
**THE UNIVERSITY OF TEXAS
SCHOOL OF LAW**

Public Law and Legal Theory Research Paper Series Number 557



**WHY FEDERAL PROSECUTORS CHARGE: A COMPARISON OF
FEDERAL AND NEW YORK STATE ARSON AND ROBBERY
FILINGS, 2006-2010**

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WHY PROSECUTORS CHARGE: A COMPARISON OF FEDERAL AND NEW YORK STATE ARSON AND ROBBERY FILINGS, 2006 – 2010

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Academic, judges, lobbyists, special interest groups, and the defense bar all love to complain about the undue discretion held by federal prosecutors. Criticism has intensified over the last few decades, as the federal criminal code has grown to more than 4,500 prohibitions, a fair number of which replicate nearly identical state offenses. Little empirical evidence, however, attempts to discern what, if anything, is distinctive about the cases charged in federal rather than state court, and what might be motivating federal prosecutors to make their charging decisions. Our study aims to shed some light on this subject. In Part II, we describe our efforts to collect data on the characteristics of cases prosecuted under arson and robbery statutes from three sources: (1) the United States Sentencing Commission (“USSC”); (2) the New York State Division of Criminal Justice Services (“DCJS”); and (3) Federal Bureau of Investigation Uniform Crime Reports.

In Part III, we explain how we combined the USSC and New York State DCJS data before proceeding to our empirical analysis. First, we conduct a simple, bivariate analysis comparing the frequency with which our independent variables are observed in federal versus state arson and robbery cases. We note where we believe the observed, bivariate relationship is likely explained by confounding variables. Second, we proceed to utilize a more sophisticated logistic regression model to simultaneously examine the effect of our independent variables on the choice between federal versus state prosecution for arson and robbery. We find statistically significant evidence that cases prosecuted under federal arson and robbery statutes are more likely to include circumstances such as a conspiracy, a minor victim, use of a weapon, and serious recidivism.

In Part IV, we conclude by discussing the higher plea rates and longer sentences imposed under federal as opposed to state criminal justice systems. We argue that where crimes involve the above-noted more egregious circumstances, federal prosecutors are more likely motivated to prosecute the crime in expectation of a likely guilty plea and longer sentence. Our study provides much needed empirical evidence to support this rational view of federal prosecutorial discretion.

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I. Introduction

Everyone loves to complain about federal prosecutorial discretion.¹ Along with the over-federalization of the criminal law, undue prosecutorial discretion is the favorite federal criminal justice related target of academics, judges, lobbyists and special interest groups, and, of course, the defense bar.² This issue has become particularly acute over the last few decades, as the federal criminal code has grown to over 4,500 prohibitions, about half of them enacted since 1970.³ A fair number of these offenses replicate almost identical state offenses, with the addition

¹ See, e.g. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001) and *Unequal Justice*, 121 Harv. L. Rev. 1969 (2008) (arguing in both pieces that the broad federal laws enacted give prosecutors discretion to target a large pool of actors); Julie R. O'Sullivan, *The Federal Criminal "Code" is a Disgrace: Obstruction Statutes as a Case Study*, 96 J.Crim.L. & Criminology 643, 673 (2006) (noting that "the overbreadth, vagueness, and redundancy of the code give prosecution power that they are not supposed to have in a decently-functioning system of justice"); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276 (2005). These and the sources noted in footnotes 2 and 15 are but a small sampling of such literature.

² See, e.g., academic literature including J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U.Rich.L.Rev. 457 (2012), Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2007) and Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2004); bar review associations like THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION TASK FORCE 1, 5 - 14 (James Strazzella et al. eds.) (1998); special interest groups like the Federalist Society John S. Baker and Dale E. Bennett, *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY Studies (2004), available at http://www.fed.soc.org/doclib/2007040_crimereportfinal.pdf, and the Heritage Foundation, Brian W. Walsh & Tiffany M. Joslyn, *Heritage Foundation, Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 6 (2010); and finally judges such as the Honorable William H. Pryor Jr., *Commentary, Federalism and Sentencing Reform in the Post-Blakely Era*, 8 Ohio St. J. Crim. L. 505 (2011) and the Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 21 - 28 ((1995).

³ The last official government count of federal criminal laws took place in the early 1980s, when the government reported identifying 3,000 federal criminal laws. See Roger J. Miner, *Crimes and Punishments in the Federal Courts*, 43 Syracuse L. Rev. 681 (1992) (estimating 3,000 in 1992); see also FEDERALIST SOCIETY REPORT,

of the connection to interstate commerce necessary to provide federal jurisdiction.⁴ For example, statutes concerning controlled substance use and distribution, arson, robbery, fraud, and weapons are the bread and butter of local District Attorney's Offices caseloads,⁵ yet similar prohibitions are scattered throughout in the U.S. Code.⁶

Of course some offenses can only be charged at the federal level, most importantly immigration and terrorism offenses.⁷ These two constituted about 29% and 0.01% of the federal criminal caseload in 2011, respectively.⁸ Drug offenses (30%), fraud (12%), and firearms and explosives offenses (8%), combined with immigration matters, comprise the largest four offense categories and altogether constitute the vast bulk (80%) of the federal criminal caseload.⁹ We believe that there are compelling reasons for Congress to have enacted these prohibitions at the federal level despite some overlapping state jurisdiction. Drug trafficking frequently involves interstate and international elements and cannot successfully be investigated or prosecuted solely by state and local officials. The same is true for combating certain sophisticated fraudulent scheme with extensive and expensive forensic accounting. Even low-level street crime involving gangs and weapons can sometimes overwhelm a state prosecutor's office.

However, regardless of what one's opinion on the wisdom of such federal enactments, if one examines the academic literature there is very little empirical data that attempts to discern why an individual case, particularly one that could be left to state or local action, is selected by an Assistant United States Attorney or Trial Attorneys at the Department of Justice ("DOJ" or "Department") for federal rather than state prosecution. There is one oft-cited law review article by Professor Richard R. Frase that studied federal criminal prosecutors in the Northern District of Illinois in 1979.¹⁰ Professor Frase found that the most frequent reasons that federal

supra note __, at 5, 7-10 (estimating 4,000 in 2004); Brian W. Walsh & Tiffany M. Joslyn, Heritage Foundation, Without Intent, How Congress is Eroding the Criminal Intent Requirement in Federal Law 6 (2010) (counting 4,450 federal criminal laws by 2008).

⁴ Abrams, Beale, and Klein, *Federal Criminal Law and Its Enforcement*, 5th ed., chapter 3, (West 2010).

⁵ District Attorneys are responsible for the general police powers in their jurisdiction and must react to all reports, unlike their federal counterparts. Federal prosecutors, except for those crimes with exclusive federal jurisdiction, can select which cases they wish to pursue, and which they can ignore. The "core" non-federal offenses tracked by the FBI include homicide, robbery, aggravated assault, and property offenses. Uniform Crime Report: Crime in the United States, Federal Bureau of Investigation, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s>.

⁶ 21 U.S.C. section 841 *et. seq.* (Controlled Substances Act); 18 U.S.C. 1951 (Hobbs Act prohibitions against robbery and extortion); 18 U.S.C. sections 1341 - 1346 (mail and wire fraud); 18 U.S.C. section 844 (arson); and 18 U.S.C. section 921 *et. seq.* (weapons offenses) and 26 U.S.C. 5801-5872 (the National Firearms Act).

⁷ The federal government has sole constitutional authority over immigration matters. U.S. Const. art. I, section 8, clause 4; *De Canas v. Bica*, 424 U.S. 351 (1976) (holding that the power to regulate immigration is unquestionably an exclusive federal power). Only the national government can combat terrorism offenses as they are directed against the United States government rather than an individual, and our response to these attacks frequently involves the U.S. military as well as the civilian justice system. *See, e.g.*, Nat'l Sec. Div., Dep't of Justice Statistics on Unsealed International Terrorism and Terrorism-Related Convictions (2010); Military Commission Act of 2006.

⁸ Federal Judicial Caseload Statistics, Administrative Office of the United States Courts, Statistics Division, 2011, Table D-1.

⁹ *See* Susan R. Klein & Ingrid Grobey, *Debunking Claims of Over-federalization of Criminal Law*, 62 *Emory Law Journal* 1 (2012).

¹⁰ Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 *U. Chi. L. Rev.* 246 (1980).

prosecutions offer for declining to bring charges, in order of how many times each factor was selected, were the state-prosecution alternative, insufficiency of the evidence, the small amount of loss by the victim, the prior record of the defendant, the small amount of the contraband (drugs and weapons), alternative civil/administrative remedies, the isolated nature of defendant's act or other defendant characteristic, a recommendation by the investigating agency or the DOJ, a lack of interstate impact, and statutory overbreadth.¹¹ These all appear to us as sensible reasons for declinations. The Department itself asks federal prosecutors nationwide to complete a short form if they decline to indict a case after a file is brought to them by an official from a federal law enforcement agency. The most common reasons for declinations checked off in 2008 were weak evidence (23%), prosecution by other authorities (12%), and investigative agency request (11%).¹²

Unfortunately, Professor Frase's work, as well as the DOJ declination form, can be more accurately described as a survey rather than a study. Both list the reasons federal prosecutors publicly offer for declining cases altogether, or holding off in favor of what the prosecutor hopes will be a state prosecution. While these are all excellent reasons for accepting or declining federal prosecution, Professor Frase's article is not going to satisfactorily answer those many critics who claim that suffering a federal prosecution is as random as being struck by a bolt of lightning,¹³ or that the decision is arbitrary,¹⁴ or even worse capricious or motivated by ill-will.¹⁵ Federal prosecutors will not be trusted by all to provide accurate answers to such a

¹¹ *Id.* at 263 - 265.

¹² See Bureau of Justice Statistics report at <http://www.bjs.gov/index.cfm?ty=tp&tid=63>. See also United States Attorneys Annual Statistical Report, Fiscal Year 2011, Table 15, available at http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf (showing most common reasons for declining prosecution are (1) lack of evidence; (2) absence of criminal intent; (3) the suspect will be prosecuted by another authority, and; (4) insufficient federal interest).

¹³ It is accurate to state that the chances of a criminal being prosecuted federally are small relative to the chances of being prosecuted locally, as 95% of felonies nationwide are prosecuted at the state and local level. Klein & Grobey, 62 Emory Law Journal at 92. However, as our study suggests, a felon can increase his odds of being pursued federally by multiple prior convictions, hurting his victim, destroying or stealing over a certain dollar amount worth of property, carrying a firearm, or having good information to sell to the government. If one is being charged with a controlled substance offense, the greatest indicator of federal charging is whether or not your crimes were investigated by an Organized Crime Drug Enforcement Task Force. OCADETF investigations focus only on larger distribution rings, not on purely local drug activity. Executive Office for U.S. Attorneys, U.S. Dep't of Justice, U.S. Attorneys' Annual Statistical Report 20-21 (2010).

¹⁴ This was the primary criticism of the long-gone possibility in the mid-1980s of being caught in "federal day," when low-level drug dealers were randomly shifted to federal court. Morganthau Calls U.S. Bid to Fight Cocaine "Minimal," New York Times, 7/11/86 (District Attorney describing United States Attorney Rudolph W. Giuliani's "Federal Day" program for prosecuting drug violators in New York city as "a token effort"); City Forms Unit to Fight Crack, Newsday, 5/22/86 (noting that those arrested on Federal Day - a day in which city police work with federal agents and charge those arrested with federal crimes, face double the normal 15-year sentence).

¹⁵ See, e.g., Ronald Wright, Federal or State? Sorting as a Sentencing Choice, 21 Criminal Justice 16 (2006); Steven D. Clymer, Unequal Justice: The Federalization of Criminal Law, 70 S. Cal. L. Rev. 643 (1997) (noting that federal laws involving drug trafficking and weapons offenses impose significantly greater penalties than similar state prohibitions, and suggesting that the Equal Protection Clause should be interpreted to bar some federal charging in these areas); Stephen F. Smith, Proportionality and Federalization, 91 Va. L. Rev. 879 (2005) (arguing that over-federalization leads to draconian federal as compared to state sentences, and suggesting that judges narrowly interpret federal statutes to ensure proportionate punishment); Ellen S. Podgor, The Tainted Federal Prosecutor in an Overcriminalized Justice System, 67 Wash. & Lee Law Rev. 1569 (2010) (suggesting that the breadth of many federal statutes give prosecutors undue discretion in selecting cases); Sara Sun Beale, From Morals and Mattress Tags to Overfederalization, 54 Am. U. L. Rev. 747 (2005).

survey, or may not be fully cognizant or able to articulate the reasons for their selections. Other investigations of prosecutorial decision-making are likewise anecdotal or based upon personal experience or political theory, and are therefore unverifiable.¹⁶ What might shed some more objective light on the subject is a study that compares state and federal charges for similar offenses, to isolate what, if anything, is different about such cases.

We attempt to provide such empirical evidence. We conducted a study of just two offenses over the span of a few years. We selected the two federal offenses that we believe replicate most closely their state counterparts - arson and robbery.¹⁷ We compare those results to the same two offenses brought in state courts in New York over the same time period. Our results are most applicable to those federal offenses that replicate state offenses; those concurrent jurisdiction offenses where the federal interest in pursuing these charges is the same as the states' interest. However, we believe that these results give us a window into federal prosecutorial decision-making in general, at least for those classes of crimes that are not restricted to federal courts.

In Part IIA, we describe our study of federal cases from the database kept at the United States Sentencing Commission, and in IIB we detail the New York data provided to us by the New York State Division of Criminal Justice Services, as well as the multi-state statistics we obtained from the FBI's Uniform Crime Reports. In Part IIC, we compare the federal and state statutes, to ensure that our premise - that the state and federal arson and robbery offenses are essentially identical, is accurate. We describe the additional multi-state data that we use from the FBI's Uniform Crime Control series in Part IID.

In Part III, we offer the results of our comparisons, and some tentative conclusions about why federal prosecutors charge cases that could be brought in either state or federal courts. In Part IIIA, we describe the process of combining those two data sets into a single computer program that allow us to compare and contrast variables common to both sets. In Part IIIB, we are primarily looking at contingency tables and associated chi-squared or Fisher's exact test probabilities. However, we also engage in mean comparisons and t-tests for the age and sentence variables. In Part IIIC, we utilize the Logit Model using regression analysis). We found that the most significant determinate of whether a case would be brought in federal court

¹⁶ Professor Daniel C. Richman, a Columbia Law School professor and former federal prosecutor, has noted that while the overlap between federal and state jurisdiction in criminal codes is substantial, there are unwritten boundaries between the two systems, resulting from negotiations between state and federal prosecutors in each jurisdiction as to the kinds of cases that each should handle. The Changing Boundaries Between Federal and Local Law Enforcement, 2 Criminal Justice Organizations 91, 91 (2000). That was also Professor Klein's experience during her time as Trial Attorney with the U.S. Department of Justice, and in her role (with Chief Assistant Anthony Brown) as supervisor of a University of Texas internship program with the U.S. Attorney's Office for the Western District of Texas. Professor Lauren M. Ouziel argues that the legitimacy theory developed by social psychologists, criminologists, and criminal law theorists best explains forum selections. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, ___ Yale Law Journal ___ (forthcoming 2013). However, she offers no empirical evidence or study to support her conclusion.

¹⁷ See Appendices A and B, reproducing the pertinent elements of the federal and state arson and robbery offenses. The federal arson statute is codified at 18 U.S.C. section 844, the federal robbery statute is codified at 18 U.S.C. section 1951 (Hobbs Act - Interference with Commerce by threats or extortion), the New York state arson statute can be found at McKinney's Penal Law section 150.00 et. seq. (Intentional and Reckless Arson of Building or Motor Vehicle), and the New York state robbery offense is listed at McKinney's Penal Law section 160.00 et. seq. (Robbery in First, Second, and Third Degree).

was whether it was investigated by a federal agency or joint-task force,¹⁸ serious recidivism of the defendant (number of total prior arrests that were for violent offenses), whether a business was involved, the high value of the items stolen during a robbery, the value of the property destroyed by arson or explosion, the use of a weapon during the crime, cooperation with the government,¹⁹ involvement in conspiracy, cooperation with the government after arrest,²⁰ involvement of a minor victim, and age of the defendant. Murder and arrests for minor offenses were factors that might point toward state charging.²¹ Neither U.S. citizenship, gender, nor race was significantly related to federal versus state involvement. When recidivism is controlled for, race clearly did not make it more or less likely that the case was brought in federal court. We did find sentences to be significantly higher at the federal level for both offenses.

While we can offer the statistical differences between the two data sets, this will, of course, not prove the motivation behind the federal prosecutors' case selections. Ascribing those factual differences we find between state and federal cases as the rational for the selection presumes that the federal prosecutors knew, understood, and cared about these factual differences in advance of making their selections. We believe this to be the case. As we show in our conclusion, scholarship and statistical information both within our study and outside of our study suggest that sentence lengths and conviction and guilty plea rates nationally are higher at the federal than the state level. That knowledge likely motivates federal actors to bring cases with a particular federal interest (crimes involving high dollar values, business-related targets, and professional criminals who work in groups) against the worst offenders (the ones who have already been convicted of serious felonies at the state level but are back on the streets) to federal court, where they will get a stiffer sentence and be assured of a conviction by trial or plea.

II. The Data

A. United States Sentencing Commission Data Set Methodology

In May of 2011, we entered into a Cooperation Agreement with the United States Sentencing Commission ("USSC") giving our team access to all of their data collected on all plea agreements entered into between federal criminal defendants and federal prosecutors, as well as sentences after jury and bench trials.²² We did not pay for this data; the Commission is charged with assisting scholars and members of the public engaged in the empirical study of federal sentencing law.²³ We examined this data for two particular federal crimes subject to concurrent state and federal criminal jurisdiction - arson and robbery. Because 97.4% of all

¹⁸ Virtually every federal case we coded was either investigated by a federal law enforcement agency, or investigated by a joint task force that included a federal agency.

¹⁹ See Appendix E.

²⁰ 16.4% of the federal arson convictions and 28.6 of the federal robbery convictions we coded contained a U.S.S.C. 5K1.1 substantial assistance departure. *See* Appendix F.

²¹ We found this inconclusive but unsurprising, as there is no general federal murder offense.

²² Susan R. Klein and Judith W. Sheon, United States Sentencing Commission Cooperation Agreement for Research Project (May 4, 2011). Agreement on file with authors, the Sentencing Commission, and the University of Houston Law Review.

²³ The agreement between Professor Klein and Ms. Sheon, Staff Director, U.S. Sentencing Commission, was entered pursuant to 28 U.S.C. section 995(a)(6)-(7), granting authority to the Commission to enter into "cooperation agreements," and is consistent with the Commission's public access to policy published as Public Access to Sentencing Commission Documents and Data, 54 Fed.Reg. 51279 (Dec. 2, 1989).

criminal convictions in 2010 were by guilty plea,²⁴ this gives us much information about nearly the entire universe of all defendants sentenced federally for robbery and arson sentences for the years studied (a random sampling of nationwide plea agreement to robbery entered into between January of 2006 and December of 2010, and all plea agreements for arson entered into between January of 2008 to December of 2010). The federal data also includes the sentences of those few arson and robbery defendants who were found guilty after trial, though less information about such individuals is accessible. The data below includes data the Commission regularly codes as part of its federal responsibilities under the statute authorizing its creation and shared with our team, plus much additional data we hand-coded from the documents described above.

The USSC staff codes quite a number of variables on each case it receives. Because we had access to their Codebook, we also have the following additional information on each arson and robbery defendant:

- * Race
- * Gender
- * Citizenship/Nationality
- * Age
- * was conviction by guilty plea or trial
- * sentence imposed

1. Federal Arson Data

Each case in the Federal Arson data set includes data coded by the USSC, as well data hand-coded by the authors. The USSC archives documents every federal sentence in the United States, whether by conviction after trial or by plea. These documents include the Pre-Sentencing Report (PSR), the sentence, a judicial statement of reasons, and written plea and cooperation agreements. The USSC uses these documents to construct a detailed file on each defendant. The USSC provided us with access to their data file and the underlying documents for all federal Arson sentences between 2008-2010. There were a total of 359 such cases.

Our team traveled to the Commission's offices in Washington, D.C. during the winter of 2012.²⁵ While there, we reviewed all Federal Arson cases from 2008 to 2010, charged under 18 U.S.C. section 844 *et. seq.*, which resulted in a plea of guilty or a disposition of guilt from trial. We also reviewed cases where the defendant may have been charged under section 844, but plead to a different offense and the section 844 charges were later dismissed. We did not review section 844 cases that did not result in an adjudication of guilt.

Our team used the underlying documents to hand-code a number of other variables of interest. Our team was given a private office and four computer work-stations, with access to all data. Extremely helpful and cooperative USSC staff provided printouts of all case numbers containing files on charges that fit within our study parameters. Using the USSC's computers

²⁴ *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (containing 2009 and 2010 data).

²⁵ The on-site team included Professor Susan Klein, then-UT law students Michael Gramer and Daniel Graver, and two additional law students hired from Georgetown Law Center and George Washington Law School. The USSC policy is not to allow their data to leave their physical office space - all researchers must come to them.

and database, we read through all of the related documents and hand-coded the following relevant variables:

- * Charging entity
- * Jurisdiction(s) where criminal activity occurred
- * Size of the city where crime was charged
- * Whether a state, federal, or joint state/federal taskforce initiated the investigation
- * Whether a state, federal, or joint state/federal taskforce arrested the defendant
- * Whether local authorities requested federal assistance
- * Whether local authorities participated in the investigation
- * The federal agency(s) involved in the investigation
- * Whether defendant was engaged in a conspiracy with one or more other people (charged or uncharged)
- * Whether the defendant was associated with a larger criminal organization
- * Whether the defendant engaged in conduct in more than one state
- * Number of co-defendants
- * Prior arrests, state convictions, federal convictions, violent offenses, and drug/alcohol related offenses (including uncharged evidence of substance abuse).
- * Whether defendant is also being charged with related state crimes
- * Weapons, Perjury, or Obstruction (present, charged, or enhanced)
- * Uncharged & unenhanced evidence of witness tampering, including restraining orders
- * Minor involved (defendant and/or victim)
- * Uncharged or dismissed conduct by defendant (in PSR or plea agreement)
- * Plea Agreement: Polygraph authorized or required²⁶
- * Plea Agreement: Habeas Corpus waiver
- * Plea Agreement: FOIA waiver
- * Plea Agreement: Brady, Jencks, and/or actual innocence waiver
- * Substantial Assistance (if any)
- * Arson - the type of structures threatened or burned
- * Arson - death or injury
- * Arson - Estimated value of property threatened (0, \$500k, \$500k, \$2M, or \$2M+)

The form we used to code these variables is attached as Appendix C.

2. Federal Robbery Data

At the U.S. Sentencing Commission we obtained data on all Robbery cases from 2006 to 2010 charged under 18 U.S.C. section 1951 *et. seq.*, which resulted in a plea of guilty or a disposition of guilt from trial. We eliminated all section 1951 cases that were charged “under color of official right” as these have no state analogue. We also reviewed cases where the defendant may have been charged under section 1951, but plead to a different offense and the section 1951 charges were dismissed. We reviewed section 1951 cases that resulted in an

²⁶ We will not in this piece discuss the rights waivers that the federal prosecutors included in their plea agreements, such as the waiver of Brady and Giglio rights, waiver of Jencks material, and the waiver of the right to appeal and engage in collateral attack of conviction or sentence. A very preliminary count of these waivers can be found in "Monitoring the Plea Process," 51 Duquesne Law Review 559, 580-581 (2013). A more extensive examination of these waivers will be revealed in "The Waiver of the Criminal Justice System," with Aleza Remis, forthcoming 2014.

adjudication of guilt. We excluded federal robbery cases by excluding from our data set all sentences including guilty pleas to 18 U.S.C. section 2113, the federal bank robbery statute.

Due to the large number of robbery cases and limited resources, we hand-coded additional data for a random sample of these cases. The USSC provided us with a list of every robbery case between 2006 and 2010, in sentencing-date order, and we coded every fifth case. We collected additional, hand-coded data for our random sample of 267 robbery cases. In all other respects, the methodology for data collection was identical to that for Arson.

We coded all of the same variables for Hobbs Act robbery as we did in the Arson cases, omitting the Arson-specific variables, but including the following Robbery-specific variables:

- * [All the same variables listed above in the Arson section]
- * Under Color of Official Right [cases excluded]
- * Type of Hobbs charge: 18 U.S.C. sections 1951(b)(1) or (b)(2)
- * Victim(s): Business, Individual, or Government
- * Objective(s) of Robbery: money, weapons, drugs, or personal property
- * Total Value (up to \$10k, \$100k, \$500k, \$1M, or \$1M+)
- * Plea Agreement: Waive DNA Testing
- * Plea Agreement: Waive Attorney's Fees

The form we used to code these variables is attached as Appendix D.

B. New York Data Provided by New York State Division of Criminal Justice Services.

We obtained the New York data by making a Data Request Policy from the New York State Division for Criminal Justice Services ("DCJS"). The DCJS maintains a Computerized Criminal History system ("CCH" as a central repository for criminal history and offense information in New York State). CCH contains the criminal history records of all persons arrested and prosecuted since 1970. This criminal history consists, *inter alia*, of a record of all finger printable arrests of any individual, the charges reported with the arrests, the prosecutorial and judicial action involved in the disposing of the charges on which the person is arraigned, and information related to sentencing if convicted. New York state collects and retains this data for their own statistical reporting and in order to make reports to the Federal Bureau of Investigation's Uniform Crime Reports.

After qualifying as a bona fide research organization,²⁷ we paid \$2500 for costs in collecting and providing the specific data set requested.²⁸ DCJS officials gave us five password protected Stata files for the robbery cases and five more for the arson cases, containing the "All Charge" database files. These files, the most comprehensive kept, contain 248 variable about each case, including criminal histories, sentences, and much more. The files have been de-

²⁷ Executive Law section 837[4][e] (Jan. 1, 2009), permitting the DCJS to release criminal history data files to bona fide researchers and research organizations for legitimate research purposes that support the expansion of criminal justice knowledge and inform public policy.

²⁸ Letter from Professors Susan Klein and Stefanie Lindquist to Theresa Salo, Deputy Commission, DCJS. Appendix B to this letter provides the computerized criminal justice fee schedule for the all charge files as \$2,500, broken down into \$500 for processing and \$2,000 for programming fee. This letter and its appendices are on file with the authors, the DCJS, and the University of Houston Law Review.

identified by removing all identifying variables that might reveal a suspect's name and replacing the NYSID and Event ID with a pseudo identifier.

DCJS provided with the CCH history for all arsons from 2008 - 2010 arrested or charged under N.Y. Penal Law Sections 150.01, 150.05, 150.10, 150.15, and 150.20. They provided the CCH history for all robberies from 2006 - 2010 arrested or charged under N.Y. Penal Law Sections 160.05, 160.10, and 160.15. There were 536 arson cases and 16,133 robbery cases.

The New York CCH files contain over 240 variables, including:

- * Charging entity
- * Jurisdiction(s) where criminal activity occurred
- * What agency arrested the defendant
- * Whether defendant was engaged in a conspiracy with one or more other people (charged or uncharged)
- * Number of co-defendants
- * Prior criminal history of defendant [CCH Variables: p_misdarr,p_felarr,p_vfoarr,p_drugarr]
- * drug/alcohol?
- * Weapon [CCH Variable: chg_weapon]
- * Minor victim [CCH Variable: chg_minor]
- * Uncharged or dismissed conduct by defendant
- * Race of defendant [CCH Variable: modal_race]
- * Gender of defendant [CCH Variable: modal_sex]
- * Citizenship/Nationality [CCH Variable: arr_birth_place]
- * Age of defendant [CCH Variable: modal_birth_yr]
- * Resolution of crime charged by guilty plea, verdict, dismissal, other [CCH Variable: c_dcode]
- * sentence imposed [CCH Variable: c_sent_type, c_fine_amount, c-fine_time, c_fine_unit, fine_amt, jail_days, pris_min_mon, pres_max_mon]
- * sentence served
- * For Arson: Object of offense: Business, Residence, Vehicle [Use FBI UCR national data?]
- * For Arson: Value [Use FBI UCR national data?]
- * For Robbery: Object of offense: Business, Residence, Vehicle [Use FBI UCR national data?]
- * For Robbery: Value [Use FBI UCR national data?]

C. Comparison of Federal and New York Statutes

1. Arson

The federal arson statute, enacted under Congress' Commerce Clause authority, provides that “[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire . . . any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years.”²⁹ Other sections of the act prohibit crimes related to interstate transportation of explosive devices, using the mail to make bomb threats, the destruction of federal buildings, carrying

²⁹ 18 U.S.C. § 844(i) (West 2013).

explosives through an airport, and using fire or explosives to commit another federal felony.³⁰ However, we did not code for such more specific non-overlapping federal offenses in our study but instead limited our review to the general arson prohibition. The statute's history and language indicate that Congress intended its reach to be broad and to overlap state arson laws.³¹

The New York State statutes cover the core arson offenses, penalizing arson in five degrees.³² The top three require “intentionally starting a fire or causing an explosion” and causing “damages to a building or motor vehicle,” the fourth drops the mens rea to “recklessly,” and the fifth expands the scope to “any property of another.”³³ The term “building” is broadly defined, incorporating its “ordinary meaning.”³⁴

Thus, the statutes are sufficiently similar such that any conduct covered by the federal statute could be charged pursuant to state law, and almost any offense that could be charged by a New York Assistant District Attorney could be brought instead in one of the four federal district courts of New York. The only notable differences for purpose of our study is that the federal statute requires that structure destroyed be “used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” During the heyday of the failed Commerce Clause revolution in the mid-1990s, the Court interpreted the federal arson statute not to reach the arson of an owner-occupied private residence, despite the fact that this home was connected to a gas main.³⁵ This limitation of federal arson has itself been limited, so that if the property is rented or unoccupied it is fair game for federal prosecutors.³⁶ The New York state analogue would clearly cover the arson of a private residence, whether or not occupied.

2. Robbery

The federal robbery statute, also enacted under Congress' Commerce Clause authority, provides “Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery . . . shall be fined under this title or imprisoned not more than twenty years, or both.”³⁷ Robbery is

³⁰ 18 U.S.C. § 844 (d) (transportation of explosives), (e) (bomb threat through mail), (f)(1) (destruction of federal building), (g)(1) (possession of explosive through airport); (h) (uses explosive to commit any felony) (West 2013).

³¹ Russell v. United States, 471 U.S. 858 (1985) (arson of rental property). Several circuits have interpreted the 1982 amendment to section 844(i) embodied in the Anti-Arson Act - which changed the statute to read ‘by means of fire or an explosive’ - to clarify Congress' intention that the provision be broadly read.” *See, e.g., United States v. Beldin*, 737 F.2d 450, 455 (5th Cir. 1984).

³² McKinney's Penal Law § 150 *et seq.* See also Appendix B.

³³ Id. The damage element is satisfied by minimal damage. *See People v. McDonald*, 68 N.Y.2d 1, 14, 505 N.Y.S.2d 824, 496 N.E.2d 844 (1986) (“[P]roof of damage short of burning (including proof of ‘charring’) is sufficient to establish this element of the crime.”).

³⁴ McKinney's Penal Law § 150.00(1) (“any structure, vehicle or watercraft used for overnight lodging of people, or used by persons for carrying on a business therein”). *See also People v. Ruiz*, 68 N.Y.2d 855, 508 N.Y.S.2d 426, 501 N.E.2d 34 (1986) (vans used by a construction company, a department store's storage trailer); *People v. Wandell*, 285 A.D.2d 736, 728 N.Y.S.2d 578 (3rd Dep't 2001) (house boat); *People v. Fox*, 3 A.D.3d 577, 771 N.Y.S.2d 156 (2nd Dept. 2004) (homeless person's shanty).

³⁵ See Jones v. United States, 529 U.S. 848 (2000) (avoiding Commerce Clause challenge to federal arson statute under United States v. Lopez, 514 U.S. 549 (1995) by construing the statute more narrowly).

³⁶ See, e.g., United States v. Logan, 419 F.3d 172 (2d Cir. 2005) (rented fraternity house); United States v. Craft, 484 F.3d 922 (7th Cir. 2007) (unoccupied residential rental properties).

³⁷ 18 U.S.C. § 1951(a) (West 2013). *See also* Appendix A.

defined as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury . . .”³⁸ This federal statute also prohibits “extortion” and taking “under color of official right”,³⁹ but our study did not review cases that were charged under either of those provisions. Moreover, Congress has codified different types of robbery in scattered sections of the U.S. Code. For example, bank robbery is codified at 18 U.S.C. § 2113 (2002). None of these more particularly federal statutes were included in our study, as these crimes do not necessarily have state analogues.

In New York State, robbery is defined as “forcible stealing.”⁴⁰ Thus, there are two elements: the commission of larceny and the used or threatened immediate use of physical force to do so.⁴¹ New York State divides robbery into three degrees of robbery. The basic offense, robbery in the third degree, is described above.⁴² The addition of an aggravating factor, either causing physical injury or displaying what appears to be a firearm, elevates the crime to robbery in the second degree.⁴³ Additional aggravating factors; that the physical injury be serious, that the defendant is armed with a deadly weapon, or that the defendant uses or threatens the immediate use of a dangerous instrument elevate the crime to robbery in the first degree.⁴⁴

The central distinction between the federal and states statutes is the interstate commerce element contained in the federal statute; however, the distinction is slight. The Hobbs Act prohibits robberies that affect interstate commerce “in any way or degree,”⁴⁵; so the required showing of an effect on interstate commerce is *de minimis*.⁴⁶ “The jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect on commerce will suffice.”⁴⁷

³⁸ 18 U.S.C. § 1951(b)(1) (West 2013).

³⁹ 18 U.S.C. § 1951(b)(2) defines extortion as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” The first category of extortion includes obtaining property by force, violence, or fear. *See, e.g., United States v. Edwards*, 303 F.3d 696 (5th Cir. 2002); *Scheidler v. National Organization for Women*, 537 U.S. 393 (2003). To establish extortion under color of official right, “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” *Evans v. United States*, 504 U.S. 255 (1992).

⁴⁰ McKinney’s Penal Law § 160.00; *see also* Appendix B.

⁴¹ *See* McKinney’s Penal Law § 160.00, *People v. Banks*, 55 A.D.2d 795, 389 N.Y.S.2d 664 (1976), *People v. Fuller*, 77 Misc.2d 747, 354 N.Y.S.2d 586 (1974).

⁴² McKinney’s Penal Law § 160.05; *see also* Appendix B.

⁴³ McKinney’s Penal Law § 160.10; *see also* Appendix B.

⁴⁴ McKinney’s Penal Law § 160.15; *see also* Appendix B.

⁴⁵ 18 U.S.C. 1951(a) (West 2013).

⁴⁶ *See, e.g., United States v. Culbert*, 435 U.S. 371 (1978); *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005) (attempted robbery of woman using her ATM card, which would have sent signals interstate); *United States v. Rodriguez*, 360 F.3d 949 (9th Cir. 2004) (attempted robbery of undercover DEA officer posing as drug dealer) The Supreme Court has held that the Hobbs Act “speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with commerce by extortion, robbery or physical violence.” *Stirone v. United States*, 361 U.S. 212, 215 (1960).

⁴⁷ *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981) (internal citation omitted). Some courts claim they might limit federal jurisdiction by including only robberies that deplete the assets of a business rather than an individual, but such an interpretation is unsupported by the language of the statute and is difficult to maintain as a matter of logic and common sense. *See, e.g., United States v. Wilkerson*, 361 F.3d 717 (2d Cir. 2004); Abrams, Beale & Klein, *Federal Criminal Law and Its Enforcement* (5th ed. West 2010), pp. 247-51 (collecting cases);

D. Multi-State Data from the Uniform Crime Reports

The Uniform Crime Reports ("UCR") are official data on crime in the United States published by the Federal Bureau of Investigation ("FBI"). UCR is a "nationwide cooperative statistical effort of nearly 18,000 city, university and college, county, state, trial and federal law enforcement agencies voluntarily reporting data on crimes brought to their attention."⁴⁸ It is worth noting that the UCR itself warns that it reflects crime reports by police, not later adjudication. Moreover, not all states require municipalities to report data, making the crime statistics under-reported in the UCR reports.

Crime statistics are compiled from UCR data and published annually by the FBI in the Crime in the United States series. The FBI does not collect this data itself. Rather, law enforcement agencies across the United States provide their data to the FBI, and the FBI analysts then compile the Reports. The UCR program began in 1990, and since then has become an important source of crime information for law enforcement, policymakers, scholars, and the media. While we realize that this data will not be nearly as accurate as our other two data sets, it contains the only state data we are aware of for comparing the value and identity of items burned and stolen in New York state.

III. The Study

A. Data Comparisons

After organizing the federal and New York data, the next step in our study was to actually compare the two data sets. Our primary concern was identifying those variables that were not only common to both sets, but also valuable in determining whether a particular crime was prosecuted at the federal or state level. We identified the following variables in the two data sets as potentially significant: involvement of a minor victim, gender of defendant, race of defendant, age of defendant, use of a weapon in the crime, prior arrests of defendant, prior violent arrests of defendant, prior drug and alcohol arrests of defendant, sentence imposed, sentenced served, and value of the property destroyed or damaged.

Next, we recoded these variables to allow for a statistical comparison between the two data sets. Such recoding was necessary because the federal and New York data sets were coded differently. For example, we identified the use of a weapon as a potentially significant variable in evaluating whether a particular crime was prosecuted federally or locally. The federal data provided three different codes:

United States v. McFarland, 311 F.3d 376 (5th Cir. 2002) (upholding Hobbs conviction by equally divided en banc court).

⁴⁸

<http://www.foi.gov/about-us/cjs/ucr/crime-in-the-u.s.-2012/resource-pages/aout-ucr/aboutucrmmain>

Variable Name How Coded

Weapon

1	Weapon Used
2	Weapon Not Used
3	Unknown

The New York data contained more detailed coding and provided eight different codes:

Variable Name How Coded

Disp_Weapon

0	No Weapons Charge
2	Use/Display/Poss/Sale Firearm
3	Use/Display Deadly Weapon
4	Use/Display Dangerous Instrument/Deadly Weapon
5	Firearm Licensing Offense
6	Display What Appears to be a Firearm
8	Underlying Firearm Charge
9	Underlying Weapon Charge

Because the New York data contained a more detailed coding structure, we simply recorded the New York data using the federal codes. All New York cases that were coded using the numbers two to nine were simply recorded as 1. All New York cases that were coded as zero were recorded using the number two. A similar process was utilized to recode the other variables common to both data sets. Once the variables were recorded, the final steps were to compare the data and then use a logistic regression model to examine effect of various variables have on the probability of an arson or robbery case being pursued in federal or state court.

B. Basic Data Analysis:

In this part we compare the data using a computer program called "Stata." Stata is a "general-purpose statistical analysis package created and maintained by StataCorp LP. Its capabilities include a broad range of statistical analyses, plus data management, graphics, simulations, and custom programming."⁴⁹ Where the Pearson's chi-squared statistic is inappropriate, we instead present the Fisher's exact test probability. We conducted a basic analysis in Stata. Specifically, we used the tabulate function to compare the count and percentage of federal versus state cases that fell into each category of the independent variable in question. We also calculated a Pearson's chi-squared test for each table. For the variables that were continuous (rather than categorical), we computed the means and standard deviation as well a t-test statistic.

1. For Arson:

⁴⁹ Knowledge Base, Indiana University, University Information Technology Services (2013), available at <http://kb.iu.edu/data/afly.html> .

The following tables compare the *count* (and *percentage*) of cases in the federal versus state arson data by various independent variables of interest. A Pearson's chi-squared statistic and associated probability value is reported for each table as well. This probability indicates the likelihood that there is *no* difference between federal and state for that independent variable.

A commonly used threshold for significance is 0.05 (or 5%). Adopting this threshold, the difference between state and federal is considered *statistically significant* if the probability associated with the chi-squared (or t-test) statistic is less than or equal to 0.05. A more stringent threshold of 0.01 (or 1%) corresponds to a higher degree of statistical significance.

The table for age of the defendant is slightly different. Here since age is a continuous variable (and not categorical like the other independent variables), the mean (and standard deviation) is presented. A t-test statistic (two-sided) and associated probability is also reported. Here the probability indicates the likelihood that there is *no* difference between federal and state for the age variable.

A short interpretive summary of the findings regarding each independent variable is presented below each table. Here we also note where we suspect that confounding variables may explain the observed relationship. We intend to conduct a more sophisticated, logistic regression to tease out these effects in our ongoing research.

A. Involvement of a Minor Victim

	Minor victim	No minor victim
NY State case	1 (0.2%)	515 (99.8%)
Federal case	23 (7.6%)	278 (92.4%)

Pearson chi-squared = 36.98, Pr=0.000

The presence of a minor victim is related to whether an arson case is brought under states versus federal statutes to a high degree of statistical significance. Based on the observed data, it appears that cases involving a minor victim are more likely to be brought as a federal as opposed to a New York State case.

B. Gender of Defendant

	Male	Female
NY State case	437 (86.2%)	70 (13.8%)
Federal case	331 (92.2%)	28 (7.8%)

Pearson chi-squared = 7.56, Pr=0.006

The gender of a defendant is related to whether an arson case is brought under state versus federal statutes to a high degree of statistical significance. From our observed data, it

appears that cases against female defendants are more likely to be brought under state versus federal statutes. The converse is observed for male defendants.

The observed gender differences, however, may be a function of the different gender composition of New York State and the United States as a whole. According to the 2010 Census, the male-to-female sex ratio was 96.7 for the United States overall and 93.8 for New York State.⁵⁰

Alternatively, the observed gender difference may be due to variation in the severity of arson crimes committed by women as compared to men. In our further statistical analysis we will seek to clarify whether a defendant’s gender has an independent effect on the decision to pursue a case within the state or federal justice system.

C. Race of Defendant

	White	Black	Hispanic	Other
NY State case	233 (45.2%)	151 (29.3%)	118 (22.9%)	13 (2.5%)
Federal case	245 (68.3%)	28 (7.8%)	30 (8.4%)	15 (4.2%)

Pearson chi-squared = 57.31, Pr=0.000

The defendant's race is related to whether an arson case is brought under states versus federal statutes to a high degree of statistical significance. An arson case involving a black defendant is slightly more likely to be brought in state court in New York than in federal court in New York or nationwide.

The differences observed here, however, may be a function of the different racial composition of New York State and the United States as a whole. According to the 2010 Census, 17.5% of New York residents were “black or African American alone” and 65.7% were “white alone.”⁵¹ This compares to 13.1% and 72.4% for the United States overall.

To further illuminate this, we collected 2010 Census data on the racial composition of each U.S. state and then compared this to the proportion of federal arson cases against white, black, and Hispanic defendants in our data. This information is presented in Appendix D, the “Comparison of Race of U.S. Population and Race of Defendants in Arson Cases.” Our logistic regression further clarifies this point. Of all arson cases we coded, 19.2% involved black

⁵⁰ See Table 3 in Lindsay M. Howden and Julie A. Meyer, Age and Sex Composition: 2010, 2010 Census Briefs (May 2011); available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

⁵¹ See Table 19 in U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, 25; available at <http://www.census.gov/compendia/statab/2012/tables/12s0019.pdf>.

defendants. Of all the New York state arson cases we reviewed, 29.5% involved black defendants.

D. Age of Defendant

	Mean (Strd. Dev)
NY State case ⁵²	33.8 years (12.8)
Federal case	35.6 years (11.7)

Two-sided t-test $p=0.034$

The age of the defendant is related to whether an arson case is brought under state versus federal statutes at a statistically significant level. Our observed data suggests that arson cases involving younger defendants are more likely to be brought under state statutes.

The observed difference here, however, may be due to systematic variation in the severity of crimes committed by younger defendants or the fact that younger defendants may tend to have been convicted of fewer past crimes. Additional analysis will be conducted to determine whether the age of a defendant has an independent effect on the choice of state versus federal arson charges.

E. Use of a Weapon in the Crime

	Weapon Used	No Weapon Used
NY State case	20 (3.9%)	489 (96.1%)
Federal case	69 (19.4%)	286 (80.6%)

Pearson's Chi-squared = 54.43, $\underline{Pr = 0.000}$ ⁵³

⁵² Note that for the New York data we constructed the age of defendant variable using the defendant's date of birth and the disposition date of the case. In most cases the disposition date should be the same as the date of sentencing. To the extent that this is true, the age of defendant variable is consistent between the New York and federal data.

⁵³ Note that the Pearson's chi-squared test is sensitive to small cell counts. See e.g., Shelby J. Haberman, A Warning on the Use of Chi-Squared Statistics With Frequency Tables With Small Expected Cell Counts, 83 Journal of the American Statistical Association 402, 555 (1988). There are only two New York arson cases in which a weapon was used. While it is possible that this means that the chi-squared statistic here may be biased, we believe it is more likely that there are few such state cases because they are all brought federally. We will check the federal policy under Operation Triggerlock to attempt to verify this.

Whether a weapon was used in conjunction with the arson is related to whether a case is brought under state versus federal statutes. Our observed data suggests that where a weapon was used, the case is more likely to be brought under federal arson statutes.

F. Prior Arrests of Defendant

	Zero	1 to 5	6 to 10	11 or more
NY State case	143 (28.4%)	181 (35.9%)	75 (14.9%)	105 (20.8%)
Federal case	106 (30.4%)	173 (49.6%)	47 (13.5%)	23 (6.6%)

Pearson chi-squared = 37.71, Pr=0.000

A defendant's prior arrests is related to whether an arson case is brought under state versus federal statutes to a high degree of statistical significance.

G. Prior Violent Arrests of Defendant

	Zero	1 to 5	6 or more ⁵⁴
NY State case	327 (64.2%)	169 (33.2%)	13 (2.6%)
Federal case	176 (49.4%)	154 (43.3%)	26 (7.3%)

Pearson chi-squared = 24.05, Pr=0.000

Prior *violent* arrests of the defendant appear to be significantly related to whether an arson case is charged under state versus federal statutes. The more prior violent arrests a defendant has, the more likely the case will be brought under federal arson statutes.

H. Prior Drug and Alcohol Arrests of Defendant

	Zero	1 to 5	6 or more
NY State case ⁵⁵	280 (55.2%)	184 (36.3%)	43 (8.5%)
Federal case	101 (47.0%)	89 (41.4%)	25 (11.6%)

⁵⁴ Given that we observed only a very small number of cases where the defendant had eleven or more prior violent arrests or prior drug and alcohol arrests, the 6 to 10 and 11 or more categories have been collapsed for the analysis here.

⁵⁵ Note that there is some discrepancy between the federal and New York State coding schemes for this variable. For the federal cases, all drug and alcohol priors as well as “uncharged evidence of substance abuse like [a] failed drug test” are included. For the New York State cases, we combined prior drug and DWI arrests to create an approximate equivalent.

Pearson chi-squared = 4.57, Pr=0.102

Prior *drug and alcohol* arrests of a defendant is not related to whether an arson case is charged under state versus federal statutes in a statistically significant fashion.

I. Sentence Imposed and Served

	Mean Sentence Imposed (Standard Deviation)
NY State case	41.1 months (62.9)
Federal case	84.2 months (109.5)

Two-sided t-test $p=0.000$

The length of sentence imposed upon a defendant is related to whether arson cases are brought under state versus federal statutes to a high degree of statistical significance. From our observed data, it appears that cases involving longer sentences are more likely to be brought under federal, as opposed to state, statutes.

While we strongly believe that this relationship is likely true, we should note that there is inherent difficulty in comparing federal and New York State sentences. Significantly, in the federal criminal system parole is not available under any circumstances.⁵⁶ Given that parole is widely granted within state criminal systems, it a comparison of sentences imposed under the two systems is not an accurate measure.

In an effort to ameliorate this problem, we constructed a variable for the New York State arson cases that measures the duration between the date of disposition and date of parole or probation (whichever is earlier).⁵⁷ The mean sentence served was 24.6 months (with a standard deviation of 13.5).

J. Value of Property Destroyed

With respect to federal arson cases, we collected information regarding the value of property destroyed or threatened. Our observations are summarized in the following table.

⁵⁶ Federal Sentencing Reform Act of 1982, implemented in 1986 (abolishing parole). Federal felons can earn, at most, 15% for good time.

⁵⁷ Note that parole or probation date information is missing for the majority of cases included in the New York State arson data. We constructed the sentence served variable for the approximately 30% of cases where this data was available.

	Unknown	\$1 to \$500,000	\$500,001 to \$2 million	More than \$2 million
Federal case	62 (17.3%)	96 (26.7%)	94 (26.2%)	107 (29.8%)

The New York State data we obtained did not directly capture this information. We investigated the possibility of imputing the value of property destroyed from the statutes under which New York defendants had been arrested. Unfortunately, the relevant statutory language did not contain sufficient information regarding the value of the property destroyed or threatened to allow this strategy to work. We are continuing to consider options for collecting state-level data on this variable for use in our further analysis.

We would note that data collected by the FBI suggests that average dollar value of damage in arson cases nationally was about \$16,000 in 2008. The fact that we observed a large number of federal arson cases in which the value of property threatened or destroyed exceeded \$500,000 suggests that higher dollar value cases are more likely to be brought under federal as opposed to state statutes.

K. U.S. Citizenship of Defendant

	Defendant a U.S. Citizen	Defendant not a U.S. Citizen
NY State case ⁵⁸	365 (89.0%)	45 (11.0%)
Federal case	337 (93.9%)	22 (6.1%)

Pearson's Chi-squared = 5.65, Pr = 0.017

The U.S. citizenship of a defendant is related to whether an arson case is brought under state versus federal statutes to a high degree of statistical significance. From our observed data, it appears that cases against non-U.S. citizens are more likely to be brought in state as opposed to federal court.

L. Conspiracy

	Conspiracy	No Conspiracy
NY State case	16 (3.1%)	505 (96.9%)
Federal case	172 (48.6%)	182 (51.4%)

Pearson's Chi-squared = 258.86, Pr = 0.000

⁵⁸ Note that a variable for citizenship of the defendant was not included in the New York State data. We constructed an approximate measure by looking to the country of birth of the defendant. We coded all defendants who were born in the US as US citizens and all defendants born in another country as a non-US citizen.

The presence of a conspiracy is related to whether an arson case is brought under state versus federal statutes to a high degree of statistical significance. Based on the observed data, it appears that cases involving a conspiracy are more likely to be brought as a federal as opposed to a New York State case.

M. Death of a Person

	Death of a Person	No Death of a Person
NY State case	21 (4.0%)	500 (96.0%)
Federal case	6 (1.9%)	317 (98.1%)

Pearson's Chi-squared = 3.04, Pr = 0.081

The fact that the death of a person was associated with an arson is not related to whether a case is charged under state versus federal statutes in a statistically significant fashion.

2. For Robbery:

A. Involvement of a Minor Victim

	Minor Victim	No Minor Victim
NY State case	34 (0.2%)	14,477 (99.8%)
Federal case	9 (3.8%)	227 (96.2%)

Fisher's Exact Test p = 0.000

The presence of a minor victim is related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance. Based on the observed data, it appears that robbery cases involving a minor victim are more likely to be brought as a federal rather than a state case.

B. Gender of Defendant

	Male Defendant	Female Defendant
NY State case	13,165 (94.8%)	720 (5.2%)
Federal case	248 (93.9%)	16 (6.1%)

Fisher's Exact Test $p = 0.484$

The gender of a defendant is not related to whether a robbery case is charged under state versus federal statutes in a statistically significant fashion.

C. Race of Defendant

	White Defendant	Black Defendant	Hispanic Defendant	Other Defendant
NY State case	1,909 (13.2%)	7,244 (50.0%)	5,206 (35.9%)	140 (1.0%)
Federal case	53 (20.1%)	133 (50.4%)	60 (22.7%)	18 (6.8%)

Fisher's Exact Test $p = 0.000$

The defendant's race is related to whether a robbery case is brought under states versus federal statutes to a high degree of statistical significance.

The differences observed here, however, may be a function of the different racial composition of New York State and the United States as a whole. Furthermore, it may be that many of the federal robbery cases originating in small, rural states with relatively fewer non-white residents may be more likely to be brought under federal statutes all else being equal.

To further illuminate this, we collected 2010 Census data on the racial composition of each U.S. state and then compared this to the proportion of federal arson cases against white, black, and Hispanic defendants in our data. This information is presented in the Appendix F in the "Comparison of Race of US Population and Race of Defendants in Robbery Cases." Our logistic regression further clarifies this point.

D. Age of Defendant

	Mean Age of Defendant (Standard Deviation)
NY State case	27.4 years (9.6)
Federal case	31.3 years (9.0)

Two-sided t-test $p = 0.000$

The age of the defendant is related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance. Our observed data suggests that robbery cases involving younger defendants are more likely to be brought under state statutes.

The observed difference here, however, may be due to systematic variation in the severity of crimes committed by younger defendants or the fact that younger defendants may tend to have

been convicted of fewer past crimes. Our logistic regression clarifies whether the age of a defendant has an independent effect on the choice of state versus federal robbery charges.

E. Use of a Weapon in the Crime

	Weapon Used	No Weapon Used
NY State case	3,984 (27.5%)	10,527 (72.5%)
Federal case	228 (86.0%)	37 (14.0%)

Fisher's Exact Test $p = 0.000$

Whether a weapon was used in conjunction with the robbery is related to whether a case is brought under state versus federal statutes. Our observed data suggest that where a weapon was used, the case is more likely to be brought under federal robbery statutes.

F. Prior Arrests of Defendant

	Zero Prior Arrests	1 to 5 Prior Arrests	6 to 10 Prior Arrests	11 or more Prior Arrests
NY State case	2,663 (18.9%)	5,960 (42.2%)	2,199 (15.6%)	3,297 (23.4%)
Federal case	69 (25.8%)	148 (55.4%)	35 (13.1%)	15 (5.6%)

Fisher's Exact Test $p = 0.000$

A defendant's prior arrests is related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance.

G. Prior Violent Arrests of Defendant

	Zero Prior Violent Arrests	1 to 5 Prior Violent Arrests	6 to 10 Prior Violent Arrests	11 or more Prior Violent Arrests
NY State case	7,055 (48.8%)	6,674 (46.1%)	639 (4.4%)	98 (0.7%)
Federal case	93 (34.8%)	148 (55.4%)	17 (6.4%)	9 (3.4%)

Fisher's Exact Test $p = 0.000$

A defendant's prior violent arrests is related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance.

H. Prior Drug and Alcohol Arrests of Defendant

	Zero Prior Drug & Alcohol Arrests	1 to 5 Prior Drug & Alcohol Arrests	6 to 10 Prior Drug & Alcohol Arrests	11 or more Prior Drug & Alcohol Arrests
NY State case ⁵⁹	6,425 (44.7%)	6,426 (44.7%)	1,023 (7.1%)	512 (3.6%)
Federal case	95 (35.6%)	157 (58.8%)	11 (4.1%)	4 (1.5%)

Fisher's Exact Test $p = 0.000$

A defendant's prior drug and alcohol arrests are related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance.

I. Sentence Imposed and Served

	Mean Sentence Imposed (Standard Deviation)
NY State case	44.6 months (68.4)
Federal case	160.2 months (148.1)

Two-sided t-test $p = 0.000$

The length of sentence imposed upon a defendant is related to whether robbery cases are brought under state versus federal statutes to a high degree of statistical significance. From our observed data, it appears that cases involving longer sentences are more likely to be brought under federal, as opposed to state, statutes.

While we strongly believe that this relationship is likely true, we should note that there is inherent difficulty in comparing federal and New York State sentences. Significantly, in the federal criminal system parole is not available under any circumstances. Given that parole is widely granted within state criminal systems, a comparison of sentences imposed under the two systems is necessarily inaccurate.

⁵⁹ Note that there is some discrepancy between the federal and New York State coding schemes for the prior drug and alcohol arrests variable. For the federal data, all drug and alcohol priors as well as uncharged evidence of substance abuse (e.g. a failed drug test) are included. For the New York State data, we combined all prior drug and DWI arrests to create an approximate equivalent. Despite these distinctions, we believe that the variables are generally comparable.

In an effort to ameliorate this problem, we constructed a time actually served variable for the New York State arson cases that measures the duration between the date of disposition and date of parole or probation (whichever is earlier). The mean time sentence served was 29.7 months (with a standard deviation of 16.2). This sentence served variable tends to support the conclusion that the minimum sentence imposed is significantly longer than the time a New York State arson defendant actually ends up serving.

J. U.S. Citizenship of Defendant

	Defendant a U.S. Citizen	Defendant not a U.S. Citizen
NY State case	11,016 (89.8%)	1,251 (10.2%)
Federal case	227 (86.0%)	37 (14.0%)

Fisher's Exact Test $p = 0.051$

The age of the defendant is related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance. Our observed data suggests that robbery cases involving non-U.S. citizen defendants are more likely to be brought under state statutes.

The observed difference here, however, may be due to systematic variation in the severity of crimes committed by younger defendants or the fact that younger defendants may tend to have been convicted of fewer past crimes. Our logistic regression clarifies whether the age of a defendant has an independent effect on the choice of state versus federal robbery charges.

K. Conspiracy

	Conspiracy	No Conspiracy
NY State case	340 (2.8%)	11,919 (97.2%)
Federal case	237 (88.8%)	30 (11.2%)

Fisher's Exact Test $p = 0.000$

The presence of a conspiracy is related to whether a robbery case is brought under state versus federal statutes to a high degree of statistical significance. Based on the observed data, it appears that cases involving a conspiracy are more likely to be brought as a federal as opposed to a New York State case.

L. Death of a Person

	Death of a Person	No Death of a Person
NY State case	384 (2.4%)	15,326 (97.6%)
Federal case	16 (6.0%)	251 (94.0%)

Fisher's Exact Test $p = 0.001$

The fact that the death of a person was associated with a robbery is related to whether a case is charged under state versus federal statutes to a high degree of statistical significance. Based on the observed data, it appears that where a person died a robbery charge is more likely to be brought under federal rather than New York State statutes.

C. Logistic Regression

When seeking to model the effect of a set of independent variables on a binary outcome (coded as zero for non-occurrence and one for occurrence), the assumptions underlying the standard regression model ordinary least squares are necessarily violated.⁶⁰ An alternative statistical model known as logistic regression or logit has been developed to address these issues and allow a researcher to estimate the effect of independent variables on a binary dependent variable.⁶¹ Logistic regression is estimated using maximum likelihood methods, which are appropriate for large samples such as ours.⁶² As such, we use a logistic regression model to examine the effect of our independent variables of interest on the probability that an arson or robbery case is pursued under federal or state statutes.⁶³

The tables below present the estimated logistic regression models for our arson and robbery data. The estimated regression coefficients, robust standard errors,⁶⁴ and the significance of the coefficients are presented along with the associated percent change in odds for each independent variable. The percent change in odds indicates how much more (or less, for negative values) likely a case is to be brought under federal as opposed to state statutes for a unit change in that independent variable.

⁶⁰ J. Scott Long, *Regression Models for Categorical and Limited Dependent Variables*, 38-40 (Sage, Thousand Oaks, CA 1997).

⁶¹ *Id.* at 40-47 (mathematically deriving the logistic regression model).

⁶² *Id.* at 53-54 (suggesting that a sample size of at least 500 is generally sufficient for maximum likelihood techniques).

⁶³ We used the methods outlined in J. Scott Long & Jeremy Freese, *Regression Models for Categorical Dependent Variables Using Stata* (2nd edition, Stata Press, College Station, TX 2006) to implement our analysis.

⁶⁴ We use cluster-corrected robust standard errors assuming clustering at the USAO level. Our findings do not change substantively if we relax this assumption.

1. Arson

Independent Variable	Estimated Coefficient	Robust Standard Error	Significance	% Change in Odds
Minor Victim	2.09	0.66	0.00	711
Male Defendant	0.50	0.36	0.16	65
White Defendant	-0.45	0.87	0.61	-36
Black Defendant	-0.88	0.88	0.32	-58
Hispanic Defendant	-1.72	0.81	0.03	-82
Age of Defendant	0.03	0.01	0.00	3
Use of Weapon	1.55	0.51	0.00	369
Few Prior Arrests (1-5)	-1.12	0.35	0.00	-67
Some Prior Arrests (6-10)	-2.08	0.55	0.00	-88
Many Prior Arrests (11+)	-4.86	0.78	0.00	-99
Few Violent Prior Arrests (1-5)	1.67	0.34	0.00	433
Some Violent Prior Arrests (6-10)	3.72	1.10	0.00	4028
Prior Drug & Alcohol Arrests	0.46	0.26	0.07	59
Defendant a U.S. Citizen	0.16	0.69	0.81	18
Conspiracy	3.10	0.56	0.00	2124
Death of a Person	-1.74	0.91	0.06	-83

A. Involvement of a Minor Victim

Our logistic regression confirms what we found in the Section III.B.1.A; that when an arson involves a minor victim, the case is significantly more likely to be brought under federal rather than state statutes. An arson case involving a minor victim is 711% more likely to be charged under federal versus state statutes, holding all other variables constant.

B. Gender of Defendant

Our logistic regression supports our concerns that the gender differences we found in Section III.B.1.B were due to some confounding relationship. Controlling for our other independent variables, the gender of a defendant is not significantly related to whether an arson case is pursued under federal versus state statutes.

C. Race of Defendant

Our logistic regression partially confirms what we found in Section III.B.1.C and partially supports our concerns that racial differences observed in that same section were due to a confounding relationship. Controlling for our other independent variables, the fact that a defendant is white or black is not significantly related to whether an arson case is pursued under federal versus state statutes. For Hispanic defendants, however, an arson case is significantly more likely to be charged under state rather than federal statutes. Holding all other variables constant, an arson case is 82% more likely to be pursued under federal statutes.

D. Age of Defendant

The logistic regression confirms our findings in Section III.B.1.D that older defendants are significantly more likely to be charged under federal rather than state arson statutes. For each additional year of age, an arsonist is 3% more likely to be pursued under federal versus state statutes holding all else constant.

E. Use of a Weapon in the Crime

The logistic regression confirms our finding in Section III.B.1.E that a defendant who uses a weapon in the commission of an arson is significantly more likely to be pursued under federal rather than state statutes. Holding all of our other independent variables constant, a defendant who uses a weapon in conjunction with the arson is 369% more likely to be charged under federal versus state statutes.

F. Prior Arrests of Defendant

Our logistic regression confirms what we found in Section III.B.1.F that prior arrests of a defendant is significantly related to whether an arson case is brought under state versus federal statutes. A defendant with 1 to 5 prior arrests is 67% more likely to be charged under state rather than federal statutes, holding all else constant. A defendant with 6 to 10 prior arrests is 88% more likely to be charged under state rather than federal statutes, holding all else constant. A defendant with 11 or more prior arrests is 99% more likely to be charged under state rather than federal statutes, holding all else constant.

G. Prior Violent Arrests of Defendant

The logistic regression confirms our finding in Section III.B.1.G that prior violent arrests of the defendant is significantly related to whether an arson case is pursued under federal or state statutes. Where a defendant had 1 to 5 prior violent arrests, an arson case was 433% more likely to be brought under federal rather than state statutes. Where a defendant had 6 to 10 prior violent arrests, an arson case was more than 1000% more likely to be brought under federal rather than state statutes.⁶⁵

H. Prior Drug and Alcohol Arrests of Defendant

The logistic regression tends to confirm our finding in Section III.B.1.H that prior drug and alcohol arrests of the defendant is not significantly related to whether an arson case is pursued under federal or state statutes. However, we should note that the prior drug and alcohol arrests variable is marginally significant in the logistic regression ($p = 0.07$).

⁶⁵ Note that Many Violent Prior Arrests (11+) was dropped from the logistic regression model because all of the arson cases that fell into this category were federal cases.

I. U.S. Citizenship of Defendant

Our logistic regression contradicts our finding in Section III.B.1.K that the U.S. Citizenship of a defendant is significantly related to whether an arson case is pursued at the federal or state level. Based on the regression model, we conclude that the U.S. Citizenship of a defendant is not significantly related to whether an arson case is brought under federal versus state statutes. This suggests that the relationship we observed in Section III.B.1.K was due to one or more confounding relationships.

J. Conspiracy

The logistic regression confirms our finding in Section III.B.1.L that involvement in a conspiracy is significantly related to an arson case being prosecuted under federal rather than state statutes. An arson defendant who was involved in a conspiracy is more than 1000% more likely to be charged under federal versus state statutes, holding all else constant.

K. Death of a Person

The logistic regression tends to confirm our finding in Section III.B.1.M that whether a person died in conjunction with an arson is not significantly related to whether a case is pursued under federal versus state statutes. However, we should note that the death of a person variable is marginally significant in our regression analysis ($p = 0.06$).

2. Robbery

Independent Variable	Estimated Coefficient	Robust Standard Error	Significance	% Change in Odds
Minor Victim	2.30	0.75	0.00	895
Male Defendant	-0.37	0.31	0.23	-31
White Defendant	-1.92	1.11	0.09	-85
Black Defendant	-2.04	1.14	0.07	-87
Hispanic Defendant	-2.84	1.13	0.01	-94
Age of Defendant	0.11	0.02	0.00	11
Use of Weapon	2.67	0.25	0.00	1345
Prior Arrests	-1.40	0.22	0.00	-75
Prior Violent Arrests	1.11	0.28	0.00	203
Few Prior Drug & Alcohol Arrests (1-5)	1.44	0.29	0.00	326
Some Prior Drug & Alcohol Arrests (6-10)	1.48	0.46	0.00	340
Many Prior Drug & Alcohol Arrests (11+)	1.51	1.08	0.16	353
Defendant a U.S. Citizen	-0.27	0.46	0.56	-23
Conspiracy	6.01	0.47	0.00	40571
Death of a Person	-0.83	0.64	0.20	-56

A. Involvement of a Minor Victim

Our logistic regression confirms what we found in Section III.B.2.B: when a robbery involves a minor victim, the case is significantly more likely to be brought under federal rather than state statutes. An arson case involving a minor victim is 895% more likely to be charged under federal versus state statutes, holding all other variables constant.

B. Gender of Defendant

Our logistic regression supports our findings in Section III.B.2.B that the gender of a defendant is not significantly related to whether a robbery case is brought under federal versus state statutes. Controlling for our other independent variables, the gender of a defendant is not significantly related to whether a robbery case is pursued under federal versus state statutes.

C. Race of Defendant

Our logistic regression partially confirms what we found in Section III.B.2.C and partially supports our concerns that racial differences observed in that same section were due to a confounding relationship. Controlling for our other independent variables, the fact that a defendant is white or black is not significantly related to whether an arson case is pursued under federal versus state statutes. However, we should note that the white and black race of defendant variables are marginally statistically significant ($p = 0.09$ and $p = 0.07$, respectively). For Hispanic defendants, however, a robbery case is significantly more likely to be charged under state rather than federal statutes. Holding all other variables constant, a robbery case is 94% more likely to be pursued under federal statutes.

D. Age of Defendant

The logistic regression confirms our findings in Section III.B.2.D: older defendants are significantly more likely to be charged under federal rather than state robbery statutes. For each additional year of age, a robbery defendant is 11% more likely to be pursued under federal versus state statutes holding all else constant.

E. Use of a Weapon in the Crime

The logistic regression confirms our finding in Section III.B.2.E that a defendant who uses a weapon in the commission of a robbery is significantly more likely to be pursued under federal rather than state statutes. Holding all of our other independent variables constant, a defendant who uses a weapon in conjunction with a robbery is more than 1000% more likely to be charged under federal versus state statutes.

F. Prior Arrests of Defendant

Our logistic regression confirms what we found in Section III.B.2.F: prior arrests of a defendant is significantly related to whether a robbery case is brought under state versus federal statutes. Holding all else constant, a defendant with 1 to 5 prior arrests is 75% more likely to be charged under state rather than federal robbery statutes than a defendant with zero prior arrests.

G. Prior Violent Arrests of Defendant

The logistic regression confirms our finding in Section III.B.2.G that prior violent arrests of the defendant is significantly related to whether a robbery case is pursued under federal or state statutes. A defendant with 1 to 5 prior violent arrests is 203% more likely to be prosecuted under federal rather than state statutes than a defendant with no prior violent arrests, holding all else constant.

H. Prior Drug and Alcohol Arrests of Defendant

The logistic regression tends to confirm our finding in Section III.B.2.H that prior drug and alcohol arrests of the defendant is significantly related to whether a robbery case is prosecuted under federal or state statutes. Holding all else constant, where a defendant had 1 to 5 prior drug and alcohol arrests a robbery case was 326% more likely to be charged under federal rather than state statutes. Where a defendant had 6 to 10 prior drug and alcohol arrests a robbery case was 340% more likely to be charged under federal rather than state statutes, holding all other variables constant. The fact that a robbery defendant had 11 or more prior drug and alcohol arrests was not significantly related to whether the case was pursued under federal versus state statutes.

I. U.S. Citizenship of Defendant

Our logistic regression contradicts our finding in Section III.B.2.J that the US Citizenship of a defendant is significantly related to whether a robbery case is pursued at the federal or state level. Based on the regression model, we conclude that the US Citizenship of a defendant is not significantly related to whether a robbery case is brought under federal versus state statutes. This suggests that the relationship we observed in Section III.B.2.J was due to one or more confounding relationships.

J. Conspiracy

The logistic regression confirms our finding in Section III.B.2.K that involvement in a conspiracy is significantly related to a robbery case being prosecuted under federal rather than state statutes. A robbery defendant who was involved in a conspiracy is more than 1000% more likely to be charged under federal versus state statutes, holding all else constant.

K. Death of a Person

The logistic regression contradicts our finding in Section III.B.2.M that whether a person died in conjunction with a robbery is significantly related to whether a case is pursued under federal versus state statutes. Based on the regression model, we conclude that cases involving the death of a person in conjunction with a robbery is not significantly related to whether the case is brought under federal versus state statutes. This suggests that the relationship we observed in Section III.B.2.M was due to one or more confounding relationships.

IV. Conclusion

Conventional wisdom by all scholars and other participants in the criminal justice system is that it is much worse for a criminal defendant to be hauled into federal court. Suspects should be fearful of the federal government because federal sentences are much longer, federal prosecutors are very skilled, and the procedures employed in federal court are strict. Thus, a suspect is more likely to plead guilty or be found guilty by a judge or jury in the federal than the state system. Available evidence supports this. 97.4% of federal criminal convictions in 2010 were by guilty plea, leaving less than three percent to proceed to trial.⁶⁶ There is, of course, a small range across the federal code - plea rates are extremely high for immigration, drug cases, and violent offenses, and slightly lower for fraud and tax cases. For those defendants convicted in federal court in 2012, 95.8% of arsonists and 96.7% of robbers pleaded guilty.⁶⁷ If we instead consider all cases indicted federally in 2010 (including all suspects charged, not just the ones convicted), the figure is that 89% of defendants charged plead guilty, and 8.7% had their cases either dismissed by the judge or acquitted at trial by the judge or jury, with the very small remainder (2.3%) convicted after trial.⁶⁸

The guilty plea rate for convicted defendants is lower for state felonies. By one estimate, approximately 94% of all state criminal felony convictions nationwide were by guilty plea.⁶⁹ Again, we get very different numbers if we look at all persons *charged* with a state crime. According to another source, in 2006 (most recent year data available on state felony case outcomes in largest 75 counties in nation), only 50% of those charged with a violent felony were convicted (45% of those by guilty plea).⁷⁰ An additional 11% were convicted of a misdemeanor (10% of those convictions were by guilty plea). Compare that to federal data, where 89% of all felony defendants charged with an offense and a slightly smaller 81% of defendants charged with a federal felony violent offense in 2006 pleaded guilty.⁷¹ That means that of the 100% of defendants charged with a state violent offense in 2006, only 66% were convicted by plea or trial - much lower than the federal 91.3% combination of guilty pleas and guilty verdicts. 11% of those state felony cases were unresolved one year after charging (which likely means they are being contested, and thus will have a lower conviction rate). About 28% of those charged in state court with violent offenses actually obtained acquittals or had their cases dismissed after being charged! Once the missing 11% is resolved and counted, the acquittal/dismissal rate for those charged with a state violent felony would be well over 30%.

⁶⁶ Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009 (2009), available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (containing 2009 and 2010 data).

⁶⁷ U.S. Sentencing Commission 2012 Annual Report. For the federal cases we coded in 2008 - 2010, 86.8% of federal arson convictions (305 of the 359) were by guilty plea (the rest were found guilty after trial or pled straight up to the indictment), and 85% of the robbery convictions (236 of the 264) were by guilty plea.

⁶⁸ Sourcebook of Criminal Justice Statistics Online, table 5.22.2010, available at <http://222.albany.edu/sourcebook/pdf/t5222010.pdf>. See also Judicial Business of the U.S. Courts, Table D-4, for years 2002 - 2012 (finding high of 89% guilty plea rate for all federal defendant charged with a felony for the year 2012).

⁶⁹ Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006-Statistical Tables, p. 1, available at <http://bjs.opj.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

⁷⁰ Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2006 (May 2010), at Table 11.

⁷¹ See Judicial Business of the U.S. Courts, 2006, at Table D-4

The odds of walking away from a felony charge are clearly much higher for a felony defendant in state court.⁷² Presumably, federal prosecutors know this. They must also be aware of the large sentencing differential between the two systems. For those convicted in federal court in 2012 for arson or robbery, more than 95% received prison time rather than probation.⁷³ The average federal sentence for all arsons in 2012 was 77 mean months and 60 median months.⁷⁴ and for robbery it was 80 months mean sentence and 63 month median sentence.⁷⁵ In our study, the mean was 84.2 months for federal arson and 160.2 for robbery, but only 41.1 months for state arson and 44.6 months for state robbery. When we accounted for time actually served rather than imposed, the state figure dropped to 24.6 months for arson and 29.7 for robbery.⁷⁶ While a state criminal defendant actually serves only a percentage of state jail time before being released on parole, a federal defendant serves all of his prison sentence except 15% good time.

Our constitution establishes a federalist system. While scholars and policy-makers debate the extent to which the framers envisioned the growth of federal criminal law, it nevertheless is an inherent feature of the United States system of justice and of our government as a whole. In some instances, federal and state criminal laws overlap to such an extent that either or even both sovereigns can prosecute the same misconduct. While federalism may not be the explanation that the suspected arsonist or robber wants to hear when he is brought before a federal judge, we have concluded that there are a number of factors that are significantly related to why the accused ends up in federal rather than state court. These factors do not seem to us any cause for alarm.

We cannot speak to the subjective motivation for federal prosecutors decision to bring a particular case in federal court, where the defendant has a much greater chance of being convicted and serving a long prison sentence. However, we have isolated variables that are significantly related to whether an arson or robbery case is charged under a state or federal statute. Our regression analysis suggests that the factors that increase the odds of a federal indictment include use of a weapons, a conspiracy, prior violent or drug-related arrests, and the presence of a minor victim. Our study also indicates that the identity of the law enforcement agency and whether the defendant can offer substantial assistance to the government play a major role. Whether a defendant is African-American or white and her citizenship do not appear to be related to where the case is brought.⁷⁷ A death resulting from the incident involves a death weighs in favor of a state prosecution, where the government can pursue a murder charge.⁷⁸ These results are not unexpected. We believe our study offers some support that the federal prosecutors as rational actors not employing arbitrary or unconstitutional factors in exercising their charging discretion.

⁷² Moreover, we must again keep in mind that not all suspects are charged. The federal government has a 15% declination rate overall and a 34% declination rate for robberies. Mark Motivans, U.S. Dep't of Justice, Federal Justice Statistics 2009 - Statistics Tables, at 10, tbl.2.2, 11 tbl.2.3 (2011). In a study of 28 urban county courts nationwide, two researchers found that approximately 50% of all felony arrests made by local law enforcement officers do not lead to charges, but are rejected by the prosecutor before charges are ever filed, or are later dismissed in court. Barbara Bolind & Elizabeth Brady, *The Prosecution of Felony Arrests*, 1980, Report for the U.S. Dept. of Justice Bureau of Justice Statistics (1985).

⁷³ USSC 2012 Annual Report Table 12.

⁷⁴ USSC 2012 Sourcebook, Table 13, page 29.

⁷⁵ USSC 2012 Annual Report p. 177.

⁷⁶ See *supra* n. 56

⁷⁷ Whether a defendant was Hispanic was related to a case being prosecuted in state rather than federal court for both arson and robbery in the logistic regressions.

⁷⁸ There is no general murder offense in the federal system, absent the victim's status as a federal official, a relationship to terrorism, or some other extraordinary factor.