Justice Quarterly

ISSN: 0741-8825 (Print) 1745-9109 (Online) Journal homepage: https://www.tandfonline.com/loi/rjqy20

Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court

Mona Lynch

To cite this article: Mona Lynch (2018) Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court, Justice Quarterly, 35:7, 1309-1336, DOI: 10.1080/07418825.2018.1535083

To link to this article: https://doi.org/10.1080/07418825.2018.1535083

JUSTICE QUARTERLY
2018, VOL. 35, NO. 7, 1309–1336
https://doi.org/10.1080/07418825.2018.1535083

Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court

Mona Lynch

Criminology, Law, and Society, University of California, Irvine, USA

ABSTRACT

In this article, I explore variations in prosecutors' discretionary case selection practices by drawing on findings from a comparative field research project of drug prosecutions conducted in four federal districts. Using data from a series of in-depth interviews with legal actors in each district, I develop a typology of the kinds of drug cases brought in my sample districts, explore the logics underpinning their selection, and examine the potential impact of selection practices on racial inequality in drug caseloads. Findings elucidate the local variations in logics and practices that are nonetheless shaped by broader ideologies and structured incentives that encourage certain types of prosecutions. Prosecutorial discretion at the case selection stage also plays an important role in how cases are adjudicated, which is often closely linked to the logic underpinning the choice to file.

ARTICLE HISTORY
Received 30 April 2018
Accepted 7 October 2018

KEYWORDS
Federal court; prosecutorial discretion; drug cases; case selection

Introduction

The federal jurisdiction plays an unusual role in the American criminal justice system, in that for many federal offenses, there exist corollary state criminal codes in each of the 50 states (Heller, 1997; Miller & Eisenstein, 2005; Zimring, 2010). The federal system has traditionally been a small player, generally prosecuting offenses in its primary jurisdiction, such as immigration violations, and complex crimes involving multiple jurisdictions (Heller, 1997). Indeed, a number of observers have suggested that since state courts process the overwhelming majority of run-of-the-mill criminal cases, they are where American criminal justice action resides (Natapoff, 2017; Pfaff, 2017; Stuntz, 2006; Zimring, 2010). Yet, since the 1970s, the federal system's involvement in crime control has exploded, especially through the so-called war on drugs, where everything from large-scale trafficking conspiracies that cross state lines, to mundane street corner sales have become regular targets for federal prosecution.

In this article, I draw on findings from a comparative field research project conducted in four federal court districts to explore the discretionary aspects of how drug cases are selected for prosecution. Using data from a series of in-depth interviews with legal actors in each district, I describe the kinds of drug cases prosecuted in my

CONTACT Mona Lynch lynchm@uci.edu

sample districts, the logic behind their selection, and the consequences of drug case selection practices for racial equality in the federal system. In the next section, I provide an overview of federal involvement in drug law enforcement, then I detail the theoretical framework for my analysis as informed by existing research on prosecutorial discretion. Following that, I describe my methods and data, including my analytic approach. In my findings section, I first delineate the localized case selection typologies, logics, and practices, then I explore how those practices seem to contribute to racial inequalities and disparities in the federal system. I conclude by drawing lessons from this exploratory examination, and highlight the key role that discretionary case selection plays in the criminal adjudication process, including in producing inequality.

Federal drug prosecutions: history, policy, and practice

The federal government's interest in regulating illicit drugs has a much longer history than its expanded involvement epitomized by the 1980s' "war on drugs." Around the turn of the twentieth century, moral panics about opium use among Chinese immigrants and cocaine use by black Americans reached the U.S. Congress, prompting a series of federal laws aimed at restricting legal access to these and other substances (Musto, 1999; Provine, 2007). Similar kinds of racialized anti-drug campaigns were launched by various constituencies over subsequent decades, and Congress responded with occasional hearings, legislative sessions, and even law-making. Those efforts were most fully realized with the passage of the 1951 Boggs Act, which authorized a series of lengthy federal drug mandatory minimums. The Boggs Act statutes were made even more punitive by Congress in 1956, including a new provision that allowed for the death penalty in certain trafficking convictions (Narcotic Control Act of 1956).

While the 1950s drug laws gave prosecutors enormous discretionary power to dictate punishment outcomes through charging decisions, they curiously did not inspire a rash of drug prosecutions in federal court (Lynch, 2016). It was not until after the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which rescinded the drug mandatory minimums and promoted rehabilitation in drug cases, that federal drug prosecutions first spiked in number (Musto & Korsmeyer, 2002).[1] In the 1980s, the number of federal drug cases filed spiked again, and even more dramatically. In 1955, fewer than 1500 defendants were charged federally for drug offenses; by the turn of the twenty-first century that figure was more than 20 times higher at just under 30,000 defendants (see Figure 1).

Several legal and policy changes seemed to catalyze the dramatic increase in drug case filings in the 1980s. First were a series of sentencing reforms passed by Congress. Specific to drug offenses, Congress passed the Anti-Drug Abuse Act of 1986 which reinstated lengthy mandatory minimum sentences for drug trafficking. Two years later, the Anti-Drug Abuse Act of 1988 passed, instituting mandatory minimums even for simple possession of crack cocaine and increasing mandatory minimums for those with prior drug convictions. Congress also authorized overarching sentencing reform in 1984, establishing the U.S. Sentencing Commission, which then developed and

[1]This was partly, but not wholly, due to a series of U.S. Supreme Court cases that expanded federal jurisdiction via the Commerce Clause even when the criminal acts were wholly within state lines (see Beale, 1996; Richman, 2000).

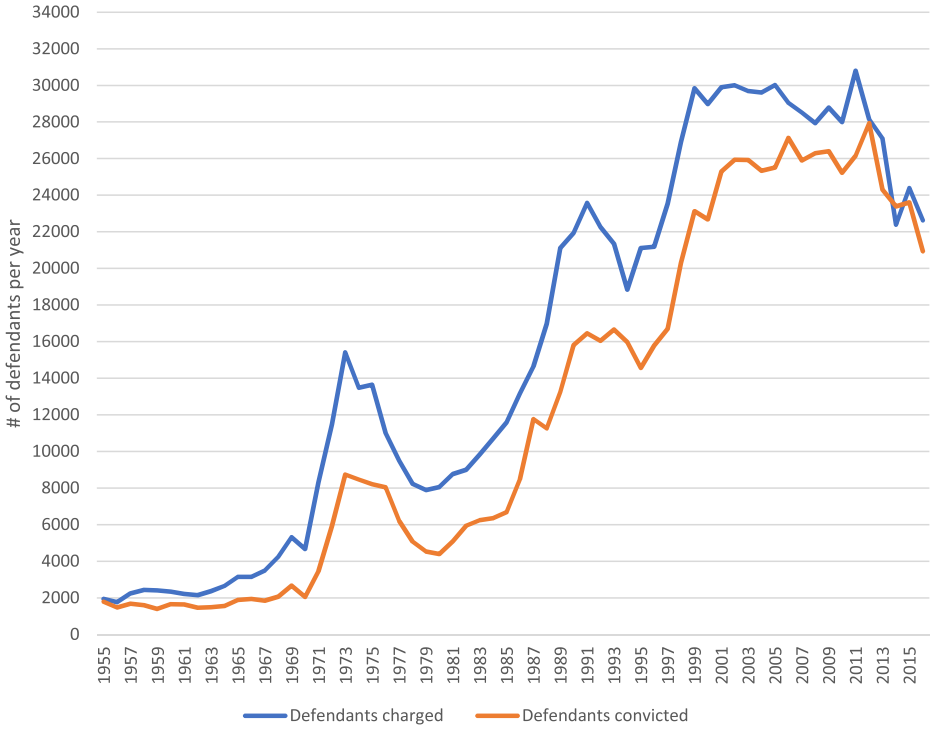

Figure 1. Federal Drug Defendants Charged & Convicted, by Year Data extracted from Annual Statistical Reports of the Offices of the U.S. Attorneys. Available at: https://www.justice.gov/usao/resources/annual-statistical-reports.

promulgated a presumptive sentencing guidelines system (Sentencing Reform Act, 1984; Stith & Koh, 1993). The resulting guidelines for drug-related convictions were benchmarked to the mandatory minimums, so drug sentence lengths grew dramatically longer after sentencing reform (Baron-Evans & Stith, 2012). The guidelines system structure remains today, although the prescribed sentence ranges are now advisory except where a mandatory minimum applies as a floor (Baron-Evans and Stith, 2012).

While the guidelines and mandatory minimums primarily regulate the endpoint of the adjudication process—the imposition of sentence after conviction—these formal back-end changes triggered significant changes to all preceding stages, from federal law enforcement strategies through conviction processes. In particular, charging decisions became highly determinative of sentence outcomes, and federal prosecutors came to control most of the adjudication process, including "making the relevant factual findings, applying the law to the facts, and selecting the sentence or at least the sentencing range." (Barkow, 2008, p. 878). This shift appeared to incentivize prosecutors to bring many more criminal matters to federal court, where they could get easy convictions by wielding their enhanced adjudicatory power.

With these developments, drug cases became especially attractive to prosecutors. Drug crimes could be charged through the conspiracy statute,[2] which provides a number of favorable conditions for obtaining convictions (Lee, 1994). Via the conspiracy law, prosecutors are exempt from the bar on hearsay testimony, so can use

[2]21 U.S.C. § 846.

cooperating witness accounts of criminal behavior to gain convictions, even in the absence of seized drugs or other physical evidence. Cooperators can also be used to establish weight of drugs sold, which goes directly to punishment severity since both drug mandatory minimums and guidelines are determined by drug weight. Most significantly, the conspiracy statute allows prosecutors to charge dealers at all levels of a drug operation with the total amount of drugs being trafficked, so even low-level street dealers can be tied to large drug quantities and face long prison sentences (Lee, 1994).

These legislative changes were coupled with changing executive branch policies and strategies regarding drug crime. In 1984, the U.S. Attorney's Manual was revised to encourage offices to bring federal charges even in smaller, local drug crimes when the state-level prosecutors were perceived as too hands-off and/or when there was a prosecutorial advantage as to conviction likelihood or punishment severity in federal court (Lynch, 2016; see also Ouziel, 2017). Moreover, significant federal funding for multijurisdictional (local, state, and federal) drug taskforces (McGarrell & Schlegel, 1993) was included in the 1980s' drug legislation, and those funded taskforces produced a number of cases that were then brought to federal prosecutors, particularly when the evidentiary rules and/or sanctioning severity were advantageous to prosecutors in federal court (Guerra, 1995; Miller & Eisenstein, 2005). By 1992, when the Office of the U.S. Attorneys first began to separately track drug taskforce prosecutions, more than one-quarter of all federal defendants charged in drug crimes formally came through taskforce investigations (U.S. Attorneys Annual Statistical Report, 1992).

While this history is suggestive as to how and why federal prosecutors began to bring many more cases in the 1980s and beyond, little empirical research has captured the contours of federal case selection as a discretionary process. In the pre-guidelines era, Frase (1980) documented a very low rate of criminal case filing, relative to the number of law enforcement referrals to federal prosecutors. Just about 1 in 5 criminal referrals resulted in a filing in the 1970s nationally, and about 1 in 4 in his case study district of Northern Illinois (Frase, 1980). The most common reason for declination in that district was that there was a state prosecution alternative, suggesting a fair degree of deference to local authorities in crime control matters. A national study of declinations several decades later indicates a complete reversal of that pattern, with the federal declination rate steadily dropping to 26% nationally by 2000 (O'Neill, 2003). This suggests some erosion of that deference to the states' primary law enforcement role in the guidelines' era. Drug case referrals were the least likely to be declined in this period (O'Neill, 2004).

Miller and Eisenstein's (2005) qualitative field research on the nexus of federal and state prosecutions stands alone in offering insight into the backstage federal case-filing processes during the guidelines era. The researchers interviewed federal and local law enforcement agents, current and former state and federal prosecutors, and criminal defense attorneys in a single federal district to assess how federal charges (or threats of federal indictment) were strategically mobilized in guns and drugs cases. Their respondents reported two ways that "local" cases entered into the federal system. The first was a straightforward adoption process, by which the U.S. Attorneys

simply adopted gun cases that met certain programmatic criteria so that the stiffer federal gun punishments would be imposed on those defendants. The second was when defendants turned down offers in state court, under threat of federal indictment. In that "state plea incentive" scheme, the plea offers were less favorable than for the typical state defendant, but more favorable than the potential sentence in federal court. While most defendants opted to remain in state court, some did not and so prosecutors generally made good on their threat to bring charges in federal court (Miller & Eisenstein, 2005).

Prosecutorial discretion, case selection and inequality

Despite the limited empirical research on federal case selection, it is a critical discretionary stage of the criminal justice process, representing one of the most opaque yet consequential decisions made by prosecutors. The very decision to bring charges has implications for mass incarceration, as increasing rates of case-filing have played a substantial role in U.S. prison growth (Pfaff, 2017). Prosecutors' decisions about which cases to pursue and which to decline are exclusively their own, with no oversight of those decisions outside of the prosecutor's office (O'Neill, 2003). Courts have also afforded immense deference to that decision-making autonomy, immunizing prosecutors from abuse-of-discretion or selective prosecution lawsuits (Davis, 2000; 2007; Gershman, 2011; Heller, 1997).

Case selection power is further enhanced in federal court when a state court alternative for prosecution exists. As Heller (1997, p. 1313) suggests, "[c]oncurrent jurisdiction due to the federalization of criminal law introduces into the criminal justice system a potential for prosecutorial abuse that was not an area of concern when crime was primarily a locally regulated phenomenon." That is, even where federal prosecutors have probable cause to charge federally, concurrent jurisdiction adds a new layer of discretion that increases the risk of biased decision-making in jurisdiction selection, especially when the goal is to maximize punitive power (Heller, 1997). This exercise of such discretion is "veiled" (Ossei-Owusu, 2010, p. 613; see also, Lynch 2013) which adds to its potency, particularly because the rules, norms, and preferences that inform case selection are concealed from public view. The identities of those eligible for prosecution but not charged, as well, are contained inside a black box of hidden discretion. Especially in regard to federal drug prosecutions, U.S. Attorneys can be highly selective and idiosyncratic in their case selection since they do not have sole primary law enforcement responsibility, producing considerable variation in norms and practices as a function of both time period and location.

Case selection processes can be characterized as simultaneously *local*, reflecting situated norms, conditions, and values, and *transcendent,* embodying power dynamics and ideologies that are inherent to the prosecutorial role in the American judicial system. In that regard, decision-making is not simply filtered through individual legal actors' focal concerns or internal biases. Rather, as the court communities literature illustrates, legal decisions are embedded in localized norms, organizational constraints, and shared ideologies, that are "joint acts" produced at the organizational level (Ulmer, 2012, 8). Even in the matter of case selection, a discretionary power

exclusive to the prosecutor's office, decisions are not made by autonomous individual actors, but rather are constrained and informed by the office's organizational norms, rules, practices, and expectations, as well as by relationships with and input from other law enforcement agencies (Ouziel, 2017). As a result, there can be huge variances in how criminal law is applied across different offices that operate under the same penal code. At the same time, macro-level factors—including the formal law itself, which provides law enforcement with the "menu" (Stuntz, 2006, p. 818) of charging choices; the Department of Justice, which sets policies for U.S. Attorneys regarding the prosecution of crime under its jurisdiction; and the appellate courts, which police the constitutionality of prosecutorial action—impose some constraints on local variation.

The present study is framed by this dual theory of prosecutorial discretion to explore the localized differences, and transcendent commonalities, in case selection practices and their consequences for racial inequality in four federal jurisdictions. It is modeled after Ulmer's (2005, p. 256) comparative study of four districts that teased out how local courts develop their own "processual orders" within the constraints and dictates of the "meta-power" imposed by three centralized governing institutions: the Department of Justice, U.S. Sentencing Commission, and Federal Judicial Center. While Ulmer's work is analytically situated in symbolic interactionism, its insights are also substantively resonant with the courts-as-communities literature (Eisenstein, Flemming, and Nardulli, 1988). To that end, the courts-as-communities literature has been especially useful in delineating the role of local norms and understandings in explaining locale-based variation.

In this analysis, I borrow from Ulmer's (2005) analytic use of "meta-power"—forces that essentially define and shape the rules, distribution of resources, and "matrix of possibilities" that govern situational action (Hall, 1995, p. 405)—as an overarching constraint on district-level variation. Ulmer found that centralized organizational imperatives, coming especially from the Department of Justice and the U.S. Sentencing Commission, imposed considerable pressure on local jurisdictions to behave in a uniform manner in meting out criminal sentences. That tension between the local and the more distal, structural forces, though, produced wide varieties of formal compliance through the interpretive processual orders of different districts.

In the matter of case selection, however, less regulatory pressure is imposed from above. As a consequence, both local forces and broader ideologies about crime, race, and the prosecutorial imperative may play a more significant role in structuring charging practices in the federal system. To that end, studies of state-level filing practices have demonstrated that considerations such as race, gender, and age of suspects and/or victims, as well as stereotypes about criminality, predict likelihood of criminal charges being filed, even when controlling for case strength. Studies have found such effects in regard to referrals on sexual assault (Spohn & Holleran, 2001), domestic violence (Worrall, Ross, & McCord, 2006), driving while intoxicated (McCoy, Salinas, Walker, & Hignite, 2012), and gang-related homicide (Pyrooz, Wolfe, & Spohn, 2011).

Qualitative interview studies examining case filing practices in sexual assault cases, in particular, have found that prosecutors' assessments of victim credibility are infused

with racialized and gendered bias, including about victims' moral character, criminality, and judgment skills (e.g., Beichner & Spohn, 2005; Frohmann, 1997; Spohn, Beichner, & Davis-Frenzel, 2001). Those stereotyped assessments transcended organizational policies and structures, reflecting broader, entrenched ideologies about women and victimization (Beichner and Spohn, 2005); however, their influence is quite locally specific, based on particular social arrangements in a given jurisdiction (Frohmann, 1997).

The present study: aims, methods, and data

In the forthcoming analysis, I examine the interplay between (1) local processual orders, (2) more distal institutional forces, and (3) broader societal ideologies to explore drug case selection logics and practices, and their contribution to inequality in federal drug prosecutions. I draw from a comparative qualitative field research project conducted in four purposively selected federal districts from late 2012 through mid-2014. Using interview data as my primary source for analysis, I examine the commonalities and differences in case selection practices across the four districts.

The field research project upon which this analysis is based examined the federal criminal adjudication process, with a primary focus on drug cases. The research was designed to complement quantitative work on federal criminal court outcomes by exploring process-related phenomena that are difficult to examine using administrative data sources, including case selection, charging practices, and negotiation strategies related to pleas and sentencing. I purposively selected the four districts in my sample to differ from each other on several key dimensions: Overall size; size of criminal caseload; size of drug trafficking caseload; variations in sentence outcomes; and geographic location. Table 1 illustrates the population demographics and drug caseload characteristics of each district.

The selected sites included one district in the northeast region of the U.S. that is made up of both urban and rural communities, and where sentences are typically more lenient (relative to the guidelines) than the national average. I refer to this district as Northeastern district.[3] The overall criminal caseload pressure in Northeastern is light compared to other federal districts, with just under 520 new defendants charged in 2012, but its drug caseload was higher than average: 39% of those defendants were charged with drug offenses. My second district, Southeast district, is more punitive relative to the national average, especially in the sentences imposed on drug defendants. Southeast was a national leader in the number of crack prosecutions in the 1990s and 2000s, but after the passage of the 2010 Fair Sentencing Act (FSA), which reduced crack penalties, drug prosecutions decreased as a share of the caseload. In 2012, 33% of approximately 1200 defendants charged in this district faced drug trafficking charges.

My third district is Rural district, and is characterized by a small and more variable criminal caseload year-by-year, including its drug caseload. Nonetheless, drug cases typically constitute a notable share of the caseload; 30% of the approximately 260

[3]I use pseudonyms in this article for each district name, as well as for all of the attorneys, judges, defendants, and others described here, to protect participants' privacy.

Table 1. Drug caseload characteristics by district, 2012.

	Race/ethnicity of general population	Race/ethnicity of convicted drug defendants	Gender of convicted drug defendants	Share of overall criminal filings	Primary drug type: convicted drug defendants
Northeastern District	73% White 9% Black 12% Latino	23% White 34% Black 41% Latino	95% men 5% women	39%	Crack/Powder: 59% Heroin: 25% Methamphetamine: 2% Marijuana: 7% Other: 7%
Southeast District	64% White 19% Black 8% Latino	17% White 63% Black 18% Latino	87% men 13% women	33%	Crack/Powder: 56% Heroin: 20% Methamphetamine: 4% Marijuana: 6% Other: 14%
Southwestern District	56% White 5% Black 31% Latino	6% White 2% Black 89% Latino	88% men 12% women	32%	Crack/Powder: 6% Heroin: 2% Methamphetamine: 8% Marijuana: 83% Other: 1%
Rural District	92% White 1% Black 3% Latino	77% White 10% Black 13% Latino	69% men 31% women	30%	Crack/Powder: 38% Heroin: 7% Methamphetamine: 8% Marijuana: 15% Other: 32%*

filings in 2012 were against defendants charged with drug trafficking, with a growing number of heroin and opioid cases in the district. My final district, Southwestern district, is situated along the U.S.-Mexico border and has among the largest criminal caseloads in the nation; the majority of cases involve immigration-related violations. Drug defendants constituted 33% of nearly 6900 defendants criminally charged in 2012, and the bulk of those drug cases were the result of border-related enforcement efforts.

I gained initial access in each district through the federal defenders' offices, and then met additional legal actors, including prosecutors, judges, private defense counsel, and some law enforcement agents, once in the field. Situating the study within federal defender's offices allowed me to observe how cases are developed and processed prior to formal sentencing. Data collection was multipronged, and data sources included court observations; extracted data from case files; longitudinal administrative data; and both formal and informal interviews. The interviews constitute my primary data source in this analysis.[4]

I interviewed 75 people in total, including federal defenders, CJA panel attorneys, and privately retained counsel; active and former prosecutors; judges; and several federal law enforcement agents. My core interviews were with defense attorneys, but in each district, I also formally or informally interviewed 3–6 other court actors. I conducted follow-up interviews with a subset of respondents subsequent to a DOJ policy change directing U.S Attorneys to refrain from seeking mandatory minimums in low-

[4]See Lynch (2016) for more details on the methods and data collection strategies other than the interviews.

level drug cases. All but two of the interviews were conducted in person; the other two were conducted by telephone. The majority (55) of the formal in-person interviews were audio recorded, as were five follow-up interviews. Formal interviews ranged in length from about 30 minutes to more than two-and-a-half hours, with a mean length of just over an hour. For the nonrecorded in-person and telephone interviews, I took notes during the interviews, which were fleshed out afterward. The transcribed interviews totaled 1238 single-spaced pages. The field research, including the interviews, took place over multiple visits to each site.

The formal interviews were structured to cover four broad areas of interest: (1) The norms of case selection and kinds of cases prosecuted in the district; plea negotiation strategies and practices; and other legal strategies deployed outside of court, both generally and specific to drug trafficking cases; (2) the working relationship between attorneys, pretrial probation officers and sentencing judges, and complications posed by each set of courtroom actors, as well as by codefendants and their co-counsel, in the adjudication process; (3) perceptions about disparities in federal court, including sources of those disparities, the meaning of "uniformity" in sentencing outcomes, and broader justice challenges that face the federal criminal justice system; and (4) the changing nature of case processes over time, and the relative influence of different kinds of legal, political, and organizational change.

Although many courts-related, interview-based studies focus on judges (e.g., Clair & Winter, 2016; Hester, 2017; Kramer & Ulmer, 2002), I prioritized interviewing attorneys, as they are actively involved in the more opaque, preconviction legal processes. In regard to filing and charging decisions, prosecutors and defense attorneys (especially through their clients) have much more inside knowledge about other potential defendants who were not charged federally, and about the logic underpinning prosecutions that do go forward. I primarily rely upon the interviews with defense attorneys and prosecutors in this analysis. To assess case selection processes, I asked questions about caseload characteristics in the district/division; how cases are both generated and selected for prosecution; criteria and norms regarding the kinds of drug cases filed or declined in the district/division; general policy goals and philosophies in the district/division around federal drug law enforcement; and relations with state and local actors on drug law enforcement and prosecution practices. Respondents also talked about case selection in response to my questions about sources of perceived inequalities and disparities in federal court.[5]

I coded responses to this set of questions to identify differences across jurisdiction and sub-jurisdiction (divisions within districts). I coded for several theoretically derived themes regarding case selection: the typology of drug case as a function of time and place; how drug cases entered the federal system, including any stated goals of federal drug prosecution; and the role of case selection in inequality. I also took a more inductive approach, using a multistage process that started with open coding to capture more spontaneous utterances about case selection and norms surrounding the federal

[5]The main question that generated these responses asked: "There's a long-standing concern in both state and federal criminal justice administration about various kinds of demographic disparities in outcomes, particularly racial disparities. Have you observed this problem to be the case in your district? [IF YES] What do you see as the source of racial disparities, particularly in drug cases?"

Table 2. District-level drug case types by case frequency rank.

	Northeastern	Southeast	Southwestern	Rural
Local street sales	1	1	N/A	1
Federal conspiracies	2	2	2	2
Courier cases	3	3	1	N/A

role in drug law enforcement. In most cases, those more spontaneous comments fit within the major coding categories that I had theoretically derived. For open coding, I first read the entirety of the transcribed set of interviews. I then coded for every distinct statement that touched upon case selection and its logics and justification, including where case selection was raised as a source of inequity or injustice.

Findings

Three core typologies of drug cases were described by respondents in the four districts: (1) cases involving small street-level sales, typically derived through local policing stings or confidential informants; (2) Federally built and/or multijurisdictional taskforce drug conspiracy cases, which usually involved multiple defendants situated at multiple rungs of the conspiracy; and (3) cases of single or groups of drug couriers, in which defendants typically had low culpability and little criminal history, but often faced lengthy sentences due to the quantities of drugs being transported. While respondents varied in their use of language, there was high convergence among defense attorneys and prosecutors within each district as to the case typologies and their key features. As I detail below, the distribution and characteristics of each type differed in important ways between districts and, to a lesser extent, between divisions within districts. Table 2 displays the ranking of case types by frequency, as reported by respondents. The variations in cases types by geography was the product of both local and more distal, structural features of federal criminal justice policy.

The localized differences in case development and selection were also associated with distinct modes of inequality-production. In each of the four districts, drug case selection was racialized, through both structural processes and through more ideological processes. Prosecutorial choices were often shaped by institutionalized "scripts" that are imbued with racial ideologies that seemingly operate without motivated discriminatory intent, but that nonetheless structure the operational practices and contribute to inequitable outcomes (Haney López, 2000).

Local logics and variations in drug case types

Street-level sales

Three of the four districts—Northeastern, Southeast, and Rural—had robust practices of federally prosecuting low-level drug trafficking cases that involved small, street-level sales, while Southwestern did not. Across the three districts, these cases were characterized as the most frequent case type, at least historically, and they shared some key features. First, they were almost always proactively produced via two primary law

enforcement strategies: the use of active cooperating witnesses who arranged buys, or the use of undercover officers who conducted "buy-bust" operations against targeted individuals. Second, the origins of their prevalence was anti-crime funding initiatives that facilitated local-federal law enforcement cooperation. Third, and related, these prosecutions were often justified as "pretextual" prosecutions where "prosecutors target defendants based on suspicion of one crime but prosecute them for another, lesser crime" (Richman & Stuntz, 2005, p. 583).

The buy-bust derived case was the most frequent drug case type in Northeastern district, where defendants were charged in federal court for very small hand-to-hand sales. These cases most often involved local law enforcement operations that selectively targeted young men in certain minority neighborhoods from the urban areas of the district. The local police worked with one particular assistant U.S. Attorney (AUSA) to target subjects who they deemed "trouble," in regard to gang or violence involvement. Undercover officers, or occasionally wired confidential informants, set up small drug purchases in the range of $25–$50. A federal defender who represented many clients in this category described the current status of the initiative to me:

> It's [AUSA's name] who has this mission, and it's really got the imprimatur of the office to work with the [local] police on hot spots. And they try to pull people who they think are a menace and who are in danger of using guns out in the community. He will take kids who have records, or who [even] don't have records, and they have this whole process where they bring them in and yell at them and tell them they have a target on their back and then they arrest them and they bring them to federal court.

Because these arrests came about through undercover buys, which were well-documented by law enforcement, they were nearly sure-fire convictions, making them ideal as pretextual prosecutions. Moreover, many of those targeted had prior drug convictions that would enhance the sentencing guideline ranges under the Career Offender Guideline[6] or increase sentence exposure through the drug recidivist statute, so even though the prosecuted criminal conduct was minor, sentence exposure was magnitudes higher in federal court than it would be in state court for these defendants.

As the defense attorney indicated in the quote above, even some people without criminal records were targeted, if local law enforcement deemed them trouble-makers. In these cases, a form of "sentencing entrapment" (Abelson, 2003) was sometimes used to increase sentencing exposure. The main prosecutor in these cases described for me how the buy-busts were set up to occur in protected zones, such as near school grounds and public parks, because those convictions came with one- to two-year mandatory minimums. He explicitly characterized this in pretextual terms, calling it an "Al Capone" strategy that was aimed at gang members who would be ensured of a "time out" upon conviction.

I also observed proceedings on numerous small buy-bust cases, handled either by this prosecutor or another AUSA in his unit. The prosecutors were fairly explicit in court about the pretextual nature of these prosecutions, describing in detail how the

[6]Career offender guidelines apply to drug and violence convictions where the defendant has two or more prior qualifying convictions (drug or violence). The calculated guideline is many times more punitive than the regularly-calculated guideline range.

defendants were suspected by local police of gang activity, violence, gun possession, or other such conduct. Indeed, these narratives, supported with documentation of the defendants' previous criminal justice contact, were regularly used to argue for pretrial detention, or for added sanctions at sentencing.

This local-federal drug enforcement partnership had morphed from a 1990s multi-jurisdictional anti-violence initiative that used the hammer of federal laws to combat gun violence. While the original program was limited to gun prosecutions, this gave way to the drugs-as-pretext strategy once that program had run its course. Thus, those deemed to be of interest for reasons other than for, or in addition to, drug sales were proactively targeted by law enforcement and/or plucked from state courts, often leaving behind co-defendants in state court or multiple similar other small-time dealers not targeted. Culpability in drug trafficking, per se, was not the driver of these cases; it might instead be due to criminal history, police suspicion about other criminal behavior, or an interest in a given subject as a potential provider of information.

Southeast District, as well, had a long-standing practice of bringing low-level street cases but there was more fluidity between those cases and the conspiracy cases in this district. This fluidity appeared to be the product of the single largest driver of federal drug case production here: confidential informing. Much more so than in Northeastern, confidential informants in Southeast had typically given up names of others in relation to their own federal charges, and those named were much more likely to face federal charges than in Northeastern. Informing worked as a relatively intricate network within communities in each of the three divisions in Southeast, where everyone charged federally was under enormous pressure to give up others as a condition of prosecutors' plea offers. Those named were then charged and brought in to be similarly pressured. This happened to the lowliest of street dealers and to the larger suppliers, alike. With the low-level targets, the cases might stop at the point of an arranged buy (or set of buys), or it might be charged as part of a larger conspiracy.

A prosecutor in the southern-most division of Southeast described this kind of case generation as "witness development":

> We develop witnesses. Often times our witnesses consist of people who we prosecuted previously. They enter into plea agreements with the government hoping for a reduction in their sentence based on their cooperation. And they're ultimately debriefed by the agents who investigated their case… If they identify someone that we believe is a legitimate, federal target for prosecution, the agents will then attempt to corroborate the witness's information [and make an arrest].

This prosecutor also described a more proactive practice to cultivate such witnesses that produced a number of the small, retail cases, where they have one of their informants target a "small player" by setting up a drug deal, then "arrest that person and turn that person into an informant." A sentencing proceeding I observed in the middle division of this district had originated through this kind of "witness development" practice. The defendant, an elderly man who had a federal drug conspiracy conviction from 14 years earlier, had simply provided a dealer's phone number to his son who was looking to make a 1-gram sale of heroin. Despite this limited involvement, the father was originally charged with conspiracy to sell 100 or more grams of heroin.

The AUSA prosecuting the case shared with me how law enforcement had "flipped" others in a larger conspiracy case, who reported that the defendant and his son were "hang-arounds" of a drug supplier. The cooperators were willing to link the defendant to more drugs via their testimony, and one of them actively set up the son by reaching out to purchase the gram of heroin. Ultimately, the prosecutor dropped the conspiracy charge in this case as part of a plea agreement in which the defendant agreed to plead guilty to aiding and abetting the 1-gram sale. Before the sentencing proceeding began, the defendant told his family members in the gallery that he had figured out that his nephew—the son's cousin—was the cooperating "witness" against them.

As in Northeastern, many of the smaller kinds of cases here started in state court, originating in particular with an active multijurisdictional taskforce. A federal defender in the middle division of the district described how selection can happen as a result of taskforce efforts:

> I'd say it's about 50/50 whether they originate in state court or whether they originate in federal court … Because of the taskforce, sometimes things are picked up directly by the federal agents and they're brought into federal court. But sometimes, they're things that have originated in state court—they sort of realize this guy's been running around with this group of people for a while and then the taskforce people say, "Hey, feds—you should really pick up this case." Their charges in state court are dismissed, and then they never see the streets usually, because they're just usually brought over here.

A prosecutor who had served for decades in the local U.S Attorney's office described the logic of the taskforce's original development in the district. Like the practice in Northeastern, this initiative emerged in the 1990s as an anti-violence strategy, and was based on using the more punitive federal drug laws in pretextual prosecutions to target those deemed to be dangerous. It also featured a variant of sentencing entrapment, designed to get potential defendants to cross the mandatory minimum threshold in their sales:

> We would focus on particular areas or particular organizations like street gangs or whatever … And during the course of that, we had a lot of low-level dealers. Guys who were conspiring with their friends on the corner; they're selling 20-dollar rocks of crack but they were doing it with the same people every day for a couple weeks or months that we were watching. [We were] sending little guys in to buy a 20-dollar rock from the same guy, four or five days in a row. And, we would charge them with five grams or more conspiracy and the historical weight would take them up. We're not really going out focusing on five-gram deals. But what we do is we go out and focus on the people who are suspected of violent crimes and maybe they're very low-level drug dealers but they're also breaking into people's houses with guns, or they're shooting at people, or there's gang rivalry.

A former supervising prosecutor in the region's taskforce critiqued this division's implementation of the program because it was so indiscriminate in its reach, sharing that the AUSAs "just came in with a steamroller in there and took every possible case." This practice had waned to some degree by the time I was in the field. Several interviewees suggested this was tied to the passage of the Fair Sentencing Act in 2010. It was harder to cross the mandatory minimum thresholds after that, since it takes 28

grams to trigger the five-year mandatory. Given advisory guidelines, and the correspondingly lowered guideline ranges, prosecutors were not able to ensure as long sentences as they previously had. A defense attorney in Southeast described how, prior to the FSA, the crack prosecutions were used against low-level defendants to get both long sentences and information:

> Three, four years ago, when they were taking more cases from the state, they would take career offenders. I have a couple of guys doing 15 years for less than a gram of crack. They were career offenders. [Prosecutors] wanted to squeeze them either for information on a murder they thought they knew or something like that. So, they were just picking off these guys who had two prior possession with intent charges in the state, and they'd bring them over here for $15.00 worth of crack, and they're doing 15 years.

Similar to Southeast, Rural district had a robust practice of targeting low-level retail dealers that had waned to some degree by the time I was in the field. This practice, too, grew out of a federal funding program. In the mid-1990s, law enforcement in the district received a federal "Operation Street Sweeper" grant which the local police used to arrest very low-level user-dealers, mainly of crack, who were then referred for federal prosecution. This initiative solidified a long-standing collaboration between local law enforcement and the federal prosecutor's office in Rural District, as had also happened in Northeastern and Southeast. A federal defender who started his career in Rural district just as this program came on line shared his recollections of the "street sweeper" strategy:

> The cases tended to focus around a couple of bars in Main City—we used to refer to them as salt licks. The undercover officers would sit at the bar, and they'd say to the person next to them, "do you know where I can score?" And they'd give the person some money, the person would go off, get them some crack, maybe get a little bit of crack or a little bit of money in exchange. That would form the basis of the case and maybe there'd be two or three of those hand-to-hand sales. Sometimes they'd try to get it up over five grams [to get the mandatory minimum].

Another long-time defender elaborated that these defendants tended to be locals who were "addicts selling to support their own addiction." The judges reportedly complained about these prosecutions as a poor use of federal resources, but since the program was "grants driven," it was maintained as long as the money continued to come to the district. A federal defender who also had considerable experience in the state criminal justice system suggested that these cases were emblematic of the lack of "true federal crime" in the district. He related that the district could just stop prosecuting federally, and let the state solely manage criminal justice and "nobody would notice."

While the small cases had waned in frequency by my time in the field, they had not disappeared. A shift was in the kind of defendant targeted for hand-to-hand sales. Rather than locals, including local addicts, police focused more on those coming from outside the district, who were characterized as potentially gang-involved and gun-involved, which was offered as the justification for federal prosecution.

In all three districts, attorneys shared that the elevation of these cases to federal court ensured much harsher punishment than had they been left to state court. The majority of the attorneys I interviewed had spent part of their careers practicing in the

local state courts, so could estimate how much better off their clients would be there. In Southeast, relatively long prison sentences would be imposed but then suspended for drug felonies, so defendants did little or no local jail time before being out on probation. In Northeastern, small hand-to-hand dealing cases would frequently be handled with probation, including a potential for dismissal after a period of good behavior. In Rural, low-level drug deals would typically garner six-month jail sentences.

Larger conspiracies

The other major case type in Northeastern, Southeast, and Rural was the more traditionally federal drug conspiracy case. These cases varied in complexity as a function of jurisdiction, but all involved multiple defendants who were charged with conspiring to distribute larger amounts of drugs. The conspiracy cases in Northeastern district were of a greater scope and scale than in the other districts, involving multiple-month, or even years-long investigations that relied upon wire-tap and other surveillance evidence, and often extended beyond state and sometimes national borders. They usually involved potential defendants at all levels of operation, from large-scale wholesalers to couriers and street dealers. Selected suspects were typically brought in early to actively cooperate and provide information about others in the conspiracy. These kinds of conspiracy cases were referred to as "historical" cases, as a federal defender described them:

> A historical case is a case where they build a case—where they get a bunch of witnesses who decided to cooperate or whatever, and they testify about a drug operation. And they might say, "Oh, and he was selling, you know, a kilo a week for fifty weeks." And then you multiply that out and it's fifty kilos. Those are usually referred to as historical cases meaning you're relying on historical testimony for the evidence, usually from multiple people.

Case selection for federal prosecution in these cases was also a discretionary process. Court proceedings and file documents, including motions, discovery requests, plea agreements, and sentencing memoranda, often revealed suspected co-conspirators who either were not criminally charged at all, or who were prosecuted in state court. In some instances, the uncharged suspects were major players who cooperated with the government as a way to avoid federal prosecution. In others, the uncharged persons were only tangentially involved, so likely deemed insufficiently culpable to be prosecuted federally. Interviews with defense lawyers confirmed that unnamed, uncharged cooperators were a looming danger for their clients in many of these cases, since the information they provided prosecutors could increase exposure on guilt or sentence. The primary danger they posed was on "historical" weight of drugs alleged sold by a given defendant in the conspiracy, since drug weight drives both guideline ranges and mandatory minimum thresholds.

The incentives in "historical" conspiracy cases also played out so that those who got the best deals in Northeastern—namely those who escaped facing any federal charges, or any charges at all—were seen by defense attorneys as most likely to exaggerate the scope and size of the prior deals, since the informant currency is in how much can be provided to increase the culpability of the target. Those uncharged

cooperators were also harder to assess on the defense side, since they typically could remain confidential and would just be used as a threat by prosecutors to get the defendant(s) to plead guilty, a near-certainty in federal drug cases.

In Northeastern, then, the prototypical drug defendants sat at the two poles of the continuum of case seriousness. The minute, hand-to-hand, state-type sales were on one end, and the multijurisdictional, multilevel, multidefendant conspiracies were on the other. But each type had something in common: shadow potential defendants NOT selected for federal prosecution. In the conspiracy cases, like in the small cases, relative culpability was not the primary sorting mechanism as to who faced federal charges and who did not (although it was a factor). Rather, the willingness to cooperate and the potential value of that cooperation appeared to be a significant determinant in the sorting process.

Conversely, in Southeast, potential defendants had a much harder time avoiding being federally charged. Consequently, in Southeast, the multi-defendant conspiracies were on the whole much smaller, flatter in organizational structure, and more local in reach compared to those prosecuted in Northeastern District. And while the very low-level street dealers had become a smaller share of the drug caseload, the mid-level federal defendants in Southeast were much more local and closer to street dealers than they were to wholesalers. As one defender put it, many conspiracy cases are "family affairs." I primarily observed conspiracy cases that were neighborhood- or community-based, rather than across even county lines, much less state and national lines. This was confirmed by both defense attorneys and prosecutors, who described cases as generally contained within their divisions. As one defender told me, "the big, long range, international or even state conspiracies are few and far between. We see a lot of cases that are really adopted cases out of the state court system."

The kind of "friends and family" informant cultivation that was prevalent in this district in conspiracy cases created some difficult dilemmas for defendants who were charged, then pressured to talk. The risk of retaliation for cooperating was heightened by the intimacy of the cooperation networks here, since it became fairly easy to figure out who had given up information. This particular strategy also posed challenges for defense attorneys, who had to explain to their clients that this is "how the game is played" if they wanted to mitigate their punishment:

> We try to explain these rules to our clients, and it's very difficult to tell a client, "Well, you should snitch against your best friend and place him in this position that you're in because that's in your best interest. You should snitch against your brother, or your girlfriend, or … .whoever it is that's involved in criminal activity so you can do better for yourself." That is just very difficult.

This strategy also ensured concentrated pockets of federal drug defendants from within the district, given the snowball quality of the strategy. Information to the government is valued based on its novelty, in addition to its damning quality, so once prosecutors knew enough about a potential suspect, they were not inclined to offer sentencing breaks for more information on that person. That meant cultivated "witnesses" were rewarded by coming up with new targets. Moreover, because those at the lowest level of involvement in the drug trade were, as a rule, less risky to name, as they do not have the same resources and incentives to retaliate against

cooperators that higher-ups typically have, naming those at the lower rungs of a drug conspiracy rather than at the top was both easier and safer. As a consequence, even the most tangential, low-level targets could end up federally charged here. The bulk of drug cases here were "historical" conspiracies, and the amount of actual seized drugs in the district was dwarfed by the weight of alleged drugs dealt in the district.

Finally, because this district had sentencing norms that were more punitive than the national average, federal law enforcement sometimes deployed a tactic to get out-of-state drug sellers to come to the district. A federal defender in the northern division described how undercover agents would "pull" defendants into the Southeast jurisdiction: "The undercover will be like, 'Oh, deliver to me at the Dunkin' Donuts on Route 1.' A lot of our guys [clients] are like, 'I don't know why I went into Southeast. He just told me to … '"

Rural District also underwent a change in its drug case strategy, in terms of the types of defendants, in a manner similar to Southeast District's trajectory. The "street sweeper" grant money dried up in the mid-2000s, and was replaced with funding for a multi-jurisdictional taskforce that targeted bigger drug cases. Unlike the street sweeper program, which targeted locals, the new initiative caught up a number of people from out-of-state who came into Rural to sell drugs. These defendants ranged from low-level retail dealers to higher level traffickers.

The other major change in Rural was in the kinds of substances targeted: crack cocaine was replaced by Oxycodone, and to a lesser extent, methamphetamine as the primary drug in federally prosecuted cases. Oxycodone cases often originated in Florida, where the pills were mailed to recipients in the district, and methamphetamine was often mailed from California (although there were some home-grown manufacturing cases in the district). Many of these cases originated with the postal service, where the packages coming in raised suspicions. Once arrested, the local recipients often became active cooperators, assisting law enforcement in controlled buys to ensnare the out-of-state sellers, who were then arrested, transported to the district, and prosecuted. This was a tactic that one defender suggested was used by prosecutors to get their caseload "numbers" up: "They're happy to prosecute conspiracy cases based on any nexus to Rural because we don't have the numbers."

One of the cases I observed and followed exemplifies this case development practice. In this case, there were four potential defendants, but only two were convicted in federal court: one who was a locally based mail recipient of methamphetamine who had moved to the district several years prior, and the other who was the shipper from California. The two others who escaped any prosecution were born and raised in the district. They each had similar culpability to the local recipient who was charged, but were able to avoid charges by working with local law enforcement as active cooperators against their partner.

The current conspiracy case development practice in Rural, then, typically uses proactive law enforcement tactics including the development of cooperators as a way to make cases. This strategy also played a role in sorting who gets brought to federal court for prosecution and who does not. Prosecutors occasionally sent pre-indictment "target letters" to potential cooperators and brought in the federal defender to

represent the letter recipient as they negotiated terms of cooperation. In some of those cases, the "target" was able to avoid facing any federal charges.

Southwest district had relatively few proactively developed drug conspiracy cases, including the "historical" weight cases. Defendants here were more likely to be charged with possession of drugs for sale, and only for the amount of drugs actually seized, rather than with conspiracy that would rely on the word of a cooperator about past transactions to build "historical weight." A couple of attorneys in the urban division had handled the more proactive, conspiracy cases in times past, but these were becoming rarer in their experience. These cases were also more prevalent in the urban division, compared to the border division, sometimes originating on Indian reservations where both smaller scale dealing and higher level involvement with the cartel trafficking occurred.

The one kind of informant-based, historical case that had developed and had become more common was directly as a consequence of the high volume of drugs coming over the border. A secondary illicit market had developed in this district of stash house robberies, some of which were quite violent. In response, federal agents set up suspects, with the help of cooperators, to commit to participating in such robberies. A federal defender described this for me:

> There's usually some snitch who's in all kind of big trouble, and [the agents] say, "well you better bring me some people who you know are doing these home invasions." And so they bring them these people and this undercover cop poses as a major drug dealer, and says something like, "I do my pickups once a month, and it's a different house every time, and I go there and there's mountains of kilos of drugs there, and there's usually just one guy with a pistol … " Once they get these dumb-dumbs to agree to the robbery, they will charge them with conspiracy to possess narcotic drugs for sale. And it's a mandatory minimum because the imaginary amount that they're talking about was way over the minimum. There's never any drugs. Nothing. But since they talked about this mountain of coke, it's a mandatory minimum. And since they talked about using guns to do this crime of violence, to steal the drugs, then there's the 924C [the mandatory gun enhancement].

Courier cases

While Southwestern had virtually no practice of targeting small-time street dealers, as the other three districts had, and was engaged in much less proactive conspiracy case development, it stood out for its huge volume of courier cases. The two major divisions, one in the larger urban center of the district and the other closer to the border, differed in some ways, but across the entire district, the overwhelming majority of the drug cases originated in the context of border control and immigration enforcement, and the vast majority of those arrested were low-level couriers.

Couriers were detected in three primary ways in this district. The first way was at ports of entry on the U.S.-Mexico border where border control officers discovered the drugs being carried or driven into the U.S. from Mexico by citizens and noncitizens with border-crossing rights. These couriers often transported methamphetamine, and sometimes cocaine, heroin, or other low-volume, high-value substances. The second

way that drug couriers were detected was via border patrol agents who surveilled the vast open space along the border to apprehend illicit border-crossers, who were usually on foot. Some of those apprehended in this manner carried drugs with them; most commonly, they carried backpacks containing 40–50 pounds of marijuana, often as part of the payment to coyotes for assistance in making the journey. Third, within the interior U.S. side of the border, a variety of law enforcement, including federal immigration and border patrol agents, state highway patrol, and local police, uncovered couriers on the roadways or at stash house locations. Within the 100-mile border zone, immigration authorities have broader authority to stop vehicles, which led to a number of courier arrests. More generally, law enforcement in the district has been relatively aggressive in pursuing undocumented immigrants and border-related crime, so couriers were regularly detected as they moved drugs inside the U.S.

Within the courier category, the numeric majority of cases were marijuana backpackers, who were usually detected and arrested in small groups not far from the border. The long-standing practice by federal prosecutors in Southwestern had been to charge these defendants with felony drug trafficking, but offer steeply discounted sentences (13 months and a day) as a way to ensure guilty pleas and quickly process the cases through the system.[7] Those convictions were "aggravated felonies" under immigration law, thereby disqualifying noncitizen defendants from subsequent legal entry into the U.S. In 2012, however, the crush of those cases put even more pressure on prosecutors in the border division to rapidly dispose of them, so the standard plea offers were reduced to misdemeanor marijuana possession, generally with a six-month sentence. At different times, the "mechanized" couriers, who drove drugs through ports of entry, were also eligible for misdemeanor offers. The fact patterns remained the same, but the misdemeanor option allowed the cases to be processed even more quickly in magistrate court, where defendants pleaded guilty and were sentenced in small groups in a single proceeding. Because the urban division had a lower volume of these cases (even though it was responsible for a sector of the border), they remained felonies in that division, creating some within-district charging disparity.

The border-related caseload pressure was so great in this district that federal prosecutors sometimes referred interior courier cases to the state as a volume management tactic. Depending upon caseload pressure, they might refer all methamphetamine cases below the 10-year mandatory minimum threshold and/or all marijuana cases with quantities of less than 400 or 500 pounds to state courts. This created a potential sentencing disparity that went the other direction than in the other districts, since the state drug penalties for these kinds of quantities were almost always more severe than those imposed in federal court in Southwestern.

In Northeastern, courier cases were not named as a specific case "type" by respondents (in contrast to the hand-to-hand cases and the conspiracies), but were described by several attorneys as an occasional kind of case charged in the district, typically involving people traveling from abroad who smuggled drugs through the major airport. These cases were characterized as almost always involving desperately poor

[7]At the time, the 13 months-and-a-day sentence had particular legal significance for undocumented immigrant defendants. It ensured a 16-level increase in the guideline sentence if the defendant subsequently re-enters the U.S. and is convicted of illegal re-entry.

people who were kept in the dark about the distribution networks, paid low amounts to do this dangerous work, and/or who were coerced into doing it. There were occasional courier cases in Southeast District as well, mainly airport smuggling cases out of the international airport in the district, with the rarer "mechanized" courier, who drove drugs into the district from routes to the north, west, or further south.

Case selection as a source of inequality

I concluded each of my interviews with a series of questions regarding perceptions of fairness, uniformity, and quality of justice in their district. Especially among defense attorneys in Northeastern, Southeast, and Rural districts, case selection was perceived as the stage in which drug caseloads produced the most inequality as a function of race, ethnicity, and class. In both Northeastern and Southeast, the robust, proactive law enforcement practices, especially those involving partnerships with local police, were seen as targeting geographically in a manner that ensured over-representation of young minority men. Defense attorneys in Northeastern nearly uniformly raised the local-federal small-case initiative as a core driver of inequality. As one federal defender put it: "I think that one of the problems with this whole approach is they're focusing on sort of neighborhoods that are largely African American or Latino, and their argument would be, 'Well those are the high crime areas of violence.' But then you're skewing your population pretty considerably."

For their part, some prosecutors in the district placed themselves on the side of the beleaguered minority communities said to benefit from the proactive initiative. The lead prosecutor himself regularly invoked the words of community members, including a prominent African-American reverend, that ostensibly approved of punitive intervention as a way to protect the black community. He justified the use of the reverend's words in one sentencing memorandum, since it expressed "the outrage the people who live in these neighborhoods feel … [he] is not the first inner-city resident to recognize the havoc that a small minority involved with drugs and drug-related violence can have on an entire community."

The story was very similar in Southeast, where defense attorneys perceived only mild favoritism (if any) for white defendants at sentencing, but stark disparities in who was brought into federal court in the first place. In both Northeastern and Southeast, defense attorneys and judges viewed the micro-targeting of low-level street dealers in minority neighborhoods as a matter of going after "low hanging fruit," where the cases were easy to make, and the prosecutions were justified on the nexus argument that the drug trade was linked to gangs and violence. In both districts, there was a concern about the self-fulfilling nature of over-policing certain neighborhoods that disproportionately created criminal records among the residents. Several defense attorneys echoed the sentiment expressed by this respondent:

> I think it starts out in just the kind of law enforcement, who is getting charged, what neighborhoods are getting targeted. If you live in the west end, you don't have a police car always parked at the end of your block, whereas if you live in [public housing complex], that's just the way life is. There's always a police car at the end of your block … I really think that that's where the racial disparity starts.

The over-policing led to unequal arrest and conviction patterns for young people, that would then both incentivize and justify federal prosecution. In Southeast, like Northeastern, those eligible for sentence enhancements in federal court were both sought out in buy-bust stings, and selected into federal court for prosecution upon arrest. A federal defender linked this to the consequences for racial disparity in caseload demographics:

> In terms of the charges, more African Americans are charged, certainly as career offenders, because there's more blacks who have priors … You don't get white career offenders. I can't remember the last time I had a white career offender. They're all the people from the projects.

The geographic law enforcement targeting, then, produced criminal histories that subsequently increased the likelihood of federal charging, ensuring that the drug defendant pool was quite racially homogeneous, drawn from concentrated pockets of the district. This pattern was also amplified by the extreme reliance on cooperation especially in the two southern divisions, given social and spatial segregation in the region. To that end, several federal defenders in each of the two southern divisions commented that it was hard to even comment on disparities, since they had never had a white drug defendant. As a defender in the southernmost division put it, "I might see racial disparities if they prosecuted any white people here, but they're not prosecuting white people." Another defender who moved from the northern division of Southeast District, where the drug caseload was more racially and ethnically diverse, to the middle division where the overwhelming majority of drug defendants were black, asked her new supervisor, "do they only prosecute black people here in Middle City?"

Two of the prosecutors I interviewed, however, pushed against the notion that their case selection process contributed to racial disparities. One from the middle division's U.S. Attorney's Office, which was among the most aggressive offices in crack prosecutions in the nation, insisted that the demographics flowed from differential criminal involvement:

> I think it's really important that people understand; we do not go out and identify black drug dealers to prosecute. We don't. Until we're sitting down to type out the criminal case cover sheet, which is the sheet that attaches to the indictment, the majority of us don't even know what race the defendant is … And, it has nothing to do with the color of their skin. The real question is, why is it that the majority of drug dealers are black males? The question should not be why are all the defendants black males. The question should be why are the majority of drug dealers black males? Right? Because, we don't choose, we don't go out and pick and choose and say, "Okay, we're gonna let the white guy go and we're gonna prosecute the black guy." We don't do that.

By invoking differential criminality, either explicitly, as this prosecutor did, or implicitly, as the targeted enforcement practices in minority neighborhoods did in this district and in Northeastern, prosecutors deflected responsibility for the racially disproportionate charging practices that their offices engaged in.

Rural was similar to Northeastern and Southeast in that a significant segment of its drug caseload was produced through long-standing partnerships with local law enforcement. In Rural, however, while there was some micro-targeting of areas for enforcement, the spatial logic was more concerned with targeting nonlocals, especially in the wake of the local targeting of crack user-dealers. And those out-of-staters ended

up accounting for the disproportionate number of black and Latino drug defendants charged in the district.

The original "street sweeper" prosecutions involved low-level local crack defendants who were predominantly white. One attorney joked that, "we helped offset the racism of the crack laws because most of the addicts back then were white." Prosecutorial practices changed after that, and when I was in the field, the strong perception among defense attorneys was that even though whites made up the majority of the caseload (given their very high proportion in the state), the deck was stacked against nonwhites, especially outsiders, when it came to case selection. As a defense attorney pointed out to me, "there's not a lot of nonwhite people around here … although we do get a lot of cases involving Hispanics and black people." This was perceived as a product of both law enforcement strategy and the choices made as to who to charge in federal court. Ultimately, the prosecutor's discretionary power was seen as responsible for such disparities:

> It all comes down to charging. I mean, it's the U.S. Attorney's office that decides whether they're going to charge some black guy that came up from [neighboring states] in federal court or state court … I've always felt ever since I've gotten here, pre-*Booker*, post-*Booker*, that if you come to Rural from some other place, if you're black or Hispanic, if you get caught selling drugs you're going to end up in federal court and you're going to end up in federal prison. You know, much more so than if you're a white local.

Another described a case that illustrated how that outsider status was then racialized, through rhetoric of gang involvement. Her client was from El Salvador, arrested for a series of quarter-gram retail crack sales to white clientele in a small, resort town. Law enforcement and U.S Attorneys characterized this defendant in press releases and in court documents as a major leader of an urban gang from out of state. They obtained GPS surveillance on him, and amassed considerable documentation on him, but came up with absolutely no evidence that he was gang-affiliated, much less a "gang leader with 800 people working for him" as he was characterized by prosecutors. At sentencing, the defender sought the prosecutor's evidence in support of the gang allegation and they had nothing: "No evidence. And there was nothing in the PSR. The word 'gang' didn't appear anywhere."

Of the four districts, the racial stratification in Southwest District was the most extreme, percentage-wise, in that almost 9 out of every 10 drug defendants here were Latino. This, though, was generally not perceived so much as a matter of discretionary choices by federal prosecutors, but as happenstance given the border enforcement regime. As one defense attorney told me, "it's the geographics of where we live. We are a border state. We have a large Hispanic community. But with the prosecutors I work with or work against, I don't have that sense [that they are biased]." This was echoed by a number of court actors who I spoke to, who essentially viewed the caseload demographics as the product of the district's location on the U.S.-Mexico border. In that sense, prosecutorial case selection in this district was perceived much more as naturally occurring, rather than actively constructed.

There was also a widely held feeling that defendants once in federal court were, at least formally, treated equitably. While noncitizens were not able to get out of custody

pending case resolution, which could produce inequities in outcomes, this was understood as a product of the status itself, not as a form of institutional discrimination. Thus, many actors in the federal courtroom communities in the two main Southwestern divisions were confident that they were not producing racial or ethnic inequities, postarrest. And given that there was little proactive drug case production here of the kind present in the other districts, prosecutors were usually reactive to those cases brought by law enforcement, but distinct from the production of those cases.

Some interviewees did, however, lament the larger structural forces that produced an overwhelming number of poor persons of color who ended up in federal court in this district. It was not lost on the defense attorney respondents that those who got arrested were at the bottom of the social strata who were the least responsible for the international drug trade, while those profiting from that drug trade were largely untouched by federal prosecutors. One federal defender implied it was at least in part of choice on the part of prosecutors: "They're targeting these poor folks who are not drug kingpins, they're not criminal element, they're just really dirt poor people who were given the opportunity to make a quick buck." Others went further, questioning the broader focus on illegal immigration as a criminal matter, and border enforcement as the primary interest of law enforcement in the region, as reflected in this defender's response:

> I do think it has to do with the charging policies and where we're at right now and what we're prosecuting … If our main goal is illegal immigration then we're going to be picking up illegal immigrants and backpackers and they're going to all be Mexican or Honduran. I mean, they're going to all be brown.

Several respondents also mentioned the problem of racial profiling by state and local police on the highways, which resulted in a number of referrals for prosecution. As one defense attorney put it, "Who do they stop on the highway? They're not stopping the guy in the Mercedes who's white. They're stopping the Mexican guy who is driving around in a clunker." But even with these cases, as noted previously, prosecutors were parsimonious in choosing to file federally, referring smaller cases to the state for potential prosecution. As such, Southwestern was again quite distinct in its logics and practices, largely because it is structurally so different from the other districts. Given that federal courts have primary jurisdiction in most immigration-related crimes, AUSAs in this district did not have the same luxury of trolling state courts, partnering with local police, or other such tactics to produce cases for federal prosecution. This meant law enforcement could be blamed for discriminatory practices without that blame tainting the U.S. Attorneys who then prosecuted those cases.

Discussion

This analysis examined the variations in case selection processes across four geographically and sociologically distinct federal districts. My primary goal was to tease out the relationship between localized processual orders and more transcendent forces that direct and constrain the case selection practices of federal prosecutors. To do so, I delineated three dominant typologies of federal drug cases and their locale-based

variations, then explored how each of those typologies contributed to racial inequalities within the distinct districts.

This examination was exploratory in nature, and has some key limitations. While it was able to some shed additional light on who gets federally charged in drug cases, the logics underpinning those filing decisions, and the consequences for inequality in the federal system, the findings presented here should be taken as suggestive rather than conclusive. First, the nature of the data and the study design, using a purposively selected sample of just four districts and a limited sample of interviewees in each, does not allow me to generalize about practices across all districts. My analytic approach was therefore more inductive, aiming to glean insights from my ideographic data that might be further examined using alternative methods and approaches.

More critically, my observational window into case selection practices was only indirect. I was not in a position to identify the universe of all cases eligible for prosecution in any given district. Rather, I could only learn second-hand (and in a less systematic manner) about prosecutorial priorities, preferences, and the kinds of cases that were NOT pursued federally. To that end, the majority of my interviewees were defense attorneys who themselves had often-incomplete understandings of how cases were selected, or not, for prosecution, and whose perspectives on some issues differed from prosecutors (as illustrated in the previous section on the issue of racial bias in case selection). My findings were especially fragmented and speculative concerning the prosecutorial black box of who gets exempted from prosecution and why, a critically important decision. Without a better understanding of that side of the decision-making calculus, the kind of justifications offered up for the extreme racial disproportionality in the federal drug caseloads—whether it is the differential involvement thesis, biased selection, or the asserted links to violence that such defendants purportedly had—are more difficult to assess.

Nonetheless, the findings offer a starting point for understanding the front-end discretionary process of case selection, including the matrix of local and transcendent forces that produce variations in that process. First, the case types I documented—the small street-level cases; the traditional federal conspiracies; and the courier cases—offer a taxonomy of sorts that may be analytically useful for researchers studying federal drug law enforcement. And the findings suggest distinct pathways to those case types.

For instance, in Northeastern, Southeast, and Rural districts, the material investment during the prime "war on drugs" years via federal grants and taskforce funding seemed to catalyze and institutionalize a practice of local-federal partnerships. Without that financial catalyst functioning as a meta-power incentivizing those partnerships, the street-level cases may not have even come on the radar for federal prosecutors. This may also be an important case of path dependency (Goldstone, 1998) emerging from the late-twentieth century, national-level investment in the war on drugs. In the same three districts, the formal changes to sentencing law and policy in the 1980s made both the targeting of defendants with prior records and the "sentencing entrapment" strategies fruitful prosecutorial practices in developing and charging federal drug cases. Both of these structural developments—federal funding opportunities and prosecutorial charging power—similarly influenced the local "processual orders" in Northeastern, Southeast, and Rural. In regard to changing practices, reforms to formal

law pertaining to crack cocaine had a transformative effect on case types in Southeast, especially, by reducing the number of small crack cases being prosecuted.

A closer examination of what the case types looked like in each locale, though, revealed important distinctions within each category. For example, the extreme investment in cultivating cooperators in Southeast contributed to a more indiscriminate use of federal prosecutions as a filing choice, relative to the other districts. Cooperation did not protect potential defendants from federal charges, as it could and did elsewhere. And in the "federal conspiracy" category, the scope, scale, and complexity of such cases varied considerably by locale, as did the techniques used by law enforcement to make these cases, including the strategic use of uncharged cooperators.

What also is made clear by my findings is that districts like Southwestern fundamentally differ from districts that do not face high volumes of primary jurisdiction cases. Southwestern's geographic locale, coupled with changes to national policy regarding immigration, significantly structured its drug caseload and ensured that the prototypical defendant was a low-level drug courier discovered through border enforcement activities. None of the typologies in Southwestern resembled those in the other three districts, and the processual order here appeared to operate the most independently from law enforcement and prosecutorial norms and ideologies that generally structure how U.S. Attorneys do their jobs.

The Southwestern case especially brings to light the centrality of local, structural conditions to case generation. While prosecutors in the other three districts appeared to select drug cases as a combined function of ideologies about crime and violence (including racialized ones) and the incentives that attend producing and prosecuting drug cases, in Southwestern, prosecutors were primarily case processors, with much less room to assert their discretion in choosing to prosecute or not. In that sense, the discretionary power afforded federal prosecutors in cases with concurrent jurisdiction was attenuated in this border district since even the drug cases were closely tied to an enforcement area of primary jurisdiction, immigration.

These findings also illustrate that prosecutorial discretion at the case selection stage is critically important to understanding variations in outcomes at all stages of the adjudication process, especially for prosecutors who have ample luxury in picking and choosing the cases they wish to pursue. For those drug defendants who are federally charged, the decision sets off a course of adjudicatory action that is often closely linked to the logic of the choice to file. That is, the same factors that bring drug defendants to federal court in the first place frequently structure the terms of plea offers, including around defendants' prior criminal record, other criminal involvement, and/or the presumed information that law enforcement hopes to get out of the defendant. As Ulmer (2005) demonstrated, those processes, too, vary considerably as a function of locale with important justice consequences.

Finally, in regard to the issue of racial inequality and disparity in federal court, this highly discretionary stage of decision-making appears to be an important, albeit under-appreciated, contributor to inequality in federal drug caseloads. In Northeastern, Southeast, and Rural, the criminal statutes and sentencing guideline provisions structured how minorities were disproportionately selected for prosecution. Sentencing provisions based on prior drug convictions, in particular, played a role in

case selection, which in itself is highly racially stratified and produced by selective law enforcement practices (Lynch, 2016). In addition, the low bars for mandatory minimums in crack cases prior to 2010 played an important role in case selection in all three districts, where black defendants have been disproportionately charged nationally (Provine, 2007). The proactive law enforcement tactics, too, were justified by widely held, more transcendent racial ideologies and scripts (Haney López, 2000) that rhetorically linked low-level dealers to gangs, guns and violence. Even in Southwestern, where case selection was less discretionary, the flow of cases was structured by national policy that had become increasingly hostile toward immigrants, and that had turned to criminal law to manage migration at the border.

Yet even with meta-power influence from key institutional forces, racialized selection was localized. Racial stratification happened to some degree in Northeastern through the decisions made about who would and would not be subject to federal prosecution among known suspects, identified in part through proactive geographic targeting, whereas in Southeast, law enforcement came to disproportionately "know" potential federal defendants who were almost exclusively minority (especially in the two southern divisions), and then federally prosecuted them much more indiscriminately. In Rural, race worked in conjunction with outsider status to sort defendants to either state or federal court. In Southwestern, the immigrant "outsider" status more broadly structured the entire enforcement regime, shaping both charging and sentencing strategies in drug cases. In the end, these findings echo Ulmer's (2005) insights in regard to the importance of local processual orders in producing variations in both law's implementation and the manifestation of inequality even under highly structured policy conditions.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

This work was supported by the National Science Foundation [grant number 1251700].

Notes on contributors

Mona Lynch is Professor in Criminology, Law and Society and, by courtesy, the School of Law at the University of California, Irvine. Her research, which has been funded by the National Institute of Justice, the National Science Foundation, and the Russell Sage Foundation, focuses on plea bargaining, criminal sentencing, and punishment processes, with a focus on institutionalized forms of bias within criminal justice settings.

References

Abelson, D. L. (2003). Sentencing entrapment: An overview and analysis. *Marquette Law Review*, *86*, 773–795.

Barkow, R. (2008). Institutional design and the policing of prosecutors: Lessons from administrative law. *Stanford Law Review*, *61*, 869–921.
Baron-Evans, A., & Stith, K. (2012). *Booker* rules. *University of Pennsylvania Law Review*, *160*, 1631–1743.
Beale, S. S. (1996). Federalizing crime: Assessing the impact on the federal courts. *Annals of the American Academy of Political and Social Science*, *543*(1), 39–51.
Beichner, D., & Spohn, C. (2005). Prosecutorial charging decisions in sexual assault cases: Examining the impact of a specialized prosecution unit. *Criminal Justice Policy Review*, *16*(4), 461–498.
Clair, M., & Winter, A. (2016). How judges think about racial disparities: Situational decision-making in the criminal justice system. *Criminology*, *54*(2), 332–359.
Davis, A. J. (2000). The American prosecutor: Independence, power, and the threat of tyranny. *Iowa Law Review*, *86*, 393–465.
Davis, A. J. (2007). *Arbitrary justice: The power of the American prosecutor*. New York, NY: Oxford University Press.
Eisenstein, J., Flemming, R. B., & Nardulli, P. F. (1988). *The contours of justice: Communities and their courts*. Boston, MA: Little, Brown.
Frase, R. S. (1980). The decision to file federal criminal charges: A quantitative study of prosecutorial discretion. *The University of Chicago Law Review*, *47*(2), 246–330.
Frohmann, L. (1997). Convictability and discordant locales: Reproducing race, class, and gender ideologies in prosecutorial decision making. *Law and Society Review*, *31*(3), 531–556.
Gershman, B. L. (2011). Prosecutorial decision making and discretion in the charging function. *Hastings Law Journal*, *62*, 1259–1283.
Goldstone, J. A. (1998). Initial conditions, general laws, path dependence, and explanation in historical sociology. *American Journal of Sociology*, *104*(3), 829–845.
Guerra, S. (1995). Myth of dual sovereignty: Multijurisdictional drug law enforcement and double jeopardy. *North Carolina Law Review*, *73*, 1159–1210.
Hall, P. M. (1995). The consequences of qualitative analysis for sociological theory: Beyond the microlevel. *Sociological. Quarterly*, *36*(2), 397–424.
Haney López, I. (2000). Institutional racism: Judicial conduct and a new theory of racial discrimination. *Yale Law Review*, *109*, 1717–1884.
Heller, R. (1997). Selective prosecution and the federalization of criminal law: The need for meaningful judicial review of prosecutorial discretion. *University of Pennsylvania Law Review*, *145*(5), 1309–1358.
Hester, R. (2017). Judicial rotation as centripetal force: Sentencing in the court communities of South Carolina. *Criminology*, *55*(1), 205–235.
Kramer, J., & Ulmer, J. T. (2002). Downward departures for serious violent offenders: Local court "corrections" to Pennsylvania's sentencing guidelines. *Criminology*, *40*(4), 897–932.
Lee, G. D. (1994). Drug conspiracy cases. *FBI Bulletin*, *63*, 1–5.
Lynch, M. (2013). Institutionalizing bias: The death penalty, federal drug prosecutions, and mechanisms of disparate punishment. *American Journal of Criminal Law*, *41*, 91–131.
Lynch, M. (2016). *Hard bargains: The coercive power of drug laws in federal court*. New York: Russell Sage Foundation.
McCoy, T., Salinas, P. R., Walker, J. T., & Hignite, L. (2012). An examination of the influence of strength of evidence variables in the prosecution's decision to dismiss driving while intoxicated cases. *American Journal of Criminal Justice*, *37*(4), 562–579.
McGarrell, E. F., & Schlegel, K. (1993). The implementation of federally funded multijurisdictional drug task forces: Organizational structure and interagency relationships. *Journal of Criminal Justice*, *21*(3), 231–244.
Miller, L., & Eisenstein, J. (2005). The federal/state criminal prosecution nexus: A case study in cooperation and discretion. *Law and Social Inquiry*, *30*(2), 239–268.
Musto, D. (1999). *The American disease: Origins of narcotic control*. New York, NY: Oxford University Press.

Musto, D., & Korsmeyer, P. (2002). *The quest for drug control: politics and federal policy in a period of increasing substance abuse, 1963 – 1981*. New Haven, CT: Yale University Press.
Narcotic Control Act of (1956). *Public Law 728-84th Congress*, Chapter 629, 2nd Session.
Natapoff, A. (2017). The penal pyramid. In S. Dolovich & A. Natapoff, eds., *The new criminal justice thinking*. New York, NY: New York University Press.
O'Neill, M. E. (2003). When prosecutors don't: Trends in federal prosecutorial declinations. *Notre Dame Law Review*, *79*, 221–290.
O'Neill, M. E. (2004). Understanding federal prosecutorial declinations: An empirical analysis of predictive factors. *American Criminal Law Review*, *41*, 1439–1498.
Ossei-Owusu, S. (2010). GIMME some more: Centering gender and inequality in criminal justice and discretion discourse. *Journal of Gender, Social Policy & the Law*, *18*, 607–624.
Ouziel, L. (2017). Ambition and fruition in federal criminal law: A case study. *Virginia Law Review*, *103*, 1077–1140.
Pfaff, J. (2017). *Locked in: The true causes of mass incarceration—and how to achieve real reform*. New York, NY: Basic Books.
Provine, D. M. (2007). *Unequal under law: race in the war on drugs*. Chicago, IL: University of Chicago Press.
Pyrooz, D. C., Wolfe, S. E., & Spohn, C. (2011). Gang-related homicide charging decisions: The implementation of a specialized prosecution unit in Los Angeles. *Criminal Justice Policy Review*, *22*(1), 3–26.
Richman, D. C. (2000). The changing boundaries between federal and local law enforcement. *Criminal Justice*, *2*, 81–111.
Richman, D. C., & Stuntz, W. J. (2005). Al Capone's revenge: An essay on the political economy of pretextual prosecution. *Columbia Law Review*, *105*, 583–639.
Sentencing Reform Act of (1984), Pub. L. No. 98–473, 98 Stat. 1987 (1984).
Spohn, C., Beichner, D., & Davis-Frenzel, E. (2001). Prosecutorial justifications for sexual assault case rejection: Guarding the "gateway to justice". *Social Problems*, *48*(2), 206–235.
Spohn, C., & Holleran, D. (2001). Prosecuting sexual assault: A comparison of charging decisions in sexual assault cases involving strangers, acquaintances, and intimate partners. *Justice Quarterly*, *18*(3), 651–688.
Stith, K., & Koh, S. Y. (1993). The politics of sentencing reform: The legislative history of the federal sentencing guidelines. *Wake Forest Law Review*, *28*, 223–290.
Stuntz, W. J. (2006). The political constitution of criminal justice. *Harvard Law Review*, *119*, 780–851.
Ulmer, J. T. (2012). Recent developments and new directions in sentencing research. *Justice Quarterly*, *29*, 1–40.
Ulmer, J. T. (2005). The localized uses of federal sentencing guidelines in four U.S. district courts: Evidence of processual order. *Symbolic Interaction*, *28*(2), 255–279.
U.S. Attorneys Annual Statistical Report (1992). Available at: https://www.justice.gov/sites/default/files/usao/legacy/2009/07/31/STATISTICAL_REPORT_FISCAL_YEAR_1992.pdf
Worrall, J. L., Ross, J. W., & McCord, E. S. (2006). Modeling prosecutors' charging decisions in domestic violence cases. *Crime & Delinquency*, *52*(3), 472–503.
Zimring, F. E. (2010). The scale of imprisonment in the United States: Twentieth century patterns and twenty-first century prospects. *Journal of Criminal Law & Criminology*, *100*, 1225–1246.