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## OVERCHARGING

Kyle Graham\*

The prosecutors in several recent high-profile criminal cases have been accused of “overcharging” their quarry.<sup>1</sup> These complaints have implied—and sometimes expressly asserted—that by “overcharging,” the prosecutors engaged in socially undesirable, illegitimate, and even corrupt behavior.<sup>2</sup> United States Supreme Court Justice Antonin Scalia also weighed in on the “overcharging” phenomenon not long ago, describing this practice as a predictable though regrettable aspect of modern plea bargaining.<sup>3</sup>

Unfortunately, many of these commentators either have failed to explain precisely what they meant by “overcharging,” or have used the same word to

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<sup>1</sup> E.g., John Dean, *Dealing With Aaron Swartz in the Nixonian Tradition: Overzealous Overcharging Leads to a Tragic Result*, JUSTIA (Jan. 25, 2013), <http://verdict.justia.com/2013/01/25/dealing-with-aaron-swartz-in-the-nixonian-tradition> (stating, as to the recent prosecution of Aaron Swartz, the “case was seriously, unnecessarily, and brutally overcharged,” with the prosecutors “using a sledgehammer for something that was merely worthy of a slap on the wrist”); David Friedman, *Overcharging: The Aaron Swartz Case*, IDEAS (Jan. 24, 2013, 7:51 AM), <http://davidfriedman.blogspot.com/2013/01/overcharging-aaron-swartz-case.html>; Emily Bazelon, *When the Law Is Worse Than the Crime*, SLATE (Jan. 14, 2013, 3:59 PM), [http://www.slate.com/articles/technology/technology/2013/01/aaron\\_swartz\\_suicide\\_prosecutors\\_have\\_too\\_much\\_power\\_to\\_charge\\_and\\_intimidate.html](http://www.slate.com/articles/technology/technology/2013/01/aaron_swartz_suicide_prosecutors_have_too_much_power_to_charge_and_intimidate.html) (describing the Swartz prosecution as an instance of “egregious overcharging of crimes by the U.S. attorney’s office in the name of setting an example.”); John R. Lott Jr., *Where’s the ‘Probable Cause’?*, THE NATIONAL REVIEW ONLINE (April 13, 2012, 2:45 PM), [www.nationalreview.com/articles/295984/where-s-probable-cause-john-r-lott-jr](http://www.nationalreview.com/articles/295984/where-s-probable-cause-john-r-lott-jr) (observing that the prosecutor of George Zimmerman, charged with the murder of Trayvon Martin, “has most likely deliberately overcharged, hoping to intimidate Zimmerman into agreeing to a plea bargain.”); John Schwartz, *Severe Charge, With a Minimum Term of 25 Years*, N.Y. TIMES (April 11, 2012), <http://www.nytimes.com/2012/04/12/us/zimmerman-faces-second-degree-murder-charge-in-florida.html> (quoting a defense attorney’s suggestion that Zimmerman may have been “overcharged”); Scott Bonn, *Casey Anthony trial was a case of overzealous prosecution: Death penalty was a bar too high*, N.Y. DAILY NEWS (July 7, 2011, 4:00 a.m.) <http://www.nydailynews.com/opinion/casey-anthony-trial-case-overzealous-prosecution-death-penalty-bar-high-article-1.160804#ixzz2Lmmfm9QN> (“Arguably, the prosecution ‘overcharged’ the case against [Casey] Anthony [by charging her with first-degree murder] and would have been better off going with a charge of nonnegligent manslaughter or even second-degree murder.”); *Is O.J. Being Overcharged?*, SENTENCING LAW & POLICY (Sept. 18, 2007, 7:56 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/09/is-oj-being-ove.html](http://sentencing.typepad.com/sentencing_law_and_policy/2007/09/is-oj-being-ove.html).

<sup>2</sup> E.g., Dean, *supra* note 1; Bazelon, *supra* note 1. See also *United States v. Robertson*, 15 F.3d 862, 876 (Reinhardt, J., dissenting) (“The practice of overcharging a defendant involves an abuse of the prosecutor’s generally unreviewable discretion.”) (footnote omitted).

<sup>3</sup> *Lafler v. Cooper*, 132 S.Ct. 1372, 1397 (2012) (Scalia, J., dissenting) (surmising that plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense.”).

describe different types of charging practices.<sup>4</sup> The various meanings given to “overcharging,” when the term is defined at all, have made it difficult to ascertain what this practice entails, why it is improper, and who the worst offenders are.<sup>5</sup>

This essay aims to improve the ongoing conversation about overcharging in two ways: first, by disentangling and fleshing out the core meanings of this term; and second, by proposing some metrics to identify prosecutors who chronically overcharge. As to the first of these matters, this essay explains how the term “overcharging” can communicate three different criticisms of prosecutorial practices. The first approach toward overcharging objects to the allegation of crimes without adequate proof. A second criticism resembles the first in that it holds criminal charges to some objective or other extrinsic standard of propriety, but differs in that it is concerned with a lack of proportionality between the nature or consequences of the charges in a case on the one hand, and the gravamen of the defendant’s alleged misconduct on the other. A third conception of overcharging combines objective and subjective elements. This perspective also perceives inadequate proof or a lack of proportionality, but particularly condemns a prosecutor’s conscious decision to allege overstated charges in order to maneuver the defendant into a plea bargain in which some or all of the charges will be dismissed or reduced. As detailed below, each of these basic criticisms has its strengths and shortcomings, which may explain why they are commonly merged or strung together. Yet the differences matter, especially because some perceived solutions to overcharging address only one or two of these critiques.

Next, this essay proposes and then applies a rudimentary methodology for tracking how often particular prosecuting authorities overcharge. Some commentators have said that it is impossible to spot overcharging in a given case, at least without an admission by the prosecutor involved.<sup>6</sup> Perhaps this is true. But

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<sup>4</sup> WILLIAM F. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 19 (1985) (“even when the same term [overcharging] is used it often has different meanings.”); Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1279 (2011) (“it is not completely clear what ‘overcharging’ means, or why the practice is illegitimate.”). See also SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990 91 (1993) (“The issue of overcharging is very complicated. The term has several meanings.”); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 41 (1983) (“‘Overcharging’ is an ambiguous term.”)

<sup>5</sup> See *Is O.J. Being Overcharged*, *supra* note 1 (“As many know (through few will admit), some — only a few? many? most? — prosecutors are willing and perhaps eager to file as many charges as they plausibly can in order to create bargaining leverage and bargaining room for inevitable plea discussions.”)

<sup>6</sup> *Bordenkircher v. Hayes*, 454 U.S. 357, 368 n.2 (Blackmun, J., dissenting) (opining that “[n]ormally . . . it is impossible to show that” a prosecutor is engaging in overcharging); Bennett

perhaps patterns of overcharging can be gleaned from larger collections of cases. Toward this purpose, this essay presents an original review of several years' worth of federal charging and conviction data. This study reveals the United States Attorney's offices that have produced patterns of charging and conviction over this span that raise yellow, if not red flags regarding systemic overcharging. Although these results admittedly do not establish frequent overcharging on their own, they do point toward those offices that have built charging and conviction records that may warrant further scrutiny.

This essay does not offer a prescription for ending or abating overcharging, however that term is defined.<sup>7</sup> Hopefully, though, the brief discussion below will lay a foundation for increasingly cogent consideration of overcharging, identification of prosecuting authorities who consistently overcharge, and potential responses to the practice.

## I. WHAT IS "OVERCHARGING"?

The word "overcharging," as directed at prosecutorial charging practices, first appeared in the academic literature in the mid-1960s.<sup>8</sup> Shortly thereafter, in 1968, Professor Albert Alschuler devised a basic vocabulary for overcharging that remains influential today.

### A. "Horizontal" and "Vertical" Overcharging

In his article *The Prosecutor's Role in Plea Bargaining*,<sup>9</sup> Professor Alschuler described two different types of overcharging: "horizontal" overcharging and "vertical" overcharging.<sup>10</sup> As Alschuler described them, both "horizontal" and "vertical" overcharging represent tactics that prosecutors employ to catalyze plea bargains. Both practices set the stage for possible "charge

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L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORD. URB. L.J. 513, 521 (1993) ("It is improper for prosecutors to use overcharging as a leverage device to more readily obtain guilty pleas or to provide a trial jury a broader range of charges that might more readily produce a compromise verdict. However, proving such improper prosecutorial motivation is virtually impossible.")

<sup>7</sup> This article does not draw normative conclusions regarding overcharging, however defined, although it does attempt to pinpoint the concerns that animate particular perceptions of the practice. For a catalogue and critique of prescriptions for addressing overcharging, see DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 19–33 (2012).

<sup>8</sup> E.g., Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030, 1035 (1967).

<sup>9</sup> 36 U. CHI. L. REV. 50 (1968).

<sup>10</sup> *Id.* at 85–87.

bargaining,” a type of plea bargaining in which the prosecutor agrees to dismiss or reduce a charge or charges in exchange for the defendant’s guilty or no-contest plea to another offense or offenses.<sup>11</sup>

The principal difference between “horizontal” and “vertical” overcharging concerns their form. According to Alschuler, “horizontal” overcharging consists of “multiplying ‘unreasonably’ the number of accusations against a single defendant.”<sup>12</sup> The practitioners with whom Alschuler spoke when preparing his article described two subspecies of this practice: charging a defendant “with a separate offense for every criminal transaction in which he has allegedly participated”<sup>13</sup> and “fragment[ing] a single criminal transaction into numerous component offenses.”<sup>14</sup>

Regardless of the form that “horizontal” overcharging took, the main criticism of the practice that Alschuler recorded lay in the prosecutor’s tactical use of seemingly extraneous charges to triangulate toward a plea bargain. On this point, Alschuler wrote that “[w]hen defense attorneys condemn this practice, they usually do not disagree with the prosecutor’s evaluation of the quantum of proof necessary to justify an accusation. Usually, they concede, there is ample evidence to support all of the prosecutor’s charges.”<sup>15</sup> To these attorneys, the perceived unreasonableness of the charges owed instead to the fact that the “excess” counts “are not usually filed against a single defendant because the prosecutor is interested in securing . . . convictions [for these charges]. The charges may be filed instead in an effort to induce the defendant to plead guilty to a few of the charges, in exchange for dismissal of the rest.”<sup>16</sup>

Alschuler’s sources also related an alternative form of overcharging, which he referred to as “vertical” overcharging. “Vertical” overcharging consists of:

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<sup>11</sup> Kyle Graham, *Facilitating Crimes: An Inquiry into the Selective Invocation of Offenses with the Continuum of Criminal Procedures*, 15 LEWIS & CLARK L.REV. 665, 686–87 (2011); Stephen S. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278–82 (1989) (discussing “charge bargaining” by federal prosecutors).

<sup>12</sup> Alschuler, *supra* note 9, at 85.

<sup>13</sup> *Id.* at 87.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Charging a single offense at a higher level than the circumstances of the case seem to warrant. The allegedly extravagant charge usually encompasses, as a “lesser included offense,” the crime for which the prosecutor actually seeks conviction. In this situation, as in cases of horizontal overcharging, the claim is not that prosecutors charge crimes of which the defendant is clearly innocent; it is instead that they set the evidentiary threshold at far too low a level in drafting their initial allegations. Usually, defense attorneys claim, prosecutors file their accusations at the highest level for which there is even the slightest possibility of conviction.<sup>17</sup>

Thus, in both vertical and horizontal overcharging, the prosecutor originally alleges a charge or charges that she subjectively does not want to pursue to conviction, or is indifferent about prosecuting. Instead, the extraneous or unduly severe allegations are put forward to incentivize the defendant to plead guilty to another charge or charges. The two practices differ in that horizontal overcharging anticipates charge dismissals as part of a desired plea bargain, while vertical overcharging envisages charge substitution in a plea deal. Furthermore, at least as Alschuler characterized the practices, only vertical overcharging entails charges premised “insufficient” proof, however sufficiency is to be measured.

Some modern commentators continue to recognize a basic distinction between horizontal and vertical overcharging.<sup>18</sup> This bifurcation is useful, but lacks comprehensiveness and rigor. Alschuler’s description of “vertical” overcharging, for example, does not account for the scenario in which the prosecutor files a charge on proof beyond a reasonable doubt, but with the intent to substitute a lesser charge as part of a plea deal. If strategic “horizontal” overcharging warrants condemnation even when premised on plentiful proof, why doesn’t this example involve comparable “vertical” overcharging? Likewise, why doesn’t the allegation of ancillary, extraneous charges on *insufficient* proof represent a subspecies of “horizontal” overcharging?

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<sup>17</sup> *Id.* at 86.

<sup>18</sup> *E.g.*, H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 85 (2011) (“Scholars suggest that there are two basic types of overcharging. Prosecutors can engage in either horizontal overcharging by filing charges for distinct crimes resulting from similar offensive conduct, or vertical overcharging by charging harsh variations of the same crime when the evidence only supports lesser variations.”); Ana Maria Gutierrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DEN. U. L. REV. 695, 697 n. 16 (2010) (“There are two types of overcharging: horizontal and vertical.”).

The simple horizontal-vertical framework also fails to consider whether overcharging may occur even when the prosecutor does *not* subjectively intend to bargain a charge down, or away. As it stands, this taxonomy of “overcharging” begs the question of whether, on its own, a departure from customary charging practices,<sup>19</sup> perceived disproportionality between the punishment attached to charges and the moral blameworthiness of the defendant’s conduct, or other disconnects can support a claim of “overcharging.” If not, why not—particularly when observers have been using the word “overcharging” to convey precisely these criticisms?<sup>20</sup>

One cannot blame Professor Alschuler for these gaps. He sought to make sense of what practitioners were telling him, not to define “overcharging” for all purposes going forward. But it has become evident that modern commentators, even as they sometimes use the horizontal-vertical terminology to describe the specific forms that overcharging can take, also apply the “overcharging” label to more fundamental criticisms of prosecutorial practices.

### **B. Three Meanings of “Overcharging”**

Alschuler’s terminology provides a practical overlay to three more basic understandings of overcharging.<sup>21</sup> These descriptions often get merged or concatenated in criticisms of perceived overcharging,<sup>22</sup> but they merit parsing insofar as they relate distinct though overlapping criticisms.

At a foundational level, claims of “overcharging” communicate one or more concerns about charging decisions. One perception of overcharging concentrates on the filing of criminal counts that lack adequate proof. Another conception of overcharging dwells on the lack of proportionality between the numerosity, gravamen, or sentencing consequences of a criminal charge or

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<sup>19</sup> See MCDONALD, *supra* note 4, at 19–20 (describing this as a type of “vertical” overcharging).

<sup>20</sup> *E.g.*, Dean, *supra* note 1.

<sup>21</sup> There may exist other, less commonly invoked definitions of “overcharging.” *See, e.g.*, *People v. O’Bryan*, No. 292570, 2011 WL 165410 at \*7 (Mich. App. Jan. 18, 2011) (“The test for prosecutorial overcharging is not whether the prosecution’s choice of charges was unreasonable or unfair, but whether the charging decision was made for reasons that were unconstitutional, illegal, or ultra vires.”)

<sup>22</sup> *E.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 31 (2007) (“Prosecutors routinely engage in overcharging, a practice that involves ‘tacking on’ additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with the legislative intent or otherwise inappropriate.”).

charges on the one hand, and the character of the defendant's conduct on the other. While these first two approaches toward overcharging contrast charging decisions against objective (though sometimes difficult to pin down) or other extrinsic standards, a third critique is more concerned with the subjective intentions of prosecutors. This view perceives overcharging when a prosecutor deliberately uses excessive allegations to induce a plea bargain to lesser or otherwise different charges.

These differences are important for practical as well as theoretical reasons. Many of the solutions that have been proposed to end or abate overcharging do not respond to all three concerns. Even if these suggestions perform as advertised, therefore, they will not end the overcharging debate. For example, proposals to reduce the "discount" that prosecutors can offer in connection with plea bargains<sup>23</sup> may not address "disproportionate" overcharging that is not intended to coerce a plea. Meanwhile, the adoption of recommendations to raise the evidentiary "floor" for criminal charges<sup>24</sup> will not necessarily deter prosecutors from engaging in overcharging in which charges are filed on ample proof, but with the subjective intent that they be bargained away in exchange for guilty pleas to other crimes. To provide a better sense of these possible disconnects, the discussion below relates each conception of overcharging, and the concerns behind it, in some detail.

### *1. Overcharging as Charging Without Adequate Proof*

First, some descriptions of overcharging connect this term to the filing of charges without sufficient proof.<sup>25</sup> At its core, this critique attacks these charges as falling short of an objective threshold for criminal allegations.

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<sup>23</sup> See, e.g., Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254–56 (2008) (discussing how "fixed discounts" on pleas would constrain overcharging).

<sup>24</sup> See MEDWED, *supra* note 8, at 20–21 (discussing possible reforms to the probable-cause standard for charging).

<sup>25</sup> E.g., Gifford, *supra* note 4, at 41 (observing that in its "strongest sense," "overcharging" "means filing charges for which the prosecutor does not even have sufficient evidence to support a finding of 'probable cause.'"); *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES, July 17, 2012, at A24 ("Prosecutors regularly 'overcharge' defendants with a more serious crime than what actually occurred"); Ed Brayton, *How to Deal with Prosecutors Overcharging*, FREETHOUGHT BLOGS (Apr. 20, 2012), <http://freethoughtblogs.com/dispatches/2012/04/20/how-to-deal-with-prosecutors-overcharging/> ("One of the hallmarks of our criminal injustice system is overcharging by prosecutors. They routinely charge defendants with far more than they can prove because that puts maximum pressure on the person to cop a plea."); Ted Rohrlich, *High-Profile Losses Tarnish Reputation of D.A.'s Office*, L.A. TIMES, Mar. 6, 1994, at 1 (stating that in Los Angeles, "Elected district attorneys may have gotten carried away by emotions or politics and charged defendants with more crimes than they could prove," a practice the article describes as "overcharging").



This approach addresses a coherent concern, at least in theory. Positive ethical proscriptions, such as the American Bar Association Standards for the Prosecution Function,<sup>26</sup> prohibit the filing of charges on inadequate proof.<sup>27</sup> With good reasons; among them, the frequent filing of charges on bare minima of evidence would lead to a greater number of erroneous convictions. Though juries and judges play important roles in weeding out weak cases, prosecutors play a necessary part in this process, too. If prosecutors entirely forfeited this responsibility, it would remove an important screening phrase from criminal proceedings. Furthermore, such an abdication would reduce the time and effort that prosecutors (and defense attorneys, and judges, and juries) would spend on their more meritorious cases, meaning that those cases, as well, might yield “incorrect” outcomes more often.

That said, concerns about charging on inadequate proof may be overstated.<sup>28</sup> First, most prosecutors understand that it is unethical to bring charges on patently inadequate grounds.<sup>29</sup> Second, for good or for ill, modern criminal codes are so robust that a prosecutor who cannot find probable cause for *some* crime may need to have both her priorities and her bar license questioned.<sup>30</sup> Third, from the prosecutor’s selfish perspective, filing paper-thin charges may prove counterproductive. Assuming a relatively full docket, the prosecution of a marginal case will draw the prosecutor’s attention, time, and other resources away from the rest of her caseload. For little purpose; this form of overcharging will often fail to induce convictions by way of a plea bargain or trial. The prevailing ethical “floor” for a criminal charge is probable cause.<sup>31</sup> Probable cause is not a

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<sup>26</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (3d ed. 1993) (“A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.”).

<sup>27</sup> Gershman, *supra* note 4, at 1263; Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2197 (2010) (“prosecutors in the vast majority of jurisdictions may file criminal charges so long as they believe they are supported by probable cause, a standard that many scholars have derided as woefully inadequate in filtering out the innocent.”).

<sup>28</sup> See Lawrence S. Goldman, *Prosecutorial Overcharging is Not “Regular,”* WHITE COLLAR CRIME PROF BLOG (Aug. 28 2012), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2012/08/see-here-see-here-see-here.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/08/see-here-see-here-see-here.html), (“Federal prosecutors do not, in my view, ‘regularly’ overcharge defendants ‘with a more serious crime than what actually occurred,’ at least in white-collar cases (although they often pile on unnecessary if legally unjustifiable multiple charges).”).

<sup>29</sup> See McDONALD, *supra* note 4, at 22 (“charging a defendant without probable cause for any of the charges filed would be unanimously condemned.”).

<sup>30</sup> See generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008) (discussing a perceived surfeit of criminal offenses in contemporary criminal codes).

<sup>31</sup> Medwed, *supra* note 27, at 2197.

high standard of proof, and in a given case evidence that just satisfies probable cause is usually detectably different from proof beyond a reasonable doubt.<sup>32</sup> Charges that lack probable cause therefore may not convince a defendant to enter a guilty plea, even to lesser charges. Instead, a significant percentage of defendants will press for trials.<sup>33</sup> And at these trials, the prosecutor cannot reasonably expect the juries or judges to reliably return guilty verdicts to overblown charges. Ultimately, then, a practice of routine overcharging promises more work and more acquittals for the prosecutor.

Of course, one might reject the probable-cause standard for charges as too low, and spot overcharging whenever a criminal count is supported by something less than proof beyond a reasonable doubt.<sup>34</sup> Prosecutors sometimes misgauge a case's strength, meaning that this sort of overcharging probably happens more often than would be ideal. Yet it may overstate the capabilities of prosecutors to assume that they routinely file charges that they know just barely lack proof beyond a reasonable doubt. As just stated, there usually exists a palpable difference between evidence that barely meets the probable cause threshold and evidence that amounts to proof beyond a reasonable doubt. In contrast, it can be difficult—sometimes impossible—to ascertain whether the evidence in a case falls just north or south of the beyond-a-reasonable-doubt standard.

The simple truth, then, is that in most cases, when prosecutors *could* knowingly overcharge within the “inadequate proof” meaning of the term, this tactic won't induce a conviction; and when the tactic might work, a prosecutor who presses charges typically won't be aware that she is overcharging at all. Thus most “true” overcharges, in the sense that a charge patently lacks proof sufficient for a conviction, likely involve a prosecutor's misunderstanding of the pertinent law, or the facts of a case.<sup>35</sup> These mistakes may involve professional negligence. But they rarely entail a more sinister *scienter*.

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<sup>32</sup> Gershman, *supra* note 4, at 1266–70 (“the subjective probable cause standard is so minimal that it offers very little protection from careless and reckless charging, to say nothing of a prosecutor's deliberate and bad faith charging”).

<sup>33</sup> See Brooke A. Masters and Carrie Johnson, *Corporate Scandals Yield Few Plea Deals; Top Executives Take Best Shot in Court*, THE WASH. POST, Jan. 11, 2004, at A1 (quoting a defense attorney as saying, “If people believe they have been improperly charged or overcharged . . . they want their day in court.”).

<sup>34</sup> E.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 87 (rev. ed. 2012) (“The prosecutor is also free to file more charges against a defendant than realistically can be proven in court, so long as probable cause arguably exists—a practice known as overcharging.”)

<sup>35</sup> See PAUL BENNETT, *PROSECUTORIAL OVERCHARGING* 1 (1979) (“Not all overcharges are the result of the prosecutor's deliberate abuse of charging discretion. The prosecutor may simply be mistaken on the law or the facts in bringing more or higher charges than are justified. Another possibility is that the law concerning a particular fact situation may be unclear. The prosecutor

All this said, certain circumstances may increase the likelihood of conscious charging on inadequate proof. Most notably, as Alschuler's description of "vertical" overcharging implies,<sup>36</sup> to the extent that an excessive charge encompasses lesser-included offenses or possesses other attractive "landing spots" for a plea bargain, these options reduce the risk of an all-or-nothing prosecution, and encourage strategic overcharging.<sup>37</sup> Meanwhile, high-profile cases invite overreaching by prosecutors.<sup>38</sup> In these matters, a prosecutor may succumb to public clamor and charge a relatively serious offense, even upon only marginal proof. A prosecutor who takes this route can blame any resulting acquittal or reduction of charges at trial on the judge or jury, while still leaving open the possibility of a subsequent plea bargain to lesser charges should the furor abate. Furthermore, where there exists at least one "strong" charge in a case, a prosecutor sometimes may not vet other, accompanying charges as carefully as she should, or be tempted to file additional charges as plea-bargaining fodder. Since there exists a high likelihood of a conviction on at least one count, the prosecutor may regard the modest marginal effort associated with charging and trying the other, weaker counts as more than offset by the possibility that these additional charges will help convince a defendant to enter a guilty plea.<sup>39</sup>

In any event, it is difficult to pin down the pervasiveness of overcharging, if defined as charges premised on insufficient proof. The rate of trial acquittals in a jurisdiction might provide some indication, but there exist some obvious reasons why this metric would fail to provide much insight into whether or not a prosecuting authority chronically files factually thin allegations. Among them, some crimes are simply harder to prove than others are; juries sometimes vote to nullify, even in cases supported by adequate proof; and the quality of defense representation varies from jurisdiction to jurisdiction. These and other extrinsic complications present significant obstacles to gaining an accurate grasp of the prevalence of this form of overcharging.

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then resolves the ambiguity in his own favor and leaves it to the courts to say whether he was wrong.”).

<sup>36</sup> Alschuler, *supra* note 9, at 86–87.

<sup>37</sup> See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1953–54 (2006) (discussing the role that “landing points” play in plea bargaining).

<sup>38</sup> See Phillip Matier and Andrew Ross, *BART shooting a trial by fire for new D.A.*, S.F. CHRON., May 19, 2010, at C1 (stating, of a high-profile murder case against a former BART police officer, “many police officers . . . think the case was overcharged”); Rohrlich, *supra* note 25.

<sup>39</sup> Of course, a prosecutor may not want to “dilute” what the judge and jury might otherwise perceive as a strong case by filing palpably weak additional charges.

## 2. *Overcharging as Filing Charges Disproportionate to the Crime*

A second basic impression of overcharging uses the term to describe charging decisions that either allege “too many” crimes, place too harsh a label on the defendant’s conduct, or threaten punishment that seems too severe in light of the factual allegations directed against the defendant.<sup>40</sup> This take on overcharging typically admits the legal sufficiency of a charge or charges, but attacks the accusations directed against the defendant as being disproportionate to his or her misconduct, in the sense that the charges are out of step with custom, moral norms, or common sense.<sup>41</sup>

This perception of overcharging resembles the first in that both contrast the prosecutor’s decision with an objective or extrinsic view of “proper” charges.<sup>42</sup> Furthermore, as with the first definition, this approach does not necessarily implicate the practice of plea bargaining. A prosecutor can overcharge, under this meaning of the term, regardless of whether she subjectively intends to plea bargain some or all of the charges away, or pursue them to conviction through trial practice. This view instead attacks the prosecutor’s failure to properly exercise her discretion and make a reasonably proportionate charging decision.

Like the first critique of overcharging, the second assessment applies a plausible gloss to the term. But a conception of overcharging premised on a perceived lack of proportionality suffers from the lack of a coherent, widely

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<sup>40</sup> This approach to overcharging permeated much of the criticism of the prosecution of Aaron Swartz. *E.g.*, Friedman, *supra* note 1 (commenting, on the recent criminal case against hacker Aaron Swartz, “I do not know whether what Aaron Swartz did ought to have been punished at all, but I think it would be hard to find anyone, including the prosecutor, willing to argue that it ought to have received the punishment that the prosecutor threatened to impose.”).

<sup>41</sup> These sentiments undergird a petition to remove the federal prosecutor who brought the Aaron Swartz case, as well as the U.S. Attorney for the District of Massachusetts who oversaw the prosecution. The petition provides, in pertinent part, “A prosecutor who does not understand proportionality and who regularly uses the threat of unjust and overreaching charges to extort plea bargains from defendants regardless of their guilt is a danger to the life and liberty of anyone who might cross her path.” *We Petition the Obama Administration to: Remove United States District Attorney Carmen Ortiz from office for overreach in the case of Aaron Swartz*, WE THE PEOPLE (Jan. 12, 2013), <https://petitions.whitehouse.gov/petition/remove-united-states-district-attorney-carmen-ortiz-office-overreach-case-aaron-swartz/RQNrG1Ck>.

<sup>42</sup> Here, this essay uses “extrinsic” to describe proportionality critiques that condemn a charging decision as inconsistent with the observer’s personal views or values. These beliefs may not admit to distillation into a single objective standard, but remain extrinsic to the prosecutor’s subjective mindset at charging.

accepted baseline for determining what amounts to “proper” charges.<sup>43</sup> Without an agreed-upon touchstone for “reasonable” charging decisions, this attack begs infinitely debatable questions regarding what theories of criminalization and punishment should apply generally, and in a given case. Moreover, even a consensus as to basic principles does not necessarily yield agreement on the specific charges and punishment terms that should adhere in particular cases.

This understanding of overcharging also leaves open whether the “proportionality” inquiry should focus upon the number and nature of the charges themselves, or on the specific penalties that attach to them; and if the latter, whether the maximum or the “likely” penalties upon conviction merit more attention. Put another way, critics of “disproportionate” prosecutions might spot overcharging when prosecutors allege crimes that (1) somehow, on their face, seem more numerous or serious than the defendant’s conduct warrants, even if the defendant’s behavior technically satisfies the elements of the offense or offenses; (2) carry maximum penalties that appear disproportionate—even if these maximum penalties almost certainly would not apply to the defendant;<sup>44</sup> or (3) *plausibly* might lead to excessive punishment in the defendant’s specific case.

These matters often coincide; “excessive” charges commonly carry “excessive” punishment, both in the abstract and as applied in a particular case. But those who spot overcharging sometimes focus upon an especially disproportionate aspect of a prosecution. This emphasis tends to hinge on the speaker’s personal concerns. For example, one might justify a focus upon charges *qua* charges on the ground that there exists no meaningful check on prosecutorial discretion at the charging stage of a case. Once filed, the bare charges themselves

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<sup>43</sup> W. David Ball, *Defunding State Prisons* 6 (January 2013) [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2220028](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220028) (“there is no such thing as a ‘normal’ charge or ‘normal’ enforcement in a given case to which we could compare ‘over-charging’ and ‘over-enforcement’). See also Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, THE VOLOKH CONSPIRACY (Jan. 16, 2013, 11:34 PM) <http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion/> (observing that, in deciding what amounted to sufficient but not excessive punishment in connection with the prosecution of Aaron Swartz, “we need a benchmark of how much punishment was enough.”).

<sup>44</sup> See, e.g., Alex Stamos, *The Truth About Aaron Swartz’s “Crime,”* UNHANDLED EXCEPTION (Jan. 12, 2013), <http://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime/> (opining that Aaron Swartz was “massively overcharge[d],” since his “downloading of journal articles from an unlocked closet [was] not an offense worth 35 years in jail.”); Lincoln Caplan, *Aaron Swartz and Prosecutorial Discretion*, TAKING NOTE (Jan. 18, 2013, 10:06 AM) <http://takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion/> (stating that federal prosecutors “go after defendants tooth and nail, overcharging them from the abundance of criminal laws with sentences so severe and out of proportion to the crime that, as now happens in 95 percent of criminal cases, the prudent choice is to cop a plea.”).

may affect the accused's reputation, not to mention the course of subsequent proceedings.<sup>45</sup> Alternatively, those who perceive in overcharging greater opportunities for disparate treatment of judicial-system “insiders” and “outsiders”<sup>46</sup> may dwell on the maximum punishment attached to initial charges. Outsiders, after all, may not know about lower “going rates” that may exist for plea deals. Finally, observers most concerned about the prospect of defendants being coerced into stilted plea bargains might concentrate upon the actual, as opposed to theoretical punishment implicated by a charging instrument.

Because each commentator brings both her own baseline for “reasonable” prosecution and a unique set of concerns to the overcharging debate, each puts her own gloss on “overcharging” when using the word to attack a lack of proportionality in a charging decision. As with the first conception of “overcharging,” these variations tend to imbue the “proportionality” definition of overcharging with a know-it-when-one-sees-it quality, such that it offers little assistance in defining the precise boundaries of the term. It is unsurprising, then, that there exists a third meaning of overcharging that grounds the proportionality and inadequate-proof approaches by connecting them to specific actions taken by prosecutors.

### 3. *Overcharging as Prosecutorial Insincerity*

A third conception of overcharging differs from the first two in that its principal concern involves the knowing misuse of charges by prosecutors. This view espies overcharging when a prosecutor files an “excessive” charge or charges (in the sense that either the charges are disproportionate or they lack adequate proof) without any subjective desire to pursue these offenses to conviction. Rather, the prosecutor alleges these offenses as bargaining chips, holding out the possibility of their dismissal or reduction in exchange for the defendant's entry of a guilty or no-contest plea to *other* charges.<sup>47</sup> The

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<sup>45</sup> BENNETT, *supra* note 35, at 3 (“A . . . consequence of overcharging is the effect that the original charges may have upon sentencing judges, probation officers and parole boards, even if they are dismissed as part of the plea agreement.”).

<sup>46</sup> See generally Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (discussing this concern).

<sup>47</sup> E.g., *State v. Harvey*, No. E2008-01081-CCA-R3-CD, 2010 WL 5550655, Tenn. Crim. App. Dec. 30, 2010, at \*28 (“Tennessee courts have referred to overcharging as a prosecutorial practice of charging a defendant with a greater charge in seeking a conviction for a lesser-included offense.”); RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 31 (2011) (“When they strategically overcharge, prosecutors do not simply respond to the evidence that individuals have committed one or more crimes. Instead, they select charges partly with an eye to putting pressure in defendants to plead guilty.”). In this same vein, the Commentary to the ABA Standards for the Prosecution Function explains:

prosecutor's subjective interest in dismissing the surplus or extreme charges thereby substantiates what might otherwise represent a nebulous "overcharging" claim.

This critique of overcharging taps the unease that surrounds the practice of plea bargaining generally.<sup>48</sup> As one observer has noted, echoing arguments directed against modern plea bargaining, this sort of overcharging "has a chilling effect on the exercise of the constitutional right to trial. . . . Even innocent defendants may be so overwhelmed by the degree or number of the charges against them that they will forego the risks of trial for the certainty of a guilty plea."<sup>49</sup> Of course, the coercion attendant to plea bargaining does not arise only when a defendant has been overcharged. The distinctive concern associated with overcharged cases involves a sense that the charges set too high a baseline for the bargain, and thus create additional, undesirable "space" for coercion.

This understanding of overcharging also reflects some other special concerns. To many observers, trials remain the preferred means of resolving a criminal case, with plea bargains being only grudgingly accepted as a necessary but decidedly second-best feature of criminal procedure landscape.<sup>50</sup> Insofar as an overcharged case, on its face, invites a plea deal to lesser charges, it appears to reverse these preferences.<sup>51</sup> This sort of overcharging also tends to call the

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The chief criticism voiced by defense counsel with respect to the exercise of prosecution discretion . . . is that prosecutors 'overcharge' in order to obtain leverage for plea negotiations. Although it is difficult to give a definition of 'overcharging' in verbal form, it is clear that the heart of this criticism is a belief that prosecutors bring charges not in the good-faith belief that they are appropriate under the circumstances and with an intention of prosecuting them to a conclusion, but merely as a harassing and coercive device, in the expectation that a guilty plea will result and that it will not be necessary to proceed to trial, verdict and sentence on all of the charges or at the degree of crime originally stated.

ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 76 (3d ed. 1993).

<sup>48</sup> This literature is too extensive to cite in full here. One leading work in this vein is Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987-91 (1992).

<sup>49</sup> BENNETT, *supra* note 35, at 3.

<sup>50</sup> HUSAK, *supra* note 30, at 23 ("Few knowledgeable commentators are prepared to defend the justice of plea bargaining. . . . Presumably, plea bargaining survives because no one knows how our penal system could function without it."); Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 506 (1999) (observing that "many legal commentators and participants view plea bargaining as inevitable," citing numerous articles to this effect).

<sup>51</sup> In an overcharged case, as that term is being used above, neither the prosecution nor the defense necessarily desires a trial on all charges. The prosecutor may agree with the defense assessment of the charges as too harsh, yet consider them sufficiently useful in securing the

sincerity of the prosecution and its allegations into question.<sup>52</sup> With tactical overcharging, the prosecution invokes some crimes principally as procedural devices, without any concomitant desire to obtain convictions for the offenses. This practice connotes that a prosecutor may allege crimes for a variety of purposes, aside from gaining a conviction for that particular offense. Although the prosecutor does intend for these allegations to produce convictions for *other* offenses, this instrumental use of criminal allegations suggests a broadening of prosecutorial prerogatives that some may find troubling.<sup>53</sup> Moreover, the repeated allegation of certain crimes without an accompanying desire to convict defendants of these offenses may erode the moral force of the criminal prohibitions themselves.<sup>54</sup>

This assessment of overcharging, like the others, has its shortcomings. In particular, the objective-subjective focus runs the risk of dodging the admittedly difficult “proportionality” inquiry simply by punting this issue to prosecutors.<sup>55</sup> With this take on overcharging, a tendency exists to look to the subjective intentions of prosecutors not as merely substantiating a pre-existing claim of disproportionality, but rather as setting the baseline for “reasonable” charges in the first instance. This deference runs the risk that a prosecutor will be seen as overcharging only when she is prepared to dismiss or reduce charges pursuant to a plea deal. If this were true, prosecutors could duck all accusations of “overcharging” simply by never agreeing to charge bargains. This result sounds strange, as it should; yet it may follow from an approach toward overcharging that allows prosecutors to define the term.

Of the three impressions of overcharging, the third is most conducive to measurement, with the prosecutor’s dismissal of charges in connection with a

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defendant’s cooperation in plea bargaining as to warrant the risk of an excessive sentence upon conviction, should plea bargaining stall.

<sup>52</sup> See BENNETT, *supra* note 35, at 4 (“the true horror of overcharging is that citizens are being charged not on the basis of the evidence against them, but on the basis of pragmatic considerations in the prosecutor’s office.”).

<sup>53</sup> See Ronald Wright & Marc Miller, *The Screening / Bargaining Tradeoff*, 55 STAN. L. REV. 33 (2002) (describing overcharging as a “particularly noxious form of dishonesty” that occurs in connection with plea bargaining, with this noxiousness owing to the fact that “the public in general, and victims in particular, lose faith in a system where the primary goal is processing and the secondary goal is justice.”).

<sup>54</sup> See Graham, *Facilitating Crimes*, *supra* note 11, at 705–07.

<sup>55</sup> ABA STANDARDS, *supra* note 47, at 77 (observing that “[t]he line separating overcharging from the sound exercise of prosecutorial discretion is necessarily a subjective one, but the key consideration is the prosecutor’s commitment to the interests of justice, fairly bringing those charges he or she believes are supported by the facts without ‘piling on’ charges in order to unduly leverage an accused to forgo his or her right to trial.”).



defendant's guilty or no-contest plea serving as a "tell." But this take on overcharging also presents some significant measurement challenges, as related below.

## II. MEASURING OVERCHARGING

Criticisms of overcharging tend to come and go with high-profile cases in which observers detect prosecutorial excess. The typically ad hoc, case-specific nature of the resulting conversations has generated little understanding as to the pervasiveness of this practice. Instead, the spare popular dialogue that surrounds overcharging in general tends to involve glib assertions to the effect that prosecutors "regularly" overcharge.<sup>56</sup> These statements shed no light on issues such as precisely how often overcharging occurs, or whether there exist prosecuting entities that engage in this practice more or less often than others do.

If overcharging is a serious problem, this lack of information will frustrate efforts to devise a solution. As the saying goes, it is difficult to fix something that isn't measured. Opacity as to who overcharges most and least often will especially hinder the development of pinpoint, as opposed to blunderbuss solutions. The dearth of analysis on overcharging also denies observers of possible "best practices" drawn from those prosecutors' offices that rarely overcharge.

These gaps suggest the utility of metrics that might provide some insight into the prevalence of overcharging within and across jurisdictions. Unfortunately, the necessary data do not exist for at least some of these measurements. For example, one might spot pervasive overcharging by contrasting the likely sentences across a set of cases, as initially charged, with the prosecution's actual plea offers to the defense. Unfortunately, these reference points rarely (if ever) appear in print, at least not for robust case cohorts.

Data that is even more basic may not exist for many jurisdictions. For federal criminal cases, however, there exist a somewhat useful series of datasets. Entries in this series, compiled by the Administrative Office of the United States Courts, relates charge-specific data for all criminal cases that terminate in United States District Courts in a given fiscal year (October 1 to September 30). The data include information such as the five "most serious" initial charges in each case, and the dispositions of the five "most serious" charges at the time of case termination.

The discussion below mines this data to propose a handful of measurements that, at least when put together, point toward those federal judicial

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<sup>56</sup> E.g., *Trial Judge to Appeals Court: Review Me*, *supra* note 25.

districts that merit further study either as possible hotbeds of overcharging, or as offices that have tended to avoid this practice. The discussion relies upon seven years of data from the AOUSC, reflecting cases that terminated between October 1, 2002 and September 30, 2009.<sup>57</sup> The data have been collected into a single dataset, referred to below as the “AOUSC Database.”<sup>58</sup> This database consists of 623,430 records, each of which relates the disposition of charges filed against a particular defendant in a specific federal case that terminated during this span.

The text below relates a series of studies that employ the AOUSC Database to tease out the prevalence of overcharging in federal court. These inquiries relate principally to the third understanding of “overcharging” presented above, inclusive of its overlaps with the other two basic meanings afforded to the term. Though this third conception of overcharging is principally concerned with the prosecutor’s subjective intent, it helpfully carries an objective marker, in the form of the prosecutor’s dismissal of charges in connection with a plea deal.

As a first step toward quantifying the prevalence of this type of overcharging, the AOUSC Database was sorted, compressed, and trolled to

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<sup>57</sup> The datasets thus capture a time frame in which the charging practices of U.S. Attorneys were governed by a memorandum issued by Attorney General John Ashcroft. This memo directed prosecutors to typically “charge and pursue the most serious, readily provable offense or offenses that are supported by the facts” of a case. MEMORANDUM FROM ATTORNEY GENERAL JOHN ASHCROFT TO ALL FEDERAL PROSECUTORS 2 (Sept. 22, 2003). This approach has since been superseded somewhat by a new policy advising that the charging decision “must always be made in the context of ‘an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on the crime.’ ” MEMORANDUM FROM ATTORNEY GENERAL ERIC HOLDER TO ALL FEDERAL PROSECUTORS 2 (May 19, 2010), quoting U.S. Attorney’s Manual § 9-27.300. The effect of this shift in policy on individual districts’ charging practices is admittedly unclear at this time.

<sup>58</sup> The data referenced in the text above derive from a series of datasets that each contain information regarding federal criminal cases that terminated in a given fiscal year (October 1 to September 30), which the author has compiled into a single database (the “AOUSC Database,” which remains in the possession of the author). The datasets comprising this database are as follows: United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2003 [ICPSR 24153]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2004 [ICPSR 24170]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2005 [ICPSR 24187]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2006 [ICPSR 24205]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2007 [ICPSR 24222]; United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2008 [ICPSR 29242]; and United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2009 [ICPSR 30784]).

ascertain: (1) the frequency with which charges were dismissed (as opposed to some other disposition) in cases that resulted in a guilty or nolo contendere plea to one or more counts; (2) the frequency with which “most serious” charging offenses, at the time of initial case filing, lost that status in cases that led to a guilty or no-contest plea; and (3) the frequency with which charges under 18 U.S.C. § 924(c), which carries a five-year “mandatory minimum” sentence, were dismissed in cases that entailed a defendant’s guilty or no-contest plea. The text below relates the reasoning behind each of these metrics. Since the AOUSC data include the particular federal judicial district in which each case terminated, and since most cases within a given judicial district are filed by the local U.S. Attorney’s office, the data permit the district-by-district comparison of charging and conviction information.<sup>59</sup>

### A. Charge Dismissals

First, a basic metric would examine the frequency of charge dismissals in cases that terminated, in whole or in part, by a guilty or nolo contendere plea (538,085 cases).<sup>60</sup> The percentage of counts that reflect termination by dismissal within these cases might provide a very rough take on the dynamics of charge bargaining within a given jurisdiction. As performed on the AOUSC Database, this analysis yielded the following list of jurisdictions with particularly *low* dismissal rates:

**Table I: Federal Judicial Districts with the Lowest Charge-Dismissal Rates in Pled Cases, AOUSC Data, FY 2003–FY2009<sup>61</sup>**

District	FY 2003–FY2009 Dismissal Rate
Rhode Island	5.6%
Massachusetts	11.7%
E.D. Pennsylvania	15.1%
New Mexico	16.6%
Maine	18.8%

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<sup>59</sup> The data that comprise the AOUSC Database are admittedly imperfect. In addition to the aforementioned five-count limitation, inputting errors and missing cases also appear within the data. These shortcomings augur caution when using the data to draw minute distinctions. Accordingly, the discussion below will focus on jurisdictions that lie at the extremes of various rankings. This focus attenuates the risk of a material mischaracterization of a district’s charging practices.

<sup>60</sup> Here, and in the subsequent charts that relate the dismissal rates of charges brought under 18 U.S.C. § 924, the dismissal rates reflect all dismissals assigned either of the codes “1” or “D” by the AOUSC. The two codes differ in that the latter reflects dismissals without prejudice.

<sup>61</sup> AOUSC Database, *supra* note 58. The District of New Jersey had a dismissal rate of 23.2 percent, but an extremely high number of counts that reflected a *nolle prosequi* disposition; the District was therefore excluded from the chart above.

S.D. Indiana	18.9%
N.D. Florida	24.7%
N.D. Alabama	24.8%
S.D. Illinois	25.2%
New Hampshire	25.7%

Meanwhile, according to the AOUSC Database, the judicial districts with the highest dismissal rates were:

**Table II: Federal Judicial Districts with the Highest Charge-Dismissal Rates in Pled Cases, AOUSC Data, FY 2003–FY2009<sup>62</sup>**

District	FY 2003–FY2009 Dismissal Rate
N.D. West Virginia	56.3%
Kansas	53.6%
Vermont	51.6%
Minnesota	51.5%
M.D. Pennsylvania	50.7%
E.D. New York	50.6%
S.D. Alabama	50.0%
E.D. Arkansas	49.2%
W.D. Virginia	48.9%
E.D. California	48.4%

Of course, charge dismissals on their own provide a weak proxy for overcharging. The volume and rate of charge dismissals in pled cases depends on many extrinsic matters, such as the types of charges that tend to be filed in a jurisdiction. Prosecutors in the District of New Mexico, for example, might dismiss few charges in pled cases because they file a large share of their cases under 8 U.S.C. § 1326 (re-entry into the United States by a removed felon),<sup>63</sup> a federal crime that is so simple to prove it rarely implicates any charge bargaining.<sup>64</sup> A large number of count-heavy fraud prosecutions in the Eastern District of New York, by comparison, may inflate that jurisdiction’s charge-dismissal rate.

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<sup>62</sup> *Id.*

<sup>63</sup> With a few exceptions, 8 U.S.C. § 1326 makes it a federal crime for someone who “has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding,” to thereafter enter, attempt to enter, or be at any time found in the United States. 8 U.S.C. § 1326 (2006).

<sup>64</sup> Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CAL. L. REV. 1573, 1617–19 (2012).

Furthermore, not all charge dismissals in connection with plea deals bespeak overcharging. For example, state prosecutors routinely allege two counts in driving under the influence cases. The first alleges that the defendant drove a vehicle while “under the influence” of alcohol.<sup>65</sup> The second charges that the defendant drove with a blood-alcohol concentration at or over a certain level.<sup>66</sup> Most of the time, more than adequate proof supports both counts, and the same result typically obtains at sentencing regardless of whether the defendant pleads guilty to one of these charges, or both. Prosecutors, therefore, usually gain no substantial plea-bargaining leverage by alleging both crimes. In these cases, the prosecutors commonly accept a guilty plea to one of these charges or the other, and dismiss the remaining charge as a *pro forma* matter. Even assuming a prosecutor filed such a case knowing that it was substantially certain to resolve with a guilty plea to one count that contemplated the dismissal of the other charge, this knowledge would not amount to overcharging. For one thing, there charges would not be disproportionate to the defendant’s conduct; for another, the necessary prosecutorial *scienter* would not exist.<sup>67</sup>

## B. “Most Serious” Charge Substitutions

If the dismissal of *any* charge pursuant to a plea does not, on its own, provide an especially meaningful indication of overcharging, perhaps a narrowed focus on the dismissal of “serious” charges will. These data may not be available, or easy to collect, for all jurisdictions. But as indicated above, the AOUSC Dataset identifies the “most serious” offense at initial charging, as well as the “most serious” offense at the time of case termination. Since charge dismissals represent the most common explanation for these substitutions, charting the discrepancies between these two offenses might provide a rough sense of the frequency of at least one form of deliberate overcharging.<sup>68</sup>

The following tables indicate how often, among pled cases, the charge identified as the most serious charging offense in a given case retained that status at the time of case termination. The data are broken out on a year-by-year basis, to highlight any inconsistencies across the studied time period. In the table

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<sup>65</sup> *E.g.*, California Vehicle Code § 23152(a) (WEST 2000).

<sup>66</sup> *E.g.*, California Vehicle Code § 23152(b) (WEST 2000).

<sup>67</sup> Similar circumstances often arise when defendants are charged with both grand theft (*e.g.*, California Penal Code § 487(a) (WEST 2000)) and possession of the stolen property (*e.g.*, California Penal Code § 496 (WEST 2000)).

<sup>68</sup> *See* Ron Sylvester, *Prosecutors’ Conviction Rate Falls*, THE WICHITA EAGLE (Wichita, KS), Aug. 11, 2002, at 1A (reporting the results of a study in which a conviction on the most serious charge in a case served as a proxy for proper charging).

immediately below, the names of districts that also appeared on the list of districts with low charge-dismissal rates are presented in bold text.

**Table III: Federal Judicial Districts with the Highest Retention Rates of Most Serious Charging Offenses in Pled Cases, FY 2003–FY2009<sup>69</sup>**

District	2003	2004	2005	2006	2007	2008	2009	Total
<b>S.D. Indiana</b>	97.6%	95.4%	97.9%	97.3%	93.9%	95.6%	93.5%	95.9%
<b>Rhode Island</b>	93.0%	96.3%	93.1%	96.9%	96.4%	98.9%	96.4%	95.8%
<b>Maine</b>	91.2%	93.4%	96.1%	97.7%	97.3%	94.8%	94.2%	95.0%
<b>S.D. Illinois</b>	94.8%	94.4%	95.3%	95.7%	94.8%	91.1%	93.8%	94.3%
Northern Mariana Islands	100%	89.7%	95.5%	93.8%	100%	94.7%	85.7%	93.4%
<b>New Mexico</b>	82.1%	92.5%	94.0%	95.4%	94.4%	95.5%	97.0%	93.4%
C.D. Illinois	95.1%	91.9%	93.0%	92.3%	92.9%	93.1%	94.6%	93.3%
<b>N.D. Alabama</b>	93.8%	93.7%	92.8%	95.4%	91.3%	92.8%	92.9%	93.2%
S.D. California	91.1%	90.0%	89.9%	91.8%	92.4%	93.6%	93.8%	92.1%
<b>E.D. Pennsylvania</b>	90.1%	90.3%	91.5%	93.1%	92.7%	94.1%	93.7%	92.1%
<b>All Districts</b>	<b>79.6%</b>	<b>81.9%</b>	<b>82.8%</b>	<b>83.3%</b>	<b>83.9%</b>	<b>84.0%</b>	<b>85.3%</b>	<b>83.1%</b>

Meanwhile, the judicial districts that experienced the highest rates of “most serious” charge substitution (with the names of districts that appeared on the list of jurisdictions with the highest “generic” dismissal rates being highlighted in bold text) were:

**Table IV: Federal Judicial Districts with the Lowest Retention Rates of Most Serious Charging Offenses in Pled Cases, FY 2003–FY2009<sup>70</sup>**

District	2003	2004	2005	2006	2007	2008	2009	Total
<b>N.D. West Virginia</b>	48.6%	58.3%	63.8%	62.6%	62.2%	56.5%	72.8%	61.2%
W.D. Washington	64.9%	69.7%	72.4%	65.8%	73.6%	65.7%	67.1%	68.4%
<b>E.D. California</b>	58.1%	60.0%	71.7%	72.4%	67.3%	75.9%	77.6%	69.0%
<b>E.D. New York</b>	62.5%	71.8%	69.3%	68.2%	71.6%	72.7%	70.4%	69.1%
E.D. Texas	67.5%	64.8%	69.7%	68.2%	72.9%	73.6%	72.5%	70.2%

<sup>69</sup> AOUSC Database, *supra* note 58.

<sup>70</sup> AOUSC Database, *supra* note 58.

Oregon	71.4%	73.0%	74.0%	72.5%	72.1%	70.8%	60.9%	70.6%
<b>Kansas</b>	71.1%	75.5%	73.3%	68.4%	71.0%	69.7%	67.4%	70.9%
S.D. Florida	59.0%	67.8%	68.0%	69.4%	76.0%	77.5%	80.5%	71.3%
<b>E.D. Arkansas</b>	66.9%	73.4%	73.6%	76.3%	73.2%	71.0%	64.9%	71.3%
South Dakota	75.9%	66.8%	69.6%	68.4%	79.0%	69.4%	71.9%	71.5%

Though the swapping of “most serious” charges in pled cases probably provides a better proxy for overcharging than the frequency of charge dismissals does, this metric also leaves much to be desired. For one thing, this measurement cannot detect “horizontal” charge bargaining in situations where the prosecution has alleged only multiple counts of a single crime, or has agreed to dismiss less serious charges in exchange for a guilty plea to the most serious offense. Also, the AOUSC Dataset premises the “most serious” charge designation on the base offense level assigned to the crime under the United States Sentencing Guidelines.<sup>71</sup> This reliance on the Guidelines can produce misleading results in situations where additional facts, such as the amount of illegal drugs at issue, ultimately play a more important role in determining the defendant’s likely sentence.

Furthermore, this reliance on base offense levels can produce haphazard results. Vast discrepancies may appear across similarly situated judicial districts when both districts (1) often charge identical sets of crimes, with each crime having the same base offense level, but (2) customarily dismiss different crimes within these sets as part of plea deals. Assume that in such a situation, the Guidelines identify Crime A as the “more serious” of the two offenses, an arbitrary designation. A jurisdiction that routinely dismisses Crime A instead of Crime B as a *pro forma* part of plea agreements will record a very high charge substitution rate, suggesting it routinely overcharges. A jurisdiction that dismisses Crime B for the same reason, however, will have a very low substitution rate. This discrepancy seems particularly unfair when, as with prosecutions under the driving under the influence laws discussed above, the prosecution gains little to no tactical advantage at plea bargaining from its decision to allege both crimes.

Notwithstanding these caveats, and the fact that the two datapoints are not wholly independent from one another, the data regarding the substitution of “most serious” charging offenses might provide a useful cross-check to the “generic”

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<sup>71</sup> The base offense level for a crime provides the starting point for sentencing calculations under the Federal Sentencing Guidelines. Higher base offense levels translate to lengthier Guidelines-prescribed advisory terms. ROGER W. HAINES, JR., FRANK O. BOWMAN, III & JENNIFER C. WOLL, FEDERAL SENTENCING GUIDELINES HANDBOOK 1305 (2010).

dismissal data. There exists significant overlap between the lists, at both extremes. The Southern District of Indiana, the District of Rhode Island, the Eastern District of Pennsylvania, the District of Maine, the District of New Mexico, and the Southern District of Illinois appear on both the list of jurisdictions with the lowest dismissal rates, and the list of jurisdictions with the lowest substitution rates for “most serious” charging offenses. At the other extreme, the Northern District of West Virginia, the Eastern District of Arkansas, the Eastern District of California, the Eastern District of New York, and the District of Kansas had among the highest dismissal rates and the highest substitution rates.

### C. 18 U.S.C. § 924(c) Dismissals

To further pin down the existence of overcharging, as opposed to innocuous charge dismissals incident to pleas, a third metric would consider how often prosecutors dismiss a specific crime or enhancement believed to commonly serve as a government bargaining chip in plea negotiations. In this vein, it is sometimes asserted<sup>72</sup> that prosecutors often use the gun enhancement found at 18 U.S.C. § 924(c)<sup>73</sup> to catalyze plea bargaining. This charge carries a five-year mandatory minimum term, to run consecutively with the sentence assigned to the underlying crime. The nature and content of the charge catalyze plea bargaining: defendants want to eliminate the five-year term, while prosecutors are willing to exchange its dismissal for guilty pleas to the underlying charges. The 924(c) charge’s reputation as a plea-deal facilitator suggests that the frequency with which prosecutors dismiss these charges might reflect prior overcharging.

Accordingly, the table below relates the federal districts with the lowest 924(c) dismissal rates in cases resolved in whole or in part by a defendant’s guilty or nolo contendere plea. (The overall dismissal rate for 924(c) charges in these cases during the studied time period, across all districts, was 45.5%.<sup>74</sup>)

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<sup>72</sup> BUREAU OF JUSTICE STATISTICS, FEDERAL FIREARM OFFENDERS, 1992–98 6 (2000) (discussing the frequent dismissal of 924(c) charges); Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1293 (1997) (observing that the dismissal of provable 924(c) counts represented a common form of charge-bargaining in federal prosecutions); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 548–49, 551–52 (1992) (remarking on the dismissal of 924(c) counts).

<sup>73</sup> Section 924(c) of Title 18 provides that a five-year (or higher) sentence enhancement is to be imposed upon “any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” 18 U.S.C. § 924(c) (2006).

<sup>74</sup> AOUSC Database, *supra* note 58.



districts that appeared within either the list of districts with the lowest general dismissal rates (Table I), or the list of districts with the lowest substitution rates for “most serious” charges (Table III), are in bold; the names of districts that appear on both of these other tables are in bold italics:

**Table V: Federal Judicial Districts with the Lowest Dismissal Rates of 18 U.S.C. § 924(c) Charges in Pled Cases, FY 2003–FY2009<sup>75</sup>**

District	18 U.S.C. § 924(c) Dismissal Rate
Northern Mariana Islands	0.0%
<i>N.D. Alabama</i>	13.8%
<i>Maine</i>	15.0%
<b>N.D. Florida</b>	16.6%
W.D. Arkansas	16.7%
<i>S.D. Indiana</i>	17.2%
<b>Massachusetts</b>	19.5%
<i>E.D. Pennsylvania</i>	21.0%
<b>C.D. Illinois</b>	24.7%
W.D. Wisconsin	25.0%
<i>Rhode Island</i>	25.0%

The following districts, meanwhile, had the highest 924(c) dismissal rates in cases terminated by plea. Text in bold or bold italics connotes a district’s appearance within either the list of districts with the highest general dismissal rates (Table II) or the list of districts with the highest substitution rates for “most serious” charges (Table IV) (bold text), or on both lists (bold italics):

**Table VI: Federal Judicial Districts with the Highest Dismissal Rates of 18 U.S.C. § 924(c) Charges in Pled Cases, FY 2003–FY2009<sup>76</sup>**

District	18 U.S.C. § 924(c) Dismissal Rate
<i>E.D. Arkansas</i>	73.0%
S.D. Georgia	70.7%
<b>Minnesota</b>	66.9%
<b>M.D. Pennsylvania</b>	66.3%
<b>Vermont</b>	65.5%
Arizona	65.2%

<sup>75</sup> AOUSC Database, *supra* note 58.

<sup>76</sup> AOUSC Database, *supra* note 58.

E.D. Washington	64.4%
<b>E.D. Texas</b>	64.2%
<i>E.D. New York</i>	63.8%
<b>Oregon</b>	62.8%

#### **D. Combined Results**

Summing the results of these three metrics reveals those districts that have compiled particularly distinctive charge-dismissal records over the studied time period.<sup>77</sup> The lowest dismissal rates in connection with pled cases belong to the District of Maine, the Southern District of Indiana, the District of Rhode Island, the Northern District of Alabama, and the Eastern District of Pennsylvania. These low dismissal rates may owe to a shared hard line on plea bargaining, it may bespeak careful charging practices, or it may owe to altogether different factors. Yet if overcharging represents a concern, these districts seem to hold promise as potential sources of best charging practices.

At the other extreme, the highest amassed dismissal rates belong to the Eastern District of Arkansas, the Eastern District of New York, the Middle District of Pennsylvania, the District of Minnesota, and the Northern District of West Virginia. Once again, there may exist good explanations for the high dismissal rates in these jurisdictions, independent of overcharging. Alternatively or in addition, changes in policy or personnel since the studied time period may have altered the charge-dismissal profiles of these offices. Yet the evidence suggests that a comprehensive, critical study of overcharging in the federal system might begin with these districts, to ascertain what accounts for their frequent dismissal of generic, serious, and “bargaining chip” offenses.

### **III. CONCLUSION**

To reiterate, a district’s position at either extreme of the aforementioned metrics does not establish that it employed or still employs “good” or “bad” charging practices. Limitations of and errors within the data, idiosyncrasies in AOUSC coding, variations in docket composition across judicial districts, the relative strength or weakness of the defense bar in a judicial district, and the possible influence on the data of cases prosecuted by attorneys out of “Main

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<sup>77</sup> The discrepancies across the tables also provide some useful insights into the limitations of each metric. While the District of New Mexico, for example, had a very low “general” dismissal rate in pled cases, there was reason to believe that this rating did not bespeak parsimonious charging. The District’s frequent dismissal of § 924(c) charges in pled cases—it ranks 50th among judicial districts in this respect—seems to substantiate this suspicion. AOUSC Database, *supra* note 58.

Justice,” as opposed to a local U.S. Attorney’s office, all certainly could, and probably did, affect the results. Furthermore, low dismissal rates may be just as consistent with overcharging coupled with a consistently hard line on plea bargaining, as they are with not overcharging at all.

Also, there exists every possibility that other, better measurements of overcharging exist. But that is the very point of this essay. The discussion above points toward a road forward, but it does not purport to specify its precise direction. At present, the conversation about overcharging remains in a protean stage. The lack of a consensus as to what the term means has deterred any effort to track and measure the practice. Within increasing precision as to what overcharging means may come enhanced interest in charting the phenomenon, and in devising ways to address it—if that is our goal.