THE MANY FACES OF PROSECUTION

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INTRODUCTION

A quick read through the bulky legal literature about criminal prosecution in the US might lead a reader to conclude that individual prosecutors, and the offices where they work, are very much the same. All prosecution professionals seem to fit the mold, regardless of the region where they work, the size of their office, or their years of experience on the job.

This generic portrait of prosecution, and of prosecutors, misses the mark. If one were to look beneath the surface to examine the professionals who work in the more than 2,500 individual prosecutor’s offices in this country, diversity would drive the story—diversity in terms of demographic profile, career plans, office policies, quality of work, and more. The point applies both to individuals and to institutions. At the individual level, one is bound to find some bad apples and some good eggs who work in the prosecutor’s office. As for the institutional setting, there are bad incentives and corrosive cultures that overcome even the best of intentions from the individuals who work there; offices elsewhere create good incentives, with a lot of institutional variation in between.

Traditional sources for legal scholarship—cases, statutes, court outcome data, and the secondary literature built upon these sources—allow only a faraway and obstructed view of the pretrial “office” work of prosecutors: their decisions to decline, charge, investigate, and offer terms for plea bargains. It is therefore difficult, using these methodological tools, to appreciate the many faces of prosecution, either in the institutional or the individual sense. These research methods offer a glimpse of single prosecutors working on single cases, or the aggregate post-conviction results of an entire office. Too often, scholars overstate or underestimate a trend, treating one news event or one point in the criminal process as the key to understanding prosecution. They reinforce an essentialist view of prosecutors.

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1. See generally Ellen Yaroshefsky & Bruce Green, Prosecutors’ Ethics in Context, in LAWYERS IN PRACTICE 269 (Leslie C. Levin & Lynn Mather eds., 2012) (arguing that misconduct by one prosecutor is often misattributed to prosecutors everywhere).
Field studies could spotlight the work of prosecutors that is not captured in court data or appellate opinions, but they are labor intensive. Conducting surveys of individual prosecutors in a variety of offices, or interviewing dozens of prosecutors to hear how they describe their practices and career paths, requires a huge commitment of time and funding, not to mention expertise. Few legal scholars have the resources, training and inclination to do it. But this approach—what we might call a ground-up examination of the professional culture of prosecution—is likely to yield more nuanced and accurate insights than the war stories and caricatures that proliferate in the literature.

We think the ground-up approach is worth the effort. In part, this is because studies that stay attuned to local conditions reveal the limited impact of federal constitutional law—and the pronouncements of the U.S. Supreme Court—on most decisions that prosecutors make every day. Ground-up studies of prosecutors better integrate the insights of political science, sociology, and law about the variety of forces that shape prosecutor case-management choices.

Ground-up studies are also likely to lead to reform proposals that are more realistic to implement. These proposals can generate buy-in from the prosecutors themselves; reforms stand no chance in state legislatures and governors’ offices unless local prosecutors take a sustained part in the conversation. When well-meaning scholars of law and criminal justice approach prosecutors after their studies are complete and simply announce to them how to do their jobs better, they often find themselves alone in the room, talking only among themselves.

In this essay, we explain the methodological strategy built into our recent ground-up examination of prosecution culture, with a focus on the state-court prosecutors who handle the overwhelming bulk of the criminal docket. We consider three aspects of diversity in prosecution culture: diversity in the social architecture of prosecution offices, diversity in prosecutors’ sense of balance in handling the cases and dealing with the defense bar, and diversity in prosecutors’ sense of belonging to the larger legal community.

When ground-up studies reach many different prosecutors’ offices, they create theoretical synergy. The more granular, empirical studies that scholars conduct, the easier it becomes to notice that some patterns hold true across time and place, while others appear to be jurisdiction-specific; this level of detail

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2. See Alafair Burke, *Talking About Prosecutors*, 31 Cardozo L. Rev. 2119, 2131-36 (2010) (discussing how a “no fault” rhetoric for addressing prosecutorial misconduct could encourage prosecutors to participate in reform discussions and more effectively persuade them to implement reforms).


makes it possible to refine old theories and to create new ones. This essay, therefore, calls for scholars who want to understand more deeply the workings of criminal justice to dive in, and add their insights by going beyond the limited lessons one can draw from reported appellate opinions and anecdotes from practitioners. Using standard social science methods from a vantage point on the ground, we can learn about prosecutorial priorities and behaviors from the people who invented them.

I. A GROUP PORTRAIT OF GENERIC PROSECUTORS

A great many of the scholarly accounts of criminal prosecutors are not based on systematic empirical investigation. Instead, the author begins with an example of prosecutor conduct (or perhaps a few examples), based either on personal observation from the practice of law or on descriptions of the prosecutor’s work in an appellate opinion or in a news story. Very often, scholarship moves briskly from a description of the prosecutor’s work to policy proposals.

Some of the writing on criminal prosecutors offers theoretical reasons to believe that the conduct in question is widespread: for instance, the author might draw inferences about prosecutor behavior based on the insights of psychological theory or political theory. Some studies construct experiments to simulate typical (and undifferentiated) prosecutor and defense counsel behavior.


Economic theories of prosecution, in particular, treat individual prosecutors as fungible rational actors who try to maximize their personal utility as they select charges and dispose of cases. These accounts posit only one or two types of prosecutors, at most: the line prosecutors who handle individual cases, and the chief prosecutor who sets office policy and monitors voter preferences.

We do not object, as a categorical matter, to academic writing about criminal prosecutors that combines the anecdotal and the theoretical. While some authors use this methodology poorly, others use it to offer important insights, critiques, or reform proposals. Our concern relates instead to the mix of methodologies that legal scholars of criminal prosecution have produced. When one considers the overall body of academic work about prosecutors, this one approach—theoretical work grounded in anecdote, analyzed based on insights borrowed from other disciplines that require a certain level of abstraction—swamps the field.

The more rare and valuable scholarly work about prosecution uses systematic empirical methods. Along with making positive or normative theoretical claims about typical prosecutor activity, these scholars use empirical methods to learn if the theory matches what we observe in the real world. Unsurprisingly, the most widely available data sources form the basis for the largest number of empirical studies that use this approach. In the paragraphs that follow, we briefly consider the sources for empirical studies of prosecution, moving from the most to the least accessible.

We start our review with court-level databases. Court statistics that allow scholars to reconstruct the outcomes in criminal cases are especially rich for the federal system. The federal statistics, designed for use by court administrators, capture many features of case processing. Accordingly, legal scholars have ana-

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lyzed the volume and type of cases filed,\textsuperscript{14} the methods used to dispose of those cases,\textsuperscript{15} and the sentences imposed in federal court.\textsuperscript{16}

These studies of federal-court statistics undoubtedly enhance our understanding of how the courts work in the United States. Federal-case level data, however, do not create a template that allows us to understand state prosecutors. The omission of state-level data is crucial, for three reasons. First, state courts handle much larger volumes of criminal cases than federal courts do. Second, they are the setting for the processing of misdemeanors, the cases that define the experience of most people who cycle through the criminal courts. Lastly, state prosecutors handle a more varied docket than their federal counterparts. An understanding of the true impact and variety of criminal prosecution in the United States, therefore, must give the state prosecutor a starring role rather than a bit part.

Some state court systems (particularly those states with sentencing commissions and other data infrastructure) do collect and publish strong aggregate statistics that deal with the disposition of criminal charges. These statistics are sometimes difficult to collect and always difficult to compare across jurisdictions. Nevertheless, empirically-minded scholars who operate outside the legal academy manage to find the stories buried in these court output numbers.\textsuperscript{17}

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States with the best data infrastructure can support research that reaches beyond case disposition to consider the prosecutorial role in sentencing. Legal historians also rely on state court outcome records to reconstruct important patterns of change and continuity across the years.

In a few states, the courts not only track the outcomes of criminal proceedings but also record a few decision points early in the process. Studies of these early events identify correlations between the prosecutor’s selection or declination of criminal charges and the court’s subsequent decision whether to release or detain a defendant during the time between arrest and disposition.

As telling as court records might be, they miss salient criminal justice events occurring outside the courtroom. Prosecutors do much of their discretionary work in their own offices. From the privacy of their desks they form-


22. See Charles E. MacLean & Stephen Wilks, Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion, 52 WASHBURN L.J. 59, 60 (2012) (noting that “most [prosecutorial] decision making is a solitary and private venture, only coming to the attention of the public intermittently . . . ”); Daniel F. Medwed, Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution, 31 CARDOZO L. REV. 2187,
late priorities and policies; behind closed doors they develop their reasons for filing or declining charges, for pursuing trials or guilty pleas, and for taking certain positions during the sentencing phase. None of these decisions is directly documented in the court file; the court file only contains the results. For that reason, the basis for prosecutorial decision making can’t be located with a Freedom of Information Act request to the court; the prosecutor’s reasoning is not included within aggregate statistics generated from court records. In short, these internal office deliberations are not typically documented the way public court proceedings are, and the empirical scholarship on the topic is correspondingly thinner. Again, more studies have focused on the relatively document-intensive offices of federal prosecutors, but a few state prosecutors over the years have documented their internal office processes, and scholars on rare occasion have gained access to those records.

Another category of documentary empirical research is budgetary: scholars scour the line items in criminal justice budgets to spot trends over time or hidden priorities. The budget categories tend to collapse into a few large headings, making it difficult to discern local differences or distinctions among various crimes. The budgets do, however, reveal important truths about the different levels of funding available to various criminal justice actors.

Empirical research based on archival sources such as court statistics, prosecutor files and public budgets is indispensable. Without these studies, we would have virtually no empirical work to explain the world of criminal prose-

2190 (2010) (“Charging decisions, like much of the grist of the prosecutorial mill, occur behind the scenes.”).


cution. Nevertheless, archival research must live with critical blind spots. Countless important moments in the criminal process are never recorded. The players record many other moments for themselves, but only in paper files that remain unconnected to one another and out of reach for all but the most persuasive and persistent researchers. Even for the narrow slices of information that are recorded in an accessible electronic format, the data exist on antiquated proprietary computer systems that do not easily answer the questions that scholars ask. In select categories such as capital cases, scholars have invested the shoe leather needed to build a nuanced picture of prosecutor charging or jury selection by the parties. For the great majority of felony and misdemeanor cases, however, local variations in criminal justice remain an unrecorded and untold story.

II. QUALITATIVE EMPIRICAL STUDIES BY SOCIAL SCIENTISTS OFFER A DIFFERENT TAKE

Archival research tends to homogenize prosecutors. The data sources generally do not link particular cases to individual prosecutors. The typical data reports from statewide judicial administrators only show aggregate statistics, or break out the numbers in ways that obscure differences between prosecutor offices.

In an effort to get beyond the fungible view of prosecutors, we consulted works that pursue a different methodology, one that combines a qualitative centerpiece—prosecutor interviews—with supporting quantitative analyses of survey data and court statistics. These studies are now almost 50 years old, produced by political scientists, sociologists and criminologists during a time of turmoil for criminal justice. The turmoil came from increased crime rates and surges in the volume of cases processed in courts, combined with major changes in legal regulation of the police; this volatile environment opened up questions about the legitimacy of plea bargains and other prosecutor practices. In a sense, these studies represented a second generation of multidimensional studies of local criminal justice, building on the work of the scholars who wrote the American Bar Foundation studies of the 1950s and 1960s.


29. See Frank W. Miller, Prosecution: The Decision to Charge a Suspect with a Crime (1969); Donald J. Newman, Conviction: The Determination of Guilt or
Scholars working in this tradition, including Milton Heumann, George Felkenes, Pamela Utz, Joan Jacoby, Peter Nardulli, Roy Flemming, and James Eisenstein, conducted in-depth studies of specific prosecution agencies across the United States. They surveyed, interviewed, and observed prosecutors in action—both in court and in their offices—to document diverse approaches to the job.

These scholars studied the interaction among institutional players in the larger criminal justice system, showing how external political constraints and incentives shape prosecutorial behavior (and vice versa). They were convinced that they would find differences among prosecutors, and out of this appreciation for difference grew seminal works about the varieties of justice that exist in the United States.

Diversity first appears at the individual level, among prosecutors who work for the same office. Consider, for example, the findings of Milton Heumann, based on his interviews of prosecutors (and defense attorneys and judges) in four state courthouses in Connecticut in the 1970s. He found that prosecutors (and defense attorneys and judges) started out their criminal justice careers in a highly adversarial, trial-oriented mode, but slowly drifted into plea bargaining. Hence, there were profound differences between rookies and their colleagues who had been doing the job for more than a year. George Felkenes also observed differences based on experience level during the same time period. In contrast to the drift toward accommodation observed by Heumann, Felkenes found that more experienced prosecutors were more likely to succumb to conviction psychology—to believe in the guilt of all defendants and to adopt an “ends justify the means” attitude about their work.

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31. Id. at 89-91, 117-23, 148-52.
33. Id. at 111 (finding a correlation between the level of prosecutors’ experience and their development of a “conviction psychology”). A somewhat similar pattern was observed by Flemming, Nardulli and Eisenstein; in their study of nine courthouse communities, they found that “[prosecutors] whose first job after law school was being a prosecutor were less punitively oriented than experienced assistants.” Roy B. Flemming, Peter F. Nardulli &
Diversity next appears at the office level, due to variations in leadership styles, the interaction of legal institutions in the jurisdiction, and the broader social and political climate in which the prosecutor’s office sits. For example, in her classic work *Settling the Facts*, Pamela Utz found that the embrace of plea bargaining that Heumann documented in Connecticut was not uniform among criminal justice communities.³⁴ Instead, she argued, plea-bargaining rates and prosecutorial attitudes toward plea negotiations differ across counties. In her study, Alameda County’s higher rates of negotiated pleas (when compared to San Diego County) resulted from multiple factors, such as a relatively strong public defense bar, the active role of the Alameda County judiciary in twisting arms to secure pleas, a long history of high crime rates, and a fairly liberal population.³⁵ She also pointed to the importance of leadership style in generating prosecutorial attitudes toward plea bargaining: Alameda’s leaders allowed line attorneys to exercise substantially more discretion than their San Diego counterparts, which generated a higher rate of plea deals in advance of trial.³⁶

A few years later, Leonard Mellon, Joan Jacoby, and Marion Brewer studied ten jurisdictions across the United States; they emphasized the external relationships between a prosecutor’s office and other local institutions to explain variety in the prosecutor function. They looked for structural features that “affect the uniformity, the quality, and the equality of justice administered by local prosecutors.”³⁷ The authors concluded that in some places, “the external environment imposes substantial limits on a prosecutor’s ability to act.”³⁸ For example, they found that caseload size, prosecutors’ trust in the local police force, the demographic character of the jurisdiction, funding sources, and the values of the underlying community can all influence policies adopted by the prosecutor’s office.³⁹ Likewise, Peter Nardulli, Roy Flemming, and James Eisenstein

³⁵ Id. at 113-14, 122-23.
³⁶ Id. at 101-02.
³⁸ Mellon et al., *supra* note 37, at 53.
³⁹ Id. at 60–65; see also Jacoby, *supra* note 37, at 2, 4. For more recent work on the correlation between community poverty levels, community political conservatism, and prosecutorial dismissals, see Travis W. Franklin, *Community Influence on Prosecutorial Dismissals: A Multilevel Analysis of Case- and County-Level Factors*, 38 J. CRIM. JUST. 693 (2010). For recent work documenting the correlation between community demographics and prosecutorial willingness to file charges with mandatory minimum sentences, see Jeffrey T. Ulmer
conducted a multi-year study of nine jurisdictions to figure out what made chief prosecutors in different places tick. They explained that chief prosecutors take on certain roles during elections and then implement certain policies—consistent with those roles—once they take office, a process that is largely shaped by judicial and defense bar power relationships, as well as by personality and professional goals.

III. RENAISSANCE OF THE COMBINED METHODOLOGY

The interlocking qualitative and quantitative methods that produced such rich studies decades ago remained underused for many years. This period of hibernation is coming to an end. A new wave of multi-layered empirical studies is helping us to recognize and learn about local variety in criminal justice. Some of these studies feature survey questions, administered to state prosecutors in different offices. Others begin with semistructured interviews, and supplement those interviews with available court data or on-site observation.


41. The Craft of Justice, supra note 33, at 24–37 (arguing that chief prosecutors choose one of three political styles—courtroom insurgent, policy reformer, or office conservator—based on strategic concerns over their status vis-à-vis the bench and the defense bar, and personal views about the expected value of creating conflict by changing this status).


Our own research for the past few years has also turned to qualitative methods, centered on prosecutor interviews. Inspired by the richness of the “second generation” field studies from the 1970s, we set out to study state prosecutors offices in the American Southeast and Southwest. Our goal was to learn how prosecutors thought about themselves and their professional roles, to hear them describe how they individually and collectively came to define what it means to be a good prosecutor.

We interviewed 267 prosecutors in nine offices in the American Southeast and American Southwest during the period 2010-2013. Some of the offices, which we call County Attorneys’ offices, handle only misdemeanors. Some handle only felonies (designated in our work as State’s Attorneys), and still others handle a mixture of felonies and misdemeanors (labeled in our work as District Attorneys). We selected offices for this research based on a variety of factors—size, docket diversity, and political climate diversity. All but one of the offices represent urban and suburban areas; rural offices have very small staffs, making it difficult to maintain the confidentiality of interviewees.

Our outreach to the offices varied by location. In some cases, we met the Elected (the County Attorney, State’s Attorney, or District Attorney) in some other setting and renewed the acquaintance to obtain support for our project. In others, we reached out to the Elected by phone or e-mail to ask if he or she would allow attorneys in the office to participate. We made clear to the Elected that our goal was to interview their line prosecutors about their professional development and their views about the prosecutor’s role, not to audit their files or to scrutinize their decisionmaking in individual cases. Responses ranged from highly enthusiastic to cautiously supportive, although in one office, enthusiasm dried up soon after the project began, causing us to terminate that office as a research site.

Once an office agreed to come on board, we received a list of all prosecutors currently working in that office, allowing us to contact them individually.46

44. Our research interviews continue, aiming to include offices of different sizes, organizational types, and regions. Some of our observations in this article include preliminary impressions from recent interviews in a ninth office of more than 300 attorneys in the Southwest. This is one of the largest offices in the United States. Interviews there were conducted by a paid associate, rather than by the authors, but the same semistructured format was used and the authors are doing all coding and analysis from these transcripts.

45. As it was reported to us, some of the attorneys in one particular State’s Attorney’s Office read some of our published scholarly works; on that basis, some prosecutors in the office feared that we would use this project to ridicule them or to cast the office in a negative light. Despite our efforts to address these concerns, we decided to withdraw.

46. In some locations, we contacted each prosecutor on that list, first by mail and then with a follow-up email or phone call to request an interview. In other offices, our limited time in the city dictated that we select a subset of attorneys from the list for follow-up contacts; we chose a sample that drew proportionately from each unit, preserving the overall office blend in terms of race, gender, and experience. Individual prosecutors were told that
Ultimately we interviewed 267 attorneys in these nine offices, following a semistructured format that produced interviews lasting between sixty and ninety minutes in a majority of cases. Among the interviewees, 155 (58%) were women and 43 (16%) were racial minorities.

Our interviews covered many aspects of the prosecutors’ educational and professional development. For example, we asked our respondents about their reasons for becoming prosecutors, the influence of office policies on their day-to-day work, and their future career plans. They described their relationships with supervisors, peers, defense counsel, and police, and discussed the relevance of law school, professional associations, families, and mentors to their professional lives. They discussed the tools and skills needed to do the job well, their philosophies of prosecution, and how their ideas about the job had changed over time. We coded the transcripts to identify common themes in the responses and recurring patterns among subgroups.

We supplemented the interviews in some counties with written survey questions. Our “attitudinal” survey asked prosecutors to declare the factors that typically influence their decisions in the selection and resolution of criminal charges. Other prosecutors completed a “simulation” survey that asked them to describe the charges they would file and the resolution they would endorse in ten hypothetical (and fairly typical) factual “vignettes.”

IV. EARLY RETURNS

In our first article, Prosecution in 3-D, we theorized that the social architecture of a prosecutor’s office could impact a prosecutor’s professional identi-
ty, particularly her sense of belonging to a team versus thinking of herself as an independent contractor. By social architecture, we mean not the physical edifice of the building, but rather “those alignments and routines inside the workspace that organize the staff to handle its caseload.”

We argued that these alignments and routines send important signals to employees about expectations for their professional behavior:

When the chief prosecutor decides whom to hire, how much to pay them, how to divide the work, how to train newcomers, how to monitor the work, and how to respond when staff prosecutors exercise poor judgment, attorneys learn from these choices what it means to be a good prosecutor.

Various aspects of office life might count as forms of social architecture: how the leadership articulates the organization’s priorities, the provision of internal training opportunities, the size and diversity of the docket, the supervisory structure, the typical progression (if any) of assignments in the office, and the ways in which the physical layout divides or joins employees.

We examined in detail two particular facets of the social architecture—organizational shape and hiring preference—to identify correlations between these variables and the professional identity of prosecutors in the office. While much of the literature about state prosecution offices derives from large urban jurisdictions and therefore assumes that prosecutor offices are inherently large bureaucracies, we show that this picture is too simple. Prosecutor’s offices present a variety of organizational shapes that largely correlate with size and location. Large bureaucracies may be the norm in urban regions, but most of the prosecution offices in the US are in suburban or rural locales, housing staffs of fewer than 10 attorneys. For that reason, scholars should picture a spec-

52. Levine & Wright, supra note 3, at 1122.
53. Id.
54. See, e.g., THE JAPANESE WAY OF JUSTICE, supra note 43, at 119 (“On the surface, organizations of prosecutors in Japan and in America may look much alike: they are bureaucratic; they distinguish between operator, manager, and executive roles; . . . they promote workers on the basis of some combination of merit and seniority.”); Jerald W. Cloyd, The Processing of Misdemeanor Drinking Drivers: The Bureaucratization of the Arrest, Prosecution, and Plea Bargaining Situations, 56 SOC. FORCES 385, 385 (1977) (observing, based on empirical research in San Diego, that prosecution has become “immersed in large bureaucratic structures that emphasize standardized procedures, specialization of activities, hierarchical decisionmaking, and the sanctity of written reports and records.”); Felkenes, supra note 32, at 115–16 (observing, based on surveys of prosecutors in California and Alabama, that the “office of the prosecuting attorney as an ideal bureaucratic structure is characterized by the hierarchy of authority . . . [and] the high degree of specialization within the office”). The only two contrary treatments we found in the literature (that is, studies that acknowledge the existence of alternative shapes) are THE CRAFT OF JUSTICE, supra note 33, at 40–47, and Mellon, et al., supra note 37, at 74–77.
55. Among the 2,344 felony state prosecutors’ offices in existence in 2005, half served jurisdictions containing fewer than 37,000 people, and more than 85% served populations of 250,000 or less, what researchers regard as a “small” jurisdiction. See STEVEN W. PERRY, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2005, at 2 (2006); Ronald F. Wright, Padilla and the Delivery of Integrated Criminal Defense, 58 UCLA L. REV. 1515, 1523 (2011). Small offices typically have very small staffs; for example, in 2001, offices
trum of office shapes, grounded at one end by offices that are tightly pyramidal, with distinct hierarchies and specialized units; at the other end are offices that are predominantly flat, setting all attorneys on basically the same level and requiring them to handle more or less identical caseloads.

Similarly, not all offices hire new line attorneys straight from the ranks of law school. While that is the predominant model for some offices, others express a strong preference for hiring veterans, attorneys with at least a few years of experience in another prosecutor’s office. The chief prosecutor’s expectations for the behavior of his new hires both derives from and shapes this hiring preference—if he wants his new hires to hit the ground running with very little supervision, veterans will likely be his choice, but he’ll have to deal with some bad habits and perhaps some challenges to (or evasion of) his policies from these seasoned professionals. If instead he wants new hires who can be easily indoctrinated and are likely to develop loyalty, recent law graduates are better bet, but they’ll have to be trained and their inexperience endured for a period of time before they become valuable assets to the office.

We hypothesized that offices with tight pyramidal shapes who hire recent law graduates would be populated by prosecutors who thought of themselves as team members, because these organizational structures and the inexperience of new hires tend generate and require both vertical and horizontal bonds between prosecutors. Conversely, offices with flat shapes that hire veteran attorneys would be staffed with prosecutors who thought of themselves largely as independent contractors. The relative lack of structure in these offices, coupled with the hiring of people who bring professional experiences and perspectives from the outside, tends to dilute professional bonds among the workforce. Moreover, these relative levels of autonomy make sense in terms of preventing professional frustration. Rookies hired into a flat-autonomy-oriented office would receive no direction about how to do their jobs and thus would experience frustration, while veterans hired into a pyramidal/team-oriented office would feel stifled the moment they arrived.

We ran a preliminary test of this hypothesis using data from three of our participating offices. These offices differed from each other along both axes, and concordantly we found different degrees of autonomy among their staffs. Consistent with our theory, we found that our most tightly structured office with a strong preference for hiring rookies was characterized by the greatest sense of team membership as well as strong staff loyalty to, and respect for, the administration. The office that was essentially flat was staffed mostly with veterans, most of who expressed low levels of regard for the administration and tended to conceive of themselves and their coworkers in independent terms. The prosecutor’s present sense of autonomy also seemed to impact his willingness to make and sustain professional connections outside his own office—to

serving populations of 250,000 or less averaged only three assistant prosecutors plus one elected D.A. CAROL J. DEFRANCES, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2001, at 2 (2002).
prosecutors in other offices, to the bar more generally—and to shape his sense of his professional future. Thus the degree of diversity stemming from social architecture choices affects not only the prosecutor in his own office, but extends to include links between the individual prosecutor and other professionals in his field.

In our second work, *The Cure for Young Prosecutors’ Syndrome*, we examined diversity along a different axis, distinguishing prosecutors by experience level. We questioned whether prosecutors experience the same career trajectory as doctors, firefighters, pilots, and military leaders—becoming more refined in their use of resources based on core intuitions about how complexity should be handled—or if instead they resemble uniformed police officers, who seem to become more cynical over time, with veteran police officers exposing rookies to war stories and training exercises in order to sharpen their edges.

Using data from eight of our nine prosecution offices, we found that prosecutors are far more like experts in unrelated fields than they are like police officers, who share the criminal justice arena with them. Prosecutors asserted that they become more balanced, rather than more hard edged, over time, due to the development of expertise and core intuitions about which cases merit full criminal justice treatment and which should be diverted out of the system early on.

When asked to describe their career trajectories, experienced prosecutors say they regret the highly adversarial, even cartoonish, posture they adopted in the early years of their careers. They even give a name to this early collection of beliefs and attitudes about the importance of every case, the constant quest for trials, and the aggressive posturing with defense attorneys: “young prosecutors’ syndrome.” Veteran prosecutors, by contrast, describe themselves as taking a more pragmatic, individualized approach to the job. This means they are able to see the true variety of cases on their docket and to calibrate their responses in individual cases. The experienced prosecutors we met say that they reserve trials and harsh consequences only for a small subset of defendants. In other cases, where the public benefits very little from a trial, they aim for a resolution through diversion programs and reasonable plea offers. Moreover, seasoned prosecutors appreciate the value that defense attorneys add to their particular cases, in contrast to the begrudging and abstract descriptions of the defense attorney role that junior prosecutors are likely to offer.

We found evidence of this evolution toward balance in all eight offices, among female and male prosecutors, as well as among Caucasian prosecutors and prosecutors of color. There were some crossovers, though, as prosecu-

tlers told us stories of “zealots” they had known—experienced prosecutors who retained their hard adversarial edge even after the passage of time. We also heard some prosecutors describe themselves as consistent in another sense, those who believed they started out with balanced values and thus did not need to develop them over time.

Beyond identifying this evolutionary path toward balance, we speculated—using the prosecutors’ own words—about the reasons why this path seems to be the common one among state prosecutors. Our veteran prosecutors suggested four possible traits that distinguish them from their younger colleagues: a developing sense of confidence based on a track record, an increasing ability to distinguish small crimes from large, an appreciation for a legacy of past mistakes, and a grounding in life experience. As the literature about the development of expertise in other fields suggests, all four of these traits can only come with time, but they are about more than just the passage of time. They embody learning from past experiences, developing a deeper appreciation for the complexities of life, for the challenges of managing a criminal caseload, and for the infinite dimensions of human behavior and motivations.

Based on these reflections by our interviewees, we offered some advice to chief prosecutors who are interested in promoting a sense of balance in their workforce, particularly those who want to speed up the evolutionary process for their new hires. We suggested that offices place rookies and veterans in each other’s sights on a regular basis, through office layout as well as caseload assignments, so that veterans can regularly share lessons they’ve learned and rookies can seek help in informal settings. We encouraged offices to develop more robust training programs, using the methods frequently found in clinical programs and workplace roundtables, so that new prosecutors can hear and participate in discussions about case evaluation and witness problems. We also hoped law schools would refine their curricular offerings to introduce law students to the complex and non-adversarial features of the justice system in a more sustained way, to plant the seeds of balance before graduation.

Our third inquiry stemming from this data, still an early work in progress, explores diversity among prosecutors in their connections to the larger legal community. We examine how a prosecutor’s willingness to entertain the idea of becoming a defense attorney reveals her deeper commitments to, or alienation from, the bar. Some prosecutors express a strong conviction that they are prosecutors—not lawyers—while others portray themselves as lawyers who just happen to practice criminal law from the prosecutor’s office.

58. See, e.g., GARY KLEIN, STREETLIGHTS AND SHADOWS: SEARCHING FOR THE KEYS TO ADAPTIVE DECISION MAKING 101 (2011) (“People become experts by the lessons they draw from their experiences, and by the sophistication of their mental models about how things work.”).
Contrary to popular belief, we found many prosecutors who had defense experience in their professional backgrounds. Those who had previously worked as defenders, whether public or private, varied in their willingness to rejoin the defense bar; some prosecutors told us they enjoyed their time as defenders and would be open to doing that work again, while others expressed an unwavering confidence that prosecution was a better fit for them professionally.

Among the prosecutors who had not previously worked as defenders, there was a similar split of opinion. Some expressed a willingness to consider it, some said they would move only if finances made them do it, and others said something akin to “over my dead body.”

Many prosecutors opined that there are “true believers” on both sides of the aisle, and commonly referred to these true believers as somehow incomplete in their professional development. We ask in this paper whether prosecutors who say that they could not switch sides also tend to show characteristics of a true believer prosecutor. In particular, we ask if they show a stronger identification with police and prosecution witnesses, greater frustration with judges, or more contempt for the defense bar.

The research also asks about the possible sources of a prosecutor’s feelings about defense work. We explore whether those attitudes correlate with qualities that prosecutors bring with them into the office: family traits, expressed religious values, or memories of law school. We also consider the possible effects of office structure and early encounters on the job on prosecutor attitudes about switching sides.

V. MATCHING METHODS AND QUESTIONS

Each empirical method has its strengths and weaknesses; the best results come from studies that combine methods with different strengths, while asking the sort of questions that each method is best suited to answer. How do these virtues and vices translate into prosecutorial research?

Qualitative research centered on semistructured interviews of prosecutors has one significant drawback that is particularly relevant to this research: it does not offer a reliable portrait of the actual job performance of the prosecutor. The interviewee might talk about how she selects charges or decides whether to take a case to trial, but that self-portrayal might not prove accurate if the full statistical record were available. We recognize that many people are inclined to paint themselves in the best light when talking to interviewers, and they may be particularly inclined to congratulate their current self when compared to their

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59. This population was not evenly distributed across all nine offices; the offices with a hiring preference for experience were more likely than those who hired recent graduates to employ attorneys with some defense experience.
younger selves.\textsuperscript{60} The best research settings are those that allow researchers to confirm a prosecutor’s claims about performance with a statistical record of that performance.

Qualitative research also requires an author to step lightly around any claims of causation. While the interviewees might say that certain factors cause them to make particular choices or to conceive of themselves in particular ways, the interviewees’ perception might not be accurate. Thus, in our article about social architecture of prosecutor offices and the team orientation of some prosecutors, we tried to avoid claims of causation. Instead, we noted that certain office structures were correlated with a team-oriented or autonomous conception of the prosecutor’s job.\textsuperscript{61}

Intensive scrutiny of a few offices and a few individuals in those offices also raises the issue of selection bias. The elected prosecutors who agree to allow us into their offices might be atypical, and the prosecutors who agree to speak with us might not give us a properly weighted sample of office opinion on any given topic. Moreover, we are not using a random sample of prosecutors, so we cannot produce statistically generalizable results even when we gather quantitative data from this research.

For these reasons, it is prudent to take precautions. We sought out offices in different regions, with different sizes of organizational schemes. Within each office, we normally achieved high response rates from the prosecutors.\textsuperscript{62} In some places we interviewed defense attorneys for an alternative take on the work of prosecutors in the jurisdiction. We read the transcripts systematically—sorting the prosecutors by race, gender, experience level, office type, and other relevant groupings as we considered their comments on any given topic. But in the end, we can only report our impressions, rather than citing strict numerical differences in opinion among groups. It is important when working within this methodology to make cautious claims about the prevalence of one’s observations.

Even after accounting for all the blind spots and limitations of the semistructured interview, the methodology offers advantages that fit precisely with the reality of state prosecutors. For one thing, many decisions and actions of a prosecutor are never recorded, or are recorded in documents that difficult to obtain. For those actions, the prosecutor’s own account might be the best available source. For instance, our interviews with chief prosecutors in Arizona and

\begin{thebibliography}{99}
\bibitem{note60} As our friend and colleague Richard Myers described this mindset, “The current me is the best possible me.”
\bibitem{note61} Levine & Wright, supra note 3, at 1178-79.
\bibitem{note62} Having a strong response rate was a priority for us. Because prosecutors within a given office know each other, we hoped our early interviewees in each office would convey to their colleagues, by word-of-mouth, favorable impressions of the interview experience. In most settings, our strategy worked. In only one office did a few skeptical prosecutors—people who had not been interviewed—voice concerns about the project to colleagues and supervisors, causing us to terminate the research site after just a few interviews. This risk is always present when one works with a research population that is quite cohesive.
\end{thebibliography}
North Carolina (for projects related to those we describe here) revealed to us several local practices and policies that were not visible in the available court data or news coverage.63 We learned through these interviews, for example, that prosecutors in one Arizona county participated regularly in “Sharkfest,” a regularly scheduled plea negotiation session that places prosecutors and defense counsel in the same room to discuss cases and to compare offers and arguments.64

Interviews also get behind the actions of prosecutors to explore the reasons for those actions. The routines of the courtroom and the office normally leave no time for prosecutors to reflect on or to record their reasons for choosing to handle cases as they do. Even when they do record reasons, the data systems use broad categories that either construct the answers or raise as many questions as they answer.65 Interviews give prosecutors the chance to explain their reasoning, and to elaborate on their efforts to live up to rule-of-law ideals such as consistency and non-arbitrariness. Those explanations capture more nuance than the categories of an office database will allow.

When the prosecutor’s reasons for case handling choices link up to a deeper professional self-image, the interview format is especially valuable. While the cold record of court statistics can reveal a few things about what happened in a given case and enables a researcher to notice trends across many cases, it misses the larger vision. Many prosecutors are idealists who aspire to make their communities better and to strengthen the rule of law. They might succeed or they might fail in this aspiration, but an empirical test of case outcomes fails to capture the breadth of prosecutorial activities and the richness of the institutional fabric. Assessing prosecutorial behavior by looking only at case outcomes is thus akin to assessing court behavior by looking only at the number of trials.66 One can grapple with the true framework of prosecutor ideals and expectations only by listening carefully for the differences among office cultures and among the individuals who choose the professional path of the prosecutor.

63. See Marc Miller & Samantha Caplinger, Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions, in PROSECUTORS AND POLITICS 265 (Michael Tonry ed., 2012); Ronald Wright, Persistent Localism in the Prosecutorial Services of North Carolina, in PROSECUTORS AND POLITICS 211 (Michael Tonry ed., 2012); Levine, Intimacy Discount, supra note 43 (showing for the first time how California prosecutors’ filing norms in statutory rape cases built on and converged around particularly notions of privacy and equality).

64. See Miller & Caplinger, supra note 63 at 280-83.


66. See THE TENOR OF JUSTICE, supra note 40, at 368 (warning that limiting research on criminal institutions to case outcomes “would be like limiting research on Congress to votes.”).
VI. ENCOURAGING PROSECUTORS, ENCOURAGING SCHOLARS

Looking to the future, we hope that the success of mixed-methodology studies will signal that scholars can treat prosecutors as active participants in research, sources of otherwise nonexistent data about criminal justice. Because prosecutors are rarely forced to put their thoughts on the record—in contrast to sentencing judges, for example—we need to be alert for more windows into their professional practice. Scholars need to understand and engage prosecutors on their own terms. This approach requires their cooperation; strategies that alienate, essentialize or depersonalize prosecutors will not get us very far down the road.

The published results of such scholarship might be unflattering to prosecutors in particular offices, but it might also offer a more sympathetic account of prosecutors in other places or contexts. Whatever the tenor of the published results, prosecutors in many different offices could find reasons to cooperate when researchers come knocking at the door. Providing a forum for prosecutors to explain their actions more fully (outside of the adversarial context), or to reflect on the longer arc of their professional goals, is a rare event in their professional lives. Interviewees often thank us, at the end of their hour-long interviews, for the chance to step back from their daily routine and to remind themselves about their goals, accomplishments, mentors, and setbacks. Perspective is not built into the prosecutor’s normal workday. Chief prosecutors might welcome the chance this sort of research offers for their line prosecutors to step back, reflect on their professional roles, and appreciate the larger landscape.

Offering prosecutors the opportunity to talk openly about what they do and about why they do it might even encourage them to collect additional data. Prosecutor office supervisors might find those records useful to summarize and analyze for their own purposes: both for internal management purposes and for external community engagement purposes. Once that data is collected for other purposes, it might become available to researchers, as well.

The ground-up approach to understanding prosecution culture can help us make better maps of prosecution behavior. Rather than a simple mapmaker’s declaration that “Here be dragons” in some unknown zone of danger, better ground-up studies of prosecutors can tell us more about the local conditions, the harsher and gentler terrains of prosecutor behavior. Such a map would allow us to see patterns without assuming that every place is the same. It would help us better to identify areas where the justice system seems to be working well, to diagnose problem areas with humility, and to pick strategies for reform and accountability that are politically and professionally acceptable.

67. See Marc Miller & Ronald Wright, Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative, in THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 392 (Erik Luna & Marianne Wade eds., 2012); Miller & Wright, supra note 65.