

ARTICLE

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

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I. INTRODUCTION

Everyone loves to complain about federal prosecutorial discretion.¹ Along with the overfederalization of criminal law,

1. See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1282–83 (2005) (implying that prosecutors prefer longer sentences because they make plea deals more attractive); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 673 (2006) ("[T]he overbreadth, vagueness, and redundancy of the code give prosecutors power that they are not supposed to have in a decently-functioning system of justice."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 572 (2001) (positing that broad discretion allows prosecutors to prosecute for any reason or no reason); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1978, 2027 (2008) (arguing that the broad federal laws enacted give prosecutors discretion to target a large pool of actors); see also *infra* notes 2, 19 (citing other literature that criticizes the broad allowance of federal prosecutorial discretion).

undue prosecutorial discretion is the favorite federal criminal justice-related target of academics, judges, lobbyists and special interest groups, and, of course, the defense bar.² This issue has become particularly acute over the last few decades, as the federal criminal code has grown to more than 4,500 prohibitions, about half of them enacted since 1970.³ A fair number of these offenses replicate almost identical state offenses, with the addition of the connection to interstate commerce necessary to provide federal jurisdiction.⁴ For example, statutes concerning controlled substance use and distribution, arson, robbery, fraud, and weapons are the bread and butter of local district attorney's offices' caseloads,⁵ yet similar prohibitions are scattered throughout the U.S. Code.⁶

Of course some offenses can only be charged at the federal level, most importantly immigration and terrorism offenses.⁷

2. See, for example, academic literature including DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3, 10–11, 27 (2008); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 467–68, 472–73 (2012); and Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 725–26 (2005). For literature from bar review associations, see TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS'N, *THE FEDERALIZATION OF CRIMINAL LAW* 11–13, 32–35 (1998). For literature from special interest groups like the Federalist Society, see JOHN S. BAKER, JR., *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION* 9–10 (2004), available at <http://fedsoc.server326.com/Publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf>; and for the Heritage Foundation, see BRIAN W. WALSH & TIFFANY M. JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* 5–6, 29 (2010). Finally, for literature from judges, see JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* 23–28 (1995); and William H. Pryor Jr., *Federalism and Sentencing Reform in the Post-Blakely/Booker Era*, 8 OHIO ST. J. CRIM. L. 515, 518, 524–26 (2011).

3. The last official government count of federal criminal laws took place in the early 1980s, when the government reported identifying 3,000 federal criminal laws. Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99, 110 (1989); see also Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681 (1992) (estimating 3,000 in 1992); BAKER, *supra* note 2, at 3, 7–8 (estimating more than 4,000 in 2006); WALSH & JOSLYN, *supra* note 2, at 6 (counting 4,450 federal criminal laws by 2008).

4. NORMAN ABRAMS, SARA SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* ch. 3 (West 5th ed. 2010).

5. District attorneys are responsible for the general police powers in their jurisdiction and must react to all reports, unlike their federal counterparts. *Id.* Federal prosecutors, except for those crimes with exclusive federal jurisdiction, can select which cases they wish to pursue and which they can ignore. *Id.* The “core” nonfederal offenses tracked by the FBI include homicide, robbery, aggravated assault, and property offenses. FED. BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012* (2013), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/offensesknownmain.pdf>.

6. 18 U.S.C. § 844 (2012) (Anti-Arson Act); *id.* § 922 (weapons offenses); *id.* §§ 1341–1343 (mail and wire fraud); *id.* § 1951 (Hobbs Act prohibitions against robbery and extortion); 21 U.S.C. §§ 841–865 (Controlled Substances Act “Offenses and Penalties”); 26 U.S.C. §§ 5801–5872 (National Firearms Act).

7. The federal government has sole constitutional authority over immigration matters. U.S. CONST. art. I, § 8, cl. 4; *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power

These two constituted about 29% and 0.01% of the federal criminal caseload in 2011, respectively.⁸ Drug offenses (30%), fraud (13%), and firearms and explosives offenses (8%), combined with immigration matters, comprise the largest four offense categories and altogether constitute the vast bulk (80%) of the federal criminal caseload.⁹ We believe that there are compelling reasons for Congress to have enacted these prohibitions at the federal level despite some overlapping state jurisdiction. Drug trafficking frequently involves interstate and international elements and cannot successfully be investigated or prosecuted solely by state and local officials.¹⁰ The same is true for combating certain sophisticated fraudulent schemes with extensive and expensive forensic accounting.¹¹ Even low-level street crime involving gangs and weapons can sometimes overwhelm a state prosecutor's office.¹²

However, regardless of one's opinion on the wisdom of such federal enactments, if one examines the academic literature there is very little empirical data that attempts to discern why an individual case, particularly one that could be left to state or

to regulate immigration is unquestionably exclusively a federal power.”). Only the national government can combat terrorism offenses as they are directed against the U.S. government rather than an individual and because the response to these attacks frequently involves the U.S. military as well as the civilian justice system. *See, e.g.*, 10 U.S.C §§ 948a–950t (Military Commission Act of 2006); U.S. DEPT OF JUSTICE, NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS (2010), *available at* <https://www.fas.org/irp/agency/doj/doj032610-stats.pdf>.

8. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.D-2 (2013), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/D02DMar13.pdf>.

9. *See* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 88 tbl.6-B (2012) (citing OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl.D-2 (2011)).

10. *Id.* at 24–25; *see* United States v. Carvajal, 924 F. Supp. 2d 219, 224, 258 (D.D.C. 2013) (concerning an international drug trafficking conspiracy and noting the “ever-evolving nature of international drug trafficking, including traffickers’ exploitation of quirks of international law”); United States v. Noriega, 746 F. Supp. 1506, 1510, 1517–18 (S.D. Fla. 1990) (involving an international conspiracy by a foreign head of state and officials to import and distribute cocaine).

11. *See* Klein & Grobey, *supra* note 9, at 29–32 (listing an increase of fraud prosecution as an example that reflects “a valid investment of resources to protect federal interests and to prosecute developing forms of interstate criminal conduct”); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 902–03, 957–58 (2000) (noting the “increasingly multistate character of fraud offenses” and the “inability of the states (despite their willingness) to prosecute multistate offenses,” rendering federal prosecution appropriate).

12. *See* Klein & Grobey, *supra* note 9, at 19, 29–32; *see also* Simons, *supra* note 11, at 928 n.157 (discussing when federal intervention might be necessary in circumstances where states fail to prosecute ordinary street crime effectively).

local action, is selected by an Assistant U.S. Attorney or Trial Attorneys at the Department of Justice (DOJ) for federal rather than state prosecution. There is one oft-cited law review article by Professor Richard S. Frase that studied federal criminal prosecutors in the Northern District of Illinois in 1973 and 1974.¹³ Professor Frase found that the most frequent reasons that federal prosecutors offer for declining to bring charges, in descending order of how many times each factor was selected, were the state-prosecution alternative, insufficiency of the evidence, the small amount of loss by the victim, the lack of prior record of the defendant, the small amount of the contraband (drugs and weapons), the isolated nature of the defendant's act, alternative civil or administrative remedies, the defendant's age, a recommendation by the investigating agency or the DOJ, statutory overbreadth, and a lack of interstate impact.¹⁴ These all appear to be sensible reasons for declinations. The DOJ itself asks federal prosecutors nationwide to complete a short form if they decline to indict a case after a file is brought to them by an official from a federal law enforcement agency.¹⁵ The most common reasons for declinations checked off in 2008 were weak evidence (23%), prosecution by other authorities (12%), and investigative agency request (11%).¹⁶

Unfortunately, Professor Frase's work, as well as the DOJ declination form, can be more accurately described as surveys rather than studies. Both list the reasons federal prosecutors publicly offer for declining cases altogether or holding off in favor of what the prosecutor hopes will be a state prosecution. While these are all excellent reasons for accepting or declining federal prosecution, Professor Frase's article does not satisfactorily answer those many critics who claim that suffering a federal prosecution is as random as being struck by a bolt of lightning;¹⁷

13. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 248–49, 252–55 (1980).

14. *Id.* at 263–64 tbl.6, 265 tbl.7.

15. See U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.020, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.020.

16. *Federal Justice Statistics, 2008—Statistical Tables*, BUREAU OF JUSTICE STATISTICS tbl.2.3 (Nov. 2010), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1745>; see also U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2011, at 88 tbl.15, available at http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf (showing that the most common reasons for declining prosecution are (1) absence of criminal intent; (2) lack of evidence; (3) agency request; (4) the suspect will be prosecuted by another authority; and (5) insufficient federal interest).

17. It is accurate to state that the chances of a criminal being prosecuted federally are small relative to the chances of being prosecuted locally, as around 95% of felonies

arbitrary and capricious;¹⁸ or, even worse, motivated by ill will.¹⁹ Federal prosecutors may not be trusted by all to provide accurate answers to such a survey, or they may not be fully cognizant or able to articulate the reasons for their selections. Other investigations of prosecutorial decision-making are likewise anecdotal or based upon personal experience or political theory and are therefore unverifiable.²⁰ What might shed some more

nationwide are prosecuted at the state and local level. Klein & Grobey, *supra* note 9, at 93 tbl.10 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FELONY SENTENCES IN STATE COURTS 1994, 2000, 2006, *available at* <http://www.bjs.gov/index.cfm?ty=pbse&sid=28>). However, as our study suggests, a felon can increase his odds of being pursued federally by having multiple prior convictions, killing his victim, destroying or stealing over a certain dollar amount worth of property, carrying a firearm, or having good information to sell to the government. If charged with a controlled substance offense, the greatest indicator of federal charging is whether or not one's crimes were investigated by an Organized Crime Drug Enforcement Task Force (OCDETF). See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, at 20–21, *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf. OCDETF investigations focus only on larger distribution rings, not on purely local drug activity. See *id.*

18. This was the primary criticism of the long-gone possibility in the mid-1980s of being caught on “Federal Day,” when low-level drug dealers were randomly shifted to federal court. See *City Forms Unit to Fight Crack*, *NEWSDAY*, May 22, 1986 (noting that those arrested on Federal Day, a day in which city police work with federal agents and charge those arrested with federal crimes, face double the normal 15-year sentence); Peter Kerr, *Morgenthau Calls U.S. Bid to Fight Cocaine ‘Minimal,’* *N.Y. TIMES*, July 11, 1986, at B1 (describing U.S. Attorney Rudolph W. Giuliani’s “Federal Day” program for prosecuting drug violators in New York City as “a token effort”).

19. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 *AM. U. L. REV.* 747, 766 (2005) (arguing that overbroad federal criminal laws give authorities “too much unchecked discretion” and stating that many defendants are singled out for harsher treatment than others who have engaged in the same crimes); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 *S. CAL. L. REV.* 643, 668, 675–79, 707–08 (1997) (noting that federal laws involving drug trafficking and weapons offenses impose significantly greater penalties than similar state prohibitions, and suggesting that the Equal Protection Clause should be interpreted to bar some federal charging in these areas); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 *WASH. & LEE L. REV.* 1569, 1578–81 (2010) (suggesting that the breadth of many federal statutes give prosecutors undue discretion in selecting cases); Stephen F. Smith, *Proportionality and Federalization*, 91 *VA. L. REV.* 879, 893–96, 930–31 (2005) (arguing that overfederalization leads to draconian federal sentences as compared to state sentences, and suggesting that judges narrowly interpret federal statutes to ensure proportionate punishment); Ronald F. Wright, *Federal or State?: Sorting as a Sentencing Choice*, *CRIM. JUST.*, Summer 2006, at 16, 20 (noting that whether a federal prosecutor files suit is “strictly a numbers game”).

20. Professor Daniel C. Richman, a Columbia Law School professor and former federal prosecutor, has noted that while the overlap between federal and state jurisdiction in criminal codes is substantial, there are unwritten boundaries between the two systems resulting from negotiations between state and federal prosecutors in each jurisdiction as to the kinds of cases that each should handle. Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 *CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS* 81, 91–93 (Charles M. Friel ed., 2000). That was also Professor Klein’s experience during her time as Trial Attorney

objective light on the subject is a study that compares state and federal charges for similar offenses to isolate what, if anything, is different about such cases.

We attempt to provide such empirical evidence. We conducted a study of just two offenses over the span of a few years. We selected the two federal offenses that we believe replicate most closely their state counterparts—arson and robbery.²¹ We compare those results to the same two offenses brought in state courts in New York over the same time period. Our results are most applicable to those federal offenses that replicate state offenses—those concurrent jurisdiction offenses where the federal interest in pursuing these charges is the same as the states' interest. However, we believe that these results give us a window into federal prosecutorial decision-making in general, at least for those classes of crimes that are not restricted to federal courts.

In Part II.A, we describe our study of federal cases from the database kept at the U.S. Sentencing Commission (USSC), and in Part II.B, we detail the New York data provided to us by the New York State Division of Criminal Justice Services, as well as the multistate statistics we obtained from the FBI's Uniform Crime Reports. In Part II.C, we compare the federal and state statutes to ensure that our premise—that the state and federal arson and robbery offenses are essentially identical—is accurate. We describe the additional multistate data that we use from the FBI's *Crime in the United States* series in Part II.D.

In Part III, we offer the results of our comparisons and some tentative conclusions about why federal prosecutors charge cases that could be brought in either state or federal courts. In Part III.A, we describe the process of combining our two data sets into a single computer program that allows us to compare and contrast variables common to both sets. In Part III.B, we are primarily looking at contingency tables and associated chi-

with the U.S. Department of Justice and in her role (with Chief Assistant Anthony Brown) as supervisor of a University of Texas internship program with the U.S. Attorney's Office for the Western District of Texas. Professor Lauren M. Ouziel argues that the legitimacy theory developed by social psychologists, criminologists, and criminal law theorists best explains forum selections. Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. (forthcoming 2014), available at <http://ssrn.com/abstract=2411594>. However, she offers no empirical evidence or study to support her conclusion.

21. See Appendices A and B, which reproduce the pertinent elements of the federal and state arson and robbery offenses. See also 18 U.S.C. § 844 (2012) (federal arson statute); *id.* § 1951 (federal robbery statute: "Interference with commerce by threats or extortion"); N.Y. PENAL LAW §§ 150.00–150.20 (McKinney 2010) (intentional and reckless arson of a building or motor vehicle); *id.* §§ 160.00–160.15 (robbery in first, second, and third degree).

squared or Fisher's exact test probabilities. However, we also engage in mean comparisons and t-tests for the age and sentence variables. In Part III.C, we use a logistic regression model to analyze our data. We find that the most significant determinants of whether a case would be brought in federal court were an investigation by a federal agency or joint task force,²² serious recidivism of the defendant (number of total prior arrests that were for violent offenses), the high value of the items stolen during a robbery, the value of the property destroyed by arson or explosion, the use of a weapon during the crime, cooperation with the government, involvement in conspiracy, cooperation with the government after arrest,²³ involvement of a minor victim, and age of the defendant. Murder and arrests for minor offenses were factors that might point toward state charging.²⁴ Neither U.S. citizenship, gender, nor black or white race was significantly related to federal versus state involvement. When recidivism was controlled for, the fact that a defendant was either black or white did not clearly make it more or less likely that the case was brought in federal court. We also find sentences to be significantly higher at the federal level for both offenses.

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

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

23. Specifically, 16.4% of the federal arson convictions and 28.6% of the federal robbery convictions we coded contained a U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 substantial assistance departure. *See infra* Appendix F.

24. We found this unsurprising, as there is no general federal murder offense. *See infra* note 94 and accompanying text.

II. THE DATA

A. *U.S. Sentencing Commission Data Set Methodology*

In May of 2011, we entered into a Cooperation Agreement with the USSC giving our team access to all of their data collected on all plea agreements entered into between federal criminal defendants and federal prosecutors, as well as sentences after jury and bench trials.²⁵ We did not pay for this data; the USSC is charged with assisting scholars and members of the public engaged in the empirical study of federal sentencing law.²⁶ We examined this data for two particular federal crimes subject to concurrent state and federal criminal jurisdiction—arson and robbery. Because 97.4% of all federal criminal convictions in 2010 were by guilty plea,²⁷ this gives us much information about nearly the entire universe of all defendants sentenced federally for robbery and arson for the years studied. The federal data also includes the sentences of those few arson and robbery defendants who were found guilty after trial, though less information about such individuals is accessible. The data below includes data the USSC regularly codes as part of its federal responsibilities under the statute authorizing its creation and shared with our team, plus much additional data we hand-coded from the documents described below.

The USSC staff codes quite a number of variables on each case it receives.²⁸ Because we had access to their Codebook, we also have the following additional information on each arson and robbery defendant:

25. Susan R. Klein & Judith W. Sheon, United States Sentencing Commission Cooperation Agreement for Research Project (May 4, 2011). Agreement on file with the Authors, the USSC, and the *Houston Law Review*.

26. The agreement between Professor Klein and Ms. Sheon, Staff Director, USSC, was entered pursuant to 28 U.S.C. § 995(a)(6)–(7), which grants authority to the Commission to enter into “cooperative agreements” and is consistent with the Commission’s public access policy published as Public Access to Sentencing Commission Documents and Data, 54 Fed. Reg. 51,279–82 (Dec. 13, 1989).

27. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2010 (2011) [hereinafter 2010 STATISTICS], available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2009 (2010), available at <http://www.albany.edu/sourcebook/pdf/t5222009.pdf>).

28. See U.S. SENTENCING COMM’N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 6–52 (2013), available at http://www.ussc.gov/Research_and_Statistics/Datafiles/Variable_Codebook_for_Individual_Offenders.pdf.

- Race
- Gender
- Citizenship/Nationality
- Age
- Conviction by guilty plea or trial
- Sentence imposed

1. *Federal Arson Data.* Each case in the federal arson data set includes data coded by the USSC, as well as data hand-coded by the Authors. The USSC archives documents from every federal sentencing in the United States, whether by conviction after trial or by plea.²⁹ These documents include the presentence report (PSR), the sentence, a judicial statement of reasons, and the written plea and cooperation agreements. The USSC uses these documents to construct a detailed file on each defendant. The USSC provided us with access to their data file and the underlying documents for all federal arson sentences between 2008–2010. There were a total of 359 such cases.

Our team traveled to the USSC's offices in Washington, D.C., during the winter of 2012.³⁰ While there, we reviewed all federal arson cases from 2008 to 2010 charged under 18 U.S.C. § 844 that resulted in a plea of guilty or a disposition of guilt from trial. We also reviewed cases in which the defendant may have been charged under Section 844 but plead to a different offense, and the Section 844 charges were later dismissed. We did not review Section 844 cases that did not result in an adjudication of guilt.

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

29. CHRISTINE KITCHENS, U.S. SENTENCING COMM'N, INTRODUCTION TO THE COLLECTION OF INDIVIDUAL OFFENDER DATA BY THE UNITED STATES SENTENCING COMMISSION 1 (2009), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/200905_Research_Notes.pdf (citing 28 U.S.C. § 994(w)(1)).

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

- Charging entity
- Jurisdiction(s) where criminal activity occurred
- Size of the city where crime was charged
- Whether a state, federal, or joint state/federal task force initiated the investigation
- Whether local authorities requested federal assistance
- Whether local authorities participated in the investigation
- The federal agency or agencies involved in the investigation
- Whether defendant was engaged in a conspiracy with one or more other people (charged or uncharged)
- Whether the defendant was associated with a larger criminal organization
- Whether the defendant engaged in conduct in more than one state
- Number of co-defendants
- Prior arrests, state convictions, federal convictions, violent offenses, and drug/alcohol related offenses (including uncharged evidence of substance abuse)
- Whether defendant is also being charged with related state crimes
- Weapons, perjury, or obstruction (present, charged, or enhanced)
- Uncharged and unenhanced evidence of witness tampering, including restraining orders
- Minor involved (defendant and/or victim)
- Death or injury of a person
- Uncharged or dismissed conduct by defendant (in PSR or plea agreement)
- Plea agreement: polygraph authorized or required
- Plea agreement: habeas corpus waiver
- Plea agreement: FOIA waiver
- Plea agreement: *Brady*, Jencks, and/or actual innocence waiver³¹

31. We will not in this Article discuss the waivers that the federal prosecutors included in their plea agreements, such as the waiver of *Brady* and *Giglio* rights, waiver of Jencks material, and the waiver of the right to appeal and engage in collateral attack of conviction or sentence. A very preliminary count of these waivers can be found in Susan

- Substantial assistance (if any)
- Arson: The type of structures threatened or burned
- Arson: Estimated value of property threatened (up to \$500k, \$500k–\$2mil, or \$2mil+)

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

2. *Federal Robbery Data.* At the USSC, we obtained data on all federal robbery cases from 2006 to 2010 charged under 18 U.S.C. § 1951 that resulted in a plea of guilty or a disposition of guilt from trial. We eliminated all Section 1951 cases that were charged “under color of official right” as these have no state analogue. We also reviewed cases in which the defendant may have been charged under Section 1951 but plead to a different offense and the Section 1951 charges were dismissed. We excluded federal bank robbery cases by excluding from our data set all sentences including guilty pleas to 18 U.S.C. § 2113, the federal bank robbery statute.

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

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

- [All the same variables listed above for arson in Part II.A.1]
- Under Color of Official Right [cases excluded]
- Type of Hobbs charge: 18 U.S.C. §§ 1951(b)(1) or (b)(2)
- Victim(s): business, individual, or government
- Objective(s) of robbery: money, weapons, drugs, or personal property
- Plea agreement: waive DNA testing
- Plea agreement: waive attorney’s fees

R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 579–82 (2013). A more extensive examination of these waivers will be revealed in Susan R. Klein, Aleza Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis* (forthcoming 2014).

- Robbery: estimated value of property stolen (up to \$10k, \$10k–\$100k, \$100k–\$500k, or \$500k+)

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

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

We obtained the New York data by making a data request to the New York State Division for Criminal Justice Services (DCJS).

The Computerized Criminal History (CCH) system maintained by the Division of Criminal Justice Services is the central repository for criminal history information in New York State. CCH contains the criminal history records of all persons arrested and prosecuted since 1970. A person's criminal history consists of a record of all fingerprintable arrests for the individual, the charges reported with the arrests, the prosecutorial and judicial actions involved in the disposing of the charges on which the person is arraigned, and information related to sentencing if convicted.³²

New York State collects and retains this data for its own statistical reporting and in order to make reports to the Federal Bureau of Investigation's Uniform Crime Reporting Program.³³

After qualifying as a bona fide research organization,³⁴ we paid \$2,500 for costs in collecting and providing the specific data set requested.³⁵ DCJS officials gave us five password protected Stata files for the robbery cases and five more for the arson cases, containing the "All Charge" database files. These files, the most comprehensive kept, contain 248 variables about each case, including criminal histories, sentences, and much more. The files

32. *Adult Arrests by County Data Overview*, OPENNY, <https://data.ny.gov/api/assets/D70C1F07-7FF1-4B2F-8E9F-E753FB754D43> (last visited Apr. 14, 2014).

33. *Crime Reporting*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., <http://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/index.htm> (last visited Apr. 14, 2014).

34. See N.Y. EXEC. LAW § 837(4)(e) (McKinney 2013) (permitting the DCJS to release criminal history data files to bona fide researchers and research organizations for legitimate research purposes that support the expansion of criminal justice knowledge and inform public policy).

35. Letter from Susan Klein, Principal Investigator, Univ. of Tex., and Stefanie Lindquist, Co-Investigator, Univ. of Tex., to Theresa Salo, Deputy Comm'r, DCJS. Appendix B to this letter provides the computerized criminal justice fee schedule for the "All Charge" files as \$2,500, broken down into \$500 for processing and \$2,000 for the programming fee. *Id.* app. B. This letter and its appendices are on file with the Authors, the DCJS, and the *Houston Law Review*.

have been de-identified by removing all identifying variables that might reveal a suspect's name and replacing the New York State and event identifiers with a pseudo identifier.

DCJS provided us with the CCH history for all arsons from 2008–2010 arrested or charged under N.Y. Penal Law Sections 150.01, 150.05, 150.10, 150.15, and 150.20. They provided the CCH history for all robberies from 2006–2010 arrested or charged under N.Y. Penal Law Sections 160.05, 160.10, and 160.15. There were 521 arson cases and 15,710 robbery cases.

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

- Charging entity
- Jurisdiction(s) where criminal activity occurred
- What agency arrested the defendant
- Prior criminal history of defendant
- Weapon
- Minor victim
- Uncharged or dismissed conduct by defendant
- Race of defendant
- Gender of defendant
- Country of birth of defendant
- Defendant's birth rate
- Resolution of crime charged by guilty plea, verdict, dismissal, other
- Sentence imposed
- Date of release on parole or probation

C. Comparison of Federal and New York Statutes

1. *Arson.* The federal arson statute, enacted under Congress's Commerce Clause authority, provides that "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire . . . any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years."³⁶ Other sections of the code prohibit crimes related to interstate transportation of explosive devices, using the mail to make bomb threats, the destruction of federal buildings, carrying explosives through an airport, and using fire

36. 18 U.S.C. § 844(i) (2012).

or explosives to commit another federal felony.³⁷ However, we did not code for such more specific, non-overlapping federal offenses in our study but instead limited our review to the general arson prohibition. “The statute’s history and language indicate that Congress intended its reach to be broad and to overlap state arson laws.”³⁸

The New York State statutes cover the core arson offenses, penalizing arson in five degrees.³⁹ The top three require “intentionally starting a fire or causing an explosion” and causing “damage[] to a building or motor vehicle,” the fourth drops the *mens rea* to “recklessly,” and the fifth expands the scope to intentional damage of any “property of another.”⁴⁰ The term “building” is broadly defined, incorporating its “ordinary meaning.”⁴¹

Thus, the statutes are sufficiently similar such that any conduct covered by the federal statute could be charged pursuant to state law, and almost any offense that could be charged by a New York Assistant District Attorney could be brought instead in one of the four federal district courts of New York. The only notable difference for the purpose of our study is that the federal statute requires that the structure destroyed be “used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.”⁴² During the heyday of the failed Commerce Clause revolution in the mid-1990s, the Supreme Court interpreted the federal arson statute to not reach the arson

37. *Id.* § 844(d) (transportation of explosives); *id.* § 844(e) (bomb threat through mail); *id.* § 844(f)(1) (destruction of federal building); *id.* § 844(g)(1) (possession of explosive through airport); *id.* § 844(h) (use of explosive to commit any felony).

38. *United States v. Beldin*, 737 F.2d 450, 455 (5th Cir. 1984) (“Several circuits . . . have interpreted the 1982 amendment to § 844(i) embodied in the Anti-Arson Act—which changed the statute to read ‘by means of fire or an explosive’—to clarify Congress’ intention that the provision be broadly read.”); *see also* *Russell v. United States*, 471 U.S. 858, 859–60 (1985) (inferring Congress’s intent to make arson of rental property a federal crime).

39. *See infra* Appendix B (citing N.Y. PENAL LAW §§ 150.01–150.20 (McKinney 2010)).

40. N.Y. PENAL LAW §§ 150.01–150.20; *infra* Appendix B. The damage element is satisfied by minimal damage. *See People v. McDonald*, 496 N.E.2d 844, 850 (N.Y. 1986) (“[P]roof of damage short of burning (including proof of ‘charring’) is sufficient to establish this element of the crime.”).

41. *See* N.Y. PENAL LAW § 150.00(1) (“[A]ny structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein.”); *People v. Fox*, 771 N.Y.S.2d 156, 158 (App. Div. 2004) (holding that a homeless person’s shanty fell within the “ordinary meaning” of building); *see also* *People v. Mincione*, 489 N.E.2d 1285, 1285 (N.Y. 1985) (ruling that a van used by a construction company is a building); *People v. Wandell*, 728 N.Y.S.2d 578, 579 (App. Div. 2001) (deciding that a store’s storage trailers constituted buildings).

42. 18 U.S.C. § 844(i).

of an owner-occupied private residence, despite the fact that this home was connected to a gas main.⁴³ This limitation of federal arson does not include business property that is rented or unoccupied; it is fair game for federal prosecutors.⁴⁴ The New York State analogue would clearly cover the arson of a private residence, whether or not occupied.⁴⁵

2. *Robbery.* The federal robbery statute, also enacted under Congress's Commerce Clause authority, provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce . . . by robbery . . . shall be fined under this title or imprisoned not more than twenty years, or both."⁴⁶ Robbery is defined as "the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury."⁴⁷ This federal statute also prohibits "extortion" and taking "under color of official right,"⁴⁸ but our study did not review cases that were charged under either of those provisions. Moreover, Congress has codified different types of robbery in scattered sections of the U.S. Code.⁴⁹ None of these more particular federal statutes were included in our study, as these crimes do not necessarily correspond with or even have state analogues.

In New York State, robbery is defined as "forcible stealing."⁵⁰ Thus, there are two elements: the commission of larceny and the

43. See *Jones v. United States*, 529 U.S. 848, 850–51, 855 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 551 (1995)) (avoiding Commerce Clause challenge to federal arson statute by construing the statute more narrowly).

44. See, e.g., *United States v. Craft*, 484 F.3d 922, 927–28 (7th Cir. 2007) (holding unoccupied residential rental properties still remained in the "stream of commerce" and under the protection of 18 U.S.C. § 844(i)); *United States v. Logan*, 419 F.3d 172, 179–81 (2d Cir. 2005) (upholding conviction regarding arson of rented fraternity house).

45. N.Y. PENAL LAW § 150.00.

46. 18 U.S.C. § 1951(a); see *infra* Appendix A.

47. 18 U.S.C. § 1951(b)(1).

48. See *id.* § 1951(a) (prohibiting extortion). Section 1951(b)(2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). The first category of extortion includes obtaining property by force, violence, or fear. See, e.g., *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 400 n.4 (2003); *United States v. Edwards*, 303 F.3d 606, 635 (5th Cir. 2002). To establish extortion under color of official right, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).

49. See 18 U.S.C. § 2113 (bank robbery); see also 10 U.S.C. § 922 art. 122 (robbery under military jurisdiction); 18 U.S.C. § 2112 (robbery of personal property of United States); *id.* § 2119 (carjacking).

50. N.Y. PENAL LAW § 160.00; see *infra* Appendix B.

use, or threatened immediate use, of physical force to do so.⁵¹ New York State divides robbery into three degrees. The basic offense, robbery in the third degree, is described above.⁵² The addition of an aggravating factor, either causing physical injury or displaying what appears to be a firearm, elevates the crime to robbery in the second degree.⁵³ Additional aggravating factors—that the physical injury be serious, that the defendant is armed with a deadly weapon, or that the defendant uses or threatens the immediate use of a dangerous instrument—elevate the crime to robbery in the first degree.⁵⁴

The central distinction between the federal and state statutes is the interstate commerce element contained in the federal statute; however, the distinction is slight. The Hobbs Act prohibits robberies that affect interstate commerce “in any way or degree,”⁵⁵ so the required showing of an effect on interstate commerce is *de minimis*.⁵⁶ “The jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect on commerce will suffice.”⁵⁷

D. Multistate Data from the Uniform Crime Reports

The Uniform Crime Reports (UCR) program began in 1930 and has become a source of crime information for law

51. See N.Y. PENAL LAW § 160.00; *People v. Banks*, 389 N.Y.S.2d 664, 666 (App. Div. 1976); *People v. Fuller*, 354 N.Y.S.2d 586, 588 (Sup. Ct. 1974).

52. N.Y. PENAL LAW § 160.05; see *infra* Appendix B.

53. N.Y. PENAL LAW § 160.10; see *infra* Appendix B.

54. N.Y. PENAL LAW § 160.15; see *infra* Appendix B.

55. 18 U.S.C. § 1951(a) (2012).

56. See, e.g., *United States v. Culbert*, 435 U.S. 371, 373 (1978) (noting the Hobbs Act is not limited to persons engaged in racketeering); *United States v. McCarter*, 406 F.3d 460, 462 (7th Cir. 2005) (holding that attempted robbery of woman using her ATM card, which would have sent signals interstate, was within the purview of the Hobbs Act); *United States v. Rodriguez*, 360 F.3d 949, 952–53, 955–56 (9th Cir. 2004) (reaffirming only *de minimis* effect on interstate commerce is required to qualify under the Hobbs Act in a case of attempted robbery of an undercover ATF officer posing as a drug dealer). The Supreme Court has held that the Hobbs Act “speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.” *Stirone v. United States*, 361 U.S. 212, 215 (1960).

57. *United States v. Angelilli*, 660 F.2d 23, 35 (2d Cir. 1981) (citation omitted). Some courts claim they might limit federal jurisdiction by including only robberies that deplete the assets of a business rather than an individual, but such an interpretation is unsupported by the language of the statute and is difficult to maintain as a matter of logic and common sense. Compare *United States v. Wilkerson*, 361 F.3d 717, 728–29 (2d Cir. 2004) (recognizing a distinction for the purposes of Hobbs Act jurisdiction between the extortion of an individual and the extortion of a business), with *United States v. McFarland*, 311 F.3d 376, 377, 397–98 (5th Cir. 2002) (upholding Hobbs conviction by equally divided en banc court), and *ABRAMS, BEALE & KLEIN*, *supra* note 4, at 247–51 (collecting cases).

enforcement, policymakers, scholars, and the media.⁵⁸ The Uniform Crime Reports are official data on crime in the United States published by the Federal Bureau of Investigation (FBI).⁵⁹ UCR is a “nationwide, cooperative statistical effort of more than 18,000 city, university and college, county, state, tribal and federal law enforcement agencies voluntarily reporting data on crimes brought to their attention.”⁶⁰ The FBI does not collect the data, but rather the individual states compile the data and provide it to the FBI.⁶¹ Not all states require local subdivisions to report data, making some crime statistics underreported in the UCR.⁶² Moreover, it is worth noting that the UCR itself reflects crime reports from police, not later adjudication.⁶³

Crime statistics are published annually by the FBI in the *Crime in the United States* series based on UCR data.⁶⁴ While we realize that this data will not be nearly as accurate as our other two data sets, it contains the only state data we are aware of for comparing the value and identity of items burned and stolen in New York State.

III. THE STUDY

A. Data Comparisons

After organizing the federal and New York State data, the next step in our study was to actually compare the two data sets. Our primary concern was identifying those variables that were not only common to both sets but also valuable in determining whether a particular crime was prosecuted at the federal or state level. We identified the following variables in the two data sets as potentially significant: involvement of a minor victim, gender of

58. CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, SUMMARY OF THE UNIFORM CRIME REPORTING (UCR) PROGRAM 1 (2012), *available at* <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/resource-pages/about-ucr/aboutucrmain.pdf>.

59. *Uniform Crime Reports*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr> (last visited Apr. 14, 2014).

60. CRIMINAL JUSTICE INFO. SERVS. DIV., *supra* note 58, at 1.

61. *Id.* at 1–2.

62. *See Frequently Asked Questions*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov/faq.cfm> (last visited Apr. 14, 2014) (noting that “not all law enforcement agencies provide data for complete reporting periods”); *UCR Frequently Asked Questions*, FED. BUREAU OF INVESTIGATION, http://www2.fbi.gov/ucr/ucr_general.html (last visited Apr. 14, 2014) (stating that UCR participation is voluntary).

63. CRIMINAL JUSTICE INFO. SERVS. DIV., FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING (UCR) SUMMARY REPORTING: FREQUENTLY ASKED QUESTIONS (FAQS) 1 (2009), *available at* http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr_faqs08.pdf.

64. *Uniform Crime Reports*, *supra* note 59.

defendant, race of defendant, age of defendant, use of a weapon in the crime, prior arrests of defendant, prior violent arrests of defendant, prior drug and alcohol arrests of defendant, and sentence imposed and served.

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

Variable Name How Coded

Weapon

1 Weapon Used

2 Weapon Not Used

3 Unknown

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

Variable Name How Coded

Disp_Firearm

0 No Weapons Charge

2 Use/Display/Poss/Sale Firearm

3 Use/Display Deadly Weapon

4 Use/Display Dangerous Instrument/Deadly Weapon

5 Firearm Licensing Offense

6 Display What Appears to be a Firearm

8 Underlying Firearm Charge

9 Underlying Weapon Charge

Because the New York State data contained a more detailed coding structure, we simply recoded the New York State data using the federal codes. All New York State cases that were coded using the numbers two to nine were simply recoded as the number one. All New York State cases that were coded as zero were recoded using the number two. A similar process was utilized to recode the other variables common to both data sets.

For two of our independent variables, conspiracy and death of a person, we looked to the New York State statutory criminal charges filed at the arrest of a defendant. When any of the charges reflected involvement in a criminal conspiracy or that an individual died in conjunction with the robbery or arson, we included these cases as involving conspiracy or death of a person

for purposes of our analysis. We believe this approach is consistent with the coding methodologies employed for federal cases using USSC files.

Once the variables were prepared, the final steps were to compare the data and then use a logistic regression model to examine the effect that various variables have on the probability of an arson or robbery case being pursued in federal or state court.

B. Basic Data Analysis

In this Subpart we compare the data using a computer program called “Stata.” Stata is a “general-purpose statistical analysis package created and maintained by StataCorp LP. Its capabilities include a broad range of statistical analyses, plus data management, graphics, simulations, and custom programming.”⁶⁵ We used Stata to perform a basic analysis of our data. Specifically, we used the tabulate function to compare the count and percentage of federal versus state cases that fell into each category of the independent variable in question.⁶⁶ We also calculated a Pearson’s chi-squared or Fisher’s exact test statistic for each table. For the variables that were continuous (rather than categorical), we computed the means and standard deviation as well as a t-test statistic.

The test statistic for each table indicates the likelihood that there is no difference between the federal and New York State data for that independent variable. A commonly used threshold for significance is 0.05 (or 5%).⁶⁷ Adopting this threshold, the difference between state and federal is considered statistically significant if the probability associated with the test statistic is less than or equal to 0.05. A more stringent threshold of 0.01 (or 1%) corresponds to a higher degree of statistical significance.

A short interpretive summary of the findings regarding each independent variable is presented below each table. Here we also note where we suspect that confounding variables may explain the observed relationship. We return to tease out these effects using a more sophisticated logistic regression in Part III.C.

65. *Knowledge Base*, UNIV. INFO. TECH. SERVS., IND. UNIV., <http://kb.iu.edu/data/afly.html> (last visited Apr. 14, 2014).

66. We used the methods outlined in SOPHIA RABE-HESKETH & BRIAN S. EVERITT, A HANDBOOK OF STATISTICAL ANALYSES USING STATA 51–52 (4th ed. 2007).

67. See, e.g., ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, EMPIRICAL METHODS IN LAW 233–34 (2010).

1. *For Arson.*a. *Involvement of a Minor Victim***Table 1**

	Minor Victim	No Minor Victim
N.Y. State case	1 (0.2%)	508 (99.8%)
Federal case	23 (7.6%)	278 (92.4%)

Fisher's exact test $p=0.000$

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

b. *Gender of Defendant***Table 2**

	Male Defendant	Female Defendant
N.Y. State case	430 (86.0%)	70 (14.0%)
Federal case	331 (92.2%)	28 (7.8%)

Pearson chi-squared = 7.95, $\text{Pr}=0.005$

The gender of a defendant is related to whether an arson case is brought under New York State versus federal statutes to a high degree of statistical significance. From our observed data, it appears that cases against female defendants are more likely to be brought under state versus federal statutes. The converse is observed for male defendants.

The observed gender differences, however, may be a function of the different gender composition of New York State and the United States as a whole. According to the 2010 Census, the male-to-female sex ratio was 96.7 for the United States overall and 93.8 for New York State.⁶⁸

68. LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010, at 7 tbl.3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

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

c. Race of Defendant

Table 3

	White Defendant	Black Defendant	Hispanic Defendant	Other Defendant
N.Y. State case	227 (44.7%)	150 (29.5%)	118 (23.2%)	13 (2.6%)
Federal case	245 (68.3%)	69 (19.2%)	30 (8.4%)	15 (4.2%)

Pearson chi-squared = 59.26, Pr=0.000

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

The differences observed here, however, may be a function of the different racial composition of New York State and the United States as a whole. According to the 2010 Census, 15.9% of New York residents were "Black or African American alone" and 65.7% were "White alone."⁶⁹ This compares to 12.6% and 72.4% for the United States overall.

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

Of all federal arson cases we coded, 19.2% involved black defendants. Of all the New York state arson cases we reviewed, 29.5% involved black defendants.

69. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 25 tbl.19 (2012), *available at* <http://www.census.gov/compendia/statab/2012/tables/12s0019.pdf>.

*d. Age of Defendant***Table 4**

	Mean Age (Strd. Dev.)
N.Y. State case ⁷⁰	33.8 years (12.8)
Federal case	35.6 years (11.7)

Two-sided t-test $p=0.035$

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

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

*e. Use of a Weapon in the Crime***Table 5**

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

Pearson's chi-squared = 54.43, $\text{Pr} = 0.000$

Whether a weapon was used in conjunction with the arson is significantly related to whether a case is brought under New

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

York State versus federal statutes. Our observed data suggest that when a weapon was used, the case is more likely to be brought under federal arson statutes.

f. Prior Arrests of Defendant

Table 6

	Zero Prior Arrests	1 to 5 Prior Arrests	6 to 10 Prior Arrests	11 or more Prior Arrests
N.Y. State case	141 (28.3%)	179 (35.9%)	73 (14.7%)	105 (21.1%)
Federal case	106 (30.4%)	173 (49.6%)	47 (13.5%)	23 (6.6%)

Pearson chi-squared = 38.20, Pr=0.000

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

g. Prior Violent Arrests of Defendant

Table 7

	Zero Prior Violent Arrests	1 to 5 Prior Violent Arrests	6 or more Prior Violent Arrests ⁷¹
N.Y. State case	327 (64.2%)	169 (33.2%)	13 (2.6%)
Federal case	176 (49.4%)	154 (43.3%)	26 (7.3%)

Pearson chi-squared = 24.05, Pr=0.000

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

71. Given that we observed only a very small number of cases in which the defendant had eleven or more prior violent arrests or prior drug and alcohol arrests, the six to ten and eleven or more categories have been collapsed for the analysis here.

*h. Prior Drug and Alcohol Arrests of Defendant***Table 8**

	Zero Prior Drug & Alcohol Arrests	1 to 5 Prior Drug & Alcohol Arrests	6 or More Prior Drug & Alcohol Arrests
N.Y. State case ⁷²	280 (55.2%)	184 (36.3%)	43 (8.5%)
Federal case	101 (47.0%)	89 (41.4%)	25 (11.6%)

Pearson chi-squared = 4.57, $\text{Pr}=0.102$

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

*i. Sentence Imposed and Served***Table 9**

	Mean Sentence (Strd. Dev.)
N.Y. State case	41.1 months (62.9)
Federal case	84.2 months (109.5)

Two-sided t-test $p=0.000$

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

While we strongly believe that this relationship is likely true, we should note that there is inherent difficulty in comparing federal and New York State sentences. Significantly, in the federal criminal system, parole is not available under any

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

circumstances.⁷³ Given that parole is widely granted within state criminal systems, a comparison of sentences imposed under the two systems is not an accurate measure.

In an effort to ameliorate this problem, we constructed a variable for the New York State arson cases that measures the duration between the date of disposition and the date of parole or probation (whichever was earlier).⁷⁴ The mean sentence served was 24.6 months (with a standard deviation of 13.5).

j. Value of Property Destroyed

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

Table 10

	Unknow n	Up to \$500,000	\$500,000– \$2 million	More than \$2 million
Federal case	62 (17.3%)	96 (26.7%)	94 (26.2%)	107 (29.8%)

The New York State data we obtained did not directly capture this information. We investigated the possibility of imputing the value of property destroyed from the statutes under which New York defendants had been arrested. Unfortunately, the relevant statutory language did not contain sufficient information regarding the value of the property destroyed or threatened to allow this strategy to work.

We would note that data collected by the FBI suggest that average dollar value of damage in arson cases nationally was about \$16,000 in 2008.⁷⁵ The fact that we observed a large number of federal arson cases in which the value of property threatened or destroyed exceeded \$500,000 suggests that higher dollar value cases are more likely to be brought under federal, as opposed to New York State, statutes.

73. Sentencing Reform Act of 1984, 18 U.S.C. § 3582(c) (2012) (abolishing parole). Federal felons can earn, at most, 15% for good time. *See id.* § 3624(b).

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

75. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: *CRIME IN THE UNITED STATES, 2008*, Arson tbl.2, available at http://www2.fbi.gov/ucr/cius2008/offenses/expanded_information/data/documents/08arsontbl2.xls.

*k. U.S. Citizenship of Defendant***Table 11**

	Defendant a U.S. Citizen	Defendant not a U.S. Citizen
N.Y. State case ⁷⁶	365 (89.0%)	45 (11.0%)
Federal case	337 (93.9%)	22 (6.1%)

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

The U.S. citizenship of a defendant is significantly related to whether an arson case is brought under New York State versus federal statutes. From our observed data, it appears that arson cases involving non-U.S. citizens are more likely to be brought in New York State, as opposed to federal, court.

*l. Conspiracy***Table 12**

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

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

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

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

m. Death of a Person

Table 13

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

Fisher's exact test $p=0.106$

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

2. For Robbery

a. Involvement of a Minor Victim

Table 14

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

Fisher's exact test $p = 0.000$

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

*b. Gender of Defendant***Table 15**

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

Fisher's exact test $p = 0.484$

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

*c. Race of Defendant***Table 16**

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

Fisher's exact test $p = 0.000$

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

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

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

d. *Age of Defendant*

Table 17

	Mean Age (Strd. Dev.)
N.Y. State case	27.4 years (9.6)
Federal case	31.3 years (9.0)

Two-sided t-test $p = 0.000$

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

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

e. *Use of a Weapon in the Crime*

Table 18

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

Fisher's exact test $p = 0.000$

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

*f. Prior Arrests of Defendant***Table 19**

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

Fisher's exact test $p = 0.000$

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

*g. Prior Violent Arrests of Defendant***Table 20**

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

Fisher's exact test $p = 0.000$

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

h. Prior Drug and Alcohol Arrests of Defendant

Table 21

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

Fisher's exact test $p = 0.000$

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

i. Sentence Imposed and Served

Table 22

	Mean Sentence (Strd. Dev.)
N.Y. State case	44.6 months (68.4)
Federal case	160.2 months (148.1)

Two-sided t-test $p = 0.000$

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

As we indicated in Part III.B.1.i, while we strongly believe that this relationship is likely true, we should note that there is inherent difficulty in comparing federal and New York State sentences. Significantly, in the federal criminal system parole is not available under any circumstances. Given that parole is widely granted within state criminal systems, a comparison of sentences imposed under the two systems is necessarily inaccurate.

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

j. Value of Property Stolen

We collected information on the value of property stolen in the course of federal robbery cases. Our observations are summarized in the following table.

Table 23

	Unknown	Less than \$10,000	\$10,000 to up to \$100K	\$100K to up to \$500K	More than \$500K
Federal case	18 (6.7%)	107 (40.1%)	60 (22.5%)	47 (17.6%)	35 (13.1%)

The New York State data we obtained did not directly capture this information. We investigated the possibility of imputing the value of property stolen from the statutes under which New York defendants had been arrested. Unfortunately, the relevant statutory language did not contain sufficient information on the value of the property robbed to allow this strategy to work.

We would note that data collected by the FBI suggest that average dollar value of property stolen in robbery cases nationally was about \$1,315 per offense in 2008.⁷⁷ The fact that we observed a large number of federal robbery cases in which the value of property stolen exceeded \$10,000 suggests that higher dollar value cases are more likely to be brought under federal, as opposed to New York State, statutes.

77. FED. BUREAU OF INVESTIGATION, *supra* note 75, at tbl.23.

k. *U.S. Citizenship of Defendant*

Table 24

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

Fisher's exact test $p = 0.051$

The U.S. citizenship of the defendant is significantly related to whether a robbery case is brought under New York State versus federal statutes. Our observed data suggest that robbery cases involving non-U.S. citizen defendants are more likely to be brought under federal statutes.

l. *Conspiracy*

Table 25

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

Fisher's exact test $p = 0.000$

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

*m. Death of a Person***Table 26**

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

Fisher's exact test $p = 0.001$

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

C. Logistic Regression

When seeking to model the effect of a set of independent variables on a binary outcome (coded as zero for nonoccurrence and one for occurrence), the assumptions underlying the standard regression model ordinary least squares are necessarily violated.⁷⁸ An alternative statistical model known as logistic regression or logit has been developed to address these issues and allow a researcher to estimate the effect of independent variables on a binary dependent variable.⁷⁹ Logistic regression is estimated using maximum likelihood methods, which are appropriate for large samples such as ours.⁸⁰ As such, we use a logistic regression model to examine the effect of our independent variables of interest on the probability that an arson or robbery case is pursued under federal or state statutes.⁸¹

The tables below present the estimated logistic regression models for our arson and robbery data. The estimated regression coefficients, robust standard errors,⁸² and significance of the

78. See J. SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES § 3.1.1, at 38–39 (1997).

79. *Id.* § 3.2, at 40–47 (mathematically deriving the logistic regression model).

80. *Id.* § 3.5.1, at 53–54 (suggesting that a sample size of at least 500 is generally sufficient for maximum likelihood techniques).

81. We used the methods outlined in J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (2d ed. 2006), to implement our analysis.

82. We use cluster-corrected robust standard errors assuming clustering at the U.S.

coefficients are presented along with the associated percent change in odds for each independent variable. The percent change in odds indicates how much more (or less, for negative values) likely a case is to be brought under federal as opposed to New York State statutes for a unit change in that independent variable.

1. *Arson*

Table 27

Independent Variable	Estimated Coefficient	Robust Strd. Error	Significance	% Change in Odds
Minor Victim	2.09	0.66	0.00	711
Male Defendant	0.50	0.36	0.16	65
White Defendant	-0.45	0.87	0.61	-36
Black Defendant	-0.88	0.88	0.32	-58
Hispanic Defendant	-1.72	0.81	0.03	-82
Age of Defendant	0.03	0.01	0.00	3
Use of Weapon	1.55	0.51	0.00	369
Few Prior Arrests (1–5)	-1.12	0.35	0.00	-67
Some Prior Arrests (6–10)	-2.08	0.55	0.00	-88
Many Prior Arrests (11+)	-4.86	0.78	0.00	-99
Few Violent Prior Arrests (1–5)	1.67	0.34	0.00	433
Some Violent Prior Arrests (6–10)	3.72	1.10	0.00	4028

Attorney's Office level. Our findings do not change substantively if we relax this assumption.

Independent Variable	Estimated Coefficient	Robust Strd. Error	Significance	% Change in Odds
Prior Drug & Alcohol Arrests	0.46	0.26	0.07	59
Defendant a U.S. Citizen	0.16	0.69	0.81	18
Conspiracy	3.10	0.56	0.00	2124
Death of a Person	-1.74	0.91	0.06	-83

a. Involvement of a Minor Victim

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

b. Gender of Defendant

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

c. Race of Defendant

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

d. Age of Defendant

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

e. Use of a Weapon in the Crime

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

f. Prior Arrests of Defendant

Our logistic regression confirms what we found in Part III.B.1.f, that prior arrests of a defendant are significantly related to whether an arson case is brought under New York State versus federal statutes. A defendant with one to five prior arrests is 67% more likely to be charged under New York State rather than federal statutes, holding all else constant. A defendant with six to ten prior arrests is 88% more likely to be charged under New York State rather than federal statutes, holding all else constant. A defendant with eleven or more prior arrests is 99% more likely to be charged under New York State rather than federal statutes, holding all else constant.

g. Prior Violent Arrests of Defendant

The logistic regression confirms our finding in Part III.B.1.g that prior violent arrests of the defendant are significantly related to whether an arson case is pursued under federal or New York State statutes. Where a defendant had one to five prior violent arrests, an arson case was 433% more likely to be brought under federal rather than New York State statutes. Where a defendant had six to ten prior violent arrests, an arson case was more than 1,000% more likely to be brought under federal rather than New York State statutes.⁸³

83. Note that the category “Many Violent Prior Arrests (11+)” was dropped from the logistic regression model because all of the arson cases that fell into this category were federal cases. Where our logistic regression model produced estimated coefficients large enough to produce a percent change in odds in excess of 1000%, we are skeptical that the true magnitude of the effect is this great. Hence, in discussing the findings of our logistic

h. Prior Drug and Alcohol Arrests of Defendant

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

i. U.S. Citizenship of Defendant

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

j. Conspiracy

The logistic regression confirms our finding in Part III.B.1.l that involvement in a conspiracy is significantly related to an arson case being prosecuted under federal rather than New York State statutes. An arson defendant who was involved in a conspiracy is more than 1,000% more likely to be charged under federal versus state statutes, holding all else constant.

k. Death of a Person

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

regression, we describe such independent variables as making an arson or robbery case more than 1000% more likely to be brought under federal as opposed to New York State statutes.

2. *Robbery***Table 28**

Independent Variable	Estimated Coefficient	Robust Strd. Error	Significance	% Change in Odds
Minor Victim	2.30	0.75	0.00	895
Male Defendant	-0.37	0.31	0.23	-31
White Defendant	-1.92	1.11	0.09	-85
Black Defendant	-2.04	1.14	0.07	-87
Hispanic Defendant	-2.84	1.13	0.01	-94
Age of Defendant	0.11	0.02	0.00	11
Use of Weapon	2.67	0.25	0.00	1345
Prior Arrests	-1.40	0.22	0.00	-75
Prior Violent Arrests	1.11	0.28	0.00	203
Few Prior Drug & Alcohol Arrests (1–5)	1.45	0.29	0.00	326
Some Prior Drug & Alcohol Arrests (6–10)	1.48	0.46	0.00	340
Many Prior Drug & Alcohol Arrests (11+)	1.51	1.08	0.16	353
Defendant a U.S. Citizen	-0.27	0.46	0.56	-23
Conspiracy	6.01	0.47	0.00	40571
Death of a Person	-0.83	0.64	0.20	-56

a. Involvement of a Minor Victim

Our logistic regression confirms what we found in Part III.B.2.a, that when a robbery involves a minor victim, the case is significantly more likely to be brought under federal rather than New York State statutes. A robbery case involving a minor victim is 895% more likely to be charged under federal versus New York State statutes, holding all other variables constant.

b. Gender of Defendant

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

c. Race of Defendant

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

d. Age of Defendant

The logistic regression confirms our finding in Part III.B.2.d that older defendants are significantly more likely to be charged under federal rather than New York State robbery statutes. For each additional year of age, a robbery defendant is 11% more likely to be pursued under federal versus New York State statutes holding all else constant.

e. Use of a Weapon in the Crime

The logistic regression confirms our finding in Part III.B.2.e that a defendant who uses a weapon in the commission of a

robbery is significantly more likely to be pursued under federal rather than New York State statutes. Holding all of our other independent variables constant, a defendant who uses a weapon in conjunction with a robbery is more than 1,000% more likely to be charged under federal versus New York State statutes.

f. Prior Arrests of Defendant

Our logistic regression confirms what we found in Part III.B.2.f, that prior arrests of a defendant are significantly related to whether a robbery case is brought under New York State versus federal statutes. Holding all else constant, a defendant with one to five prior arrests is 75% more likely to be charged under New York State rather than federal robbery statutes than a defendant with zero prior arrests.

g. Prior Violent Arrests of Defendant

The logistic regression confirms our finding in Part III.B.2.g that prior violent arrests of the defendant are significantly related to whether a robbery case is pursued under federal or New York State statutes. A defendant with one to five prior violent arrests is 203% more likely to be prosecuted under federal rather than New York State statutes than a defendant with no prior violent arrests, holding all else constant.

h. Prior Drug and Alcohol Arrests of Defendant

The logistic regression tends to confirm our finding in Part III.B.2.h that prior drug and alcohol arrests of the defendant are significantly related to whether a robbery case is prosecuted under federal or New York State statutes. Holding all else constant, when a defendant had one to five prior drug and alcohol arrests, a robbery case was 326% more likely to be charged under federal rather than New York State statutes. Where a defendant had six to ten prior drug and alcohol arrests, a robbery case was 340% more likely to be charged under federal rather than New York State statutes, holding all other variables constant. The fact that a robbery defendant had eleven or more prior drug and alcohol arrests was not significantly related to whether the case was pursued under federal versus New York State statutes.

i. U.S. Citizenship of Defendant

Our logistic regression contradicts our finding in Part III.B.2.k that the U.S. citizenship of a defendant is significantly related to whether a robbery case is pursued at the federal or New York State level. Based on the regression model,

we conclude that the U.S. citizenship of a defendant is not significantly related to whether a robbery case is brought under federal versus New York State statutes. This suggests that the relationship we observed in Part III.B.2.k was due to one or more confounding relationships.

j. Conspiracy

The logistic regression confirms our finding in Part III.B.2.l that involvement in a conspiracy is significantly related to a robbery case being prosecuted under federal rather than New York State statutes. A robbery defendant who was involved in a conspiracy is more than 1,000% more likely to be charged under federal versus New York State statutes, holding all else constant.

k. Death of a Person

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

IV. CONCLUSION

Conventional wisdom by all scholars and other participants in the criminal justice system is that it is much worse for a criminal defendant to be hauled into federal court. Suspects should be fearful of the federal government because federal sentences are much longer, federal prosecutors are very skilled, and the procedures employed in federal court are strict. Thus, a suspect is more likely to plead guilty or be found guilty by a judge or jury in the federal than the state system. Available evidence supports this. For example, 97.4% of federal criminal convictions in 2010 were by guilty plea, leaving less than 3% to proceed to trial.⁸⁴ There is, of course, a small range across the federal code—plea rates are extremely high for immigration, drug cases, and violent offenses and slightly lower for fraud and tax cases. For those defendants convicted in federal court in 2012, 95.8% of arsonists and 96.7% of robbers pled guilty.⁸⁵ If we instead

84. 2010 STATISTICS, *supra* note 27, tbl.5.22.2010.

85. U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11, available at http://www.ussc.gov/Research_and_Statistics/Annual_

consider all cases indicted federally in 2010 (including all suspects charged, not just the ones convicted), the figure is that 89% of defendants charged pled guilty, and 8.7% had their cases either dismissed by the judge or acquitted at trial by the judge or jury, with the very small remainder (2.3%) convicted after trial.⁸⁶

The guilty plea rate for convicted defendants is lower for state felonies. By one estimate in 2006, approximately 94% of all state criminal felony convictions nationwide were by guilty plea.⁸⁷ Again, we get very different numbers if look at all persons *charged* with a state crime. According to another source, in 2009 (the most recent year data available on state felony case outcomes in the largest seventy-five counties in the nation), only 49% of those charged with a violent felony were convicted of a violent felony (46% by guilty plea).⁸⁸ An additional 13% were convicted of a misdemeanor (12% guilty plea). Compare that to the 2009 federal data, where 87.5% of all felony and class A misdemeanor defendants charged with an offense and a slightly smaller 83.5% of defendants charged with a federal felony or class A misdemeanor violent offense pled guilty.⁸⁹ That means that of the defendants charged with a state violent offense in 2009, only 61% were convicted by plea or trial—much lower than the federal 89.4% combination of guilty pleas and guilty verdicts. In addition, 15% of those state felony cases were unresolved one year after charging (which likely means they are being contested and thus will have a lower conviction rate). About 33% of those charged in state court with violent offenses actually obtained acquittals or had their cases dismissed after being charged! Once the missing 15% is resolved and counted, the acquittal/dismissal rate for those charged with a state violent felony would be well over 30%.

Reports_and_Sourcebooks/2012/sbtoc12.htm. For the federal cases we coded in 2008–2010, 86.8% of federal arson convictions (305 of the 359) were by guilty plea (the rest were found guilty after trial or pled straight up to the indictment), and 85% of the robbery convictions (236 of the 264) were by guilty plea.

86. 2010 STATISTICS, *supra* note 27, tbl.5.22.2010; *see also* U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2012, at 25 tbl.D-4, *available at* <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2012.aspx> (finding 2012, at 89%, to be the highest year for guilty plea rates for all federal defendants charged with a felony from 2002 through 2012).

87. SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1, 24 tbl.4.1, 25 tbl.4.2 (2009), *available at* <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

88. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, NCJ 243777, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 tbl.21 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

89. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2009, at 102 tbl.D-4, *available at* <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2009.aspx>.

The odds of walking away from a felony charge are clearly much higher for a felony defendant in state court.⁹⁰ Presumably, federal prosecutors know this. They must also be aware of the large sentencing differential between the two systems.

For those convicted in federal court in 2012 for arson or robbery, more than 95% received prison time rather than probation.⁹¹ The average federal sentence for all robberies and arsons in 2012 was 77 mean months and 60 median months.⁹² In our study, the mean was 84.2 months for federal arson and 160.2 for robbery, but only 41.1 months for state arson and 44.6 months for state robbery. When we accounted for time actually served rather than imposed, the state figure dropped to 24.6 months for arson and 29.7 for robbery.⁹³ While a state criminal defendant actually serves only a percentage of state jail time before being released on parole, a federal defendant serves all of his prison sentence except 15% good time.

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

We cannot speak to the subjective motivation for a federal prosecutor's decision to bring a particular case in federal court, where the defendant has a much greater chance of being convicted and serving a long prison sentence. However, we have

90. Moreover, we must again keep in mind that not all suspects are charged. The federal government has a 16% declination rate overall and a 19% declination rate for robberies. MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, NCJ 239914, *FEDERAL JUSTICE STATISTICS 2010—STATISTICAL TABLES* 11 tbl.2.2. (2013), available at <http://www.bjs.gov/content/pub/pdf/fjs10.pdf>. In a study of twenty-eight urban county courts nationwide, two researchers found that “[a]pproximately 50% of all felony arrests” made by local law enforcement officers “do not lead to a conviction but are rejected by the prosecutor before court charges are filed or are later dismissed in court.” BARBARA BOLAND & ELIZABETH BRADY, BUREAU OF JUSTICE STATISTICS, NCJ-97684, *THE PROSECUTION OF FELONY ARRESTS*, 1980, at 1 (1985).

91. U.S. SENTENCING COMM’N, *supra* note 85, tbl.12.

92. *Id.* tbl.13.

93. See *supra* Parts III.B.1.i, III.B.2.i.

isolated variables that are significantly related to whether an arson or robbery case is charged under a New York State or federal statute. Our regression analysis suggests that the factors that increase the odds of a federal indictment include use of a weapon, a conspiracy, prior violent or drug-related arrests, and the presence of a minor victim. Our study also indicates that the identity of the law enforcement agency and whether the defendant can offer substantial assistance to the government play a major role. Whether a defendant is black or white and her citizenship do not appear to be related to where the case is brought. A death resulting from the incident weighs in favor of a state prosecution, where the government can pursue a murder charge.⁹⁴ These results are not unexpected. We believe our study offers some support that federal prosecutors are rational actors and are not employing arbitrary or unconstitutional factors in exercising their charging discretion.

94. There is no general murder offense in the federal system, absent the victim's status as a federal official, a relationship to terrorism, or some other extraordinary factor. 18 U.S.C. §§ 1111–1122 (2012).

APPENDIX A—FEDERAL OFFENSES

1. Hobbs Act, 18 U.S.C. § 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term “robbery” means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

2. Importation, Manufacture, Distribution, and Storage of Explosive materials. 18 U.S.C. § 844. Penalties

(a) Any person who—

(1) violates any of subsections (a) through (i) or (l) through (o) of section 842 shall be fined under this title, imprisoned for not more than 10 years, or both; and

(2) violates subsection (p)(2) of section 842, shall be fined under this title, imprisoned not more than 20 years, or both.

(b) Any person who violates any other provision of section 842 of this chapter shall be fined under this title or imprisoned not more than one year, or both.

...

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with

the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

...

(h) Whoever -

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if

committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section and section 842(p), the term “explosive” means gun powders, powders used for blasting, all forms of high explosives, blasting materials, fuses (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

...

(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both.

(n) Except as otherwise provided in this section, a person

who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy.

(o) Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3)) or drug trafficking crime (as defined in section 924(c)(2)) shall be subject to the same penalties as may be imposed under subsection (h) for a first conviction for the use or carrying of an explosive material.

APPENDIX B—NEW YORK STATE OFFENSES

*A. Robbery***McKinney's Penal Law § 160.00 Robbery; defined**

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

McKinney's Penal Law § 160.05 Robbery in the third degree

A person is guilty of robbery in the third degree when he forcibly steals property.

Robbery in the third degree is a class D felony.

McKinney's Penal Law § 160.10 Robbery in the second degree

A person is guilty of robbery in the second degree when he forcibly steals property and when:

1. He is aided by another person actually present; or

2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.

Robbery in the second degree is a class C felony.

McKinney's Penal Law § 160.15 Robbery in the first degree

A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:

1. Causes serious physical injury to any person who is not a participant in the crime; or

2. Is armed with a deadly weapon; or

3. Uses or threatens the immediate use of a dangerous instrument; or

4. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime.

Robbery in the first degree is a class B felony.

B. Arson

McKinney's Penal Law § 150.00 Arson; definitions

As used in this article,

1. "Building", in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate building.

2. "Motor vehicle", includes every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven invalid chairs being operated or driven by an invalid, (b) vehicles which run only upon rails or tracks, and (c) snowmobiles as defined in article forty-seven of the vehicle and traffic law.

McKinney's Penal Law § 150.01 Arson in the fifth degree

1. A person is guilty of arson in the fifth degree when he or she intentionally damages property of another without consent of the owner by intentionally starting a fire or causing an explosion.

Arson in the fifth degree is a class A misdemeanor.

McKinney's Penal Law § 150.05 Arson in the fourth degree

1. A person is guilty of arson in the fourth degree when he recklessly damages a building or motor vehicle by intentionally starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle.

Arson in the fourth degree is a class E felony.

McKinney's Penal Law § 150.10 Arson in the third degree

1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

Arson in the third degree is a class C felony.

McKinney's Penal Law § 150.15 Arson in the second degree

A person is guilty of arson in the second degree when he intentionally damages a building or motor vehicle by starting a fire, and when (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

Arson in the second degree is a class B felony.

McKinney's Penal Law § 150.20 Arson in the first degree

1. A person is guilty of arson in the first degree when he intentionally damages a building or motor vehicle by causing an explosion or a fire and when (a) such explosion or fire is caused by an incendiary device propelled, thrown or placed inside or near such building or motor vehicle; or when such explosion or fire is caused by an explosive; or when such explosion or fire either (i) causes serious physical injury to another person other than a participant, or (ii) the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor; and when (b) another person who is not a participant in the crime is present in such building or motor vehicle at the time; and (c) the defendant knows that fact or the circumstances are such as to render the presence of such person therein a reasonable possibility.

2. As used in this section, "incendiary device" means a breakable container designed to explode or produce uncontained combustion upon impact, containing flammable liquid and having a wick or a similar device capable of being ignited.

Arson in the first degree is a class A-I felony.

APPENDIX C—FEDERAL CODING FORMS

USSC—HOBBS/ROBBERY**ROBBERY CASE ONLY.**

Use separate ARSON & CARJACKING forms.

*** Required****Question #1: Name of coder ***

(if “other” enter initials only)

- ☐ = Susan Klein
- ☐ = Michael Gramer
- ☐ = Daniel Graver
- ☐ = Ingrid Grobey
- ☐ = Stefanie Lindquist
- ☐ = James Burch
- ☐ = Michael Franklin
- ☐ = Lauren Grugan
- ☐ = Other:

Question #2: CASE TYPE: Disposition includes carjacking, arson, robbery, combination of the three *

Check 1, 2, or 3 if D is guilty of carjacking, arson, or robbery (OK if additional other fed. offenses charged or uncharged); check 4 only if D guilty of two or three of these three listed crimes. Select one answer only.

- ☐ 1 = Carjacking under 18 U.S.C. section 2119
- ☐ 2 = Arson under 18 U.S.C. section 844
- ☐ 3 = Robbery under 18 U.S.C. section 1951
- ☐ 4 = two or more of the above

Question #3: USSCIDN *

Enter USSC identifying number for this case

UNDER COLOR OF OFFICIAL RIGHT

Extortion Under Color of Official Right —18 U.S.C. section 1951(b)(2)

Question #0: HOBBS ACT: Charged "Under Color of Official Right." IF YES—CHECK BELOW, STOP CODING, SUBMIT RECORD. *

We need to have a record that this record is complete, but do not waste time coding the rest of the information.

- 1= YES. STOP CODING. SUBMIT AND GO TO NEXT RECORD.
- 2 = No—Any other Hobbs/Robbery charge. Continue coding.

JURISDICTION—JURISDICTION

Question #4: Charging entity *

Can select one answer only

USAO one of 93 offices

Question #5: First Jurisdiction where criminal activity occurred (If multiple, also use next question) *

List state(s) where crime/charge/conspiracy occurred, whether charged or uncharged. (AL, AZ, & Foreign at end of list).

***(Optional) Question #5a: Second Jurisdiction where criminal activity occurred** List state(s) where crime/charge/conspiracy occurred, whether charged or uncharged. (Alabama & Foreign at end of list).

(none)

***(Optional) Q #5b: IF crimes committed in three or more jurisdictions**

- 1 = Crime(s) committed in three or more jurisdictions

Question #6: Size of City where crime charged *

(make your best guess)

- Major Metropolitan Area (L.A. / Dallas)
- Small City (Tampa / Des Moines)
- Town / Rural (Waco)
- Unknown

INVESTIGATING AGENCIES—INVESTIGATING AGENCIES

Question #7: Fed. or state investigation? *

	1– Fed. Law Enforcement Agency	2 – State/Local Law Enforcement Agency	3 – Formal or Informal Joint State/Local/Fed. Task Force	4 – Unknown or None
What Agency Initiated Investigation of D?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
What Agency Arrested D?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question #8: Local & Federal Authorities Relationship

	1 – Yes	2 – No	3 – Unknown
Did Local Authorities Participate in the Investigation?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

*(Optional) Q #9(a): Second Federal Agency or Joint Fed/State Taskforce Investigating

(select second Fed Agency Investigating, below)

CONSPIRACY—CONSPIRACY**Question #11: Was Defendant Part of a Conspiracy? ***

Must select one answer per row

	1 – Yes	2 – No	3 – Unknown
Was D Part of a Conspiracy (1+ Other People Involved – Charged or Uncharged)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
D Was Associated with Larger Criminal Organization (Example a Street Gang, La Cosa Nostra)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
D Himself Engaged in Conduct in More Than 1 State	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

PRIOR ARRESTS AND CONVICTIONS—PRIOR ARRESTS AND CONVICTIONS**Question #13: All Prior Arrests & Convictions ***

(Combine ALL Juvenile & Adult Offenses)

	0	1 to 5	6 to 10	11 or more	Unknown
Total State Convictions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prior Arrests That Did NOT Result in Convictions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Total Violent Arrests & Convictions (State & Fed)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Total Federal Convictions Drug/Alcohol Abuse Related	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Priors (Include Uncharged Activity Like Failed Drug Tests)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**WEAPONS—PERJURY—OBSTRUCTION—
TAMPERING—INJURY—DEATH**

**Question #16: Enhancements: Weapons / Perjury /
Obstruction**

	1 – Yes	2 – No	3 – Unknown
WEAPON: Present / Charged / Enhanced?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
PERJURY or FALSE STATEMENTS TO LAW ENFORCEMENT: Present / Charged / Enhanced?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
OBSTRUCTION: Present / Charged / Enhanced?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

**Question #17: Witness Tampering or Restraining
Orders**

(Uncharged & Unenhanced)

	1 – Yes	2 – Yes	3 – Unknown
Was There Evidence of Witness Tampering / Contact (Uncharged & Unenhanced)?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Were There Related Restraining Orders Against D?	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question #35A: HOBBS ACT ONLY—What TYPE of Hobbs Act Charge?

(Select for each TYPE, not each individual charge)

	1 – Robbery by Force/Fear/Threats (18 U.S.C. §1951(b)(1))	2 – Extortion by Economic Fear (18 U.S.C. §1951(b)(2))	3 – Unknown
First TYPE of Hobbs Act Charge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* (optional) Second TYPE of Hobbs Act Charge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* (optional) Third TYPE of Hobbs Act Charge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

***(Optional) Question #36(a): Hobbs Act: SECOND VICTIM**

Select one answer

- ☐ 1 = Victim of robbery was a business
- ☐ 2 = victim of robbery was an individual
- ☐ 3 = victim was government entity (federal or state)
- ☐ 4 = victim unknown
- ☐ Other:

***(Optional) Question #36(b): Hobbs Act: THIRD VICTIM**

Select one answer

- ☐ 1 = Victim of robbery was a business
- ☐ 2 = victim of robbery was an individual
- ☐ 3 = victim was government entity (federal or state)
- ☐ 4 = victim unknown
- ☐ Other:

Question #37: Hobbs Act—OBJECTIVE of the robbery/extortion?*

(If multiple, see question below)

- ☐ 1 = money
- ☐ 2 = weapons
- ☐ 3 = controlled substances
- ☐ 4 = personal property
- ☐ 5 = unknown
- ☐ Other

***(Optional) Question #37a: Hobbs Act—SECOND OBJECTIVE of the robbery/extortion?**

- ☐ 1 = money
- ☐ 2 = weapons
- ☐ 3 = controlled substances
- ☐ 4 = personal property
- ☐ 5 = Other/Multiple Types
- ☐ Other:

Question #38: Hobbs Act: Total VALUE of all Item(s)/extortion *

(Make your best estimate)

(value unknown)

MINORS—PLEA AGREEMENT QUESTIONS—CODER NOTES**Question #18: Involvement of Minor ***

Select one option only

- ☐ 1 = Defendant Minor (under 18)
- ☐ 2 = Victim(s) Minor (under 18)
- ☐ 3 = No minors involved
- ☐ 4 = Unknown
- ☐ 5 = Defendant & Victim(s) Minors (Under 18)

Question #19: Polygraph Test Authorized/Required? *

4 = None Unknown

Question #20: Is there a HABEAS CORPUS Waiver? (See Plea Agreement) *

(In Plea Agreement. Also called "Waiver of Collateral Attack")

- 1 = Yes - Habeas Corpus Waiver
- 2 = No - No Waiver
- 3 = No - No PLEA Agreement
- 4 = Unknown

Question #20A: Is there a FOIA Waiver? *

(See Plea Agreement)

- 1 = Yes - FOIA WAIVER
- 2 = No - No FOIA Waiver
- 3 = No - No PLEA Agreement
- 4 = Unknown

Question #20B: Is there a BRADY Waiver? *

(See Plea Agreement) ALSO CALLED: ADDITIONAL DISCOVERY WAIVER

- 1 = Yes—BRADY Waiver INCLUDING Evidence of ACTUAL INNOCENCE
- 2 = Yes—BRADY Waiver (may mention Giglio & Jencks) BUT EXCLUDING Actual Innocence
- 3 = Maybe—Brady Waiver IMPLICIT In FOIA Waiver (waive right to receive ANY record from Any Dept or Agency, including FOIA).
- 4 = No—No Brady Waiver
- 5 = No—No PLEA Agreement
- 6 = Unknown

Question #20C: Waiver of DNA Testing*

In Plea Agreement.

- 1 = YES—Waiver of Right to Request DNA Testing (likely 18 USC 3600A(C) (2))
- 2 = YES—D Allowed Government to Destroy DNA Samples
- 3 = Yes—BOTH Destruction of DNA and Waiver of Right to Testing
- 4 = No—No PLEA Agreement
- 5 = No—No DNA Waiver

Question #20D: Waive Attorney's Fees*

In Plea Agreement.

- 1 = YES—Waiver of Attorney's Fees or Lit Expenses (possibly under Hyde Amendment (18 USC 3001A))
- 2 = No—No Waiver of Fees or Expenses
- 3 = Unknown/ Other

Question #21: Uncharged or Dismissed Conduct by D*

Select one answer per row

	1 – Yes, one offense	2 – Yes, more than one offense	3 – No	4 – Unknown
There were dismissed charge(s) against this D in the indictment/information as part of the plea agreement	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
There was criminal conduct by the D described in plea agreement or PSR that was not charged in this case	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

CODER NOTES—CODER NOTES**Question #23: Other Reason for fed. jurisdiction**

NO COMMAS. Please type anything you notice in documents that might explain fed. jurisdiction not otherwise already listed. Take as much space as you would like.

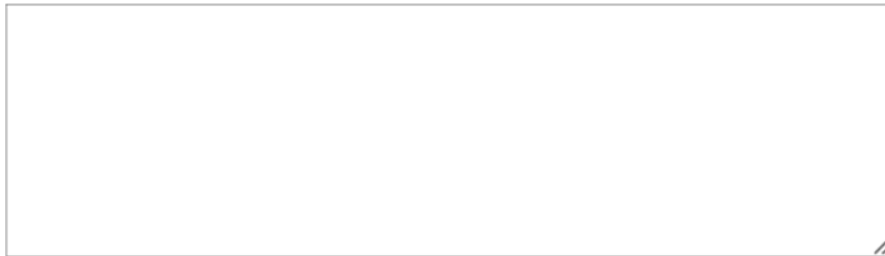
**Question #24 CODER: Do you have any Questions or Special Notes? ***

(Type any notes in next question)

- ☐ YES
- ☐ NO

Question #25 CODER: Anything Coders confused about?

NO COMMAS. Type anything you had a question about here, take as much space as you would like.



STOP CODING HERE --- STOP CODING HERE --- STOP CODING HERE

Stop coding here. Questions on next page are for HOBBS & CARJACKING ONLY

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APPENDIX D—COMPARISON OF RACE OF U.S. POPULATION AND
RACE OF DEFENDANT IN ARSON CASES

	Total Federal Arson Cases	% Black Population (2010) ⁹⁵	Federal Arson Ds % Black	% Hispanic Population (2010) ⁹⁶	Federal Arson Ds % Hispanic	% White Population (2010) ⁹⁷	Federal Arson Ds % White
AL	6	26.8	0	3.9	0	67	100
AK	2	4.7	0	5.5	0	64.1	100
AZ	3	5	0	29.6	0	57.8	67
AR	5	16.1	60	6.4	20	74.5	20
CA	9	7.2	33	37.6	22	40.1	33
CO	4	5	0	20.7	0	70	75
CT	3	11.3	0	13.4	0	71.2	67
DE	-	22.9	-	8.2	-	65.3	-
FL	16	17	31	22.5	25	57.9	44
GA	13	31.5	46	8.8	0	55.9	46
HI	2	2.9	0	8.9	0	22.7	0
ID	2	1	0	11.2	50	84	0
IL	13	15.4	15	15.8	15	63.7	69
IN	9	10.1	44	6	0	81.5	44
IA	5	3.7	0	5	0	88.7	100
KS	10	7.1	50	10.5	10	78.2	30
KY	6	8.7	17	3.1	0	86.3	83
LA	10	32.8	40	4.2	10	60.3	50
ME	3	1.6	0	1.3	0	94.4	100
MD	11	30.9	27	8.2	0	54.7	73
MA	12	7.8	0	9.6	8	76.1	92
MI	10	15.2	20	4.4	0	76.6	80
MN	2	6.2	0	4.7	50	83.1	50
MS	8	37.6	50	2.7	0	58	50

95. Percent “Black or African American alone or in combination” from SONYA RASTOGI ET AL., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010, at 8 tbl.5 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

96. Percent “Hispanic or Latino” from SHARON R. ENNIS, MERARYS RÍOS-VARGAS & NORA G. ALBERT, U.S. CENSUS BUREAU, THE HISPANIC POPULATION: 2010, at 6 tbl.2 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>.

97. Percent “White alone, not Hispanic or Latino” constructed from LINDSAY HIXSON, BRADFORD B. HEPLER & MYOUNG OUK KIM, U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010, at 8 tbl.4 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>; and PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 tbl.1 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

	Total Federal Arson Cases	% Black Population (2010) ⁹⁵	Federal Arson Ds % Black	% Hispanic Population (2010) ⁹⁶	Federal Arson Ds % Hispanic	% White Population (2010) ⁹⁷	Federal Arson Ds % White
MO	27	12.5	15	3.5	0	81	85
MT	-	0.8	-	2.9	-	87.8	-
NE	-	5.4	-	9.2	-	82.1	-
NV	2	9.4	0	26.5	0	54.1	100
NH	-	1.7	-	2.8	-	92.3	-
NJ	3	14.8	0	17.7	0	59.3	100
NM	5	2.8	0	46.3	20	40.5	80
NY	6	17.2	22	17.6	11	58.3	67
NC	13	22.6	8	8.4	8	65.3	85
ND	1	1.6	0	2	0	88.9	100
OH	6	13.4	17	3.1	0	81.1	50
OK	1	8.7	0	8.9	0	68.7	100
OR	10	2.6	0	11.7	0	78.5	90
PA	6	11.9	17	5.7	0	79.5	83
RI	-	7.4	-	12.4	-	76.4	-
SC	12	28.8	0	5.1	0	64.1	100
SD	4	1.8	25	2.7	0	84.7	75
TN	10	17.4	10	4.6	10	75.6	80
TX	15	12.6	20	37.6	20	45.3	53
UT	6	1.6	17	13	17	80.4	67
VT	1	1.5	0	1.5	0	94.3	100
VA	17	20.7	35	7.9	6	64.8	59
WA	12	4.8	0	11.2	0	72.5	100
WV	2	4.2	0	1.2	0	93.2	100
WI	8	7.1	13	5.9	13	83.3	63
WY	1	1.3	0	8.9	0	85.9	100
U.S.	359	13.6	19.2	16.3	8.4	63.7	68.3

	Total NY Arson Cases	NY % Black Population (2010)	NY State Arson Ds % Black	NY % Hispanic Population (2010)	NY State Arson Ds % Hispanic	NY % White Population (2010)	NY State Arson Ds % White
NY	6	17.2	0	17.6	0	58.3	100

APPENDIX E—COMPARISON OF RACE OF U.S. POPULATION AND
RACE OF DEFENDANT IN ROBBERY CASES

	Total Federal Robbery Cases	% Black Population (2010) ⁹⁸	Federal Robbery Ds % Black	% Hispanic Population (2010) ⁹⁹	Federal Robbery Ds % Hispanic	% White Population (2010) ¹⁰⁰	Federal Robbery Ds % White
AL	1	26.8	100	3.9	0	67	0
AK	-	4.7	-	5.5	-	64.1	-
AZ	-	5	-	29.6	-	57.8	-
AR	-	16.1	-	6.4	-	74.5	-
CA	9	7.2	11	37.6	33	40.1	11
CO	1	5	0	20.7	0	70	100
CT	3	11.3	33	13.4	33	71.2	33
DE	2	22.9	100	8.2	0	65.3	0
FL	37	17	62	22.5	32	57.9	5
GA	10	31.5	60	8.8	10	55.9	30
HI	3	2.9	0	8.9	0	22.7	0
ID	-	1	-	11.2	-	84	-
IL	3	15.4	33	15.8	33	63.7	33
IN	4	10.1	100	6	0	81.5	0
IA	1	3.7	100	5	0	88.7	0
KS	1	7.1	100	10.5	0	78.2	0
KY	2	8.7	100	3.1	0	86.3	0
LA	-	32.8	-	4.2	-	60.3	-
ME	2	1.6	0	1.3	0	94.4	100
MD	4	30.9	100	8.2	0	54.7	0
MA	1	7.8	0	9.6	0	76.1	100
MI	4	15.2	50	4.4	0	76.6	50
MN	-	6.2	-	4.7	-	83.1	-
MS	-	37.6	-	2.7	-	58	-
MO	4	12.5	25	3.5	25	81	50
MT	1	0.8	0	2.9	0	87.8	0
NE	-	5.4	-	9.2	-	82.1	-
NV	6	9.4	50	26.5	17	54.1	33
NH	5	1.7	20	2.8	20	92.3	60

98. Percent “Black or African American alone or in combination” from RASTOGI ET AL., *supra* note 95, at 8 tbl.5.

99. Percent “Hispanic or Latino” from ENNIS, RÍOS-VARGAS & ALBERT, *supra* note 96, at 6 tbl.2.

100. Percent “White alone, not Hispanic or Latino” constructed from HIXSON, HEPLER & KIM, *supra* note 97, at 8 tbl.4; and MACKUN & WILSON, *supra* note 97, at 2 tbl.1.

	Total Federal Robbery Cases	% Black Population (2010) ⁹⁸	Federal Robbery Ds % Black	% Hispanic Population (2010) ⁹⁹	Federal Robbery Ds % Hispanic	% White Population (2010) ¹⁰⁰	Federal Robbery Ds % White
NJ	7	14.8	43	17.7	43	59.3	0
NM	-	2.8	-	46.3	-	40.5	-
NY	56	17.2	21	17.6	48	58.3	27
NC	16	22.6	100	8.4	0	65.3	0
ND	-	1.6	-	2	-	88.9	-
OH	5	13.4	40	3.1	0	81.1	60
OK	2	8.7	100	8.9	0	68.7	0
OR	-	2.6	-	11.7	-	78.5	-
PA	26	11.9	85	5.7	8	79.5	8
RI	-	7.4	-	12.4	-	76.4	-
SC	8	28.8	75	5.1	0	64.1	13
SD	-	1.8	-	2.7	-	84.7	-
TN	12	17.4	42	4.6	25	75.6	25
TX	4	12.6	0	37.6	50	45.3	25
UT	3	1.6	0	13	0	80.4	67
VT	1	1.5	0	1.5	0	94.3	100
VA	11	20.7	73	7.9	0	64.8	9
WA	-	4.8	-	11.2	-	72.5	-
WV	1	4.2	0	1.2	0	93.2	100
WI	5	7.1	60	5.9	0	83.3	40
WY	-	1.3	-	8.9	-	85.9	-
U.S	264	13.6	50.4	16.3	22.7	63.7	20.1

	Total NY Robbery Cases	NY % Black Population (2010)	NY State Robbery Ds % Black	NY % Hispanic Population (2010)	NY State Robbery Ds % Hispanic	NY % White Population (2010)	NY State Robbery Ds % White
NY	14,449	17.2	50	17.6	35.9	58.3	13.2

APPENDIX F—COOPERATION WITH GOVERNMENT AFTER ARREST

	Arson (count)	Arson (%)	Robbery (count)	Robbery (%)
0 = Sentenced Within Range/No Departure	197	54.9%	1042	42.4%
1 = Upward Departure	14	3.9%	50	2.0%
2 = Substantial Assistance/§5K1.1	59	16.4%	702	28.6%
3 = §5K3.1/EDP			1	0.0%
4 = Government Sponsored (Excludes §5K1.1)	12	3.3%	137	5.6%
5 = Other Downward Departures	12	3.3%	68	2.8%
Blank / No Data	65	18.1%	458	18.6%
Total	359	100.0%	2458	100.0%