverage through overcharging, prosecutors can engage in coercive plea deals, tricking defendants into taking unfavorable plea deals. Prosecutors have ample incentive to overcharge when a trial would be inefficient, so as to end the case as quickly as possible and avoid trial. Bringing a case to trial is the scenario that causes the most work for the prosecutor. Trials also bring the issue that the prosecutor can still lose, not matter how much work was put in, and a plea is a guaranteed “win” for the prosecutor. Another instance where there is incentive to overcharge is when the prosecutor believes the defendant is guilty of one of the charged offenses, the overcharging leads the defendant to pleading guilty for a lesser charge in order to escape the overcharged crime (Work 479).

Commented [GW1]: Why vertical and why horizontal, as opposed to 1 charge

While in most cases the charging power wielded by prosecutors is handled properly, there are cases where that is not true. A prosecutor uses their charging power on a case by case basis, allowing prosecutors the decision to either use their power correctly or to abuse it. According to an investigation of Florida homicide cases between 1973 and 1977, it was found that prosecutors classified a disproportionate amount of black-on-white homicides as a felony when compared to white-on-white and black-on-black homicides (Babikian 146). Prosecutors may not have any explicit bias toward certain people/groups, but the prosecutors could have implicit bias, which is more widely held than explicit bias (Kang 1130). Implicit bias is the preconceived notion/prejudice a person unknowingly has toward others (Kang 1129). A prosecutor might make a plea deal that the prosecutor thinks is fair, but really the plea deal was made involving implicit bias. Prosecutors may be misusing discretionary powers and not even be aware of it. Misuse of prosecutorial discretion was addressed by *United States v. Armstrong*, where the courts ruled that “due to the strong presumption of prosecutorial good faith”, the defendant must shoulder the responsibility of proving that the prosecutor was unjust. If a defendant thinks that the prosecution unfairly charged the defendant, the defendant must show that the government failed to charge an offender that was “virtually identical” to another defendant (Babikian 150).

In addition to the power of charging prosecutors wield another major power, plea bargaining. Only a slim proportion of criminal cases actually proceed to trial, with nearly 95% of federal criminal cases resolved by plea bargain instead (Babikian 143). Plea deals are a necessary part of the criminal justice system. If every case went to trial, the courts would be unimaginably buried in cases that every person involved in the courts (prosecutors, defense attorneys, judges, clerks, court officers) would have to work more hours than possible. Plea deals are a way for prosecutors to avoid those negatives by allowing the defendant to admit guilt in exchange for a

lesser punishment. In a plea deal the prosecutor has all the control, they are the administrator, advocate, judge, and legislator (Balisacari 383). The power of plea deals is closely intertwined with charging, specifically overcharging. As discussed above, the pressure exerted from overcharging can force a defendant to accept an unfavorable plea.

Plea bargaining too can be used or abused by the prosecutors. A prosecutor has almost all the power when it comes to plea deals. They can choose whether to offer a plea deal or not, and more importantly, prosecutors choose what to offer. While the typical prosecutor has a “standard” plea given for each crime, for any individual the plea can be changed, for better or worse. Cases such as *Lafler* and *Frye* (Lieb 1040) establish that defense attorneys must inform their clients of beneficial plea deals, if it is reasonable to think that the client would have taken it (underlying this decision is that there are “good” and “bad” plea deals, and that there is a standard of plea deal that divides the two) (Lieb 1042). *Lafler* and *Frye* create the idea that a defendant is “supposed” to receive a “standard” plea offer but *Lafler* and *Frye* say nothing about when prosecutors must actually make such offers, what kind of offer should be made, or whether any offer should be made at all (Lieb 1043). So, while prosecutors may not offer a plea at all, if a plea is offered there is an expectation that the plea deal will be similar to the “standard” plea deal given in similar cases. Prosecutors can use their plea dealing power to be vindictive towards defendants, which is best captured by one prosecutor who explained how he views plea deals;

“I’ll give you a deal if you don’t bust my ass. You start taking a bunch of depositions, filing a bunch of motions—fuck you. This system is overloaded as it is. Most of these people know if

they're guilty or not. . . . If you hold out [,] . . . if you don't recognize what you've done and try to get through here with a little bit of facility, then I'm going to try to bust your ass." (Lieb 1048)

From this statement it is apparent that prosecutors have an enormous amount of power over defendant rights, but it was not always like this. In the past the power of plea bargaining was reined in by independent judicial sentencing (Standen 1474). The judge would determine the sentence if the defendant was found guilty, so if the judge had a better "offer", then the defendant could go through with the trial, be found guilty, and receive the judge's sentence. This required prosecutors to offer a lower sentence than the judge in order for the defendant to plead guilty. Now the United States Sentencing Guidelines have eliminated the discretion judges previously possessed and instead replaced them with sentencing guidelines (Standen 1475). The elimination of the discretion judges had with regards to sentencing increases the power of the prosecutor. No longer is the power of plea bargaining controlled by independent standards, now plea bargaining belongs to the prosecutor.

In light of the problems with the amount of discretion possessed by prosecutors, solutions emerge. Solutions were addressed by *United States v. Armstrong*, but not in the way critics of prosecutorial discretion would have liked. *Armstrong's* overall conclusion was that "in early stages of a selective prosecution claim, a trial court should not even order discovery from the government unless the defendant first demonstrates the existence of a control group of similarly situated violators who have not been prosecuted" (Poulin 1076). This decision created a difficult burden of proof for those unsatisfied with a prosecutor's use of discretion. Selective prosecution claims require the defendant to establish that the prosecution "had a discriminatory effect and that it was motivated by a discriminatory purpose." Due to the strong presumption of prosecutorial good faith, the defendant shoulders a heavy burden in providing the clear evidence

needed to prove his case (Babikian 189). Besides having the defendants prove the misconduct, some solutions call for external help, primarily from state legislatures and Congress. These plans include; reducing overall sentence lengths, more objective charging guidelines (Lieb 1068), removal of the plea-bargaining system, and changing the bargaining system so that the bargaining is over the sentence length, not the actual charge (Work 482). Other possible solutions are to create internal disciplinary regulation, empowering judges to supervise prosecutors to deal with prosecutorial misconduct. If a judge notices prosecutorial misconduct, the judge brings the issue to a board who would then investigate the matter. There is also the idea that prosecutorial discretion could be handled if a stricter view of ethics is adopted along with strict enforcement of these new ethical standards (Levine 8). Another proposed solution is that courts should hear all/most cases of misused discretion, disregarding the standard set by *Armstrong*, and to track accusations of mishandled prosecutorial discretion. This way the courts can keep track if any prosecutorial misconduct patterns occur and observe any patterns that emerge. For example, a pattern over many years could emerge and show that the same prosecutor had a disproportionate amount of complaints filed from young African-American women, or that a prosecutor offers better plea deals for defendants involved in black-on-black crimes than black-on-white crimes.

The prosecutorial powers of charging and plea bargaining are heavily influenced by implicit bias. While briefly mentioned in the section about charging, implicit bias plays a large role in a prosecutor's actions. Explicit bias is a conscious preconceived notion of an individual/group of individuals. A common example is a white person who believes that all black people are criminals. The white man in the scenario has prejudice toward others and is conscious of that prejudice. Implicit bias is an unconscious preconceived notion of an individual/ group of

individuals. Someone who is influenced by implicit bias is unaware of having a preconceived notion and would claim to be impartial. An example is a white cashier who claims to treat every race equally, but unconsciously tenses up when a group of minorities enters the store. While the cashier claims to be impartial when it comes to race, in reality the cashier has an implicit bias centered around race. An implicit bias is typically less obvious than an explicit bias, as even the person holding the bias is unaware. This creates problems when hiring prosecutors. While it is likely that an explicit bias would be uncovered during the hiring process for prosecutors, an implicit bias is more likely to go unnoticed in the hiring process. Combining these factors with the fact that implicit bias is more widely held than explicit bias (Kang 1130), implicit bias seems to be to more important bias to study when it comes to prosecutors.

While some of the solutions for reducing prosecutorial misconduct would also address the implicit bias some prosecutors may have, like hearing all cases of misconduct and having internal review boards, there are strategies to reduce implicit bias. These strategies, in order to be truly effective, have to strike at the root of how implicit bias develops. The first strategy is to increase self-awareness. When people become stressed, especially when that stress stems from time pressure, implicit bias is more likely to manifest (Boscardin 1726). Typically, it is difficult, if not impossible, to leave a stressful environment, but there are still solutions. Studies have shown that participating in self-reflection exercises, like taking an implicit bias test, improves self-awareness and reduces negative biases (Boscardin 1726). Just being aware that implicit bias exists, and can increase in stressful environments, as well as consciously acknowledging the potential that implicit bias could affect anyone, seems to reduce the effect of implicit bias on one's actions. Another possible remedy to implicit bias is increasing opportunities for positive interaction. An example given is when a group of people holds implicit bias toward minorities.

Putting that group of people together with minorities and making it a positive experience decreases implicit bias. The new positive experience “replaces” the negative stereotype the person previously held (Boscardin 1727). The final solution put forward is to develop the empathy skills of the biased (Boscardin 1727). Empathy seems to be the core of reducing implicit bias. Increasing self-awareness and increasing opportunities for positive interaction both increase the empathy felt by the biased person. Instead of viewing others by a preconceived stereotype, these solutions force the acknowledgment that one could have unconscious biases and that the members of the stereotyped group do not act as predicted. This creates a humanization of a previously dehumanized group. People who once viewed others with only a static negative trait in mind, such as thinking all black people are criminals, now must face the truth that that group is composed of complex dynamic people.

Statement of the Problem

With a solid foundation on the powers of the prosecutor, the various problems associated with those powers, and possible solutions laid out; the next step comes with identifying how individual prosecutors might apply their powers on a case-by-case basis, and if prosecutors are aware of the problems associated with prosecutorial discretion. Broaching these topics will reveal how a prosecutor weaves the powers of charging and plea bargaining together and how a typical prosecutor remains as fair as possible. Other topics that benefit from researching individualistic prosecutorial discretion are the impact of implicit bias, if prosecutors are aware of implicit bias, and what, if anything, do prosecutors do to circumvent the dangers associated with that bias.

Methods

The methods used to research these components will be a combination of a survey and a set of open ended questions. The survey is a series of close-ended questions with possible responses ranging from 1-5. The questions ask how important the prosecutor considers each factor in determining what to charge a defendant with, along with how important a factor is when creating plea deals. The answers range from 1(not at all important), 2 (slightly important) 3 (important), 4 (moderately important), and 5 (very important). The factors will be the following;

1. Age
2. Gender
3. Race
4. Place of residence
5. Occupation
6. Socio-economic status
7. History of criminal violations convictions
8. History of criminal misdemeanor convictions
9. History of criminal felony convictions
10. Amount of previous arrests
11. Current crime
12. Number of victims
13. Prior history involving current crime
14. Other factor (list below)

The answers to the survey are then plotted, with the prosecutors (letters A-E) on the X-Axis and the importance of the factor given as a number (1-5) on the Y- Axis. Then the mean number for each factor is calculated.

Commented [GW2]: Each factor own graph

The next section is the open-ended questions. The purpose of these questions is to pick the prosecutor's brain, to see their answers/general attitude toward the topics and keep field notes. The open-ended questions serve as a launchpad for further conversation of the topic. The open-ended prompts are:

1. Why did you pursue a law degree?
2. Did you see yourself in this position while still in law school?
3. Has your view of the justice system changed from before you began this job? If so, why?
4. What are some important lessons you've learned from your work?
5. Are you familiar with the concept of implicit bias? If so, how do you think it impacts your decisions at work? Do you know of any strategies to reduce implicit bias?
6. Are you familiar with the concept of prosecutorial discretion?
7. Do you think prosecutors should have more/less/or the same amount of discretion they have now?
8. I'm going to read a quote (below) and then I'd like your general opinion on it.
9. How much potential for misconduct is there. What are the chances of getting caught?

Each open-ended question should lead to a discussion, not just about the question at hand, but also about the topics that naturally stem from the conversation.

Results

The sample consisted of five active New York State prosecutors, a mix of District Attorneys as well as Assistant District Attorneys. The prosecutors were made aware that any

answers would be anonymous and were encouraged to answer candidly. The time of each interview was about one hour and was held in a private space.

Survey

The survey consisted of thirteen distinct factors as well as an open-ended “other” category. The X-axis consists of which prosecutor (A-E) was interviewed, and the Y-axis consists of the importance (1-5) the interviewed prosecutor gave.

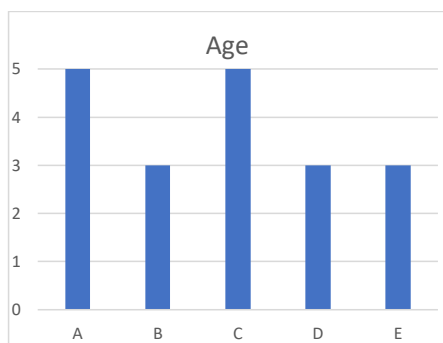


Figure 1

The first factor is how much the offender’s age impacts their charge/ plea bargain. Those who scored a 5 on this factor stated that age is especially important to decisions in cases of extremely young offenders as well as in cases of extremely old offenders. Those prosecutors believe that when an offender is on either extreme of the age spectrum, the offender will typically receive a lighter charge/ plea deal. Someone who is young will be treated more carefully “because they have their whole life in front of them still, they shouldn’t be stuck in the system if they can still change”, according to one prosecutor. On the other end of the spectrum are elderly offenders, who for many a jail sentence could last the rest of the elderly offender’s

life. The prosecutors were diligent to mention that leeway based on age will only occur in less serious or non-violent crimes. The more serious the crime, the less age affects the charging/ plea bargain. The average score given in this category was 3.8.

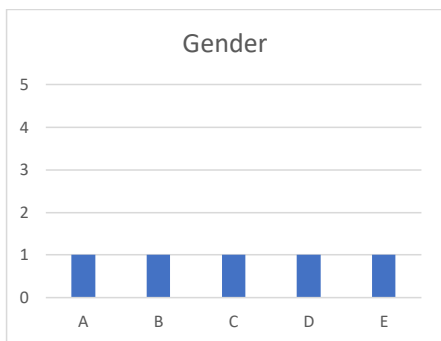


Figure 2

Gender was unanimously rated as not at all important. Every prosecutor stated that they decide what to charge and what kind of offer to make are completely independent from an offender's gender, and that in no circumstance would someone's gender affect the prosecutor's decision. The average score given in this category was 1.

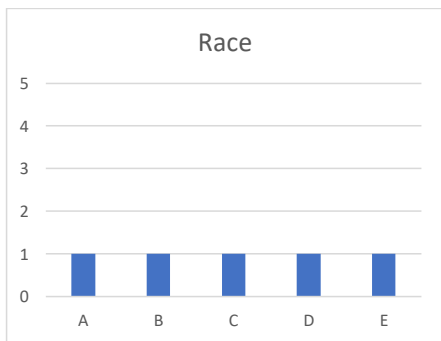


Figure 3

Race was unanimously scored as a 1, meaning race is not at all important to the prosecutors' decision-making process. While prosecutors deal with offenders from every race and ethnic background, the prosecutors interviewed state that race never comes into the picture when the time to charge/ offer a plea deal comes, and oftentimes the offender's race is not immediately identifiable. The average score given in this category was 1.

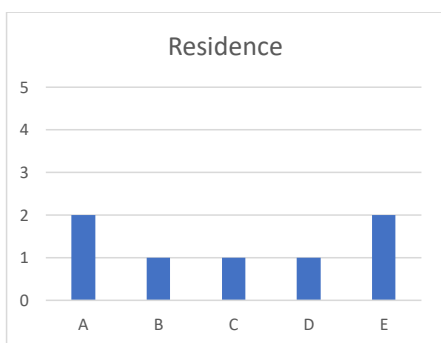


Figure 4

Place of residence is not an important factor when it comes to a prosecutor making charging/ plea bargaining decisions. The only cases when it would matter is for a minor offense, like a traffic ticket, and the offender lives many hours away or in a different state. The trouble the offender would need to go through to contend the charge “isn't worth it for such a small issue” and oftentimes it is easier for the offender to be given more leniency. The average score given in this category was 1.4.

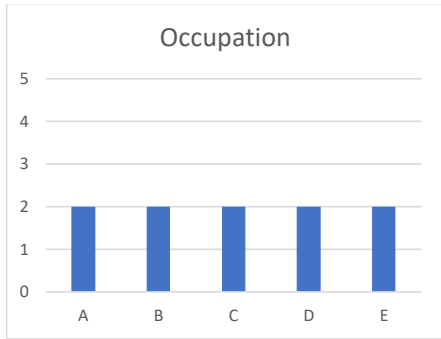


Figure 5

The factor of “occupation” was unanimously given a score of 2, meaning the prosecutors interviewed regard occupation as “slightly important” when it comes to charging/ plea bargaining. The reasons were all similar; prosecutors must take special care when the occupation of the defendant is a police officer, judge, or other similar occupation. While this may not affect the actual charges/ plea deal offer, it occasionally changes the way prosecutors must approach the case. Another reason occupation factors into prosecutor’s decisions is that oftentimes offenders have jobs that require transportation, and some cases have outcomes that restrict the offender’s transportation (i.e. taking away the offender’s license). Prosecutors must be aware of when this occurs, as it directly affects an offender’s ability to pay restitution, court fees, etc. The average score given in this category was 2.

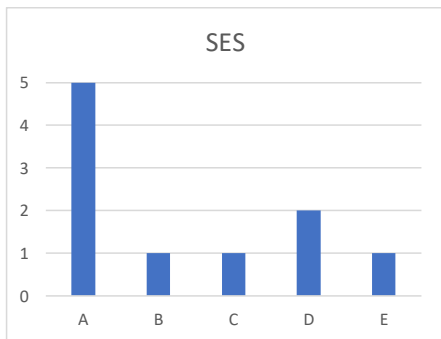


Figure 6

Socioeconomic Status (SES) is “extremely important” to one prosecutor, “not very important” for another, and “not at all important” for the rest. The two prosecutors who rated SES as more than “not at all important” shared the same reasoning. SES only matters in certain cases, such as a low SES individual committing petty theft of food, clothing, or other basic essentials. In these cases, a prosecutor may charge a lesser crime, or none at all if the crime was minor enough, due to the prosecutor’s understanding of what drove the offender; necessity not greed. The difference between one prosecutor rating a “2” and one prosecutor rating a “5” is mostly due to how heavily one’s conscious effects decisions made in these cases. The average score given in this category was 2.

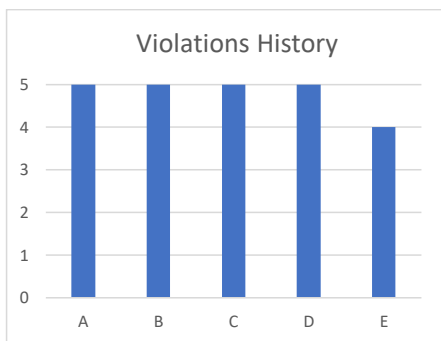


Figure 7

The offender’s history of violations convictions was rated as “very important” by all but one prosecutor who rated it “moderately important”. This factor is part of a larger more important issue, the offender’s criminal history. Criminal history is important as it gauges how likely the offender is to commit more crimes. If the offender has a long criminal history, it is more likely that the offender will commit another crime in the future. If the offender has a criminal history that is short or nonexistent, it can indicate that the offender is not inclined

toward a life of crime and may not engage in further criminal behavior. The reason one prosecutor rated this factor a “4” is that violations are the least severe criminal conviction and are only for very minor offenses, so violation convictions are given less weight than other convictions. The average score given in this category was 4.8.

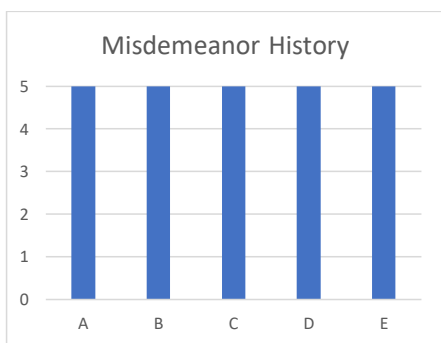


Figure 8

Misdemeanor conviction history was rated unanimously as “very important” by each prosecutor. For the same reasons that “violations history” was important, misdemeanor history is important; it is a part of an offender’s criminal record. Misdemeanors are more serious than violations, spanning a wide range of crimes from excessive speeding to assault. An offender with a long history of only misdemeanors is treated less leniently than an offender with a long history of only violations. The average score given in this category was 5.

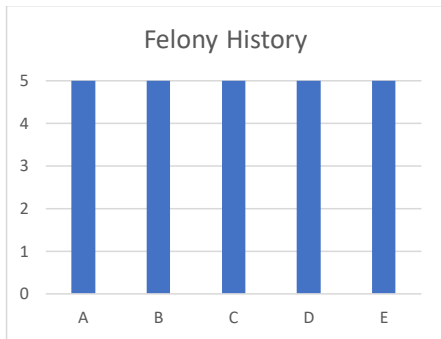


Figure 9

Felony conviction history was rated as “very important” by every prosecutor interviewed. The last piece of an offender’s criminal history, felony convictions are the most serious convictions. Every felony crime is a serious crime, consisting of murder, arson, sexual assault, and fraud. A person cannot receive too many felony convictions before eventually receiving a sentence that can extend up to life in prison. A habitual felony offender is extremely dangerous, but even someone with one or two felony convictions is much less likely to receive any leeway from prosecutors. The average score given in this category was 5.

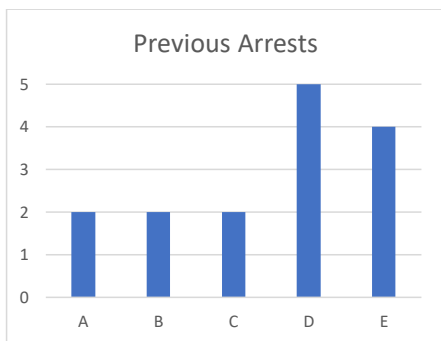


Figure 10

Previous arrests was rated “slightly important” by three of the five prosecutors. One other prosecutor rated it “very important”, while the other prosecutor rated it “moderately important”.

Those that rated “previous arrests” a “2” specified that while an offender’s previous arrests can give a very general overview of the offender’s behavior, the amount of previous arrests and what the arrest was for does not impact the current case in any relevant way. The two prosecutors who rated “previous arrests” higher seem to mostly agree with the other prosecutors, except for that in certain cases seeing if someone has been arrested for the same crime a multitude of times is important. This is especially true if the offender has received leeway in the past for the relevant arrests, the offender is less likely to receive leeway for the current crime. The average score given in this category was 3.

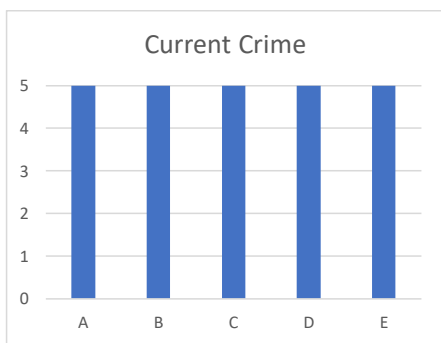


Figure 11

The current crime committed by the offender was rated as “very important” unanimously among prosecutors. The current crime determines or contributes to the determination of; where the offender attends court (i.e. local court or county court), the amount of bail, the possible sentence range if convicted, and occasionally which prosecutor oversees the case. The current crime is the entire reason the offender is being prosecuted. While other factors affect a prosecutor’s decision making, the current crime is the center of the case. The average score given in this category was 5.



Figure 12

The number of victims involved in the crime was rated as “very important” by the majority of prosecutors, and “important” by the remaining prosecutors. The reasoning given by every prosecutor was similar. The number of people affected by the crime usually impacts the leeway the prosecutor is willing to extend. The more victims there are, the less leeway there is. A prosecutor is less willing to make the criminal justice system easier for the offender if that offender intruded upon the lives of many. The average score given in this category was 4.2.

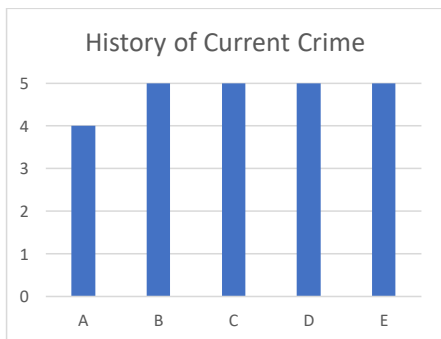


Figure 13

The history of the offender and the current crime was rate as “very important” by all but one prosecutor who rated it “moderately important”. All the prosecutors stated that the “history of the current crime” factors in because it demonstrates how likely the offender is going to

commit the current crime again, if given the opportunity. If a person has five prior petty larceny convictions and is currently being accused of petty larceny, the prosecutors will show little to no leeway for this person. Having many convictions of the same crime demonstrates to prosecutors that no amount of leeway or discretion will cause the offender to stop committing the crime in question. The average score given in this category was 4.8.

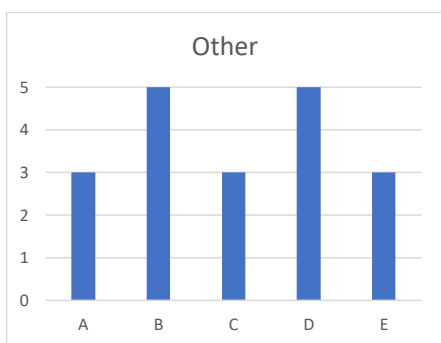


Figure 14

The other category had varying responses that changed from individual to individual, though there are some common themes. Prosecutor A stated that besides the above factors, offender’s demeanor in court also matter, attaching a rating of “important”. Prosecutor A stated that if an offender enters the courtroom and yells demands at the judge/ prosecutor such as “get rid of this ticket right now”, Prosecutor A is now less likely to dismiss, or even reduce, the ticket. Prosecutor B had an “other” factor of “mental health”, meaning the offender’s mental health, attaching a rating of “very important”. Occasionally Prosecutor B must deal with people with learning disabilities who typically commit minor offenses. The line that Prosecutor B drew in the sand between treating the offender like one with “normal” mental health or allowing more leeway is if the offender can understand the difference between right and wrong. Prosecutor B stated that in minor offenses it is almost futile to prosecute someone who cannot understand the

difference between right and wrong, since the offender genuinely will not understand that the offense in question is a crime that should not be repeated. Prosecutor C had an “other” factor of “who the victim is”, attaching a rating of “important”. Prosecutor C went on to clarify that the offender will receive less leeway if the victim is a vulnerable population, as in the elderly, children, and those with mental health issues. Prosecutor D had an “other” factor of “willingness to admit wrongdoing” assigning a rating of “very important”. Prosecutor D stated that when an offender is willing to admit that his or her actions were wrong, should not be repeated, and is willing to accept punishment for the offense, then Prosecutor D will extend more leeway toward the offender. Prosecutor D thinks that people can make mistakes and change for the better, if the offender can attain the above requirements previously laid out, and that someone who is willing to change should be given the opportunity to. Finally, Prosecutor E had three “other” factors which each received a rating of “important”. Those three factors, which all rely on similar reasoning, are “addiction”, “mental health”, and “behavioral issues”. Each of these factors implies that Prosecutor E will be less harsh on an offender that committed a crime due to issues that keep people from being in full control of their own actions. Those with addiction oftentimes commit crimes to obtain more drugs to deal with withdrawal and other similar symptoms. Those with mental health issues, as well as those with behavioral issues, cannot “think things through” as well as the average person, and therefore has less self-control, which leads to offending. As mentioned before, sometimes those with mental health issues cannot even understand the difference between right and wrong, between legal and illegal. The average score given in this category was 3.8.

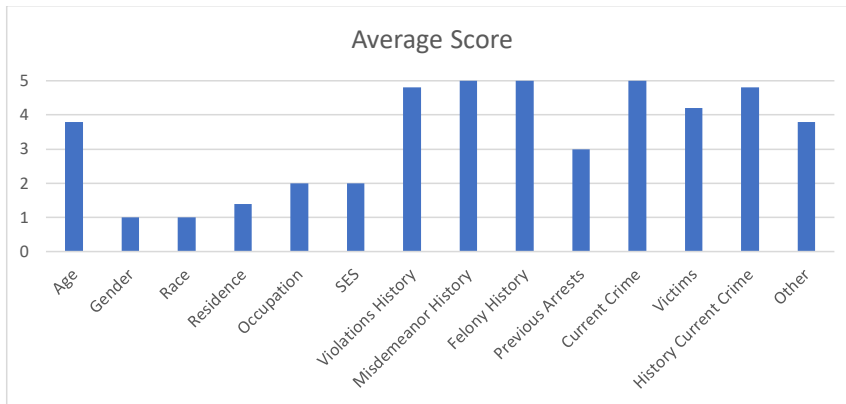


Figure 15

Open-ended

Questions 1 & 2: “Why did you pursue a law degree?”/ “Did you see yourself in this position while still in law school?”

The prosecutors that were interviewed had many different reasons as to why they sought after a law degree. A majority of the prosecutors answered that they went to law school out of their interest in law, one specifically attended law school in order to become a prosecutor. One prosecutor attended law school because of family expectations, and the last attended because “it would make more a difference in the world than my journalism degree.” Once starting law school, four of five of the prosecutors stated that a serious interest in prosecution grabbed hold. The overall reasoning between the four is that the prosecutors in question have always been “pro-prosecution”, having an interest in criminal law but none in defense work. The prosecutor who did not imagine being a prosecutor while in law school stated that they had no interest in criminal law until several years of being a general practitioner first.

Commented [GW3]: Factors matter less and less the more severe the crime is. Have less opportunity for discretion

Question 3: “Has your view of the justice system changed from before you began this job? If so, why?”

All prosecutors stated an affirmative to Question 3. Three of these prosecutors stated that the average person has no understanding of the courts and that one cannot truly understand the system without working in it. Discovering how pleas before trial work was an eye-opening moment for one prosecutor about how much there was to learn. One prosecutor stated that since becoming a prosecutor it’s become apparent that prosecutors have all the power over the defense attorney on a case, due to the nature of charging/plea bargaining. The final prosecutor stated that since becoming a prosecutor, they have adopted a cynical view of most pro-defendant legislation, like “raise the age” and new discovery provisions. This cynical view has stemmed from encounters with defendants who try to “game the system” with the pro-defendant legislation. This prosecutor also mentioned that the justice system is always changing with new legislation and attitudes, so the prosecutor’s view of the justice system is always changing.

Question 4: “What are some important lessons you’ve learned from your work?”

When answering this question a majority of the prosecutors said something unique. One prosecutor mentioned that “the slower you move, the more people think you know what you’re doing”, so being able to convey confidence/ be confident is the lesson learned for this prosecutor. One of the other prosecutors learned the lesson of compassion. There is a thin line that separates a prosecutor from a defendant, potentially just one bad mistake or oversight. Prosecutors need to know each case, take all the factors into consideration, and do the best job possible because that’s what anybody would want as a defendant. One prosecutor stated a lesson learned has been how the victim is not always the best source of information. One tends to want to believe the victim, but when victims are not truthful it is hard to prosecute. Then there is the issue of victims

being defendants in the past and prosecutors have to walk the line between properly vetting the story and interrogating the victim. The two prosecutors who had similar lessons learned on the job both stated that “you can’t take it home with you.” Some people you cannot change, you cannot save, and you just keep having to prosecute them. Both prosecutors said the real trouble is with young defendants who break the law constantly, gradually becoming more severe. The prosecutors want to help these people and stop their crimes and potential future imprisonment, but a prosecutor can only do so much to help.

Question 5: “Are you familiar with the concept of implicit bias? If so, how do you think it impacts your decisions at work? Do you know of any strategies to reduce implicit bias?”

All of the interviewed prosecutors were familiar with the concept of implicit bias and how it is different from explicit bias. All of the prosecutors also claimed that implicit bias does not impact the decisions made at work. One of the prosecutors does not think implicit bias exists, that all bias is explicit. This prosecutor holds that societal influences do not impact one’s thought process that any bias is the result of an individual’s character, not society. One of the prosecutors who believes implicit bias exists says that one may find more implicit bias in a defense attorney’s office. This prosecutor feels that some defense attorneys stereotype a defendant’s appearance and that defendant’s guilt. A clean-cut well-spoken individual in a suit is more likely to be perceived innocent by the defense attorney, and therefore receive more of the attorney’s attention, than a shaggy unbathed individual with tattered clothes. Two prosecutors, of the four who believe in implicit bias, could not identify strategies that could be used to reduce implicit bias. Additionally, two prosecutors stated that it is almost impossible to tell if implicit bias is affecting decisions. Three prosecutors successfully identified a strategy used to reduce implicit bias. Each prosecutor answered, in some form, that having someone else review the case was the

strategy to reduce implicit bias. Most of the prosecutors interviewed come from small offices that allows prosecutors to review each other's cases. When cases are reviewed by many people from different backgrounds, the decisions can be checked for bias. If some individual feels someone else's case is being handled wrong, that individual will speak up. Other times a prosecutor will not feel wholly confident in a decision and can just turn to a colleague and ask for a second opinion. Both prosecutors feel that larger offices do not have such an option, and combined with the increased workload at a larger office it is much more susceptible to implicit bias. The final prosecutor stated that oftentimes prosecutors do not know the race of the defendant until late in the case. This prosecutor also added that it is important to put prosecutors in a location that is familiar and understandable. A prosecutor from rural New York will not operate well trying to understand defendants in Queens and vice versa. Operating in a community one can understand and empathize with will take care of many unconscious issues plaguing prosecutors.

Question 6 "Are you familiar with the concept of prosecutorial discretion?"

All of the prosecutors stated familiarity with the concept of prosecutorial discretion. Many of the prosecutors stated that within the first couple weeks, the amount of power a prosecutor holds became apparent. A defense attorney is always playing "catch-up" when compared to the prosecutor, since the prosecutor makes most of the decisions about a case. One prosecutor stated that prosecutorial discretion is their "greatest stress" and that "everyone just wants to make the right decisions." One prosecutor recalled the first month as a prosecutor and the uncertainty that came with every decision made. Debating what decision to make, and then if that decision is "right" or "wrong", was overwhelming for this prosecutor. The prosecutor added

that the small size of the office allowed colleagues to help but wished there was more formal training.

Question 7: “Do you think prosecutors should have more/less/or the same amount of discretion they have now?”

All of the prosecutors answered that prosecutors should have the same amount of discretion. One of the prosecutor stated that there are already many rules regarding a prosecutor’s actions except for one additional rule that would require all discovery materials to be turned over to the defense, instead of just some of the discovery. Another prosecutor said that if one takes power of the prosecutor, the power would just be shift to another position. Both this prosecutor and another think that the criminal justice system succeeds because of how much power the prosecutor has. The police have power, the prosecutor has power, the judge has power, each are supposed to serve as checks and balances on the others. Taking power away from one upsets the balance. Defense attorneys and judges should be keeping an eye on the prosecutor to ensure the prosecutor does a fair job. A judge can turn down a plea offer made by the prosecutor for being too strict/not strict enough. Defense attorneys cannot do much for the case during prosecution but has many options when it comes to determining if a prosecutor violated the defendant’s rights.

Question 8: “I’m going to read a quote (below) and then I’d like your general opinion on it.”

“I’ll give you a deal if you don’t bust my ass. You start taking a bunch of depositions, filing a bunch of motions—fuck you. This system is overloaded as it is. Most of these people know if they’re guilty or not. . . . If you hold out [,] . . . if you don’t recognize what you’ve done and try to get through here with a little bit of facility, then I’m going to try to bust your ass.”

Three of the prosecutors interviewed stated, in some form, agreement for the sentiment of the quote but not for the delivery. One of the prosecutors in agreement stated that “There’s a constitutional right to file whatever you want, but there’s no constitutional right to a plea deal.” A different prosecutor went on to clarify their opinion, saying that “it isn’t that we’re going to punish them for filing motions, it’s punishment for frivolous motions.” Frivolous motions, to a prosecutor, denotes an abuse of the system and a lack of responsibility on the part of the defendant. A separate prosecutor said the deals this prosecutor offers typically stay consistent from the start. This prosecutor also had the unique viewpoint that punishing a defendant for frivolous motions is wrong since the motions are typically the defense attorney’s doing. Punishing a defendant would be wrong since the defense attorney is the one responsible. The prosecutors who expressed disagreement for the quote had the same reasoning. These prosecutors feel that prosecutors have to “do the work anyway” and that you cannot fault someone for pursuing an available option. These two prosecutors also feel that how cases are handled is not influenced by “how annoying the other side is”. One prosecutor went on to add that the quote garners some sympathy if the defense attorney is filing frivolous motions and playing the system, but prosecutors should not meet approach these issues using the same tactics.

Question 9: “How much potential for prosecutorial misconduct is there? What are the chances of getting caught?”

All of the interviewed prosecutors agreed there was potential for prosecutorial misconduct, with one going on to say that there is almost unlimited potential for misconduct. One prosecutor added that the vetting process to becoming a prosecutor is hopefully good enough to prevent appointing someone who will act maliciously. This prosecutor also thinks that there is more potential in a larger office where less attention is paid by other prosecutors on the case. While other prosecutors could catch instances of misconduct, it is much easier for a defense attorney or judge to spot prosecutorial misconduct. Three prosecutors used an example of a prosecutor discarding exculpatory material in the trash. The prosecutors state that throwing away important documents, like exculpatory material, would be easy to do. Defense attorneys obtain most of their information for trial from the prosecution, and if a prosecutor were to discard an important document, the defense attorney might never know. One prosecutor said someone could get away with throwing important documents away for a while but would eventually be caught. Three prosecutors also made sure to state the difference between prosecutorial misconduct and prosecutorial negligence/incompetence. Purposefully malicious attorneys are rare, with most instances of reported “misconduct” being the result of negligence or incompetence. The interviewed prosecutors think that prosecutorial mistakes from negligence and incompetence happen much more often. There are rules and safeguards, like timeframes for filing certain motions, to negligence, but perhaps there is not enough.

Discussion

The results of the survey indicate that misdemeanor history, felony history, and the current crime are the factors that prosecutors use when making decisions relating to charging and plea bargaining. At first glance the factors that weigh most heavily in decisions are factors that give an accurate depiction of the offender's criminal inclinations. Much of what makes a prosecutor change plea deals/ charges for the same offense is the likelihood of the offender reoffending. Misdemeanor history, felony history, and violation history give a complete overview of the offender's criminal history. Violation history is not as important due to the lack of severity of the crimes, but misdemeanor history and felony history both impact a prosecutor's decisions heavily. Two identical men are charged for petty larceny, one has a clean record and one has past charges for theft, petty larceny, and assault. The offender with the past history of similar crimes has shown that being caught and receiving punishment did not motivate the offender to stop offending. A prosecutor will look on that poorly and is less likely to use discretion to lower the potential sentence. On the other side, a previously upstanding citizen who has shown no inclination toward reoffending, looks favorable to the prosecution since the legal proceedings for the clean record individual can serve as a deterrent and cause the individual to not commit future crimes.

The current crime in the matter is clearly essential to the prosecutor's decisions. The difference between assault in the 3rd degree (a misdemeanor) and attempted murder (a felony) is so vast that in no way could both cases be handled in similar fashions. For the assault, a prosecutor may reduce the charge and most likely the punishment would be a few years of probation with no jail time. An attempted murder receives no such treatment. The initial charge would most likely not be reduced until later in the case, the punishment for being found guilty would be many years in prison. The less severe the crime the more willing the prosecution is to

use discretion. The next tier of important factors includes the history of the current crime and the age of the offender. History of the current crime ties back in with the previous point of how prosecutors perceive reoffending and how this relates to the use of discretion. The history of the current crime demonstrates to prosecutors the offender's propensity for the current crime. A long history of committing the same crime indicates to prosecutors that no amount of leeway/discretion will make this individual stop committing the crime at hand. Age is the next factor prosecutors consider when making work decisions. Prosecutors typically try giving younger offenders some sort of "break" using discretion. Prosecutors usually see the young offender as someone who is starting down the wrong path, someone who is making a mistake, and want to help the offending individual. If the offender can realize the severity of committing crimes and face the reality of incarceration, then hopefully the offender can be deterred from reoffending.

While the interviewed prosecutors each traveled a different journey to becoming a prosecutor, each of the attorneys decided to become a part of the criminal justice system and became a prosecutor, learning lessons along the way that only a prosecutor can. Becoming acquainted with the plea deal process, learning how to negotiate with defense attorneys, and realizing how defendants generally act, are all examples of lessons learned by prosecutors since starting the job. Besides work related lessons the prosecutors also gained many personal lessons, like how to portray confidence, how to properly vet a victim's story, and that even prosecutors do not have the power to save some people.

While each of the prosecutors understands implicit bias, one does not think implicit bias actually exists, and two could not name practices that could potentially reduce implicit bias. The remaining three prosecutors believed in implicit bias, believed implicit bias could impact work

decisions, and knew of strategies to reduce implicit bias. The strategy the prosecutors mentioned consists of coworkers checking each other's work and speaking up if something does not feel right. While this strategy does not reduce or eradicate the actual bias harbored inside people, it does reduce the effects one's implicit bias has. By running major decisions and case outcomes by other colleagues, the decisions get passed through a sort of filter. The additional people reviewing the decisions are the filter and are filtering out mistakes, oversights, and other potentially biased results.

All of the interviewed prosecutors stated familiarity with the concept of prosecutorial discretion. While the powers granted to prosecutors make performing the duties of a prosecutor easier, the powers also instill a sense of responsibility on the prosecutor. Prosecutors do not want to make blatantly wrong decisions or make unfair offers, and the potential of accidentally doing so causes a great deal of stress. Each prosecutor agreed that the amount of discretion given to prosecutors should stay the same. The interviewed prosecutors stated that there are not many more discretionary powers to give a prosecutor, besides deciding guilt and the sentence, but that any less power would lead to a decline in the effectiveness in the criminal justice system. Even with the opinion that prosecutors should keep the same amount of discretion, all of the interviewed prosecutors agreed there is potential for prosecutorial misconduct. Each prosecutor went on to specify that, given a malicious enough attorney, the potential to engage in misconduct and cause negative effects is huge. One prosecutor described the potential as unlimited. For example, a prosecutor could potentially shred exculpatory material and never give the defense a look at it, and according to one interviewee, the prosecutor would not be caught for a while. Defense attorneys typically rely on the prosecution for information gathering, but still have avenues to balance out the prosecutor's powers. A defense attorney primarily can accuse

the prosecutor of violating the defendant's rights at some point during the case. There are many actions that violate a defendant's rights, and through filing a potential violation of rights, a defense attorney has a judge more closely investigate the case and prosecutor's actions for misconduct. Judges can also mitigate prosecutorial misconduct through denying a prosecutor's plea, for reasons like a too harsh or too lax plea. Additionally, the police can arrest a prosecutor if the police suspect serious prosecutorial misconduct.

Conclusion

A prosecutor has the major powers of charging and plea bargaining. By weaving together charging and plea bargaining, a prosecutor wields discretion, the power to choose how to apply charging and plea bargaining to each case. But, discretion does not come without its own set of problems. Discretion can lead to individual prosecutors misusing the prosecutorial powers and abusing the discretion given with such powers. An example of prosecutorial misconduct is a prosecutor willfully offering an unfavorable plea deal or offering a black person a worse deal than what an identical white person would receive. Implicit bias is a source of a large part of prosecutorial misconduct. Most prosecutorial misconduct stems not from active maliciousness, but from passive issues like incompetence or implicit bias. Of the two passive issues, implicit bias is the more important one. Implicit bias does have some potential solutions that strike at the heart of implicit bias like, increased self-awareness training, increased positive interaction, and overall increasing empathy. Other potential solutions for prosecutorial misconduct are creating internal agencies that empower judges to supervise prosecutors further, hearing all cases of alleged misconduct and recording the details in a misconduct file, or creating new legislation. Of the interviewed prosecutors there were mixed reactions to the topic of implicit bias and more cohesive reactions to issues of prosecutorial misconduct. While some

prosecutors do not believe or know much about implicit bias, those prosecutors still engaged in anti-implicit bias strategies. The major strategy used by prosecutors was having colleagues check over the cases and decisions made. While this “filter” strategy does not reduce the implicit bias held by prosecutors, it keeps implicit bias from affecting case results too much. Between balancing a prosecutor’s powers, discretion, potential implicit bias, checking colleague’s work, “not taking it home”, the case load, family, and the not so polite meetings with defendants, prosecutors have a lot to juggle and even more to think about.

References

Babikian, J. (2015). Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines. *American Journal Of Criminal Law*, 42(2), 139-175.

Balisacari, R. C. (2014). Towards an Accountability Framework for the Exercise of Prosecutorial Discretion in Plea Bargaining. *Ateneo Law Journal*, 59(2), 379-410.

Boolell, S. (2013). Prosecutorial discretion and its challenges. *Commonwealth Law Bulletin*, 39(1), 5-15.

Boscardin, C. K. (2015). Reducing Implicit Bias Through Curricular Interventions. *Journal Of General Internal Medicine*, 30(12), 1726-1728.

Kades, M. (1997). Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice. *American Journal Of Criminal Law*, 25(1), 115.

Kang, J., Bennett, J. M., Carbado, D., Casey, P., Dasgupta, N., Faigman, D., & Mnookin, J. (2012). Implicit Bias in the Courtroom. *UCLA Law Review*, 59(5), 1124-1186

Knott, V. (2016). Reconsidering the Use of the Grand Jury: Eliminating Prosecutorial Discretion to Indict Law Enforcement Officers. *Thomas Jefferson Law Review*, 38(2), 202-232.

Lieb, D. (2014). Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future. *Yale Law Journal*, 123(4), 1014-1069.

Levine, S. J. (2016). The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion. *Duke Journal Of Constitutional Law & Public Policy*, 12(2)

Poulin, A. B. (1997). Prosecutorial discretion and selective prosecution: Enforcing protection after United States. *American Criminal Law Review*, 34(3), 1071.

Standen, J. (1993). Plea Bargaining in the Shadow of the Guidelines. *California Law Review*, 81(6), 1472.

Work, M. (2014). Creating Constitutional Procedure: Frye, Lafler, and Plea Bargaining Reform. *Journal Of Criminal Law & Criminology*, 104(2), 457-487.