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Authors

Wright, Megan S

Cain, Cindy L

Baughman, Shima Baradaran

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Dimensions of Prosecutor Decisions: Revealing Hidden Factors with Correspondence Analysis

Megan S. Wright,^{*} Cindy L. Cain,^{**} and Shima Baradaran Baughman^{***}

Despite the significant impact of prosecutorial discretion on criminal justice outcomes, there are very few large-scale studies of state and local prosecutor decision-making. Our previous empirical research demonstrated that a defendant's race and class do not affect prosecutorial charging decisions and revealed a gap in the literature about factors that do influence prosecutorial charging decisions and sentencing recommendations. Accordingly, we designed a study to obtain more information about prosecutor discretion and decision-making. Over 500 prosecutors from across the United States completed our vignette-based experiment and survey, which produced quantitative and qualitative data. We transformed these data to use Correspondence Analysis (CA), an empirical method that allowed us to identify associations between prosecutors' charging decisions and sentencing recommendations for a hypothetical defendant and the prosecutors' individual characteristics, office and jurisdiction characteristics, and the factors they described as important to their decision-making. Our

^{*} Professor of Law, Medicine, Sociology, and Bioethics, Penn State Law and Penn State College of Medicine; Adjunct Assistant Professor of Medical Ethics in Medicine at Weill Cornell Medical College. Thanks to Veronica Rosenberger for assistance with qualitative data analysis and Jacob Schuman for helpful feedback on a previous draft. Christopher Robertson collaborated with us in earlier scholarship and was instrumental to the design of the study on which this research is based, and we are thankful to him for his feedback on the present study.

^{**} Associate Professor of Sociology, University of Alabama at Birmingham.

^{***} Woodruff J. Deem Professor of Law at BYU Law School and Distinguished Fellow at the Wheatley Institute. We thank the Yale University Institution for Social and Policy Studies for their support of this project (Yale ISPS ID P20-001). We appreciate the feedback received at the Annual Center for Empirical Legal Studies Conference hosted at the University of Michigan. Special thanks to John Rappaport, Sonja Starr, Carissa Hessick, Darryl Brown, Sim Gill, Andrew Ferguson, Jeffrey Bellin, L. Song Richardson, Cathy Hwang, Andy Hessick, Christopher Griffin, Ron Wright, and John Pfaff. I am grateful for research assistance from David Griffiths, Mason Spedding, Lillian Kwok, and Morgan Bronson. We are thankful to all of the prosecutors nationally who participated in this experiment. IRB 69654 (University of Utah).

analysis shows two dimensions of prosecutor decisions—Punitive vs. Therapeutic Sentence and Most Severe Criminal Record vs. Least Severe Criminal Record—and we mapped the prosecutor decisions onto these dimensions. Our results also reveal factors associated with prosecutor decisions about charges and whether to (i) defer prosecution or suspend sentences, (ii) recommend a monetary penalty, (iii) recommend a term of confinement, or (iv) seek alternative sentences, and we discuss these findings in the context of effects on recidivism.

Introduction.....	273
I. Review of Prior Research on Prosecutorial Decision-Making.....	276
A. Research on Felony Charging	276
B. Research on Deferring Prosecution and Suspending Sentences.....	278
C. Research on Monetary Penalties and Other Financial Conditions	283
D. Research on Incarceration.....	285
E. Research on Alternatives to Traditional Sentences	291
II. Data and Methods	296
A. Description of Sample and Prior Studies	297
B. Correspondence Analysis	300
III. Results.....	303
A. Interpreting CA Figure.....	303
B. Variables Associated with Recommending Confinement	305
C. Variables Associated with Recommending a Monetary Penalty.....	306
D. No Variables Associated with Charging a Felony	306
E. Variables Associated with Recommending Deferred Prosecution or Suspended Sentence	307
F. Variables Associated with Recommending Additional or Alternative Consequences	307
IV. Discussion and Limitations	309
A. Deciding to Charge a Felony.....	309
B. Deferred Prosecution, Suspended Sentences, and Lack of Physical Injury	310
C. Monetary Penalties and Harm to the General Public.....	313
D. Confinement and Teaching a Lesson, Presence of a Weapon, Impact on Victim, and Probable Cause.....	313
E. Alternative Sentences and Larger Jurisdictions, Victim Input, Mental Health, and Plea Bargaining.....	314
F. Limitations	316
Conclusion	317
Appendix.....	319

INTRODUCTION

Prosecutorial discretion is integral to the criminal justice system and an important component in criminal punishment.¹ But there is much yet unknown about how prosecutors exercise their discretion, particularly when making charging decisions and sentencing recommendations. Contrary to the majority of observational research, our prior empirical research found that there is not a detectable correlation between a defendant's race and class and prosecutorial

1. See, e.g., Albert Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing*, 126 U. PENN. L. REV. 550 (1978).

decision-making, leaving open questions about factors responsible for influencing prosecutorial discretion and criminal justice outcomes.² These outcomes include a prosecutor's decision to charge a felony; defer prosecution or suspend a sentence; and recommend a financial penalty, jail time, or an alternative sentence. Building on our previous research,³ we analyze the results of our survey of over 500 prosecutors across the United States and present findings to provide insight into some of the significant questions surrounding prosecutorial discretion, including influential factors.

Our survey provided prosecutors with vignettes containing police reports, witness statements, a description of an offense, and a charging statute. Our survey then asked the prosecutors how they would charge the given case and what punishments, if any, they would recommend. We examine how prosecutors' individual and job characteristics (e.g., length of time they have served as a prosecutor, jurisdiction size, office size, etc.) and reasons given for their charging decisions and sentencing recommendations correspond with their charging and sentencing recommendations. We analyzed the survey results using a technique called Correspondence Analysis (CA), an exploratory method most useful for generating new hypotheses. This Article represents just the second time this novel empirical approach has been used in the law review literature.⁴

In addition to demonstrating a novel analytical technique, this Article presents several novel findings. First, given the vignettes presented to respondents, our analysis shows that there are two dimensions to prosecutor charging decisions and sentencing recommendations. The primary dimension is the difference between traditional sentences for criminal offenses, such as incarceration or monetary penalties, compared to alternative sentences, such as community service or drug court. The second dimension is the difference between a severe criminal record (as indicated by a felony charge) compared to a less severe criminal record (as indicated by a deferred prosecution and a suspended sentence).

Second, our findings shed light on factors associated with deferred prosecution, which, despite being regularly used by state prosecutors, is an understudied area of the law.⁵ We found that the work setting and job experience

2. Christopher Robertson, Shima Baradaran Baughman & Megan S. Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16 J. EMPIRICAL LEGAL STUD. 807, 808, 816–18 (2019) (considering racial bias in prosecution).

3. *Id.*; Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 101, 124–32 (2022); Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133 (2022).

4. Martin Gelter & Mathias Siems, *Letting Companies Choose Between Board Models: An Empirical Analysis of Country Variations*, 43 U. PA. J. INT'L L. 137, 172 (2021) (“To our knowledge, correspondence analysis has not yet been used as a tool for comparative law . . .”).

5. Though many of the state prosecutors we surveyed requested a deferred prosecution agreement (DPA), the literature on deferred prosecution assumes that these agreements are not offered to individuals and are only used in corporate criminal settlements. *See, e.g.*, Jon May, *Non-Prosecution, Deferred Prosecution, and Pretrial Diversion Agreements: Just Say No to Pleas*, 46 CHAMPION 40, 40 (2022) (“Lawyers hear almost nothing about the application of DPAs to individuals because individual liability is rarely disposed through a DPA.”); Paola C. Henry, *Individual Accountability for Corporate Crimes*

of prosecutors was associated with their decision to defer prosecution and suspend sentencing. Both decisions were associated with more experienced prosecutors, head prosecutors, and prosecutors working in smaller offices. Deferred prosecution was also associated with considering the financial state of the offender and noting the absence of injury in the provided vignettes.

Third, we identified specific factors associated with recommending monetary penalties or confinement and found that given the results of existing empirical research, prosecutors' stated reasons for charging decisions and traditional sentencing recommendations likely will not lead to the outcomes they hope to achieve. For instance, 65% of the prosecutors who recommended a monetary penalty for the individual described in the vignette did so because they determined that the offense harmed the public. What respondents may not have considered, however, is that according to empirical research, imposing a monetary penalty may increase harm to the public by increasing poverty and recidivism.⁶ Another example of prosecutors charging against the weight of empirical evidence is in their assertions that they were using a term of confinement to teach the offender a lesson. Though 30% of prosecutors who recommended a term of confinement stated that they hoped it would teach the defendant a lesson, the research is clear that such an approach is unlikely to be successful. Studies have shown that rather than teach a low-risk, first-time offender to avoid crime, even a short period of confinement can increase recidivism. Overall, it seemed that the prosecutors we studied either may not have been aware of or were not sensitive to the empirical data on the effects in their charging decisions.⁷

Fourth, we found that recommending alternative sentences like community service, drug courts, and mental health courts was associated with respondents working in a large jurisdiction (greater than 500,000 residents) as well as respondents who considered the offender's mental health, discussed plea bargaining, and considered victim input. We discuss these and other original findings from the CA throughout this Article.

This Article proceeds as follows. Part I surveys existing literature on prosecutorial decision-making about charging and sentencing with a primary focus on the effects of such decisions on recidivism. Part II describes our study sample, design, and method of analysis. Part III presents results from our Correspondence Analysis. Part IV discusses our results and notes study limitations. We conclude by discussing the implications of our results and suggesting directions for future research.

After the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform, 6 AM. U. BUS. L. REV. 153, 157 (2018) (noting that DPAs are now rarely used to encourage individual rehabilitation and are not used frequently in individual cases). At the very least, most of the data on deferred prosecution is in the corporate space, not in the criminal arena.

6. See *infra* notes 60–78.

7. Because of the empirical nature of this Article, we focus primarily on utilitarian theories of punishment and on offender recidivism.

I. REVIEW OF PRIOR RESEARCH ON PROSECUTORIAL DECISION-MAKING

This Part reviews the legal and scholarly literature on prosecutor decisions to (a) charge a felony, (b) defer prosecution or recommend a suspended sentence, (c) recommend a monetary penalty, (d) recommend incarceration, or (e) pursue alternatives to traditional sentences. Much of this literature focuses on the association of these prosecutor decisions with recidivism or other harmful external consequences associated with prosecutorial felony-charging and incarceration.

A. Research on Felony Charging

Prosecutors are legally permitted to charge a felony (used here as offenses punishable by imprisonment for more than a year⁸) anytime the law supports it. But despite the severity of potential criminal punishments, guidance available to prosecutors about when to charge a felony is inconsistent. The result is that the severity of the charge brought is often only limited by the prosecutor's perception of evidence strength. Independent of legal charging limitations, less experienced prosecutors tend to bring more serious charges than more experienced prosecutors. Prosecutors may also decline to bring a charge, bring a misdemeanor charge instead of a felony charge, or otherwise avoid labeling an offender (adult or juvenile) as a felon—all of which result in decreased recidivism.

Guidance as to when prosecutors should charge a felony is inconsistent. The American Bar Association (ABA) directs prosecutors “to pursue public safety both by pursuing appropriate criminal charges of appropriate severity” and to “not pursue criminal charges in appropriate circumstances.”⁹ The NDAA directs prosecutors to charge based on the “accused’s criminal activity” and based on what “can be substantiated by admissible evidence at trial.”¹⁰ And U.S. Attorneys are directed to charge “the most serious, readily provable offenses.”¹¹ As the potential penalty severity increases, prosecutors are correspondingly motivated to ensure that the evidence is sufficiently strong to support their sentencing choice.

Admittedly, some of the contradiction in guidance for prosecutors can be attributed to differing institutional opinions around incarceration. Additionally, the decision to charge a felony may be part of a prosecutor's plea-bargaining strategy—prosecutors often initially pursue serious charges with the goal of inducing a guilty plea to lesser charges. But outside the applicable law, the only functional legal limitation on a prosecutor's decision to pursue a felony charge is the strength of the available evidence.

8. *Felony*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2020).

9. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(B) (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [https://perma.cc/YK8G-9HB8].

10. NAT'L PROSECUTION STANDARDS § 4-2.2 (NAT'L DIST. ATT'YS ASS'N 2009), https://nda.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf [https://perma.cc/P8C4-FQSF].

11. U.S. DEP'T OF JUST., JUST. MANUAL § 9-27.300 (2020), <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.300> [https://perma.cc/U9JC-TUGU].

Independent of legal charging limitations, prior research demonstrates that the severity of the pursued charge is negatively associated with the experience of the prosecutor. That is, less experienced prosecutors generally tend to bring more serious charges than more experienced prosecutors. Reasons for this include that less experienced prosecutors are afraid of making mistakes, are wary of being “duped” by the defendant or defense attorneys, and have a desire to punish.¹² Studies show that more experienced prosecutors view their roles as “arbitrators, negotiators, ‘BS meters,’ and advocates” and charge accordingly.¹³

Instead of charging a felony, prosecutors (usually more experienced prosecutors) may decide not to bring any charge or to charge the offense as a misdemeanor instead. Declination may be more likely when the offense is “trivial,” the victim is not participating in prosecution, there is a lack of evidence, or the defendant lacks a prior record.¹⁴ A prosecutor’s decision to either decline to charge an offense or to charge an offense as a misdemeanor rather than a felony may decrease recidivism. In 2014, California passed Proposition 47 (Prop 47), which required prosecutors to charge certain felonies, such as low-level drug and property offenses, as misdemeanors.¹⁵ Not only did the prison population in California drop by roughly 15,000 prisoners after Prop 47 was implemented, but recidivism also decreased.¹⁶

Even if defendants are not sentenced to prison, there may be a negative effect on recidivism simply by labeling them as “felons.”¹⁷ Chiricos, Barrick, Bales, and Bontrager found that defendants who were labeled as felons had higher recidivism rates than those who were not formally assigned guilt until after probation was completed.¹⁸ And this observation is not limited to adult defendants. Bernburg, Krohn, and Rivera found that labeling juveniles as criminals was associated with an increase in subsequent criminal activity.¹⁹ In this study, teens who experienced “juvenile justice intervention” were “substantially more likely than their peers to become members of a gang in a successive period.”²⁰ In an earlier study, Bernburg and Krohn also found that official intervention (a means of labeling individuals as

12. Fan Li, *Youthful Indiscretion: The Structural Challenge of Inexperienced Prosecutors*, in CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 1, 115 (Melba V. Pearson ed., 2020); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065, 1084–88 (2014).

13. Li, *supra* note 12, at 115.

14. Angela Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 409 (2001); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 262–66 (1980).

15. MIA BIRD, MAGNUS LOFSTROM, BRANDON MARTIN, STEVEN RAPHAEL & VIET NGUYEN, *THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM*, (Pub. Pol’y Inst’t. Cal. ed., 2018).

16. *Id.* at 5.

17. Ted Chiricos, Kelle Barrick, William Bales & Stephanie Bontager, *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547 (2007).

18. *Id.* at 570.

19. Jón Gunnar Bernburg, Marvin D. Krohn & Craig J. Rivera, *Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory*, 43 J. RSCH. CRIME & DELINQUENCY 1, 81 (2006).

20. *Id.*

criminals) for juvenile offenders “affect[ed] educational attainment by decreasing the odds that those labeled will graduate from high school.”²¹ Thus, although prosecutors are permitted to charge a felony whenever the law supports it, research generally demonstrates a positive association between felony charges and increased recidivism.

B. *Research on Deferring Prosecution and Suspending Sentences*

After an offender has been charged, the prosecutor may agree to defer prosecution or suspend a sentence. A deferred prosecution occurs when a defendant pleads guilty, but the official judgment is delayed until after the defendant completes probation, rather than incarceration.²² If the defendant successfully completes probation without any violations, the plea is changed to not guilty and dismissed, fully removing the criminal conviction. In contrast, a suspended sentence occurs when the defendant pleads guilty and an official criminal conviction is entered. The judge may then suspend the incarceration sentence (often as a part of negotiations with the prosecutor) by replacing it with probation. Upon successful completion of probation, the guilty plea is not expunged. Because deferred prosecution and a suspended sentence result in the defendant avoiding incarceration, both are substantially more cost-effective than confinement.²³ In the United States, the average annual cost to supervise someone within the community following sentencing, such as probation for a suspended sentence or deferred prosecution, costs \$4,392 as compared to \$34,770 to incarcerate someone.²⁴ Benefits of alternative adjudication practices extend beyond comparative costs. Deferring prosecution and suspending sentencing both result in decreased

21. Jön Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 CRIMINOLOGY 1287, 1311 (2003).

22. But as Love and Schlüssel note in their report, “[D]eferred adjudication is designated variously in state codes, and varies also in how it is administered from state to state.” Margaret Love & David Schlüssel, *The Many Roads to Reintegration*, COLLATERAL CONSEQUENCES RES. CTR. 64 (Sept. 2020), <https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf> [<https://perma.cc/GA4B-9UHU>]. See *id.* at 64 n.141 (“ARK. CODE ANN. § 16-93-1206 (“suspended imposition of sentence”); CAL. PENAL CODE §§ 1000, 1000.8 (“deferred entry of judgment”); COLO. REV. STAT. § 18-1.3-102 (“deferred sentencing”); 11 DEL. CODE ANN. § 4218 (“probation before judgment”); CONN. GEN. STAT. § 54-56e (“accelerated pretrial rehabilitation”); HAW. REV. STAT. § 853-1 (“deferred acceptance of guilty plea”); MD. CODE, CRIM. PROC. § 6-220 (“probation before judgment”); MASS. GEN. LAWS ch. 278, § 18 (“continuance without a finding”); N.Y. CRIM. PROC. § 170.55 (“adjournment in contemplation of dismissal”); N.D. CENT. CODE § 12.1-32-02(4) (“deferred imposition of sentence”); OHIO REV. CODE ANN. § 2951.041 (“intervention in lieu of conviction”); TEX. CODE CRIM. PROC. ANN. art. 42A.102 (“deferred adjudication community supervision”); UTAH CODE ANN. 77-40-104 (“plea in abeyance”); 18 U.S.C.A. § 3607 (“prejudgment probation”).

23. Rohan Lulham, Don Weatherburn & Lorana Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison with Full-Time Imprisonment*, 136 CONTEMP. ISSUES IN CRIME & JUST. 1, 13 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188708 [<https://perma.cc/44MG-2BAB>].

24. *Incarceration Costs Significantly More Than Supervision*, U.S. COURTS (Aug. 17, 2017), <https://www.uscourts.gov/news/2017/08/17/incarceration-costs-significantly-more-supervision> [<https://perma.cc/4RAP-CBLB>].

recidivism. As such, prosecutors (depending on their office resources and experience) are increasingly interested in pursuing deferred prosecution and suspended sentencing.

In 2022, the Collateral Consequences Resource Center launched a study on deferred adjudication, awarding each state a letter grade based on whether a deferred sentence was (1) accessible, (2) effective, (3) coordinated, (4) fair, and (5) administrable based solely on the texts of the statutes.²⁵ Since the 2020 edition of this report, all states now allow deferred adjudication to varying degrees.²⁶ States that stood out for their progressive deferred-adjudication statutes include Colorado, Maine, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia.²⁷ These states are characterized as providing “broad eligibility for deferred adjudication by type of offense and record of defendant, with sealing upon disposition.”²⁸ This provides courts and state prosecutors significant discretionary power to determine on a case-by-case basis who is eligible for probationary sentences.²⁹

Despite this trend toward expanded opportunity for deferred adjudication, there exist concerns that neither deferred prosecution nor a suspended sentence is a “tough” enough response to a criminal offense and either option will lead to additional crimes. But multiple jurisdictions have found that increased diversion does not appear to be associated with increased recidivism.³⁰ Indeed, much evidence points to the contrary: the choice to sentence an offender to deferred prosecution or suspended sentencing likely reduces the defendant’s risk of recidivism. Many studies have found that offenders sentenced to probation are less likely to recidivate than those sentenced to incarceration.³¹ Others have found that when compared

25. Margaret Colgate Love, *The Many Roads from Reentry to Reintegration*, COLLATERAL CONSEQUENCES RES. CTR. 13 (Mar. 2022).

26. *Id.*; see also Love & Schlüssel, *supra* note 22, at 66 (noting in 2020 that only Kansas and Wisconsin did not allow deferred adjudication and recognizing the fast adoption of deferred prosecution statutes because just two years prior in the 2018 report there were a total of thirteen states that prohibited deferred adjudication).

27. Love, *supra* note 25.

28. *Id.* at 85.

29. *Id.*

30. See, e.g., *Recidivism Among Iowa Probationers*, THE IOWA DIV. OF CRIM. JUV. JUST. PLANNING 1 (July 2005), <https://publications.iowa.gov/15032/1/Recidivism%20Among%20Iowa%20Probationers.pdf> [<https://perma.cc/3ZVA-ZU6H>]; Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 88 REV. ECON. STUD. 883, 899 (2021); Margaret Love, *Study: Texas Diversion Provides Dramatic Benefits for People Facing Their First Felony*, COLLATERAL CONSEQUENCES CTR (Feb. 23, 2021), <https://ccresourcecenter.org/2021/02/23/study-texas-diversion-provides-dramatic-benefits-for-people-facing-their-first-felony/> [<https://perma.cc/54VF-E76F>]; Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL’Y INITIATIVE (Sept. 2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/RG4J-ZNHQ>]; José Cid, *Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates Between Prison and Suspended Prison Sanctions*, 6 EUR. J. CRIMINOLOGY 459, 459 (2009); Lulham et al., *supra* note 23, at 1.

31. See Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 329 (2002); David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen & Shawn D. Bushway, *Short- and Long-Term Effects of Imprisonment on*

with probation, incarceration increased the chances of an individual reentering the prison system within five years of release by 10-14%.³² Lulham, Weatherburn, and Bartels found that offenders receiving a suspended sentence were not more likely to reoffend than defendants sentenced to prison.³³ In fact, those sentenced to prison reoffended more quickly than those who received suspended sentences.³⁴ A Michigan study found that sentencing felons to prison rather than probation “had no significant effects on arrests or convictions for violent crimes after release from prison.” The study concluded that “imprisonment is an ineffective long-term intervention for violence prevention, as it has, on balance, no rehabilitative or deterrent effects after release.”³⁵ In sum, research suggests that suspending sentences decreases recidivism and does not create any public harm.

Given the demonstrated benefits of deferred prosecution and suspended sentences, others have argued that the alternatives’ positive effects could be even greater if made more widely available. The Prison Policy Initiative released a report in 2020 arguing that state restrictions preventing individuals charged with violent criminal offenses from accessing sentencing alternatives other than incarceration restricts the success of such alternatives by limiting their impact.³⁶ Ten states explicitly prohibit individuals charged with violent criminal offenses access to any sentencing alternatives, including suspended sentencing or deferred judgment, other than incarceration.³⁷ At the federal level, minimum sentencing guidelines often make a suspended sentence unattainable by requiring incarceration for violent crimes, particularly if an injury occurred.³⁸ O’Hear argues that these policies reflect “public and policymaker concern over the risk of violent recidivism.”³⁹ To prevent this risk, policymakers pass mandatory minimums and parole-eligibility restrictions against violent offenders because they are viewed as having the greatest risk of committing future violent offenses.⁴⁰ O’Hear notes that even though the few cases of violent recidivism have received disproportionately massive media attention and stoked

Future Felony Convictions and Prison Admissions, 114 PROC. NAT’L ACAD. SCI. 11103, 11104 (2017).

32. Harding et al., *supra* note 31, at 11106.

33. Lulham et al., *supra* note 23, at 10.

34. *Id.* at 7.

35. David J. Harding, Jeffrey D. Morenoff, Anh P. Nguyen, Shawn D. Bushway & Ingrid A. Binswanger, *A Natural Experiment Study of the Effects of Imprisonment on Violence in the Community*, 3 NATURE HUM. BEHAV. 671, 671 (2019).

36. Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL’Y INITIATIVE (Apr. 2020), <https://www.prisonpolicy.org/reports/violence.html> [<https://perma.cc/FJ7U-GCQ5>].

37. *Id.* (providing a map showing California, Oregon, New Mexico, Arkansas, Missouri, Tennessee, South Carolina, West Virginia, Michigan, and Pennsylvania as the states that block access to incarceration alternatives for violent offenders).

38. John Devendorf, *What is a Suspended Sentence?*, LAWINFO (May 2021), <https://www.lawinfo.com/resources/criminal-defense/sentencing/what-is-a-suspended-sentence.html> [<https://perma.cc/CT8L-2HYC>].

39. Michael O’Hear, *Managing the Risk of Violent Recidivism: Lessons from Legal Responses to Sexual Offenses*, 100 B.U. L. REV. 133, 136 (2020).

40. *Id.* at 138.

aggressive political response, support for this view (that violent offenders represent the biggest threat of violent recidivism) has received little scholarly attention.⁴¹

Similarly unsupported by current scholarly literature is the exclusion of violent offenders from suspended sentencing or deferred judgment simply for the incapacitation effect of preventing future injury. Evidence instead suggests that state prisoners convicted of violent offenses have, in fact, among the lowest rates of recidivism.⁴² The Bureau of Justice Statistics (BJS) found that during the first year following release, 39% of prisoners who served time for violent offenses were arrested for any type of offense, in comparison to 51% of those released after serving time for a property offense.⁴³ Even extending the time period from one to seven years following release, violent offenders were always less likely to be arrested for any offense in comparison to property, drug, or public order prisoners.⁴⁴ These findings support the theory that an act of violence may reflect only a singular moment in time rather than a violent behavioral trend that poses an ongoing threat to society.⁴⁵

Critics of this research may point to additional data, notably that violent offenders are more likely to be rearrested for subsequent violent crime than nonviolent offenders.⁴⁶ They argue that because the severity of the subsequent crime by a violent offender poses a greater risk to society, violent offenders therefore require more severe sentencing. Such a criticism is, however, inflated. In reality, the difference in violent recidivism between violent and nonviolent offenders is marginal. Whereas 40.3% of nonviolent offenders were rearrested for a violent crime, just 43.4% of violent offenders were subsequently arrested for a violent crime.⁴⁷ And neither is this difference, marginal as it is, entirely attributable to the violent or nonviolent status of the original offense. The difference may be alternatively explained by the longer incarceration sentences imposed on violent offenders, the criminal behavior they learned or that was reinforced while in prison, and the stigmatization of felons, all of which increase the risk of recidivism.

Skeptics may also point to a U.S. Sentencing Commission report examining violent federal offenders that strikingly contrasts with the findings of the BJS. The Commission concluded that “offenders who engaged in violent criminal activity . . .

41. *Id.* at 137 n.20 (referencing Bush’s 1988 presidential ad campaign against Dukakis for his release of Willie Horton on a weekend pass where he murdered a boy during a robbery, fled, stabbed a man, and raped a woman); see also Rachel Withers, *George H.W. Bush’s “Willie Horton” Ad Will Always be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018), <https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics> [<https://perma.cc/K5ET-KTMM>].

42. Jones, *supra* note 36.

43. Mariel Alper & Matthew R. Durose, *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014)*, BUREAU OF JUST. STAT. 10 (May 2018), <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/CH7R-4CEQ>].

44. *Id.*

45. Jones, *supra* note 36.

46. See also *Recidivism Among Federal Violent Offenders*, U.S. SENT’G COMM’N 3 (2019), https://www.usssc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf [<https://perma.cc/4D5K-PD7J>].

47. Alper & Durose, *supra* note 43, at 7, 11

generally recidivated at a higher rate, more quickly, and for more serious crimes than non-violent offenders.”⁴⁸ These findings may be partially explained by looking at the average lengths of federal and state sentencing. The average sentence length in a federal prison is over 12 years, whereas the average state prison sentence is only 2.7 years.⁴⁹ The different sentencing lengths affect the average age upon release, extent of criminal culture influence, defendants’ ability to reenter the job market, and other factors—all of which may explain the difference in state and federal recidivism rates for violent offenders.

Existing scholarship suggests that decisions to pursue deferred prosecution or suspended sentences compared to monetary penalties or terms of confinement may be affected by prosecutor office resources. In 2012, the Vera Institute of Justice released a report analyzing prosecutors in two counties, both serving under 100,000 residents.⁵⁰ The Vera analysis found that a variety of contextual constraints frequently influence prosecutors’ decisions, including a “lack of resources of the prosecutor’s office and the local court system,” sometimes leading prosecutors “to reject, dismiss, or amend charges in order to work within available resources limits.”⁵¹ Vera states that the resource constraints “could trump evaluations of strength of evidence, seriousness of the offence, and defendant’s criminal history, forcing prosecutors to make decisions that they might not consider ideal.”⁵² The Institute for Justice Research and Development asserts that the “goal for pre-charge and pre-plea programs is to reduce costs associated with processing defendants who pose a low risk to public safety and invest resources in processing defendants who pose a greater safety risk.”⁵³ The study concluded that suspended and deferred sentencing resulted in “allocating limited resources in a more efficient and effective way, improving intervention programming, reducing long-term recidivism risk, and successfully diverting low-level defendants out of the criminal justice system.”⁵⁴

Decisions to pursue deferred prosecution or suspended sentences compared to monetary penalties or terms of confinement may also be affected by prosecutors’ length of job experience. Although their study did not consider deferred or suspended sentencing, Wright and Levine studied 200 state prosecutors in eight offices to compare the decision-making of young prosecutors to experienced

48. *Recidivism Among Federal Violent Offenders*, *supra* note 46, at 3.

49. See Danielle Kaeble, *Time Served in State Prison, 2018*, BUREAU JUST. STAT. (Mar. 2021), <https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf>; *Quick Facts: Federal Offenders in Prison*, U.S. SENT’G COMM’N (Mar. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/BOP_March2021.pdf [<https://perma.cc/MYY3-RMGZ>].

50. BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – TECHNICAL REPORT 18* (2012).

51. *Id.* at 116.

52. *Id.* at 4.

53. Carrie Pettus-Davis, Matthew Epperson, Annie Grier, Megan Kraatz, Leon Sawh & Stephanie Kennedy, *An Implementation Guide: Deferred Prosecution Programs*, INST. FOR JUST. RSCH. & DEV. (Mar. 2020), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/deferred_prosecution_programs_implementation_guide.pdf [<https://perma.cc/PSH7-ALDQ>].

54. *Id.*

prosecutors.⁵⁵ That research refers to the “Young Prosecutors’ Syndrome” as the tendency of less experienced prosecutors to goad defendants into a trial, aggravate already overcrowded trial dockets, contribute to unnecessary courtroom delay, and “press for overly broad categories in their sentencing recommendations, when more individualized judgments could produce more proportional and economical sentencing.”⁵⁶ The study found that veteran prosecutors differ from their junior colleagues in that their “sense of balance inspires a prosecutor to economize, based on a pragmatic view of those times when a criminal sentence could add the most benefit for the public.”⁵⁷ An experienced “prosecutor focuses resources on exceptional cases, acknowledging that very few cases actually need to be tried for the criminal justice system to get results.”⁵⁸

Deferred prosecution and suspended sentencing are increasingly used by state prosecutors and may lead to better outcomes for offenders and society. These alternatives have the potential to decrease recidivism and improve outcomes for defendants. There is little existing information on the types of prosecutors and prosecutor offices more inclined to use deferred prosecution and sentencing. Our study sheds light on these questions for the first time, but more research would help our understanding of which prosecutors recommend deferred prosecution and sentencing and the impacts of these practices on criminal justice.

C. Research on Monetary Penalties and Other Financial Conditions

As another potential alternative to custodial punishment, prosecutors may seek to impose financial sanctions on criminal defendants by recommending a monetary penalty instead of confinement. Despite the attractiveness (at least to defendants) of a punishment option other than incarceration, arguments against the routine imposition of monetary penalties in the criminal context include the resulting contribution to national court debt, perpetuation of poverty–crime cycles, increased societal burden, and (as supported by empirical research) negative effect on recidivism.

Monetary penalties significantly affect the national court debt. In 2020, the national court debt total was at least \$27.6 billion dollars.⁵⁹ The Hamilton Project noted that the increase in monetary penalties resulting in such an outstanding debt is partially due to the rising expense of correctional, judicial, and law enforcement expenditures, alongside some jurisdictions’ heavy reliance on the courts for new revenue.⁶⁰

55. Wright & Levine, *supra* note 12, at 1069.

56. *Id.*

57. *Id.* at 1081.

58. *Id.*

59. Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUST. CTR. 5 (2021), https://finesandfeesjusticecenter.org/content/uploads/2021/04/Tip-of-the-Iceberg_Criminal_Justice_Debt_BH1.pdf [<https://perma.cc/98UF-TBTR>] (noting that twenty-five states and the District of Columbia did not provide debt totals, only fourteen states fully complied, and eleven states provided partial information).

60. Patrick Liu, Ryan Nunn & Jay Shambaugh, *Nine Facts About Monetary Sanctions in the Criminal Justice System*, THE HAMILTON PROJECT 1 (Mar. 2019), <https://www.brookings.edu/wp-con>

There is some debate as to whether financial conditions are better or worse than other sanctions for criminal offenses. One consideration is the close connection between crime and poverty. Many people in jail were raised in poverty.⁶¹ The Hamilton Project found that “more than half of all individuals with a felony conviction in Alabama owe more than \$5,000 each in criminal justice debt.”⁶² Fines imposed on defendants are not always paid in full, and nonpayment can lead to further incarceration.⁶³ This tremendous debt is often a significant factor in the cycle of poverty and reincarceration.⁶⁴ The study found that 1.5% of prison inmates were “reincarcerated due to their parole or probation being revoked for a failure to meet financial conditions” and that “roughly 20 percent of jail incarcerations were for failure to pay monetary obligations.”⁶⁵

Incarceration results in higher expenses for the government and eventually for tax payers.⁶⁶ Additionally, monetary sanctions can inhibit a person released from prison from integrating into society.⁶⁷ This is because their “[l]egal debt reduces access to housing, credit, and employment; it also limits possibilities for improving one’s educational or occupational situation.”⁶⁸ Reincarceration as a result of unpaid court debts generates costs to society through increasing corrections costs, “interrupting careers and housing, disrupting families, and harming job prospects.”⁶⁹ Further, if the potential gain from a crime is higher than the benefit of employment, an individual may be more likely to commit the crime to pay off the fine rather than work to pay off the fine.⁷⁰ Therefore, by imposing fines on defendants who will be unlikely to pay them, defendants could be sent further into poverty, causing more long-term public harm. Overall, monetary penalties are likely to bring people back into the criminal justice system, thereby increasing the odds of recidivism.⁷¹

Advocates of financial conditions note, however, that when monetary penalties rather than custodial punishments are used, they can be made “less desocializing, relatively economical, . . . easy to administer,” and more adaptable to the individual by using variable daily rates based on the defendant’s finances.⁷²

tent/uploads/2019/03/BailFacts_20190314.pdf [https://perma.cc/4FT4-AN4T].

61. NAT’L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 340 (Jeremy Travis, Bruce Western & Steven Redburn eds., 2014), <https://nap.nationalacademies.org/read/18613/chapter/1> [https://perma.cc/N5M3-W43R].

62. Liu et al., *supra* note 60, at 3.

63. Anubrat Prasai, Impact of Fines on Prison Recidivism (Apr. 14, 2017) (B.A. thesis, Colorado College).

64. Liu et al., *supra* note 60, at 10.

65. *Id.*

66. Prasai, *supra* note 63.

67. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 505, 506 (2011).

68. *Id.* at 507.

69. Liu et al., *supra* note 60, at 10.

70. Prasai, *supra* note 63.

71. Liu et al., *supra* note 60, at 1.

72. *Taking Monetary Punishments Seriously*, MAX PLANCK INST. FOR THE STUDY OF CRIME, SEC. & L. (2021), <https://csl.mpg.de/en/projects/taking-monetary-punishments-seriously> [https://pe

Zedlewski found that “day fines” could replace incarceration without disrupting the existing American court system and act effectively on a wide range of criminal offenses, including lesser felonies.⁷³ Because day fines are calculated based on the gravity of the offense and the offender’s daily income, they make for a deterrent as effective and more personalized than other criminal punishments.⁷⁴ Although there are early data supporting the efficacy of day fines, the current American monetary penalty system exacerbates economic disparities and increases the risk of recidivism.

There are conflicting findings about the connection between monetary fines and recidivism and deterrence. Moffatt and Poynton’s study found that fines have no deterrence effect, not even a marginal deterrent effect.⁷⁵ This suggests that the imposition of higher fines would not help the public any more than a lower fine. Similarly, Elvik and Christensen concluded that based on their examination of the cost of speeding tickets in Norway, higher fines do not reduce recidivism.⁷⁶ As the price of speeding tickets increased, speeding did not decrease.⁷⁷ However, Goncalves and Mello found that when compared to those who received a harsher ticket, those who received a more lenient speeding ticket were 25% more likely to receive a subsequent speeding ticket.⁷⁸

We do not know what factors lead prosecutors to recommend monetary penalties and whether individual, office, or jurisdiction characteristics or professional norms, ethics, or theories of punishment affect their decisions to pursue this type of penalty.

D. Research on Incarceration

Prosecutors may recommend incarceration because they believe that prison acts as a form of specific deterrence, they focus on the victim’s experience, a weapon was involved in the offense, or they experience resource restraints.⁷⁹ But where the goal of specific deterrence is discouraging the individual offender from recidivating, imprisonment is generally ineffective at achieving that aim. While some research suggests that there may be narrow exceptions (e.g., a short sentence for a low-risk defendant) relative to sentence length, confinement is no more likely to

rma.cc/3UFG-9HJN].

73. Edwin W. Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, NAT’L INST. FOR JUST. 10 (May 2010), <https://www.ojp.gov/pdffiles1/nij/grants/230401.pdf> [<https://perma.cc/U64X-RL9F>].

74. *Id.* at 2.

75. Steve Moffatt & Suzanne Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, NSW BUREAU OF CRIME STAT. & RSCH. 9–10 (2007).

76. Rune Elvik & Peter Christensen, *The Deterrent Effect of Increasing Fixed Penalties for Traffic Offenses: The Norwegian Experience*, 38 J. SAFETY RSCH. 689, 693 (2007).

77. *Id.*

78. FELIPE GONCALVES, DOES THE PUNISHMENT FIT THE CRIME? SPEEDING FINES AND RECIDIVISM 22 (2017).

79. Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 50S (2011).

reduce recidivism than noncustodial sentencing options. And in many cases, incarceration has the opposite effect, instead increasing the likelihood that defendants will reoffend after release. Additionally, despite legitimate prosecutorial interest in a victim's suffering, general changes in victims' perspective on justice may justify prosecutors in considering alternatives to imprisonment. Finally, conflicting research around weapon enhancing sentences and recidivism cautions against prosecutors recommending incarceration because of a weapon.

Specific deterrence is a rationale that posits that exposing a defendant to harsh conditions and a lack of freedom will cause her to be less likely to reoffend, and that imprisonment is sometimes a more effective means of preventing recidivism than noncustodial sanctions.⁸⁰ This perspective gained significant traction due to economist Gary Becker's model that argued that the higher the cost of criminal activity, the more a rational person will balance the cost and benefits of the criminal act and choose not to commit the crime.⁸¹ Becker further argued that an optimal level of acceptable crime exists because decreases in expenses of fighting crime result in a net value of decreased societal loss.⁸² Supporters point to this rationale and the significant decrease in crime in the last decades as evidence that mass incarceration is effective.⁸³

But in contrast to the suggestions of Becker's model, most recent scholarship indicates that confinement is unlikely to reduce recidivism compared to alternative options,⁸⁴ and is therefore unlikely to teach individual offenders a lesson. The U.S. Sentencing Commission reported that in 2016, roughly one-half of federal offenders were rearrested within eight years of release from prison, 24.6% were reincarcerated, and "the median time to rearrest was 21 months."⁸⁵ Similarly, the 2002 BJS reported that among the 272,111 individuals released from state prisons in 1994, 67.5% were rearrested within three years of their release, and 25.4% of prisoners were resentenced to prison.⁸⁶ Furthermore, 30% of prisoners were rearrested within just three months of release.⁸⁷ These findings suggest that "many offenders simply are

80. *Id.*

81. *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

82. *See generally, id.*; John Donohue III, *Assessing the Relative Benefits of Incarceration: The Overall Change Over the Previous Decades and the Benefits on the Margin*, in *DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM* (Steven Raphael & Michael Stoll eds., 2009).

83. Donohue III, *supra* note 82, at xx.

84. Cullen et al., *supra* note 79, at 50S.

85. *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. SENT'G COMM'N (2016), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [<https://perma.cc/UV6E-B9N9>] [hereinafter *Recidivism Among Federal Offenders*].

86. Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, BUREAU OF JUST. STAT. 3-4 (2002), <https://bjs.ojp.gov/content/pub/pdf/rpr94.pdf> [<https://perma.cc/P7UY-SCDJ>].

87. *Id.*

not moved by imprisonment to stay out of trouble.”⁸⁸

The 2016 U.S. Sentencing Commission report also found that among federal offenders, shorter prison sentences (here, less than six months) were correlated with lower rates of recidivism.⁸⁹ Those sentenced to less than six months in prison had a rearrest rate of 37.5%, while offenders sentenced to six to twenty-four months had a rearrest rate of 50.8%.⁹⁰ When looking at sentences of longer than six months, the study ultimately found that “the rate of recidivism varies very little by the length of prison sentence imposed (fluctuating between 50.8% for sentences between 6 months to 2 years, to a high of 55.5% for sentences between 5 to 9 years).”⁹¹

More recently, the 2022 U.S. Sentencing Commission report expanded on this study, focusing on longer incarceration sentences.⁹² The key findings included that “the odds of recidivism were lower for federal offenders sentenced to more than 60 months incarceration compared to a matched group of offenders receiving a shorter sentence.”⁹³ The report noted that

the odds of recidivism were approximately 29% lower for federal offenders sentenced to more than 120 months incarceration . . . 18% lower for offenders sentenced to more than 60 months up to 120 months . . . [and] for federal offenders sentenced to 60 months or less incarceration, the Commission did not find any statistically significant differences in recidivism.⁹⁴

The 2016 and 2022 studies demonstrate that there may be a tipping point at which the length of a sentence impacts recidivism. For example, minor offenses that require less than six months of incarceration correlate with lower recidivism rates. But sentences over sixty months also reduce recidivism compared to those receiving shorter sentences.⁹⁵ However, some scholars disagree and believe that as a sentence becomes longer, post-criminal propensities may increase.⁹⁶

When compared with probation, imprisonment does not provide an additional

88. Cullen et al., *supra* note 79, at 54S.

89. *Recidivism Among Federal Offenders*, *supra* note 85, at 22.

90. *Id.*

91. *Id.*

92. *Length of Incarceration and Recidivism*, U.S. SENT’G COMM’N 4 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220621_Recidivism-SentLength.pdf [<https://perma.cc/AR2E-SG2A>].

93. *Id.*

94. *Id.*

95. *Id.* at 19.

96. Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155, 158 (1988) (“As the sentence becomes longer, expected legitimate earnings and employment opportunities decrease because of the loss of contact with the job market, expected earnings and employment in illegitimate activity increase . . . and the distaste or unwillingness to engage in 8 hr per day, 5 days per week work activity increases as one becomes accustomed to the inactivity of prison life.”); *see also* M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1 (2007).

benefit to reducing recidivism.⁹⁷ Spohn and Holleran found that drug offenders sent to prison were five to six times more likely to reoffend than drug offenders sentenced to probation.⁹⁸ They concluded that there is “no evidence that imprisonment reduces the likelihood of recidivism.”⁹⁹ Rather, prison sentences are associated with quicker rates of recidivism when compared to those sentenced to probation.¹⁰⁰ Reinforcing these findings, Harding found that felons sentenced to prison were 18-19% more likely to be subsequently incarcerated within the first three years after release than those sentenced to probation.¹⁰¹ The 2016 U.S. Sentencing Commission report also noted 52.5% of offenders who were sent to prison were rearrested, in comparison to 35.1% of offenders sentenced to probation.¹⁰²

Although one purpose of incarceration is to deter future criminal conduct, there is a disconnect between this purpose and actual outcomes. This is especially a problem for low-risk offenders who may be particularly harmed by incarceration¹⁰³ and become more likely to reoffend after incarceration compared to high-risk offenders.¹⁰⁴

Rather than teaching offenders the lesson that wrongdoing is to be avoided, incarceration “multiplies the chances that the accused will learn criminal behavior.”¹⁰⁵ Defendants may “develop new addictions, and non-violent criminals may quickly learn violence (if only to defend themselves at first).”¹⁰⁶ Wiseman states this may even result in “possibly lingering tendencies.”¹⁰⁷ Angel and colleagues add that there is an “indelible impact of this incarceration” because of the “exposure to those whose way of life is crime and to persons who have lost all hope and are resigned to failure.” Prison time thus causes many defendants to become “hardened, embittered, and more likely to recidivate once released, than they were before incarceration.”¹⁰⁸

The damaging effects of incarceration can occur even during short periods, such as detention prior to trial. Pretrial arrest is a method of detaining a defendant to prevent the risk of further crime before they are officially charged and incarcerated. Though justified as reducing opportunity for interim crime, pretrial

97. Lulham et al., *supra* note 23; Spohn & Holleran, *supra* note 31, at 329.

98. Spohn & Holleran, *supra* note 31, at 346.

99. *Id.* at 329.

100. *Id.* at 345.

101. Harding et al., *supra* note 31, at 11104.

102. *Recidivism Among Federal Offenders*, *supra* note 85, at 22.

103. Timothy Ore & Astrid Birgden, *Does Prison Work?: A View from Criminology*, 19 POLICY 62 (2003) (showing an instance where low-risk offenders were found “to be more negatively affected by the prison experience”).

104. Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN CMTY. CORR. 6 (2004), <https://dvrisc.org/wp-content/uploads/2021/09/Understanding-the-Risk-Principle.pdf> [<https://perma.cc/UZ4K-3FKF>].

105. Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L. J. 1344, 1354 (1988).

106. *Id.*

107. *Id.*

108. Arthur R. Angel, Eric D. Green, Henry R. Kaufman & Eric E. Van Loon, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L. L. REV. 300, 352 (1971).

detention may do more harm than good, especially because some research indicates it is unnecessary to protect the public. One study found that the rearrest rate for individuals on pretrial release with no prior conviction is 1.5%, and this number barely increases even with several previous convictions.¹⁰⁹ The rearrest rate for violent crimes of those with four or more prior convictions is only 2.5%.¹¹⁰ This study demonstrates that despite a defendant's not being detained, the imminent threat of being charged with a crime is sufficient to prevent further criminal actions. Pretrial detention also does not meaningfully protect the public from further crime, because, as this study demonstrates, defendants are already aware even before trial that they should not engage in further criminal activities. And this lesson is learned by threat of charges, not detention.

Another reason prosecutors may seek incarceration relates to prosecutors' focus on the victim's experience. There are numerous reasons why it is advantageous for a prosecutor to work closely with the victim of a crime, including the ability to present a compelling story that will readily be believed by a jury and elicit a sympathetic response.¹¹¹ Gershman argues that a prosecutor's role requires them to be neutral, but that "neutral does not mean that a prosecutor should be indifferent to whether a victim suffered a grievous injury at the hand of the accused. Indeed, a prosecutor should feel personally outraged at such conduct . . . [and] advocate that view zealously by any lawful and ethical means."¹¹² Prosecutors must be careful, however, because if they align "too closely with the victim, a prosecutor may compromise [their] ability to evaluate the case objectively, to weigh the credibility of the victim impartially, to exercise [their] broad discretion fairly and dispassionately, and to protect the legal right of the accused."¹¹³ Thus, a strategic interest in the victim's experience may inform a prosecutor's decision to recommend incarceration.

Moreover, prosecutors may benefit from an awareness of how victims' opinions on criminal punishment, like much of the public perception of justice, continue to shift. The Alliance for Safety and Justice found that 70% of "victims prefer holding people that commit crimes accountable through different options beyond just prison such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service."¹¹⁴ The majority of victims have this preference despite that more than half of them also suffer from anxiety or feelings of fear and that 80% of them experience at least one trauma symptom.¹¹⁵ Whether

109. *Id.*

110. *Id.*

111. Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005).

112. *Id.* at 562.

113. *Id.* at 561.

114. *Crime Survivors Speak*, ALL. FOR SAFETY & JUST., <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Page.pdf> [<https://perma.cc/35MN-52WM>] (last visited Nov. 5, 2024).

115. *Id.*

fear of crimes is founded on a legitimate risk of the crime occurring, victim fear does not evidently equate to an increased desire for the offender's incarceration. Instead, "by a margin of 3 to 1[,] victims prefer holding people accountable through options beyond prison."¹¹⁶

Prosecutors may also be inclined to recommend incarceration if a weapon was present or used during the commission of the offense. Studies show, however, that weapon enhancement sentences are associated with increased recidivism. Data from a 2017 study by the U.S. Sentencing Commission found that offenders across all age groups with a weapon enhancement sentence had a higher rearrest rate than offenders who did not. For example, federal offenders who were younger than thirty and had a weapon enhancement had a rearrest rate of 70.2% compared to 64.2% for those younger than thirty without a weapon enhancement.¹¹⁷ This study demonstrates that enhancing a sentence due to the presence of a weapon as a dispositive factor may actually have an adverse effect on recidivism.¹¹⁸

Weapon enhancing sentences may be justified by studies showing that violent offenders, often characterized as those in possession of a weapon during an offense, are more likely to reoffend. The Department of Justice defines a violent offender as "a person who either is currently charged or convicted of an offense during the course of which: the person carried, possessed, or used a firearm or other dangerous weapon."¹¹⁹ The Sentencing Commission defines violent offenses as murder, kidnapping, rape, armed and unarmed robbery, aggravated assault, child abuse, arson, and rioting.¹²⁰ The 2019 U.S. Sentencing Commission reported that among 10,004 "violent offenders" and 15,427 "non-violent offenders," 63.8% of the violent offenders were rearrested, whereas only 39.8% of nonviolent offenders were rearrested.¹²¹ Violent offenders also recidivated more quickly than nonviolent offenders.¹²²

Finally, some scholars argue that prosecutor choices to incarcerate may also be driven by resource constraints. A lack of resources may "prevent the district attorney's office from pursuing all viable cases . . . [and] prosecutors may choose, for example, to pursue person offenses involving injury or weapons over cases involving threats of injury or no weapons."¹²³

Regardless of the prosecutor's reason for recommending incarceration, research shows that, with limited exceptions for low-risk defendants given shorter sentences, confinement is associated with increased recidivism. Defendants who faced charges for having weapons typically had higher rates of recidivism compared

116. *Id.*

117. U.S. Sent'g Comm'n, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 25 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf [<https://perma.cc/CY3X-G245>].

118. *See id.*

119. 28 C.F.R. § 93.3 (2024).

120. *Recidivism Among Federal Violent Offenders*, *supra* note 46.

121. *Id.* at 3.

122. *Id.*

123. FREDERICK & STEMEN, *supra* note 50, at 88.

to those who were not confined longer for possessing a weapon. And while rearrest rates are low (even for violent defendants), those who are charged with violent crimes are more likely to recidivate and recidivate more quickly than those charged with nonviolent crimes. Overall, research shows that confinement does not typically serve justice and recidivism aims.

E. Research on Alternatives to Traditional Sentences

Outside of traditional criminal punishments like imposing monetary penalties or terms of confinement, many states provide for sentencing alternatives. These alternatives include community service, drug court, and mandatory mental health treatment. In addition to considering the defendant's characteristics (e.g., prior convictions, substance use disorder, mental illness, etc.), a prosecutor may elect to recommend an alternative sentence based on the victim's preferences. Because each state designs its alternative programs and their scope independently, drug and mental health courts are neither universally available nor based on a standardized model, and defendants are still overwhelmingly subject to prosecutorial discretion.¹²⁴ Prosecutor decision-making ought to be informed by the reality that non-traditional options are more cost-effective long-term and generally result in lower recidivism rates than prison sentences.

A common form of alternative sentencing is volunteer community service to supplement or replace traditional sentencing. In a national survey, 76% of courts responded that community service mandates should serve as an alternative for court fines and fees, and 42% of courts also responded that community service mandates are, or should be, used as alternative to jail sentences.¹²⁵ Although there is a judicial preference for community service, the use of such an alternative sentence varies by court caseload and jurisdiction size. In a national survey of 396 lower jurisdictional criminal courts, 65% of responding courts reported using community service programs in their sentencing.¹²⁶ Courts using community service tended to have high case volume.¹²⁷

Prosecutors may choose to recommend that offenders perform community service as part of their sentence to reduce recidivism. Studies have shown that

124. For example, Tennessee's alternative sentencing is statutorily defined as community based. "Community-based alternatives to incarceration' means services and programs provided in local jurisdictions for eligible offenders in lieu of incarceration in state penal institutions or local jails and workhouses. The alternatives include noncustodial community corrections options, short-term community residential treatment options and individualized evaluation and treatment services as provided in § 40-36-302." TENN. CODE ANN. § 40-36-102 (2014).

125. SARAH PICARD, JENNIFER A. TALLON, MICHELA LOWRY & DANA KRALSTEIN, COURT-ORDERED COMMUNITY SERVICE: A NATIONAL PERSPECTIVE 9–10 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/community_service_report_11052019_0.pdf [<https://perma.cc/HVT8-G5TP>] (noting that the total is greater than 100% because courts could report multiple response options).

126. *Id.* at 2 (including, for example, "county, municipal, or district courts that primarily hold jurisdiction over non-felony cases").

127. *Id.* at 9. The survey found that "in 2016, courts using community service averaged a caseload of 10,965, compared to 1,814 among the sample not using community service."

performing community service is associated with less recidivism.¹²⁸ Studies have also shown, however, that *completing* community service is associated with lower recidivism, and that the more serious the offense, the less likely the offender is to complete a community service sentence and the more likely they are to recidivate.¹²⁹

Specialized drug courts are another type of alternative sentence, and as of 2021, there were 3,660 adult drug courts in the United States.¹³⁰ There are twenty-four counties with four or more adult drug courts, twenty of which serve populations more than 500,000.¹³¹ Populations served by four or more drug courts are likely to be in large jurisdictions, where greater resources are available to handle the larger populations. Prosecutors may recommend diverting drug offenders to drug court to target the underlying reason for their crime (i.e., substance use disorder) and try to connect the offender to appropriate treatment with the hope of reducing recidivism.

Spohn and Holleran reviewed recidivism for drug offenders and the effectiveness of drug court as an intervention rather than traditional incarceration.¹³² Results showed that offenders who participated in drug court, regardless of whether they were low-risk or high-risk offenders, had lower recidivism rates than offenders who were convicted and sentenced in a traditional court.¹³³

These results are reinforced by a study conducted by the Institute of Public Policy that found that the best practice to reduce recidivism includes alternative sentencing to help minimize the cost of corrections because it diverts individuals into

128. Megan Holmes & Tina M. Waliczek, *The Effect of Horticultural Community Service Programs on Recidivism*, 29(4) HORTTECHNOLOGY 490, 490–492 (July 2019), <https://journals.ashs.org/horttech/view/journals/horttech/29/4/article-p490.xml#:~:text=Frequency%20statistics%20showed%20that%20any,option%20of%20community%20service%20reoffended> [https://perma.cc/X2JQ-U4HZ] (noting in their study that 100% of those who did not participate in community service reoffended, but only 5.4% of those in horticultural community service and 14.1% of those who served in nonhorticultural community service reoffended).

129. Jeffrey A. Bouffard & Lisa R. Muftic, *Program Completion and Recidivism Outcomes Among Adult Offenders Ordered to Complete a Community Service Sentence*, 43 J. OFFENDER REHAB. 1, 1, 24, 26–28 (2006).

130. *Treatment Court Maps*, NAT'L DRUG CT. RES. CTR., <https://ndcrc.org/interactive-maps/> [https://perma.cc/R48V-QR48] (last visited Nov. 5, 2024).

131. *Id.* (noting that Cook, IL (5.17 M), Cuyahoga, OH (1.24 M), Dallas, TX (1.339 M), Erie, NY (918,873), Fayette, KY (322,200), Harris, TX (4.681 M), Jefferson, KY (768,419), Los Angeles, CA (10.4 M), Macomb, MI (870,893), Middlesex, MA (1.6 M), Mohave, AZ (210,998), Oakland, MI (1.255 M), Orange, CA (3.17 M), Plymouth, MA (518,597), Richland, OH (121,043), Riverside, CA (2.438 M), Salt Lake, UT (1.146 M), San Bernadino, CA (2.163 M), San Diego, CA (3.324 M), Suffolk, MA (801,162), Washoe, NV (464,182), Wayne, MI (1.753 M), Westchester, NY (968,738), and Worcester, MA (826,655) all have four or more adult drug courts in their county). *See County Population Totals and Components of Change: 2020–2023*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-counties-total.html> [https://perma.cc/P4DS-V933] (last visited Nov. 5, 2024) (providing the most current population data for each county).

132. Cassia Spohn, R.K. Piper, Tom Martin & Erika Davis Frenzel, *Drug Courts and Recidivism: The Results of an Evaluation Using Two Comparison Groups and Multiple Indicators of Recidivism*, 31 J. DRUG ISSUES 149 (2001).

133. *Id.* at 155.

“society successfully whereas prison can have the reverse effect.”¹³⁴ The Institute thus argues that “placing a drug user in prison . . . may do more harm than good especially when there are few treatment programs.” These findings suggest that regardless of risk level, alternative interventions to incarceration are often more effective than traditional adjudication and sentencing for offenders with substance use disorders.

Prosecutors may also consider the mental health of offenders, which may lead to alternative sentences. It is estimated that 56% of people currently or previously in state prisons suffered from one or more mental health problems,¹³⁵ but most Americans believe individuals with mental illness should receive treatment rather than be incarcerated.¹³⁶ In 2016, the ABA updated its Mental Health Standards.¹³⁷ Standard 7-1.5 outlines the role of prosecutors when they are involved in a case with a defendant suffering from a mental health disorder.¹³⁸ The very first recommendation is to “consider treatment alternatives to incarceration for defendants with mental disorders that might reduce the likelihood of recidivism and enhance public safety.”¹³⁹

Prosecutors can divert some offenders with mental illness out of the traditional criminal incarceration system and into mental health courts. These courts focus on court-supervised mental health treatment, status assessments, and resolution of the case upon completion of the treatment plan.¹⁴⁰ As of 2021, over 450 mental health courts existed in forty-six states.¹⁴¹

Multiple studies have found that mental health courts reduce recidivism relative to traditional arrest and conviction. Lowder, Rade, and Desmarais found that mental health courts reduce recidivism by 20%.¹⁴² A study on Mental Health

134. NATHANIEL ALBERS, ALTERNATIVE SENTENCING & STRATEGIES FOR SUCCESSFUL PRISONER REENTRY 11 (2006), <https://core.ac.uk/download/pdf/62757493.pdf> [<https://perma.cc/Q2UE-RNRR>].

135. Leah Wang, *Chronic Punishment: The Unmet Health Needs of People in State Prisons*, PRISON POLY INITIATIVE (June 2022), <https://www.prisonpolicy.org/reports/chronicpunishment.html#mentalhealth> [<https://perma.cc/Z8SZ-CDZN>].

136. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, AM. C.L. UNION (Nov., 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/67C6-E47C>].

137. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH 6 (2016), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_standards_2016.authcheckdam.pdf [<https://perma.cc/TQ5Y-KDA2>].

138. *See id.*

139. *Id.*

140. *Mental Health Courts Program*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/MentalHealthCtFS.pdf> [<https://perma.cc/7UQA-W8B2>] (last visited Nov. 7, 2024).

141. *Adult Mental Health Treatment Court Locator*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults?field_gains_mhc_state_value=VA [<https://perma.cc/8TV9-E3D6>] (last visited Nov. 7, 2024) (listing the mental health treatment courts in each state and noting none in Wyoming, South Dakota, North Dakota, and Nebraska).

142. *See* Evan M. Lowder, Candalyn B. Rade & Sarah L. Desmarais, *Effectiveness of Mental Health Courts in Reducing Recidivism: A Meta-Analysis*, 69 PSYCHIATRIC SERVS. 15 (2017), <https://p>

Courts in King County, Washington found that only 28% of mental health court participants were charged with a new crime within a year, in comparison to 38% of the comparison group.¹⁴³ Offenders diverted to mental health court were also less likely to be rearrested, at a rate of 32% rather than 42% in the comparison group.¹⁴⁴ The study concluded that “mental health court participation led to fewer arrests and charges for new crimes and reduced days of incarceration.”¹⁴⁵

Unfortunately, the process for admission into a mental health court varies by state and involves significant discretion by multiple parties. There is no universal model for these courts, and each state imposes different requirements for the type of offense, qualifying mental illnesses, treatments offered, length of program, and whether all charges will drop upon successful completion of the program.¹⁴⁶ Other factors that influence whether an offender will be admitted to a mental health court include who refers the potential client to the mental health court, who performs the screening, what information is used to determine eligibility, and issues with offender treatability and motivation—all independently affect the selection of an individual to be seen before a mental health court.¹⁴⁷

Although some states do not involve prosecutors in the referral process, prosecutors often refer a case to a mental health court team and act as “filtering agents . . . [.] consult[ing] with victims, as well as defense attorneys, on their willingness to have the case referred to a mental health court.”¹⁴⁸ With a system that relies on multiple actors’ discretion, proactive prosecutors can play a significant role in diverting defendants suffering from mental health issues out of traditional incarceration and toward alternative sentencing that demonstrates more reliable rates of decreased recidivism.

Prosecutors who recommend alternative sentences may also be affected by a victim’s preferences. The Alliance for Safety and Justice found that 70% of victims prefer holding criminals accountable through different options beyond incarceration.¹⁴⁹ But as Davis reminds readers, “the prosecutor does not represent the victim . . . instead, she represents the state.”¹⁵⁰ She argues that the victims’ rights

s.psychiatryonline.org/doi/epdf/10.1176/appi.ps.201700107 [https://perma.cc/MH6D-VZN5].

143. PAULA DITTON HENZEL, JIM MAYFIELD, CALLIE BLACK & BARBARA E.M. FELVER, THE IMPACT OF MENTAL HEALTH COURT ON RECIDIVISM AND OTHER KEY OUTCOMES 5 (2018), <https://www.dshs.wa.gov/sites/default/files/rda/reports/research-3-49.pdf> [https://perma.cc/7NGF-VPZL].

144. *Id.*

145. *Id.*

146. Sarah Martinson, *Alternative Courts Not a Catch-All Fix for Mental Illness Crisis*, LAW360 (Mar. 7, 2021, 8:02 PM), <https://www.law360.com/articles/1356267/alternative-courts-not-a-catch-all-fix-for-mental-illness-crisis> [https://perma.cc/FL2J-VFF8].

147. Nancy Wolff, Nicole Fabrikant & Steven Belenko, *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, L. & HUM. BEHAV. (Oct. 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3874803/> [https://perma.cc/P9VH-QPJQ].

148. *Id.*

149. ALL. FOR SAFETY & JUST., *supra* note 114.

150. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 61 (2009).

movement, which began in the 1970's, resulted in a "culture change in the treatment of crime victims, especially among police officers and prosecutors."¹⁵¹ Today, all states have statutory or constitutional protections for victims of crime, and in many states prosecutors were instrumental in the passage of those amendments.¹⁵² However, there are "no laws or constitutional amendments that provide a right to be heard regarding the charging decision."¹⁵³ This autonomy in the charging decision is crucial because the prosecutor "represents interests broader than those of the individual victim" and must balance the victim input alongside the interests of the entire community when pursuing justice.¹⁵⁴

But allowing victims to express their feelings not only to prosecutors but also directly to the defendant may reduce recidivism.¹⁵⁵ A study implemented a twelve-session program where victims expressed the impact crimes had on them to the offender.¹⁵⁶ Prisoners who attended the program had a recidivism rate of 35% within the three years following release from prison, while prisoners who did not attend the program had a recidivism rate of 67% in the three years post-release.¹⁵⁷ Similar results have been found among juvenile offenders.¹⁵⁸ A study found that 20.3% of juvenile offenders who were enrolled in a "victim-offender mediation program" (which included the victims and their families expressing their feelings) were rearrested within one year of the original arrest, while 41.6% of juvenile offenders enrolled in an alternative detention center that did not include victim-offender mediation were rearrested within one year of the original arrest.¹⁵⁹

The success of community-based intervention and other incarceration alternatives lead some to argue that alternative sentences are also more cost-effective than traditional sentences, noting that "investing in alternatives to incarceration . . . today will reap significant savings in the potential costs of tomorrow."¹⁶⁰ For example, in 2009, the Washington state legislature commissioned a study on "how much money could be saved by the year 2030 by investing in alternatives to incarceration for youth"

151. *Id.* at 64.

152. *Victim's Rights*, PRETRIAL JUST. CTR. FOR CTS., <https://www.ncsc.org/pjcc/topics/victims#:~:text=All%20states%2C%20the%20District%20of,protections%20for%20victims%20of%20crime> [<https://perma.cc/NMZ6-37BQ>] (last visited Nov. 7, 2024).

153. DAVIS, *supra* note 150, at 65.

154. *Id.* at 66.

155. JANETTE BAIRD, VICTIM IMPACT: LISTEN AND LEARN (2015), https://www.ovcttac.gov/downloads/VictimImpact/files/delaware-evaluation-report-2015_508c_090716_ES.pdf [<https://perma.cc/7HJB-V9VT>].

156. *Id.* at 7.

157. *Id.* at iv.

158. Karin Jewel Stone, An Evaluation of Recidivism Rates for Resolutions Northwest's Victim-Offender Mediation Program (Nov. 3, 2000) (Master of Science dissertation, Portland State University) https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=3293&context=open_access_etds [<https://perma.cc/689K-5PGU>].

159. *Id.* at 49–50.

160. JUST. POLY INST., THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE 13 (2009), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/09_05_rep_costsofconfinement_jj_ps.pdf [<https://perma.cc/AY5X-NZEN>].

such as through aggression replacement training, multi-systemic therapy, family therapy, multidimensional treatment foster care, and others.¹⁶¹ The study concluded that an aggressive approach would save taxpayers an estimated \$2.6 billion, in part through decreased incarceration and recidivism rates, but that the biennial costs of implementation were estimated at \$171 million.¹⁶² Long-term investment is required to see benefits of alternative sentences.

Criticisms of alternative sentences include that they are “unduly lenient, poorly evaluated, expanding social control over alleged offenders, widening the net of the criminal justice system, and for bearing additional administrative and financial costs in monitoring compliance.”¹⁶³ Despite these criticisms, the United Nations has found that recidivism rates are lower for offenders who serve community sentences rather than prison sentences and that this is true globally.¹⁶⁴ And U.S. studies have found that mental health courts and drug diversion reduce recidivism and improve outcomes for defendants.

* * *

Despite the importance of prosecutorial discretion in the criminal justice system, there is much yet unknown about factors that influence how prosecutors make decisions. These factors include how individual prosecutor characteristics (e.g., job experience), office characteristics (e.g., size, role), jurisdiction characteristics (e.g., size, geographic region), and elements prosecutors consider important in forming judgments about appropriate charges and sentences (e.g., strength of evidence, considerations of harm) may affect their exercise of discretion. Our study aims to contribute to the scholarly discussion on factors important to charging decisions and sentencing recommendations. Part II describes our prosecutor study design and methods.

II. DATA AND METHODS

To better understand prosecutor decision-making, we surveyed 542 state and local prosecutors across the United States. Because we did not have access to a list of all prosecutors, we constructed our sample as follows: first, we selected one to two states from each of the Census Bureau’s nine geographic divisions; second, we searched for prosecutor names and email addresses using publicly available lists of

161. *Id.* at 12.

162. STEVE AOS, MARNA MILLER & ELIZABETH DRAKE, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES 286 (2006), https://www.wsipp.wa.gov/ReportFile/952/Wsipp_Evidence-Based-Public-Policy-Options-to-Reduce-Future-Prison-Construction-Criminal-Justice-Costs-and-Crime-Rates_Full-Report.pdf [<https://perma.cc/KJ3L-TURK>].

163. E4J *University Module Series: Crime Prevention and Criminal Justice, Module 7: Alternatives to Imprisonment*, UNITED NATIONS OFF. ON DRUGS & CRIME (Mar. 2019), <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-7/index.html> [<https://perma.cc/2G3S-9Q24>]; Jamie S. Gorelick, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. C.R.-C.L. L. REV. 180, 194–195 (1975).

164. *Id.*

state employees, county prosecutor websites, state bar association websites, and state Freedom of Information Act requests; finally, we compiled a list of 4,484 prosecutors and emailed them an invitation to participate in our fifteen-minute online survey.¹⁶⁵ 542 prosecutors completed the survey (a response rate of 12.09%).

A. Description of Sample and Prior Studies

Table 1 provides a description of the sample.¹⁶⁶ 22.5% of our respondents were head prosecutors, respondents had worked as prosecutors for an average of 12.52 years, and respondents were, on average, 46.02 years old. The average office size for respondents was 34.83 prosecutors, most of whom worked in jurisdictions containing fewer than 500,000 people (71.07%), and although the sample contained respondents from all Census regions, most were in the Mountain (24.07%), Midwest (21.3%), South Atlantic (14.63%), Pacific (11.67%), and West North Central (10.93%) regions. 65.86% of our sample was men, 90.26% of our sample was white, and 96.07% of our sample was not Hispanic.

Table 1: Description of Sample

	Percent of Sample or Mean
Recommended Disposition of Case	
Felony Charge	16.05%
Monetary Penalty	41.68%
Average Amount of Monetary Penalty	\$247.21
Confinement	27.83%
Average Minimum Days of Confinement	25.73 days
Jurisdiction Characteristics	
Average Size of Office	34.83 prosecutors
Size of Jurisdiction	
Over 2,000,000 people	7.42%
1,000,000-2,000,000 people	10.76%
500,000-1,000,000 people	10.76%
100,000-500,000 people	28.58%
Less than 100,000 people	42.49%
Region	
New England	4.44%
Middle Atlantic	3.52%
Midwest	21.30%

165. Study instruments in possession of authors.

166. Study instruments in possession of authors. This Table is reproduced from our prior work. See Wright et al., *supra* note 3.

West North Central	10.93%
South Atlantic	14.63%
East South Central	8.52%
West South Central	0.93%
Mountain	24.07%
Pacific	11.67%
Prosecutor Characteristics	
Average Number of Years as Prosecutor	12.52 years
Head Prosecutor	22.55%
Average Age	46.02 years
Gender	
Male	65.86%
Female	34.14%
Race	
White	90.26%
Black/African American	3.93%
American Indian/Alaska Native	0.56%
Asian	1.12%
Native Hawaiian/Pacific Islander	0.19%
Other	3.93%
Hispanic	
No	96.07%
Mexican/Mexican American/Chicano	1.50%
Puerto Rican	0.19%
Cuban	0.94%
Other Spanish/Hispanic/Latino	1.31%

In the survey, we embedded a vignette-based experiment. The vignette contained two police reports from different officers describing their response to complaints about the behavior of a twenty-nine-year-old man who was scaring people at a train station. The man was distressed because of a recent romantic breakup and was intoxicated, yelling, and asking people for money to ride the train. He also had a knife and grabbed the arm of a woman, but she was not physically harmed nor was anyone else. We then provided a list of criminal statutes¹⁶⁷ with definitions and corresponding jail time and fine amounts and asked respondents which, if any, charges they would bring against the suspect and how much, if any, jail time and monetary penalty they would recommend and reasons for their recommendation. In a prior study, we used an experimental design to test if race or

167. The possible charges included disorderly conduct, loitering, public nuisance, criminal nuisance, harassment, endangerment, assault, and aggravated assault.

occupation was associated with charging decisions. In the control condition, we did not report the race (black or white) or employment (accountant or fast-food worker) of the suspect, and in the four experimental conditions we varied his race and class to determine whether prosecutors' decisions were influenced by the suspect's race or social class.

As reported in prior work, we found no evidence that the race or social class of the suspect affected prosecutors' decisions to charge the suspect with a felony or recommend a jail sentence or monetary penalty.¹⁶⁸ However, we found that there was regional variation in the number of charges respondents would bring and whether respondents would charge the suspect with a felony, that the average monetary penalty recommended was \$247.21 (but there was significant regional variation), and that the average recommended confinement was 25.73 days in jail (although over 70% of respondents recommended no confinement, and again there was significant regional variation).¹⁶⁹ See Table 1 for more information about how respondents recommended disposition of the case.

Because there was a great deal of variation in how prosecutors approached decisions about charges and penalties, we also used open-ended questions to understand factors associated with decisions. When explaining their decision-making, respondents often noted that despite the vignettes describing a minor crime, punishment was still necessary.¹⁷⁰ Indeed, some respondents used jail to teach a lesson.¹⁷¹ Many respondents considered the financial state and mental health of the offender, and many discussed plea-bargaining motivations and strategies.¹⁷²

In the survey, we also asked questions about how charging and plea bargaining decisions are made in respondents' offices (e.g., front-line prosecutors decide alone, superiors decide, etc.), whether the decision-making process depends on whether the charge is a felony or misdemeanor, and whether another prosecutor becomes involved after the initial charging decision is made.¹⁷³ We asked whether respondents' offices had internal guidelines and standards to help prosecutors make charging decisions. We asked what information respondents typically need to make a charging decision, how long they have been a prosecutor and whether they are the head prosecutor, the size of their office and jurisdiction, and standard demographic questions.¹⁷⁴

We have reported results from the survey questions elsewhere, and we found that most respondents worked in offices where a front-line prosecutor made charging and plea bargaining decisions by themselves (72.46%), and most reported that the same prosecutor will prosecute the case (57.22%).¹⁷⁵ Nearly half (45.91%)

168. Robertson et al., *supra* note 2.

169. *Id.*

170. Wright et al., *supra* note 3.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

of respondents reported not having any internal guidelines or standards to follow in making charging decisions, and 45.35% reported having standards or guidelines but not being required to follow them.¹⁷⁶

B. Correspondence Analysis

This study builds on our prior research to generate more specific hypotheses about prosecutor decision-making. In the present study, we are especially interested in how respondents' individual and job characteristics (e.g., length of time they have served as a prosecutor, jurisdiction size, office size, etc.) and stated reasons given for their charging and sentencing recommendations in response to the vignette correspond with their actual charging and sentencing recommendations. For example, were discussions of the offender's mental health or the respondent's career stage correlated with decisions to charge a felony, recommend deferred prosecution or a suspended sentence, recommend a monetary penalty or term of confinement, or recommend additional or alternative punishments? To answer this type of question, we used a technique called Correspondence Analysis (CA), which required us to transform both the qualitative and quantitative survey data.

CA is useful when variables are not purely numerical, such as reason(s) for a decision. CA requires the variables, both continuous and categorical, to be put in a matrix. In our case, the rows of the matrix were the prosecutor and work settings, along with the reasons for their charging and sentencing decisions. The columns are the decisions about charges and penalties. CA then decomposes the correlations between variables to highlight how they group together. It is an exploratory method, most useful for generating new hypotheses rather than testing hypotheses.¹⁷⁷

To use CA, we transformed our variables to create the matrix. For charging and sentencing recommendations, we created the following categorical variables (yes/no): recommend confinement, recommend monetary penalty, charge felony, defer prosecution or suspend the sentence,¹⁷⁸ and recommend additional or alternative sentences (e.g., substance use treatment, anger management, etc.). To report reasons for prosecutor decisions, we created the following categorical variables through transformation of the qualitative data (responses to the question asking respondents for the reason for their decision and recommendations) (yes/no): lacks criminal history (i.e., respondent noted the suspect lacked a criminal history), weapon (i.e., respondent noted the use of a weapon), no injury (i.e., respondent noted that no one was physically harmed by suspect's conduct), mental health (i.e., respondent noted

176. *Id.*

177. MICHAEL GREENACRE, CORRESPONDENCE ANALYSIS IN PRACTICE (3rd ed. 2017); Hervé Abdi & Michel Béra, *Correspondence Analysis*, in ENCYCLOPEDIA OF SOCIAL NETWORK ANALYSIS AND MINING 275 (2014); STEN-ERIK CLAUSEN, *Introduction*, in APPLIED CORRESPONDENCE ANALYSIS (2011).

178. Despite the different impact on a defendant's criminal record, these charging and sentencing options are coded together in our analysis because of their similarity as a diversionary probation charge or sentence that departs from traditional conviction and incarceration.

concerns about mental health), victim input (i.e., respondent would request input from the victim), harm to public (i.e., respondent noted the suspect harmed the general public), financial (i.e., respondent considered the financial state of the offender), probable cause (i.e., respondent mentioned probable cause), beyond a reasonable doubt (i.e., respondent mentioned BARD), lesson (i.e., the recommended sentence is meant to teach a lesson), deterrence (i.e., the recommended sentence is meant to deter crime), and plea (i.e., the respondent mentioned plea bargaining). For characteristics of the prosecutor, their office, and their jurisdiction, we created the following categorical variables (yes/no): junior/midcareer prosecutor (i.e., ten or fewer years worked as a prosecutor), experienced prosecutor (i.e., more than ten years worked as a prosecutor), head prosecutor, small office (i.e., ten or fewer prosecutors), medium/large office (i.e., more than ten prosecutors), small jurisdiction (i.e., serves fewer than 100,000 people), medium jurisdiction (i.e., serves 100,000-500,000 people), large jurisdiction (i.e., serves more than 500,000 people), and standards (i.e., office has internal guidelines or standards for charging decisions).¹⁷⁹ Tables 2 (below) and 3 (Appendix) provide the variables included in the CA.

Table 2: Codes in Analysis

	Definition/Explanation	% of Sample
Reasons for Decision		
Lacks Criminal History	No criminal history	62%
Weapon	Presence of weapon	39%
No Injury	No one was injured	35%
Fear or Threat	Created fear	33%
Mental Health	Concerns about mental health	27%
Victim Input	Would request input from victim	17%
Harm to Public	Harmed general public	63%
Financial	Financial state of offender	10%
Probable Cause	Mentioned probable cause	4%
Beyond a Reasonable Doubt	Mentioned BARD	9%

179. We also created categorical variables for whether the respondent identified themselves as a “progressive” prosecutor, the gender of the respondent, the race of the respondent, the geographic region in which the respondent worked, whether the respondent worked in an office where prosecutors had to consult with superiors about charging decisions, and whether respondents thought the incident described in the vignette was “no big deal.” But these variables were ultimately excluded from the CA because of insufficient cases (progressive prosecutors, respondents who said the incident was no big deal, Northeast region) or because the variables did not improve the analysis (consulting with a superior and the gender and race of the respondent).

Lesson	Sentence meant to teach a lesson	16%
Deterrence	Sentence meant to deter in future	24%
Plea	Proposed plea bargaining	20%
Characteristics of the Prosecutor, Office, or Jurisdiction		
Junior/Mid-Career	Ten or fewer years in career	53%
Experienced	More than ten years in career	47%
Head Prosecutor	Respondent is head prosecutor	22%
Standards	Uses organization-wide standards	54%
Small Office	Ten or fewer prosecutors in office	45%
Med-Large Office	More than ten prosecutors in office	54%
Small Jurisdiction	Serves fewer than 100,000	41%
Med Jurisdiction	Serves 100,000 - 500,000	29%
Large Jurisdiction	Serves more than 500,000	29%

Once the matrix is created, we used Stata SE's multiple correspondence analysis command to analyze how each row variable (reasons and characteristics of the prosecutor or setting) groups with each outcome (charge and penalty). The analysis first discerns underlying dimensions that structure the data in the matrix. This process is similar to a factor analysis, where the analyst is trying to determine if a latent construct produces the observed data. After the number of dimensions is determined, each variable is given a score for how strongly it is associated with the overall model (% inertia), how strongly it is associated with each dimension (contribution), and how the variables are similarly situated in space.

In the final step, we use the cabiplot command to transform the table by mapping the statistical associations into n-dimensional space, where n is the number of dimensions necessary for accounting for observed associations.¹⁸⁰ By then plotting all variables according to these underlying dimensions, we can identify and visualize how variables in the rows cluster around the outcomes in the columns. CA uses an inductive approach that reveals the underlying structures within the observed data.¹⁸¹ From this mapping, associations are made clearer and deeper qualitative analysis can be guided by the visualization.

180. GREENACRE, *supra* note 177.

181. CLAUSEN, *supra* note 177.

Based on existing theory and empirical work on prosecutor discretion and decision-making, we refer to Dimension 1 as Punitive vs. Therapeutic and Dimension 2 as Least Severe Criminal Record to Most Severe Criminal Record.

Figure 1 provides several additional forms of information about how these variables cluster together. The space is divided into four quadrants (see red lines). Confinement and felony are in the same quadrant, meaning they are more similar to one another than the other outcomes, which is not surprising given that felony charges are more serious than misdemeanors or no charges and confinement is the most severe penalty. Monetary penalty, suspended/deferred, and additional/alternative each have their own quadrants, so they are distinct in terms of how respondents made decisions.

The red lines also highlight the 0,0 point in the plot. If there were no correlations between any of the rows and columns, all variables would be near the 0,0 point. Instead, most variables cluster in the quadrants, near each outcome. It is important to note which variables do NOT have strong associations to any of the outcomes: medium jurisdictions, medium/large offices, standards, and junior/mid-career stage. This means that respondents who were from medium sized jurisdictions, medium or large offices, and were at junior or mid-career stages were just as likely to select any of the outcomes. Additionally, the presence of office standards for prosecutors' decisions was not strongly associated with any particular outcome.¹⁸²

Most of the other variables cluster around the charging decision and sentencing recommendation. For each variable, the percentage of variation explained by that variable is noted by % inertia. For each of the two underlying dimensions, each variable also has a coordinate value, as shown in Figure 1; a squared correlation value, which is the squared residual between the observed pattern and the expected value under independence, and can be used to determine which dimension is most important for that variable; and, a contribution value, which is the % inertia within that dimension that is accounted for by that variable (see Table 4, Appendix). For example, "lacks criminal history" has an overall % inertia of .064, which means that 6.4% of the variation within the model can be attributed to this variable. For Dimension 1, "lacks criminal history" is positioned at .109, while for Dimension 2, it sits at .009. Taken together, we see that this variable is plotted in the top right quadrant, just above the horizontal line. The squared correlation is .665 for Dimension 1 and .004 for Dimension 2, which tells us that for "lacks criminal history," Dimension 1 drives the positioning much more than Dimension 2. Finally, the contribution values indicate that "lacks criminal history" makes up about 7% of the inertia within Dimension 1 and .1% within Dimension 2.

Returning to Figure 1, the circles indicate which reasons or characteristics can be matched to which outcomes. Examples of each follow.

182. This may be because the vignette provided charges to select from as well as sentencing guidelines. The respondents' office standards were asked about in a later section of the survey.

B. Variables Associated with Recommending Confinement

Reasons for decisions that were associated with confinement included: teaching the defendant a lesson, deterrence, the presence of a weapon, causing fear or posing a threat, and working in an office where probable cause is used as a charging guideline. Several respondents were interested in specific and general deterrence, which was associated with recommending that the defendant serve a term of confinement. One respondent who recommended two weeks in jail seemed to want to teach the defendant a lesson, writing, "I want sometime in the jail to be sure he is stable and [has] a taste of jail. This is his first encounter. This is not a career criminal. He's 29 without a record." Another respondent who recommended ninety days of confinement explained, "This seems to be a situation that is the exception for this Defendant. However, this could have been a much more serious matter. I would rather impress upon him the seriousness of his actions and potential consequences now rather than after somebody is actually physically harmed." And another respondent who recommended 180 days of jail focused both on specific and general deterrence concerns, explaining that "[w]ielding a knife in public must be deterred. I would seek a split sentence with serve time to deter the individual from further acts, and to demonstrate to the public that they will be protected."

Noting the fact that the defendant had a knife was associated with recommending a term of confinement. One respondent recommended five days in jail and explained "Given the lack of record, I thought the sanction should be de minimis but not non-existent because of the presence of a deadly weapon, i.e. the knife. Had he not had the knife, I would have recommended deferred prosecution." And another respondent who recommended thirty days in jail observed,

This individual certainly caused a spectacle, and probably placed others, particularly the woman he grabbed, in fear of imminent bodily injury. The fact that he wielded a knife is certainly an aggravating factor . . . It would seem that his intent is to place her in fear of bodily injury. However, under the fact pattern, I believe he has no criminal history. At first blush, I was thinking a fully suspended sentence; however, wielding a knife, causing a scene with obscenities in a public place, and especially grabbing a woman's arm while holding a knife under those circumstances warrants some period of incarceration.

This respondent's explanation similarly shows that if not for the presence of a weapon, there would have been no jail recommended. The reasoning also incorporates another element associated with imposing a term of confinement: causing fear or posing a threat. Another respondent who recommended ninety days in jail also emphasized the presence of the knife and the fear this would have caused, stating, "Needs some jail for threatening behavior with a knife at his side. The victim would have been very frightened by this behavior."

Finally, working in an office that used a charging standard that included

concerns about probable cause was also associated with recommending confinement. One respondent who recommended two days of jail time commented, "If he had just been yelling and harassing people[,] I would've deferred prosecution or offered community service. But given that he was displaying a weapon I think some jail time is required." This respondent then went on to explain that their office standard relies on probable cause: "[T]here must be probable cause and we (as an individual prosecutor) must feel that they can (or will be able to) prove the case beyond a reasonable doubt."

None of the variables for prosecutor, office, or jurisdiction characteristics were associated with confinement. Of all the reasons associated with confinement, fear or threat explained 14.5% of the variation in the observations and was the highest contributor of Dimension 1 (see Table 4). This means that when prosecutors listed concerns about fear or threat to the individuals involved, it was most influential in their decisions.

C. Variables Associated with Recommending a Monetary Penalty

Monetary penalty was not a driver of the overall model, as indicated by its low % inertia and low values of contribution to either dimension. There was only one reason for respondents' decisions that was associated with imposition of monetary penalties: a sense that the defendant harmed the public. This is distinct from the reason of the offender creating fear or threatening the victim, which is a harm to an identifiable individual. Harm to the public is a general wrongdoing because it decreases safety for members of the community. A prosecutor who recommended a \$300 fine explained,

The defendant did not cause serious harm, but was clearly disorderly, thus the misdemeanors. When he did grab a hold of the woman, that raised it a level, such that he should be held accountable, but not through jail time. I like assessing a fine and some minimal level of probation.

None of the variables for prosecutor, office, or jurisdiction characteristics were associated with monetary penalties.

D. No Variables Associated with Charging a Felony

The decision to charge a felony was not strongly associated with any of the reasons or respondents' individual or contextual characteristics we coded for. Because a felony charge is in the same quadrant as confinement, some of the reasons for recommending confinement were also often used to justify a felony charge (although these reasons still were used more often to justify confinement). For example, looking to Table 3, presence of a weapon was used in 52% of the felony charge explanations and 59% of the confinement recommendation explanations. Both are higher than for other outcomes (monetary penalty: 35%, suspended/deferred: 34%, alternative: 33%). These findings suggest that decisions to charge a felony have some overlap with recommendations of a term of

confinement, but that no reasons or characteristics are most closely associated with felony charges.

E. Variables Associated with Recommending Deferred Prosecution or Suspended Sentence

In contrast, decisions to recommend a deferred prosecution or suspended sentence were strongly associated with several reasons and office/jurisdictions characteristics. Reasons for this decision included concerns about the financial state of the offender, the fact that no one was injured, and the defendant's lack of criminal history. Each of these has a % inertia under 10%, so none of them are driving the overall model, but they are closely clustered with this outcome.

Most respondents who offered these explanations for this recommendation drew on several different reasons. One respondent who recommended a suspended sentence and no monetary penalty stated their reasons as follows: "Because there was no physical harm to anyone and the defendant complied with the requests of the police and he does not have a criminal record." This explanation highlights the importance of lack of injury and lack of prior criminal record to recommending a suspended sentence. Another respondent who recommended a suspended sentence and would defer to the court on imposition of a monetary penalty justified their recommendations by stating that "Defendant has no priors and there were no injuries. He complied with law enforcement once confronted. . . . Defendant is unlikely to comply with financial penalties because he couldn't even pay for the bus." This reason incorporates financial considerations, lack of criminal history, and lack of physical injury, all of which were correlated with recommending a suspended sentence. Additionally, head prosecutor status and long-term experience was associated with recommending deferred prosecution or suspended sentence. Working in smaller jurisdictions or smaller offices were also associated with this outcome.

F. Variables Associated with Recommending Additional or Alternative Consequences

Finally, some respondents wrote in additional or alternative sentences that they thought were especially appropriate for this case. Reasons associated with these alternatives included considering mental health, attempting a plea deal, and taking victim input into consideration. Table 4 shows that mental health concerns have the highest % inertia of all the explanations respondents gave. This means that mental health explained the most variation in the model. It is in the far corner of the lower right quadrant. Respondents' comments illustrate how the particular vignette made mental health a central concern when making decisions about consequences. For example, one respondent imposed an alternative consequence, but no confinement or monetary penalties, to further deal with the mental health concerns, stating,

The defendant may have mental and/or emotional problems. I would ask for a period of probation subject to a mental health assessment and that he follow up with any recommended treatment suggestions. If the Defendant has no criminal history or a mild criminal history, but with no similar incidences such as

this, I might also be inclined to place the defendant on pretrial diversion with the same conditions that I would recommend for a probated sentence.

Additional/alternative sentences were also associated with plea deals and taking victim input into consideration. One respondent who explicitly did not want to impose a term of confinement or monetary penalty, but also was concerned about the offender's mental health and wanted to ensure that he received counseling, stated that one necessary condition of diversion would be victim agreement. They wrote,

If the mental health report indicated he did not pose a threat to the community and the victim was in agreement, then a diversion/suspend[ed] sentence would be offered. If there are concerns about the defendant being unstable or posing a threat to the community, then probation would be granted with conditions that he enter and complete mental health counseling.

Finally, additional or alternative sentencing recommendations were also associated with attempting plea deals. One respondent who wanted to address the offender's possible substance abuse problems but did not recommend any (additional) confinement or monetary penalties, engaged in an extensive discussion of how they would use the plea-bargaining process to incentivize substance abuse treatment. They noted,

This defendant would be a good candidate for a substance abuse assessment and supervision on probation. . . . This defendant has no criminal hx [history] and was acting out based on a bad circumstance in his life. I would charge high (the felony disorderly charge) along with assault for grabbing the woman, and look to reduce the felony to a misdemeanor as an incentive for the defendant to accept a plea offer. . . . Since probation offers good services to defendants to address issues such as substance abuse and can protect the public by supervising him, I would be ok with two misdemeanor charges.

Many of these examples demonstrate that some respondents saw their role as offering an opportunity to be creative in imposing consequences, especially when the offender's actions may have just been him having a "bad day" or responding to a difficult situation. Additional/alternative options were also associated with large jurisdictions, which may have more support for creative options.

Taken together, these findings indicate that there are patterns in how characteristics of the prosecutors, office, and jurisdictions and prosecutors' reasons align with their decision-making. Each outcome is conceptually distinct, although confinement and felony have some overlap. There are two dimensions that explain these associations, Punitive vs. Therapeutic sentencing and Most Severe Criminal Record to Least Severe Criminal Record. Recommending a term of confinement is

associated with a range of reasons related to immediate harm, potential harm, and preventing future harms. Recommending imposition of a monetary penalty is associated with general harm to the public. Charging a felony is not strongly associated with anything. Recommending a deferred prosecution or suspended sentence was associated with working in a smaller office, working in smaller jurisdictions, being a more experienced prosecutor, and being a head prosecutor. Reasons for choosing a deferred prosecution or suspended sentence include concerns about the offender's financial state, a sense that the crime was without injury, and the offender lacked a criminal history. Additional/alternative sentences that were recommended were associated with working in larger jurisdictions, expressing concerns about the offender's mental health, hoping to engage in plea bargaining, and taking victim input into account.

IV. DISCUSSION AND LIMITATIONS

In this Part, we discuss the results of our study in light of existing scholarship. In particular, we focus on what our study adds to knowledge about prosecutors' decisions to charge felonies, defer prosecutions, and suspend sentences. We also explore prosecutors' decisions to institute terms of confinement, impose monetary penalties, and levy additional or alternative sentences.

A. Deciding to Charge a Felony

As shown in Table 1, 16.05% of the sample charged the hypothetical defendant with a felony. Our CA did not show any close associations with prosecutor characteristics or reasoning. Figure 1 hints at some factors that may be fruitful for future research. First, deciding to charge a felony is distinct from all the other decisions in this analysis. As seen in the distance between its placement and other circles in Figure 1, it is most distinct from the decision to seek a deferred prosecution or a suspended sentence. One of the reasons for this difference may be the reliance on an analysis of injury. Between 29-38% of prosecutors who selected confinement, suspended sentence/deferred prosecution, monetary fines, or alternative sentencing analyzed injury within their decision-making (see Table 3). However, only 15% of respondents who chose felony mentioned the lack of injury within their rationale (see Table 3).

The lack of association between the absence of injury and the choice to charge a felony may be due to an aversion to trial unless there is strong evidence supporting the sentencing. Although most cases do not go to trial,¹⁸³ the cases that are most likely to go to trial tend to be “where there are significant disagreements over the

183. *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/#:~:text=Over%20the%20last%2050%20years,were%20resolved%20through%20plea%20deals> [https://perma.cc/549L-HT62] (“Over the last 50 years, defendants choose trial in less than three percent of state and federal criminal cases.”).

probability of conviction and where penalties are severe.”¹⁸⁴ The CA results may demonstrate that an actual physical injury is one of the motivating factors that distinguishes whether or not the case is worth pursuing as a felony, rather than a less severe charge. Based on existing research about felony charges and recidivism,¹⁸⁵ prosecutors who want to pursue a felony conviction should not dismiss the lack of an injury during their decision-making. Instead, prosecutors should weigh the lack of an injury as an important fact. This may encourage them to challenge their perceptions of a violent crime and possibly mitigate the sentence down to a misdemeanor or alternative sentencing, which is more likely reduce the chances of recidivism than felony incarceration.

Unlike prior scholarship,¹⁸⁶ we did not find associations between prosecutor experience and charging a felony, but this could be because prosecutors as a whole were very unlikely to charge a felony based on the specific facts described in our vignette. We also did not find associations with plea bargaining strategies and charging a felony, in contrast to other scholarship.¹⁸⁷

Future research should focus on other factors that may affect the decision to charge a felony, especially because this is a hugely consequential decision for offenders and one that is solely within prosecutors’ discretion (unlike sentencing for which they only advise). The decision to charge a felony can have significant collateral consequences, including voting rights, immigration proceedings, access to public housing, and the severity of sentences should there be future criminal offenses.¹⁸⁸

B. Deferred Prosecution, Suspended Sentences, and Lack of Physical Injury

56% of respondents opted for deferred prosecution or a suspended sentence. Our study found that deferred prosecution and suspended sentences were associated with the prosecutor’s level of experience. Experienced prosecutors (rather than junior and midcareer prosecutors) pursued this option as did head prosecutors.¹⁸⁹ These findings were not previously reported in the scholarly literature on deferred prosecution and suspended sentences. Similar prior research shows that “Young Prosecutor Syndrome” can lead junior prosecutors away from

184. William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 75 (1971).

185. See *supra* notes 15–21.

186. Li, *supra* note 12; Wright & Levine, *supra* note 12.

187. See, e.g., Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 104 (1968); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011).

188. SHIMA BARADARAN BAUGHMAN, *THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA’S CRIMINAL JUSTICE SYSTEM* 77–92 (2017); Baughman & Wright, *supra* note 3, at 1129; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

189. 47% of respondents were experienced prosecutors, defined as over ten years of experience. 22% of respondents were head prosecutors. See Table 2. Head prosecutors’ overall inertia was 1.2%, and experienced prosecutors’ inertia was 2.6%. See Table 4.

diversion,¹⁹⁰ and thus this finding is not surprising as deferred prosecution and suspended sentencing can be considered as an alternative charging and sentencing scheme, akin to diversion or restitution programs.

Serving as head prosecutor is distinct from length of time working as a prosecutor, and future research should explore why head prosecutors are more willing to defer prosecution or offer a suspended sentence. It may be because their position affords them information about budgetary and other resource constraints in prosecuting cases. It may also be because head prosecutors have more discretion in their job to make decisions. It could also be that they are one of the most senior, experienced prosecutors in the office, supporting previous work that more experienced prosecutors are willing to consider each defendant's case individually.¹⁹¹ Our findings may also be the result of the vignette we provided and the possibility that the described offense was not perceived by such respondents as "an extraordinary case" requiring the resources of a more severe sentence (such as incarceration) when probation through a suspended sentence or deferred prosecution could act as an economical alternative.

Prosecutors working in smaller jurisdictions and smaller offices also pursued deferred prosecution and suspended sentences,¹⁹² a finding that is consistent with other studies which found that lack of resources may lead prosecutors to divert cases from court, even if the offense is serious and can be easily proved. An alternative explanation for this finding, however, is that in small jurisdictions, prosecutors may personally know offenders and thus may be able to contextualize their behavior and exercise compassion. Future research should explore the full range of reasons why small offices and jurisdictions may impact prosecutor decision-making.

Although office and jurisdiction characteristics leading to different outcomes for criminal defendants can be justified, prosecutor job experience or role in office leading to different outcomes cannot. Elected prosecutors thus may wish to reduce discretion of other prosecutors in their office or provide junior prosecutors with more mentoring and training.

We found a strong association between a prosecutor's choice of a suspended sentence or deferred prosecution and the rationale that there was no injury involved in the incident. No injury is an important characteristic in this model (with overall inertia of 8.7%), and it is a major predictor of Dimension 2 or the implications of prosecutors' decisions on the offender's criminal record (see Table 4).¹⁹³ Some states have policies against offering deferred prosecution or suspended sentences for felony charges or for violent offenders. This could explain why the lack of injury is associated with this option and felony is in a completely different quadrant with no association.

190. Wright & Levine, *supra* note 12.

191. Wright & Levine, *supra* note 12, at 1068–69, 1081.

192. 45% of respondents worked in a small office, and 41% worked in a small jurisdiction. See Table 2. Neither characteristic drives the overall inertia of the model at 2% inertia each. See Table 4.

193. The lack of criminal history for the hypothetical defendant also mattered for pursuing this option, which is consistent with other findings. See Table 4.

This association can also be explained by the concern with allowing “violent” criminals to receive sentencing other than incarceration. It is estimated that there are \$5 billion in medical costs for injuries incurred by violence in the United States each year.¹⁹⁴ With costs this high, critics argue that suspended sentences are “a ‘let-off’ with the offender ‘walking free’ or getting a ‘slap on the wrist’ . . . especially in the case of a serious offender.”¹⁹⁵ The definition of violent crimes differs by state, but such crimes usually are distinguished by the harm or threat of harm caused to the victim in the crime.¹⁹⁶ Therefore, injury to the victim occurs more often in the event of a violent crime. The association between a lack of injury and choosing suspended sentencing or deferred judgment is most likely how prosecutors rationalize mitigation efforts.

Another new finding from our study is that considering the financial state of the offender was associated with offering deferred prosecution or a suspended sentence. This may be because in the vignettes presented, the offender was asking members of the public for money, which could indicate something about the offender’s motivation for their conduct as well as their ability to pay fines. But some of the vignettes also contained information that the offender was employed as an accountant or a fast-food worker, which indicated that he may or may not have sufficient resources to pay a monetary penalty.

This finding about considering the financial state of the offender could also be explained in light of other associated factors of office and jurisdiction size. Suppose choosing deferred prosecution and suspended sentencing is based on the office and jurisdiction’s ability to allocate resources. This may also explain why there is similarly a strong association with the financial state of the offender. Prosecutors from small jurisdictions and offices may be more aware of not only their resources and financial restraints but also those of the population they serve. Prosecutors from small offices and jurisdictions may favor a suspended sentence or deferred prosecution because they are more acutely aware of the resources that can be saved by avoiding traditional incarceration. Future research should explore how exactly considering the financial state of the offender matters for prosecutor decision-making.

Because we know from prior research that deferring prosecution and suspending sentences is associated with lower rates of recidivism,¹⁹⁷ it is important to know how and why the factors we have identified as correlating with this recommendation matter for prosecutor decision-making.

194. Phaedra S. Corso, James A. Mercy, Thomas R. Simon, Eric A. Finkelstein & Ted R. Miller, *Medical Costs and Productivity Losses Due to Interpersonal and Self-Directed Violence in the United States*, 32 AM. J. PREVENTATIVE MED. 475, 474–82 (2007).

195. *Issues Paper: Suspended Sentences*, VICTIMS OF CRIME COMMISSIONER 1–2 (Nov. 2017), <https://nla.gov.au/nla.obj-562563259/view> [<https://perma.cc/2U63-A93B>].

196. JONES, *supra* note 36, at n.2.

197. *See supra* notes 30–35.

C. Monetary Penalties and Harm to the General Public

Over 40% of the prosecutors in our survey chose a monetary penalty (see Table 1), often in combination with another sentence such as incarceration. On average, prosecutors recommended a monetary penalty of \$247.21 (see Table 1). The one factor associated with imposing a monetary penalty is the perception that the public was harmed by the offense. Harm to public was not a driver of the overall model, with only 2.2% inertia (see Table 4). Harm to the public was mentioned by 63% of respondents (see Table 2) across all outcomes but is most closely associated with monetary penalty.

Although prosecutors seem to frequently choose monetary penalty based on an analysis of the public harm caused by the offender, the imposition of fines appears to be contradictory to the goal of protecting the public from harm given the association between monetary penalties and recidivism, as demonstrated in the existing scholarly literature.¹⁹⁸ However, imposition of this penalty is likely related to retributivist reasons for imposing punishment and, in this case, a sense that justice requires some penalty despite the lack of harm to the specific victim.

D. Confinement and Teaching a Lesson, Presence of a Weapon, Impact on Victim, and Probable Cause

Only 28% of respondents recommended a term of confinement, and recommending this sentence was not associated with any prosecutor, office, or jurisdiction characteristics. Rather, it was associated with the following reasons: the offender created fear, the offender needs to be taught a lesson, the offender needs to be deterred from future criminal conduct, a weapon was present, and there was probable cause.

Previous research has found that prosecutors may seek incarceration for specific deterrence (based on the economic theory of crime),¹⁹⁹ and our findings are consistent with this given the association between recommending confinement and justifying this recommendation by discussing teaching a lesson and deterrence. But respondents who recommended a term of confinement to “teach a lesson” (strong overall model inertia at 8.7%, see Table 4) or for deterrence may be teaching the wrong lesson and not deterring future bad conduct.²⁰⁰ This is because of the connection between length of sentence and whether the offender is low-risk or high-risk. Low-risk offenders like the offender portrayed in our vignette have bad experiences while incarcerated (even during brief periods of incarceration), which can lead to recidivism. Further, teaching a defendant a “lesson” can be accomplished in multiple ways, including through alternative, deferred, or

198. LIU ET AL., *supra* note 60, at 10.

199. Cullen et al., *supra* note 79, at 50S; *see generally* BECKER, *supra* note 81.

200. There is, however, some ambiguity in the phrase “teach a lesson.” It may be the case that respondents were incorporating retributivism (inflicting suffering on the offender) rather than solely focusing on specific deterrence.

suspended sentencing.

The presence of a weapon is strongly associated with the prosecutor's choice of confinement and possesses strong overall inertia at 9.5% (see Table 4). The language associated with this choice often expressed the sentiment that if not for the presence of a weapon, they would not have recommended incarceration. The presence of a knife as described in our vignettes is associated with recommending confinement, and this is consistent with weapon enhancement sentences, although such sentences are associated with increased recidivism as previously discussed.

Some existing studies show that prosecutors treat possession of a weapon as a determinative factor in choosing incarceration.²⁰¹ For violent offenders, it may be easier to obtain a judgment against the defendant. Prosecutors may also feel that incarceration is the best chance at preventing future crime because violent offenders are more likely to reoffend.²⁰² But prosecutors should carefully consider the adverse effects of weapon enhancement on recidivism and whether any other sentencing options may be more appropriate for the defendant, despite the presence of the weapon. The presence of a weapon should be balanced alongside other elements of the offense for the best chances of reducing recidivism.

In contrast to seeking a monetary penalty and its association with the offender harming the public, respondents who recommended confinement focused on the offender harming an identifiable individual (i.e., the victim) by creating fear. Causing fear or posing a threat to the victim accounted for 14.5% of the variation in the model and was the highest contributor to Dimension 1, Punitive vs. Therapeutic Sentencing (see Table 4). The difference between these sentencing recommendations and their reasons may be explained by an abstract harm compared to a concrete harm. However, focusing on harm to the victim is distinct from accounting for the victim's preferences, the latter factor which was associated with alternative sentences and not confinement (confinement is, in fact, contrary to many victim's preferences, as noted in scholarship discussed previously).²⁰³ Future research should explore different types of offenses to see if this finding related to sentencing recommendations is replicable.

Additionally, listing probable cause in their explanation was associated with seeking incarceration. This is a finding not reported in existing scholarly literature, and future research should explore this association further, especially because using other standards was not found to be associated with this or other outcomes.

E. Alternative Sentences and Larger Jurisdictions, Victim Input, Mental Health, and Plea Bargaining

Recommending alternative sentences, such as drug courts, mental health courts, and community service, was associated with respondents working in a large

201. FREDERICK & STEMEN, *supra* note 50, at 88; Cullen et al., *supra* note 79, at 50S.

202. *See supra* notes 120–122.

203. ALLIANCE FOR SAFETY & JUSTICE, *supra* note 149.

jurisdiction (greater than 500,000 residents) and who mentioned victim input, plea bargaining, and offender mental health when explaining their sentencing recommendations. Nearly 40% of respondents recommended such sentences. Previous research has found that alternatives to traditional sentences are more likely to be available in larger jurisdictions that have more resources,²⁰⁴ as discussed earlier. Prosecutors from large jurisdictions are most likely to consider alternative sentences because they possess the resources and capacity to pursue alternative options which, although expensive in the short term, will result in long-term savings due to reduced recidivism. This contrasts with the immediate price-saving appeal of suspended and deferred sentencing associated with smaller jurisdictions. Our findings about the association between large jurisdiction and recommending alternative sentences are thus consistent with existing literature.²⁰⁵

Given that alternatives to monetary penalties and incarceration are associated with lower recidivism, especially for low-risk offenders, and that there is an association with larger jurisdictions, future research should explore whether recidivism rates differ by jurisdiction size and available resources.

Mental health is the largest singular driver of variation within the correspondence analysis biplot, accounting for 22.1% of the overall inertia (see Table 4). Within alternative sentencing, mental health represents the strongest positive trait association. Given that the vignette indicated the offender was emotionally distressed, it is not surprising that some respondents (27%) flagged the offender's mental health as something to be considered in sentencing (see Table 2), with many recommending anger management, substance abuse treatment, and counseling. Such recommendations are also consistent with professional guidance to divert offenders with mental health problems out of jails and are consistent with public preferences that mentally ill offenders be treated rather than incarcerated. Further, larger jurisdictions may also have more mental health treatment resources.

Desiring victim input was also associated with alternative sentences. Victim input only accounts for 1.1% of the overall model inertia (see Table 4). We found that 17% of the prosecutors said they would request input from the victim (see Table 2). Prosecutors are likely properly balancing their role to both victims and the public in their choice of alternative sentencing when considering victim input. Respondents who incorporate victim input into their everyday decision-making likely know what research has demonstrated—victims often do not desire offenders to be incarcerated when there are other options. But it is important for prosecutors to remember that they represent the state and not the victims.

Finally, mentioning plea bargaining strategies was also associated with recommending alternative sentences. Prior literature discusses plea bargaining in the context of charging decisions,²⁰⁶ but our findings show that there is not an

204. See *supra* notes 125–127, 130–131.

205. Picard et al., *supra* note 125, at 9.

206. Alschuler, *supra* note 187, at 104; Caldwell, *supra* note 187.

association between charging a felony (based on the vignette) but instead recommending alternative sentences. It could be that the offense described was clearly not a felony, which is why felony was not associated with anything, or it could be how we measured what constituted a felony for this specific analysis. Further, the association between plea bargaining and alternative sentences could be because prosecutors want the offender to receive counseling or substance abuse treatment, but do not think he will without an incentive. To incentivize treatment, the prosecutor may make these alternatives or additions to confinement and monetary penalties part of a plea agreement. Future research should explore whether and why plea bargaining is associated with alternative sentences.

In brief, it appears that public opinion supporting alternative sentencing, victim preference to avoid incarceration, and reductions in recidivism through alternative sentencing all reinforce one another. Overall, prosecutor reasoning for the selection of alternative sentencing likely reflects careful considerations of the victim's desires, the offender's mental health, and the safety of the public. This nuanced approach is positively associated with large jurisdictions where there are resources to consider alternative options and invest in them for the future.

F. Limitations

Our study has several limitations, which should be noted. First, our sample is not representative of all state and local prosecutors. Although our study does include prosecutors from across the country, our findings are not generalizable. Second, our response rate of just over 12% is low, and those prosecutors who chose to participate may differ in important but unknown respects from prosecutors who declined to participate.²⁰⁷ Third, our study was designed to be short, and so it did not include many survey questions or contain a lot of space for respondents to write in responses; relatedly, because respondents were not required to write responses (instead, they could skip questions or select from a list of options), the incidence of the qualitative themes in their thinking is likely much higher than what they wrote. For example, respondents could have considered the suspect's mental health, but because we did not specifically ask about this, they may have neglected to indicate this consideration.²⁰⁸ Fourth, our vignettes described only one relatively minor crime, which cannot represent all crime and reflect all decisions prosecutors make in the course of their work.²⁰⁹ Perhaps different crimes, especially more serious crimes, would have resulted in different findings. Fifth, responses to the survey questions in our study may not indicate how prosecutors would handle the same or similar cases in the real world.²¹⁰

207. Robertson et al., *supra* note 2, at 808, 816–18.

208. *Id.*

209. *Id.*

210. *Id.*

Finally, this study should be considered exploratory in nature.²¹¹ CA cannot determine causal relations, only correlations. Additionally, it can be sensitive to outliers, and the model selection relies heavily on selecting variables that are motivated by previous literature. Our results should therefore be used to generate hypotheses for future research.

CONCLUSION

Prosecutorial discretion is highly impactful on criminal punishment, but little is known about the factors that influence prosecutors' decision-making, particularly around their charging decisions and sentencing recommendations. To better understand prosecutorial decision-making, we analyzed the results from over 500 prosecutors across the country who participated in our survey in which they were asked to evaluate a hypothetical case and make charging and sentencing recommendations.

We found that nearly all our respondents (97%) chose to charge even when facts could support a decision not to charge, but that they often selected deferred prosecution and suspended sentences (56%), choices that in the real world likely reduce recidivism. Factors important to such decisions included prosecutor experience and role, lack of injury to the victim, office size, jurisdiction size, and considering the offender's financial state. Existing scholarship indicates that decisions to defer prosecution or suspend sentences will likely reduce recidivism and lead to better outcomes for the offender and society.

There are reasons to think that some prosecutor decisions, particularly decisions to charge a felony or recommend confinement or monetary penalties, will not result in decreased recidivism and may even increase recidivism. For example, respondents who recommended confinement to teach the defendant a lesson or because a victim felt afraid may not realize that offenders are unlikely to learn any positive lessons through incarceration or that victims who suffered from fear or threats do not support incarceration. Further, respondents who recommended monetary penalties because the offender harmed society may not be thinking about the long-term harm to the public from imposing such a penalty because of its associations with increased recidivism and entrenchment of poverty. Additionally, avoiding an injury analysis when charging a felony or focusing on the presence of a weapon for incarceration as a determinative factor could result in more severe sentencing with detrimental impacts on recidivism.

Our analysis also shows that prosecutors tended to emphasize or ignore the presence or types of injury in a manner that often supported their recommendations. Prosecutors who choose a suspended sentence or deferred prosecution appear to focus on the objective result—whether there is a physical injury. Whereas prosecutors who choose confinement often focus on the victim's subjective fear of imminent bodily injury. Lastly, prosecutors who charge a felony

211. *Id.*

usually avoid the discussion of the absence of physical injury altogether.

The different strength of associations demonstrated in the CA reveal that the amount of consideration given to this single factor may result in far-reaching consequences for sentencing outcomes. This relationship deserves further exploration, particularly because a simple shift of perspective from the subjective fear or threat experienced by the victim to the objective resulting injury may drastically affect a prosecutor's choice of sentencing.

The strong positive association between alternative sentencing and large jurisdictions in the CA reinforces findings in existing literature analyzing the costs of alternative sentencing and the resources available in large jurisdictions. Despite the upfront cost, alternative sentencing shows positive decreases in recidivism which should encourage medium and small jurisdictions to also consider the benefit that alternative sentencing may have within their own communities and to identify means to offer these alternatives to traditional sentencing.

The ABA encourages prosecutors to consider any alternative sentencing that may uniquely decrease recidivism of that individual. The results from our CA show promising signs that prosecutors who consider mental health understand that alternative sentencing is the most effective way to achieve these goals, hence the strong association. Specialized courts, community treatment, outpatient treatment centers, and other alternatives provide more beneficial treatment than incarceration for those suffering from mental health challenges.

Prosecutors are trusted with great discretion and have a difficult job that requires weighing numerous facts, various interests, and risks to public safety while trying to achieve justice. As prosecutors critically reflect on the reasoning for and effects of their charging decisions and sentencing recommendations, we hope our analysis provides some insight.

We suggest that rather than focusing on the presence of a weapon, which often leads to prosecutors recommending incarceration, they instead focus on the resulting injury (or lack thereof) which may lead them to more seriously consider suspended sentencing or deferred prosecution. Similarly, rather than "teaching the defendant a lesson" through incarceration, prosecutors may consider how lessons can be learned in alternative sentencing through rehabilitation or mental health support. The lessons learned outside of traditional incarceration are less likely to result in recidivism after completion of the alternative program.

The results of our CA contribute to the ongoing conversation about issues in American criminal law and the role of prosecutorial discretion and decision-making. Given that our method is hypothesis generating, we need more research to fully understand the significance of these findings. Future empirical research should explore different types of offenses, which may identify other reasons for recommending punishment and thus different dimensions of decision-making. Future theoretical work should explore how the dimensions of our CA—Punitive vs. Therapeutic Sentences and Severity of Criminal Record—map onto different theories of and justifications for punishment.

APPENDIX

Table 3: Codes, Percent by Outcome

	Definition/Explanation	Confine	Monetary	Felony	Sus/Def	Alt
Reasons for Decision						
Lacks Criminal History	No criminal history	50%	57%	68%	69%	64%
Weapon	Presence of weapon	59%	35%	52%	34%	33%
No Injury	No one was injured	29%	34%	15%	38%	32%
Fear or Threat	Created fear	56%	36%	44%	26%	27%
Mental Health	Concerns about mental health	23%	23%	31%	27%	50%
Victim Input	Would request input from victim	18%	16%	23%	17%	20%
Harm to Public	Harmed general public	73%	65%	63%	61%	54%
Financial	Financial state of offender	10%	5%	4%	10%	9%
Probable Cause	Mentioned probable cause	6%	2%	4%	3%	3%
Beyond a Reasonable Doubt	Mentioned BARD	10%	8%	5%	9%	7%
Lesson	Sentence meant to teach a lesson	30%	21%	19%	13%	15%
Deterrence	Sentence meant to deter in future	36%	26%	33%	22%	21%
Plea	Proposed plea bargaining	19%	21%	24%	20%	26%
Characteristics of the Prosecutor, Office, Jurisdiction						
Junior/Mid-Career	Ten or fewer years in career	53%	57%	68%	53%	53%
Experienced	More than ten years in career	47%	43%	32%	46%	47%
Head Prosecutor	Respondent is head prosecutor	24%	23%	17%	25%	22%
Standards	Uses organization-wide standards	59%	55%	60%	51%	54%
Small Office	Ten or fewer prosecutors in office	44%	47%	40%	50%	46%
MedLarge Office	More than ten prosecutors in office	56%	53%	60%	50%	54%
Small Jurisdiction	Serves fewer than 100,000	46%	48%	35%	43%	41%
Med Jurisdiction	Serves 100,000 - 500,000	27%	28%	31%	29%	28%
Large Jurisdiction	Serves more than 500,000	27%	24%	35%	29%	32%

Table 4: Correspondence Analysis

	Overall	Dimension 1			Dimension 2		
	% Inertia	Coord	SqCorr	Contrib	Coord	SqCorr	Contrib
<i>Columns: Sentencing Outcomes</i>							
Confinement	33.5%	-.209	.907	.512	-.004	0	.001
Monetary Penalty	8.1%	-.041	.198	.027	0.052	.320	.105
Felony Charge	17.5%	-.099	.202	.060	-.158	.522	.372
Suspended/Deferred	14.8%	.071	.444	.111	.069	.419	.252
Alternative	26%	.135	.662	.290	-.084	.256	.271
<i>Rows: Reasons and Characteristics of Prosecutor or Setting</i>							
Lacks Criminal History	6.4%	.109	.665	.071	.009	.004	.001
Weapon	9.5%	-.187	.826	.132	-.062	.090	.035
No Injury	8.7%	.123	.325	.048	.172	.637	.226
Fear or Threat	14.5%	-.264	.96	.234	-.045	.028	.016
Mental Health	22.1%	.254	.516	.192	-.218	.381	.342
Victim Input	1.1%	.039	.141	.003	-.086	.689	.031
Harm to Public	2.2%	-.063	.65	.024	.044	.316	.028
Financial	3.3%	.085	.102	.006	.079	.088	.012
Probable Cause	1.8%	-.243	.618	.019	-.023	.006	0
Beyond a Reasonable Doubt	1.2%	-.032	.041	.001	.140	.771	.038
Lesson	8.7%	-.267	.854	.125	-.009	.001	0
Deterrence	4.9%	-.177	.947	.078	-.039	.046	.009
Plea	2.2%	.088	.448	.016	-.085	.415	.036
Junior/Mid-Career	2.1%	.008	.009	0	-.022	.071	.006
Experienced	2.6%	.057	.32	.014	.054	.293	.031
Head Prosecutor	1.2%	.034	.127	.003	.083	.742	.037
Standards	.3%	-.014	.203	.001	-.019	.354	.004
Small Office	2%	.060	.492	.016	.061	.500	.040
MedLarge Office	.5%	.003	.006	0	-.030	.577	.011
Small Jurisdiction	2%	.002	0	0	.076	.696	.058
Med Jurisdiction	.4%	.031	.368	.003	.004	.005	0
Large Jurisdiction	2.2%	.072	.375	.014	-.075	.416	.038