

# Overcharging

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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, immoral, and even corrupt behavior.<sup>2</sup> Recently, United States Supreme Court Justice Antonin Scalia also weighed in on the “overcharging” phenomenon, describing this practice as a predictable, though regrettable, aspect of modern plea bargaining.<sup>3</sup>

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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 alleged hacker 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 NAT’L REV. ONLINE (Apr. 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 (Apr. 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 non-negligent manslaughter or even second-degree murder”); Douglas A. Berman, *Is O.J. being overcharged?*, SENT’G L. & POL’Y (Sept. 18, 2007, 7:56 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/09/is-0j-being-ove.html](http://sentencing.typepad.com/sentencing_law_and_policy/2007/09/is-0j-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 (9th Cir. 1994) (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. 1376, 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”).

Unfortunately, many of these commentators either have failed to explain precisely what they mean by “overcharging,” or have used the same word to 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 maps criminal charges against some 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 seriousness of the defendant’s alleged misconduct on the other. Finally, a third conception of overcharging also attacks a lack of proof or proportionality, but only when a prosecutor has framed charges with an eye toward dismissing or reducing some or all of them as part of a plea bargain. The differences among these definitions matter, especially because some perceived solutions to overcharging address only one or two of these critiques.

Next, this essay proposes and then applies an array of methodologies for tracking how often particular prosecuting authorities overcharge. Some commentators have said that it is impossible to detect overcharging in a given case, at least without an admission by the prosecutor involved.<sup>6</sup> Perhaps this is true. But perhaps patterns of overcharging can be gleaned from larger collections of cases. Toward this purpose, this essay presents an original review of eight years’

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<sup>4</sup> WILLIAM F. McDONALD, *PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES* 19 (1985) (“[E]ven 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) (“[I]t 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 extremely 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, 47 (1983) (“‘Overcharging’ is an ambiguous term.”).

<sup>5</sup> See Berman, *supra* note 1 (“As many know (through [sic] 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*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (opining that “[n]ormally . . . it is impossible to show that” a prosecutor is overcharging); Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 *FORDHAM 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.”) (footnotes omitted).

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 endemic overcharging on their own, they do point toward those offices that have compiled 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 that consistently overcharge, and potential responses to the practice.

### I. WHAT IS "OVERCHARGING"?

The word "overcharging," as directed at prosecutorial charging practices, first emerged 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 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>

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<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> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 *U. CHI. L. REV.* 50 (1968).

<sup>10</sup> *Id.* at 85–87.

<sup>11</sup> Kyle Graham, *Facilitating Crimes: An Inquiry into the Selective Invocation of Offenses Within 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).

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>

The main criticism of “horizontal” overcharging that Alschuler recorded concentrated upon the prosecutor’s tactical use of seemingly excessive charges to facilitate 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:

[C]harging 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 at least indifferent about prosecuting. Instead, the extraneous or unduly severe allegations are put forward to incentivize the defendant to plead

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

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

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

<sup>15</sup> *Id.* at 85.

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

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

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 promises charge substitution in a plea deal. Furthermore, at least as Alschuler characterized the practices, only vertical overcharging entails charges premised on “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. The aforementioned 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 subjective intention of substituting a lesser charge as part of a plea deal. If strategic “horizontal” overcharging warrants condemnation even when premised on plentiful proof, why does this example not involve comparable “vertical” overcharging? Likewise, why does the allegation of ancillary, extraneous charges on *insufficient* proof not represent a subspecies of “horizontal” overcharging?

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. To phrase this point a little differently, the prevailing 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. These critiques provide the next topic of discussion.

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<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.”) (footnotes omitted); Ana Maria Gutierrez, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 697 n.16 (2010) (“There are two types of overcharging: horizontal and vertical.”).

<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.

### B. Three Meanings of “Overcharging”

Alschuler’s terminology provides a practical overlay to three basic understandings of what “overcharging” entails.<sup>21</sup> These impressions often get blended or concatenated,<sup>22</sup> but they merit parsing insofar as they relate distinct though overlapping criticisms. One of these elemental critiques of overcharging concentrates on the filing of criminal counts that lack adequate proof. Another approach dwells on the lack of proportionality between the quantity, gravamen, or sentencing consequences of a criminal charge or charges on the one hand, and the character of the defendant’s conduct on the other. Lastly, a third view of overcharging adds a gloss to the inadequate-proof and lack-of-proportionality critiques by attacking the prosecutor’s knowing use of “excessive” allegations to induce plea bargains to lesser charges.

The differences among these characterizations of overcharging 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 conceptions of this practice. Even if these suggestions perform as advertised, therefore, they will not silence 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 to bargain these counts away in exchange for pleas to other crimes. To better assess these limitations, a more extensive discussion of each take on “overcharging” follows.

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<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. Ct. 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.”).

<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 7, at 20–21 (discussing possible reforms to the probable-cause standard for charging).

### 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>

This approach addresses a coherent concern, at least in theory. Positive ethical proscriptions, such as those found within the American Bar Association Standards for the Prosecutor 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 phase 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

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<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, “[e]lected 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”).

<sup>26</sup> ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION AND DEFENSE 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) (“[P]rosecutors 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.”) (footnote omitted).

<sup>28</sup> See Ellen Podgor, *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 justifiable multiple charges).”).

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

robust that prosecutors often have little difficulty finding an adequate basis to allege at least *some* crime.<sup>30</sup> Third, from the prosecutor's selfish perspective, filing paper-thin charges may prove counterproductive. This form of overcharging often will fail to bring about 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 particularly 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 even 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 reputation-damaging 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 aggressive charging 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. While there usually exists a palpable difference between evidence that falls short of the probable cause threshold and evidence that amounts to proof beyond a reasonable doubt, 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 will not induce a conviction; and when the tactic might work, a prosecutor who presses charges typically will not be aware that she is overcharging at all. These dynamics mean that most "true" overcharges, in the sense that a charge patently lacks proof sufficient for a conviction, likely involve a prosecutor's

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<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.

<sup>32</sup> Gershman, *supra* note 4, at 1271 ("[T]he 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 & Carrie Johnson, *Corporate Scandals Yield Few Plea Deals; Top Executives Take Best Shot in Court*, WASH. POST, Jan. 11, 2004, at A1 (quoting a defense attorney as saying, "[i]f 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: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 87 (rev. ed. 2012) ("The prosecutor is also free to file more charges against a defendant than can realistically be proven in court, so long as probable cause arguably exists—a practice known as overcharging.").

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*.

All this said, certain circumstances increase the likelihood of conscious charging on inadequate proof. 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 or compromise verdict, 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 plea bargain to lesser charges should the furor abate prior to trial. 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 the defendant to enter a guilty plea.<sup>39</sup>

In any event, it is difficult to pin down the pervasiveness of overcharging, if defined simply 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;<sup>40</sup> juries sometimes vote to nullify, even in cases supported by adequate proof;<sup>41</sup> and the quality of

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<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 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> 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).

<sup>38</sup> See Phillip Matier & 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"). See also 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.

<sup>40</sup> Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CAL. L. REV. 1573, 1586–87 (2012).

<sup>41</sup> *Id.* at 1588.

defense representation varies from jurisdiction to jurisdiction.<sup>42</sup> These and other extrinsic complications present significant obstacles to gaining an accurate grasp of the prevalence of this form of overcharging.

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

A second basic impression of overcharging applies the term to 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>43</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 allegations fall out of step with charging customs, moral norms, common sense, or some other yardstick.<sup>44</sup>

This perception of overcharging resembles the first in that both juxtapose the prosecutor’s decision against an estimation of what would amount to “proper” charges. 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. This view instead attacks the prosecutor’s failure to properly exercise her discretion and make a reasonably proportionate charging decision, without regard to the calculations behind this choice.

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 accepted baseline for determining what amounts to “proper” charges.<sup>45</sup> Without an

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<sup>42</sup> See Rodney Uphoff, *Convicting the Innocent: Why it is not Just an Isolated Occurrence*, 2007 J. INST. JUST. INT’L STUD. 1, 1 (2007) (“[I]n the United States, the quality of the indigent defense lawyers varies significantly from jurisdiction to jurisdiction.”).

<sup>43</sup> This approach to overcharging permeated much of the criticism of the recent prosecution of Aaron Swartz. *E.g.*, Friedman, *supra* note 1 (commenting on the case against 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>44</sup> These sentiments undergirded 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 provided, 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>45</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) (“[T]here is no such thing as a ‘normal’

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 matters.

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>46</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 espy overcharging sometimes focus upon a single especially disproportionate aspect of a prosecution. This emphasis tends to follow from the critic’s broader concerns regarding criminal prosecution generally. 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 may affect the accused’s reputation, not to mention the course of subsequent proceedings.<sup>47</sup> Alternatively, those who perceive in overcharging greater opportunities for disparate treatment of judicial-

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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>46</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”); *see also* 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”).

<sup>47</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.”).

system “insiders” and “outsiders”<sup>48</sup> may dwell on the maximum punishment attached to initial charges. Outsiders, after all, may not know about lower “going rates” 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.

In sum, 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 spin on “overcharging” when using the term to attack a lack of proportionality in a charging decision. These variations tend to imbue the “proportionality” approach to 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 take by connecting it to specific actions taken by prosecutors.

### 3. Overcharging as Prosecutorial Insincerity

A third critique differs from the first two in that it detects overcharging only when a prosecutor files an “excessive” charge or charges (in the sense that either the charges lack adequate proof or, more often, that they are somehow disproportionate to the gravamen of the crime) without any subjective desire to pursue these offenses to conviction. Rather, the overcharging 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, or to a subset of the charged crimes.<sup>49</sup> The prosecutor’s subjective interest in dismissing the surplus or extreme charges thereby substantiates an otherwise nebulous “overcharging” claim.

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<sup>48</sup> See generally Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (discussing this concern).

<sup>49</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 the chief criticism voiced by defense counsel with respect to the exercise of prosecutorial discretion:

[P]rosecutors . . . ‘overcharge’ in order to obtain leverage for plea negotiations. Although there are many different conceptions of what ‘overcharging’ actually is, the heart of the criticism is a belief that prosecutors bring charges not in the good-faith belief that they fairly reflect the gravity of the offense, but rather as a harassing and coercive device in the expectation they will induce the defendant to plead guilty.

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

This impression of overcharging taps into several streams of unease that surround the practice of plea bargaining generally.<sup>50</sup> As one observer has noted, echoing arguments directed against modern plea dealing, 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>51</sup> Of course, the coercion attendant to plea bargaining does not arise only when a defendant has been “overcharged.” Instead, the distinctive concern associated with “overcharged” cases involves a sense that the engrossed charges set too high a baseline for the bargain and thus create additional, undesirable “space” for coercion. Also, 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 the criminal procedure landscape.<sup>52</sup> Insofar as an overcharged case, on its face, invites a plea deal to lesser charges, it appears to reverse these preferences in a particularly blatant manner.<sup>53</sup> Furthermore, this sort of overcharging tends to call the sincerity of the prosecution and its allegations into question.<sup>54</sup> With tactical overcharging, the prosecution invokes some crimes principally as artifices. Although the prosecutor does intend for these allegations to produce convictions for *other* crimes, some find this instrumental use of criminal allegations to be troubling.<sup>55</sup> To these observers, 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>56</sup>

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<sup>50</sup> This literature is too extensive to cite in full here. One leading work is Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987–91 (1992).

<sup>51</sup> BENNETT, *supra* note 35, at 3.

<sup>52</sup> HUSAK, *supra* note 30, at 22 (“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.”); *see also* Jeff Palmer, 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>53</sup> In an “overcharged” case, as that term is being used in the text immediately above, neither the prosecution nor the defense necessarily desires a trial on all charges. The prosecutor may agree with the defense’s assessment of the charges as too harsh, yet consider them sufficiently useful in securing the defendant’s cooperation in plea bargaining as to warrant the risk of an excessive sentence upon conviction, should bargaining efforts fail.

<sup>54</sup> *See* BENNETT, *supra* note 35, at 4 (“[T]he 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>55</sup> *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 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>56</sup> *See* Graham, *Facilitating Crimes*, *supra* note 11, at 705–07.

Like the other approaches toward overcharging, this perspective has its shortcomings as a lens through which to view the practice. In particular, its dual nature runs the risk of dodging the admittedly difficult “proportionality” inquiry simply by punting this issue to prosecutors.<sup>57</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 follows from an approach toward overcharging that allows prosecutors to define the term.

That said, of the three impressions of overcharging, the third is most conducive to measurement, with the prosecutor’s dismissal of charges in connection with a defendant’s guilty or no-contest plea serving as a “tell.” But this take on overcharging still 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>58</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 is not measured. Opacity as to who overcharges most and least often will especially hinder the development of pinpoint, as opposed to blunderbuss, remedies. Additionally, the dearth of analysis deprives would-be reformers 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

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<sup>57</sup> ABA STANDARDS, *supra* note 49, 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”).

<sup>58</sup> *E.g.*, *Trial Judge to Appeals Court: Review Me*, *supra* note 25.

necessary data does 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) become visible to the public, at least for robust case cohorts.

For federal criminal cases, however, there does exist a somewhat useful series of datasets. Entries in this series, compiled by the Administrative Office of the United States Courts [AOUSC], relate 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 incorporates 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 U.S. Attorney's offices that merit further study either as possible hotbeds of overcharging or as offices that tend to avoid this practice. The discussion relies upon eight years of data from the AOUSC, reflecting cases that terminated between October 1, 2002 and September 30, 2010.<sup>59</sup> The data has been collected into a single dataset, referred to below as the "AOUSC Database."<sup>60</sup> This database consists of 722,268 records, each of

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<sup>59</sup> The datasets mostly coincide with 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 been superseded 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.

<sup>60</sup> The data used in the database was obtained through the Interuniversity Consortium for Political and Social Research (ICPSR). The datasets comprising the 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]; 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]; and United States Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics Program: Defendants in Federal Criminal Cases in District Court—Terminated, 2010 [ICPSR 34326] [hereinafter AOUSC Database]. The aggregated database is on file (in Microsoft Excel format) with

which relates the disposition of charges filed against a particular defendant in a specific federal case that terminated during this span.

The author conducted a series of inquiries that employed the AOUSC Database to tease out the prevalence of overcharging in federal court. These inquiries pertain principally to the third understanding of overcharging presented above. As discussed, this conception of overcharging helpfully incorporates 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 queried to ascertain, in those cases that terminated upon a guilty or nolo contendere plea to one or more counts: (1) the frequency with which charges were dismissed (as opposed to some other disposition); (2) the frequency with which "most serious" charging offenses, at the time of initial case filing, lost that status at the time of case termination; and (3) the frequency with which charges under 18 U.S.C. § 924(c), which carries a "mandatory minimum" sentence, were dismissed. The text below relates the reasoning behind each of these metrics. Since the AOUSC data includes the particular federal judicial district in which each case terminated, these inquiries permit the district-by-district comparison of charging and conviction information.<sup>61</sup>

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the author. Pursuant to the terms of a data protection plan filed with the ICPSR, the data cannot be publicly posted; however, researchers can construct a database identical to the one used here through compilation of the aforementioned datasets.

<sup>61</sup> The data that comprises the AOUSC Database is admittedly imperfect. In addition to the aforementioned five-count limitation, inputting errors and missing cases also appear within the data. These shortcomings argue for 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 minimizes the risk of a material mischaracterization of a district's charging practices.

### 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. The idea being, the percentage of counts that reflect termination by dismissal within these cases might provide a very rough take on the prevalence of charge bargaining within a given jurisdiction—with more dismissals revealing more aggressive charging practices. 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–FY 2010<sup>62</sup>**

District	FY 2003–FY 2010 Dismissal Rate
Rhode Island	5.2%
Massachusetts	12.3%
E.D. Pennsylvania	15.0%
New Mexico	15.6%
Maine	19.1%
S.D. Indiana	20.5%
New Jersey	22.1%
N.D. Florida	24.1%
S.D. Illinois	24.3%
N.D. Alabama	24.9%

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<sup>62</sup> AOUSC Database, *supra* note 60. This table, and those that follow, includes charges dismissed either with (AOUSC Code 1) or without (AOUSC Code “D”) prejudice. Across the subset of the AOUSC database that relates cases terminated wholly or partly by guilty or no-contest plea, counts with the first of these outcomes outnumber the latter by a ratio of approximately 3.8 to one. The overall dismissal rate of “terminating” counts, across districts, during the studied time span was thirty-eight percent.

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–FY 2010<sup>63</sup>**

District	FY 2003–FY 2010 Dismissal Rate
N.D. West Virginia	55.9%
Kansas	53.2%
Minnesota	51.2%
M.D. Pennsylvania	50.8%
Vermont	50.8%
E.D. New York	50.5%
S.D. Alabama	50.1%
E.D. Arkansas	49.2%
W.D. Virginia	48.6%
W.D. Louisiana	48.1%

Of course, charge dismissals alone provide a weak proxy for overcharging; one reason being, not all charge dismissals in connection with plea deals bespeak overcharging. For example, California 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>64</sup> the second charges that the defendant drove with a blood-alcohol concentration at or over a certain level.<sup>65</sup> Most of the time, more than adequate proof supports both counts, and the same result obtains at sentencing regardless of whether the defendant pleads guilty to one of these charges, or both. Prosecutors, therefore, normally gain little plea bargaining leverage by alleging both crimes. In these cases, prosecutors commonly accept a guilty plea to one of these charges or the other, and dismiss the remaining charge as a *pro forma* matter. Therefore, even assuming a prosecutor entered 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, a complaint filed with this knowledge would not amount to overcharging. For one thing, the charges would not be disproportionate to the defendant’s conduct; for another, the necessary prosecutorial *scienter* would not exist.<sup>66</sup>

<sup>63</sup> *Id.*

<sup>64</sup> California Vehicle Code § 23152(a) (WEST 2000).

<sup>65</sup> California Vehicle Code § 23152(b) (WEST 2000).

<sup>66</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)).

Furthermore, the caseloads within certain federal districts may make it unnecessary to dismiss very many criminal counts. Prosecutors in the District of New Mexico, for example, might dismiss relatively few charges in pled cases because they file a large share of their cases under 8 U.S.C. § 1326 (re-entry of a removed alien), a federal crime that is so simple to prove it rarely implicates any charge bargaining.<sup>67</sup> More complex dockets elsewhere, by comparison, may inflate other districts' charge-dismissal rates.<sup>68</sup>

#### B. "Most Serious" Charge Substitutions

If the dismissal of *any* charge pursuant to a guilty or no-contest plea does not, on its own, provide an especially meaningful indication of overcharging, perhaps a narrowed focus on the dismissal of "serious" charges will. This 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. By charting how often discrepancies appear between these two designations, one might gain a rough sense of the frequency of conscious "vertical" overcharging, at least.<sup>69</sup>

The following tables indicate how often, among cases resolved wholly or partly by plea, the charge identified as the most serious charging offense in a given case retained that status at the time of case termination. The names of districts that appear on the prior, parallel list of districts with low charge-dismissal rates are presented in bold text.

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<sup>67</sup> See Graham, *supra* note 40, at 1617–19 (discussing charges under 8 U.S.C. § 1326).

<sup>68</sup> This variation in the caseloads of the judicial districts also compromises the utility of any ranking premised on how often *multiple* charges were dismissed in cases resolved in whole or in part by a guilty or no-contest plea. In any event, a ranking of U.S. Attorney's offices based on how often three or more charges were dismissed (with or without prejudice) in pled cases would look, at the extremes, very similar to Tables I and II. The districts with the lowest rate of high-dismissal cases between FY 2003 and FY 2010 were the District of Rhode Island (.5%), the Southern District of Indiana (2.1%), the District of New Mexico (2.2%), the District of Massachusetts (2.5%), the Northern District of Florida (3.6%), the District of Maine (3.7%), the Western District of Wisconsin (3.7%), the Eastern District of Pennsylvania (3.7%), the Southern District of Texas (3.8%), and the Middle District of Louisiana (4.0%). The highest rates appeared in the District of Kansas (22.5%), the Northern District of West Virginia (22.5%), the Western District of Virginia (21.9%), the District of Puerto Rico (20.9%), the Eastern District of New York (20.0%), the Eastern District of Tennessee (19.6%), the District of Minnesota (19.0%), the District of Idaho (18.8%), the Middle District of Pennsylvania (18.8%), and the District of the District of Columbia (18.6%). Overall, 10.0% of cases resolved wholly or partly by plea involved the dismissal of three or more counts.

<sup>69</sup> See Ron Sylvester, *Prosecutors' conviction rate falls*, THE WICHITA EAGLE (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).

**Table III: Federal Judicial Districts with the Highest Retention Rates of Most Serious Charging Offenses in Pled Cases, FY 2003–FY 2010<sup>70</sup>**

District	FY 2003–FY 2010 Retention Rate
<b>Rhode Island</b>	96.4%
<b>S.D. Indiana</b>	95.5%
<b>Maine</b>	95.2%
<b>S.D. Illinois</b>	94.6%
<b>New Mexico</b>	93.9%
<b>N.D. Alabama</b>	93.6%
C.D. Illinois	93.5%
W.D. Pennsylvania	92.6%
<b>E.D. Pennsylvania</b>	92.2%
S.D. California	92.1%

Meanwhile, the judicial districts that experienced the highest rates of “most serious” charge substitution (with districts that appeared on the list of districts with the highest dismissal rates again 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–FY 2010<sup>71</sup>**

District	FY 2003–FY 2010 Retention Rate
<b>N.D. West Virginia</b>	62.9%
W.D. Washington	68.5%
<b>E.D. New York</b>	69.5%
Oregon	69.7%
E.D. California	70.0%
<b>E.D. Arkansas</b>	71.1%
E.D. Texas	71.1%
<b>Kansas</b>	71.5%
South Dakota	72.0%
S.D. Florida	72.3%

Unfortunately, this metric also leaves something to be desired. For one thing, the AOUSC Dataset premises the “most serious” charge designation on the base

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<sup>70</sup> AOUSC Database, *supra* note 60. The overall retention rate of most serious initial charging offenses, across districts, during the studied time span was 83.5%.

<sup>71</sup> *Id.*

offense levels assigned to crimes under the United States Sentencing Guidelines.<sup>72</sup> This reliance on base offense levels can produce misleading results in situations where additional facts, such as the amount of illegal drugs involved in a drug crime, ultimately play a more important role in determining the defendant's likely sentence. Likewise, vast discrepancies may appear across similarly situated judicial districts when both districts (1) frequently 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 authorities' coding identifies Crime A as the "more serious" of the two offenses—an arbitrary designation. A district that routinely dismisses Crime A instead of Crime B as a *pro forma* part of a plea deal will record a very high charge substitution rate, suggesting it routinely overcharges. A different district 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 earlier, the prosecution gains little to no tactical advantage at plea bargaining from its prior decision to allege both crimes.

Notwithstanding these caveats, and the fact that the two datapoints are not wholly independent from one another, the retrospective data regarding the substitution of "most serious" charging offenses might provide a useful cross-check to the "generic" dismissal data. Here, it merits notice that there exists significant overlap between the lists, at both extremes. The Southern District of Indiana, the District of Rhode Island, the Northern District of Alabama, the District of Maine, the Eastern District of Pennsylvania, the District of New Mexico, and the Southern District of Illinois appear on both the list of districts with the lowest dismissal rates and the list of districts 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 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 bargaining chip for the government in plea negotiations. In this vein, it is sometimes asserted<sup>73</sup> that prosecutors often use the gun crime found at 18 U.S.C. §

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<sup>72</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).

<sup>73</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*

924(c)<sup>74</sup> to catalyze plea bargaining. This charge carries a mandatory minimum term, to run consecutively with the sentence assigned to the underlying crime. The nature and content of the charge encourage plea agreements: defendants want to eliminate the added term, while prosecutors are willing to dismiss the gun count in exchange for a guilty plea to the underlying crime.

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 by plea. Judicial 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 the 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–FY 2010<sup>75</sup>**

District	18 U.S.C. § 924(c) Dismissal Rate
<i>N.D. Alabama</i>	13.4%
<i>Maine</i>	14.5%
<b>N.D. Florida</b>	15.6%
Northern Mariana Islands	16.7%
<i>S.D. Indiana</i>	19.5%
<i>E.D. Pennsylvania</i>	20.1%
<b>Massachusetts</b>	22.0%
<b>C.D. Illinois</b>	23.2%
<i>Rhode Island</i>	23.8%
<b>W.D. Pennsylvania</b>	24.6%

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*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 section 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>74</sup> Section 924(c) of Title 18 provides that a five-year (or longer) 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>75</sup> AOUSC Database, *supra* note 60. The overall dismissal rate of § 924(c) charges during the studied time period, across districts, was 45.1%.

The following districts, meanwhile, had the highest § 924(c) dismissal rates in cases terminated by plea. Text in bold 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), while bold italics signifies a district's presence on both lists:

**Table VI: Federal Judicial Districts with the Highest Dismissal Rates of 18 U.S.C. § 924(c) Charges in Pled Cases, FY 2003–FY 2010<sup>76</sup>**

District	18 U.S.C. § 924(c) Dismissal Rate
<i>E.D. Arkansas</i>	75.0%
S.D. Georgia	73.3%
<b>M.D. Pennsylvania</b>	67.2%
<b>Minnesota</b>	66.7%
Arizona	65.2%
E.D. Washington	64.6%
<b>E.D. Texas</b>	64.2%
<b>Oregon</b>	63.1%
<b>Vermont</b>	62.8%
Guam	61.5%

#### D. Combined Results

Summing the results of these three metrics reveals those districts that have compiled particularly "low" and "high" charge-dismissal records over the studied time period.<sup>77</sup> Five districts appear on all three lists of jurisdictions with "low" dismissal rates: the District of Maine, the District of Rhode Island, the Southern District of Indiana, the Eastern District of Pennsylvania, and the Northern District of Alabama. Other districts that score very well in these "rankings" include the Southern District of Illinois, the District of Massachusetts, and the Northern District of Florida. For whatever reasons, the U.S. Attorney's offices in these districts appear to dismiss few charges in plea-bargained cases. This low dismissal rate 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.

<sup>76</sup> *Id.*

<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 forty-ninth among judicial districts in this respect—seems to substantiate this suspicion. *Id.*

At the other extreme, while only the Eastern District of Arkansas appears on all three lists of districts with the highest dismissal rates, other districts that performed “poorly” across all three metrics include the Middle District of Pennsylvania, the Northern District of West Virginia, the District of Minnesota, and the Eastern District of New York. Once again, good explanations, independent of overcharging, may exist for the high dismissal rates in these jurisdictions. 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, important, and “bargaining chip” offenses.

### III. CONCLUSION

A district’s position at either extreme of the aforementioned metrics does not establish that the local U.S. Attorney’s office employs “good” or “bad” charging practices. Limitations of and errors within the data, idiosyncrasies in coding, variations in docket composition across judicial districts, the relative strength or weakness of the defense bar in a judicial district, and other influences all certainly could—and probably did—effect the results presented above. Furthermore, low dismissal rates may be just as consistent with overcharging (under the second definition of the term) 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. With 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.